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EDITORIAL

HORIZONTAL RESERVATION FOR TRANSGENDER PERSONS: RESOLVING THE NALSA CONUNDRUM.....*Prakhar Raghuvanshi & Sandhya Swaminathan*

ARTICLES

ASSESSING STATE SCHOOL EDUCATION LAWS ON ADMINISTRATIVE SAFEGUARDS.....*Jayana Bedi & Prashant Narang*

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS.....*Manish*

THE ROAD NOT TAKEN: INDIA'S FAILURE TO ENTRENCH THE RIGHTS OF THE OPPOSITION.....*Meenakshi Ramkumar & Aishwarya Singh*

POLITICAL PROCESS FAILURE IN THE INDIAN PARLIAMENT: STUDYING ABUSE OF POWER BY THE CHAIR AND HOW IT CAN BE ADDRESSED.....*Anmol Jain*

ANALYSING THE INVISIBLE: THE CONSTITUENT ASSEMBLY AND INDIA'S TRYST WITH THE REPRESENTATION OF MARGINALISED MUSLIMS.....*Mustafa R. & Tejas B. N.*

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EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

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Religious conversions, especially with allegations of force involved, have continued to be an issue of concern among Indian state administrations since pre-independence. Following the Constitution of India coming into force, a specific right under Article 25 of the Constitution provided all persons with the freedom to profess, practice and propagate religion, the last of which has been the subject of much controversy. Early state legislations prohibiting “forced conversion”, which placed restrictions on religious practitioners seeking to convert others, were upheld by the Supreme Court as reasonable restrictions on Article 25 of the Constitution on the grounds of public order in Rev. Stainislaus v. State of Madhya Pradesh.

A newer set of laws since 2000 has, however, sought to place additional substantive burdens on individuals seeking to change their religion and bring them under intensive surveillance by the State. Analysing a cross-section of these laws from different states, this article argues that these newer provisions are unconstitutional for three reasons: they are in excess of the restrictions permitted in Stainislaus, they violate Article 25 of the Constitution, and are not saved by the exception in public order. Additionally, these restrictions deeply infringe the individual’s right to privacy, which had not been well developed in Indian jurisprudence at the time of the decision in Stainislaus, but is now clearly defined by a nine-judge bench in Justice K. S. Puttaswamy v. Union of India.

INTRODUCTION

“Religion is only a means for the attainment of one’s salvation. Supposing I honestly believe that I will attain salvation according to my way of thinking, and

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EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

according to my religion, and you Sir, honestly believe that you will attain salvation according to your way, then why should I ask you to attain salvation according to my way, or way, should you ask me to attain salvation according to your way? If you accept this proposition, then, why propagate religion? As I said, religion is between oneself and his God. Then, honestly profess religion and practise it at home. Do not demonstrate it for the sake of propagating. Do not show to the people that this is your religion for the sake of showing. If you start propagating religion in this country, you will become a nuisance to others. So far it has become a nuisance.”

–Tajamul Hussain, Member, Constituent Assembly²

Anxieties regarding religious conversion manifested themselves as long ago as the debates of the Constituent Assembly. These anxieties, in a broader South Asian context, have been characterised as arising from a situation where a “*dominant religious (and often ethnic) majority feels threatened by an active and growing religious minority*”.³ These feelings were also closely linked to perceptions of the role of (white) Christian missionaries in perpetuating British and Portuguese colonialism in various parts of the subcontinent.⁴

Prior to Independence, a handful of princely states in India had legislations prohibiting religious conversion, ostensibly targeted at British missionaries.⁵ Post-Independence, the drafting of the Constitution was marked by heated debates around the “*propagation*” of religion as an element of the right to freedom of religion, especially in the background of communal violence surrounding the partition. Opponents of this wording raised objections to “*propagation*” as a right primarily benefiting Abrahamic religions, thus serving as a means to convert people from Hinduism to Islam and Christianity, which they argued would exacerbate religious tensions. Eventually, these objections were rejected by the Constituent

² 7 CONSTITUENT ASSEMB. DEB. (Dec. 3, 1948), https://www.constitutionofindia.net/c-constitution_assembly_debates/volume/7/1948-12-03#7.66.254.

³ Meghan Grizzle Fischer, *Anti-Conversion Laws and the International Response*, 6 PENN ST. J. L. & INT’L AFF. 1, 11 (2018).

⁴ James Andrew Huff, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J. L. & RELIGION 1, 4 (2009).

⁵ One source lists “*Over a dozen princely states, including Kota, Bikaner, Jodhpur, Raigarh, Patna, Surguja, Udaipur, and Kalahandi*”. See Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, 71 L. & CONTEMP. PROBS. 109, 113 (2008).

Assembly.⁶ The final provision regarding religious freedom under Article 25 of the Constitution, which has remained unamended since, guaranteed equally to all persons the freedom of conscience and the right to freely profess, practice and propagate religion, subject to public order, health and the other provisions of Part III. Following the failure in the Constituent Assembly to remove “*propagation*” as an element of the right under Article 25 of the Constitution, further attempts were made to introduce anti-conversion legislations in Parliament, but these never came to fruition.⁷ Today, while there remains no move in Parliament to legislate on the matter, a number of states have sought to enact restrictions on conversion, several of which are under challenge before courts.

The rest of this article is divided into four parts. The first part provides historical background to the issue, the older laws and the build up to the Supreme Court’s 1977 decision in *Stainislaus*. The second part examines the Court’s decision in *Stainislaus* and provides two critiques of the judgment. The third part looks at the newer post-2000 laws and the judicial scrutiny they have received. The fourth part analyses the Court’s decision on privacy as a fundamental right and its implications. The article concludes with a summary of the analysis of the constitutionality of the newer laws and outlines the various legal challenges pending resolution.

THE OLDER ANTI-CONVERSION LAWS AND THE DECISION IN *STAINISLAUS*

A. THE OLDER ANTI-CONVERSION LAWS AND THE FIRST LEGAL CHALLENGES

In the late 1960s, the states of Madhya Pradesh and Orissa enacted anti-conversion legislations, again directed at religious preachers, that were dubiously named “*Freedom of Religion*” Acts⁸—nomenclature that continues

⁶ A detailed discussion took place in the Constituent Assembly on the role of the word “*propagate*” in the draft Article 19 (which became the final Article 25). All amendments proposed by the Members in relation to this were negated by the Assembly. See 7 CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06.

⁷ Fischer, *supra* note 3, at 14.

⁸ The Madhya Pradesh Freedom of Religion Act, 1968 was ostensibly the outcome of an informal committee appointed by the state government in 1956 to “*enquire into the activities*

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

to the present day. For the purpose of this article, these two laws that formed the basis for our present jurisprudence on religious conversion are referred to in this article as “*the earlier legislations*”.⁹ Both these laws sought to ban religious conversions brought about by force, fraud, or inducement/allurement.¹⁰

Being the first post-constitutional exercises in this direction, the Madhya Pradesh and Orissa laws were challenged by (Christian) preachers, first at their respective High Courts and then in the Supreme Court, as violating their right to propagate their religion under Article 25 of the Constitution. The petitioners in these cases also challenged the legislative competence of the state legislatures to make these laws.¹¹ The Madhya Pradesh High Court upheld the Madhya Pradesh Freedom of Religion Act, 1968,¹² while the Orissa Freedom of Religion Act, 1968 was struck down by the Orissa High Court.¹³ A summary of the key provisions under challenge is given in **Table 1** below.

Table 1: Provisions of the older laws challenged in *Stainislaus*

Act/Provisions	What is prohibited?	Penalty for violation
Orissa Freedom of Religion Act, 1967	Conversion of another person by the use of force or by inducement or by any fraudulent means	Up to one year's imprisonment and a fine of up to five thousand rupees

of the Christian Missionaries in Madhya Pradesh”, headed by Justice (Retd.) M.B. Niyogi. See Jenkins, *supra* note 5, at 114–15.

⁹ Strictly speaking, there is a third law—the Arunachal Pradesh Freedom of Religion Act, 1978, but it is defunct since rules for its implementation were never framed.

¹⁰ The Madhya Pradesh Freedom of Religion Act, 1968, § 3, No. 27, Acts of Madhya Pradesh State Legislature, 1968; The Orissa Freedom of Religion Act, 1967, § 3, No. 2, Acts of Orissa State Legislature, 1968.

¹¹ Rev. Stainislaus v. State of M.P., (1977) 1 SCC 677, ¶ 21.

¹² Rev. Stainislaus v. State of M.P., 1974 SCC OnLine MP 16, ¶ 33.

¹³ Yulitha Hyde v. State of Orissa, 1972 SCC OnLine Ori 58, ¶ 45.

<p>Madhya Pradesh Freedom of Religion Act, 1968</p>	<p>Conversion of another person by the use of force or by allurement, or by any fraudulent means</p>	<p>Up to one year's imprisonment and a fine of up to five thousand rupees</p>
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B. THE SUPREME COURT’S DECISION IN *STAINISLAUS*

On appeal, a Constitution Bench of the Supreme Court, in a very brief judgment in 1977,¹⁴ upheld them as being valid exercises of legislative power under the public order exception to Article 25 of the Constitution, holding that the right to propagate one’s religion did not include the right to convert others and that forcible conversions could raise communal passions giving rise to a breach of the public order.¹⁵

There were two main issues (the same as those raised before the High Courts) before the Constitution Bench. The first was regarding the legislative competence of the state legislatures. The second was in terms of the laws being an encroachment into Article 25 of the Constitution. On both counts, the Supreme Court used “*public order*” as a ground to uphold the validity of the laws.¹⁶

C. TWO CRITIQUES OF *STAINISLAUS*

Public Order

Stainislaus is a very brief judgment—it runs into no more than five pages in the Reporter, and the Court’s findings on the issues are similarly brief and cryptic. The only direct connection that the Court makes between religious conversion and public order is in a single paragraph at the end:¹⁷

“Thus if an attempt is made to raise communal passions, e.g. on the ground that someone has been “forcibly” converted to another religion, it would, in all

¹⁴ Rev. *Stainislaus v. State of M.P.*, (1977) 1 SCC 677, ¶ 25.

¹⁵ *Id.* ¶ 21.

¹⁶ *Id.* ¶ 24.

¹⁷ *Id.* ¶ 25.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

probability, give rise to an apprehension of a breach of the public order, affecting the community at large. The impugned Acts therefore fall within the purview of the Entry I of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community."
(emphasis supplied)

With respect, it is submitted that the reasoning of the Constitution Bench is extremely shallow. The Court did not advert to two prior Constitution Bench decisions on public order that were binding on it: *Ram Manohar Lohia*¹⁸ and *Madhu Limaye*,¹⁹ both of which delineate the “concentric circle” comprising, in decreasing order of severity: security of the state, public order, and law and order. By this jurisprudence, which has remained intact in the decades following, the transition from a disturbance of “law and order” to a disruption of “public order” occurs when an act affects the community or the public at large. In the context of fundamental rights, this has been subsequently interpreted to mean that there has to be a necessary and proximate connection between the (disruption to) public order and the restriction imposed on a right.²⁰

The singular connection to public order analysed in *Stainislaus* is only concerned with the “attempt to raise communal passions on the ground that someone has been forcibly converted to another religion.”²¹ On this basis alone, the Court upheld the restrictions on persons seeking to carry out religious conversion—and not persons attempting to raise communal passions. In free speech jurisprudence, this is termed the *heckler’s veto*—where the State imposes restrictions on citizens’ speech and expression because of the fear of violence by third parties.²² In other words, where certain miscreants threaten to violate public order on the ground of objections to someone else’s speech, the State responds by restricting the speech itself rather than

¹⁸ Supdt., Central Prison v. Dr. Ram Manohar Lohia, (1960) 2 SCR 821, ¶ 9.

¹⁹ Madhu Limaye v. Sub-Divisional Magistrate, (1970) 3 SCC 746, ¶ 14.

²⁰ For a recent summary of the position, see *Banka Sheela Sneha v. State of Telangana*, (2021) 9 SCC 415.

²¹ Rev. Stainislaus v. State of M.P., (1977) 1 SCC 677, ¶ 24.

²² For a more detailed explanation of the heckler’s veto and the chilling effect, see GAUTAM BHATIA, *OFFEND, SHOCK, OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION* 32–34 (Oxford University Press 2016).

the miscreants.²³ This then produces a *chilling effect* on speech—because people will be hesitant to speak due to the threats of violence and abdication of the State’s responsibility to protect it.²⁴

With ordinary speech, the right under Article 19(1)(a) is violated. With religious speech, such as proselytization, there is an additional violation of Article 25 of the Constitution, for the individual’s right to propagate gets affected. As the eminent jurist HM Seervai pointed out:²⁵

“To propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in conversion.”

(emphasis supplied)

Unfortunately, the nuance of this position was not explored by the Supreme Court in *Stainislaus*. After a survey of biological and dictionary definitions of the word “propagate”, it merely observed that:²⁶

“...what the Article [25] grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees ‘freedom of conscience’ to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is not fundamental right to convert another person as one’s own religion because if a person purposely under-takes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all the citizens of the country alike.”

(emphasis supplied)

This articulation is not helpful because it ignores the rights of “another person” to willingly undertake such conversion and this question has now arisen in the context of newer anti-conversion laws that also penalise individuals wishing to change their religion. This will be dealt with in more

²³ *Id.* at 150–152.

²⁴ *Id.*

²⁵ H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 1287 (Universal Law Publishing 4th ed. 1991).

²⁶ *Rev. Stainislaus v. State of M.P.*, (1977) 1 SCC 677, ¶ 20.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

detail in the succeeding section, explaining the actors in religious conversion. The Court's observations above also elide the close connection between "*spreading the tenets of one's religion and conversion of another person to one's religion*" because, as is clear from Seervai's observations, the latter is the ultimate objective of the former and the two are inextricably linked.

Vagueness

In its overall upholding of the laws based on public order, to satisfy both the requirements of legislative competence and Article 25 of the Constitution, the Court did not go into the specifics of the legislations' clauses. This exercise had, however, been carried out by the Orissa High Court, which analysed the definitions of "*force*", "*fraud*", "*misrepresentation*", and "*inducement*" and found that the first three satisfied the test of morality to be permissible restrictions under Article 25 of the Constitution.²⁷ However, in relation to inducement, it found:²⁸

"We shall now deal with the argument regarding the definition of 'inducement'. The attack is mainly on the ground that it is too widely stated and even invoking the blessings of the Lord or to say that 'by His grace your soul shall be elevated' may come within the mischief of the term. (...) We are of the view that the definition is capable of covering some of the methods of proselytising and though the concept of inducement can be a matter referable to 'morality', the wide definition is indeed open to reasonable objection on the ground that it surpasses the field of morality."

(emphasis supplied)

Accordingly, it found that the definition of inducement in the statute was liable to be struck down for vagueness. The Supreme Court did not engage with this point at all while setting aside the High Court judgment leaving the question very much open for consideration by future courts, especially given the increasingly wide definitions of "*forcible conversion*" being adopted in newer laws as discussed in the next section.

²⁷ Yulitha Hyde v. State of Orissa, 1972 SCC OnLine Ori 58, ¶ 25.

²⁸ *Id.* ¶ 25.

THE NEWER ANTI-CONVERSION LAWS AND THE DEEPER INTRUSIONS INTO INDIVIDUAL LIBERTY

A. UNDERSTANDING THE ACTORS IN RELIGIOUS CONVERSION

In order to properly understand the difference between the older and newer legislations, it is essential to understand the actors involved in religious conversion. Proselytising religions generally have individuals, such as preachers or clergy, who spread the message of their religion among the public—and, if successful, perform the necessary rituals to admit new people into their faith. These constitute the first set of actors and, like Rev. Stainislaus, were involved in the challenges to the earlier laws. The second set of actors are the individuals who seek to change their religion, with or without the involvement of a preacher, who were not involved in the *Stainislaus* decision at all. Indeed, the Supreme Court did not at all go into the impact of these legislations on the individual, focusing only on the limited question in relation to preachers.²⁹ That impact, in turn, is closely linked to the development of the jurisprudence on privacy, which is dealt with subsequently.

B. THE NEW ANTI-CONVERSION LAWS AND THEIR PROBLEMATICS

With this background, we now proceed to analyse the next set of anti-conversion legislations, all enacted after the year 2000 (“**the newer laws**”). These laws go beyond the mere prohibition of forced religious conversion by preachers (which was upheld in *Stainislaus*), now requiring individuals desirous of changing their religion, in addition to people facilitating the conversion, to provide *prior* notice to or take permission from the District Magistrate under fear of penal consequences. In addition, they also expand the definition of “*forced conversion*”, create an exception to this definition for “*reconversion*”, render marriages following “*forced conversion*” voidable, and

²⁹ The third set of actors, in some sense, comprise the bevy of religious extremists who strongly oppose religious conversion to the point of indulging in violence, and in particular view the potential (mass) conversions of socio-economically backward communities, especially the Scheduled Castes and Scheduled Tribes, as a threat to Hindu society. Their argument is similar to the one rejected by the Constituent Assembly (7 CONSTITUENT ASSEMB. DEB. (Dec. 6, 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06), but as subsequently discussed in Section B, has been given increasing credence in newer anti-conversion laws.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

permit persons other than the individual converted to initiate criminal proceedings. A summary of these additional provisions introduced by the newer laws is presented in **Table 2**.

Table 2: Provisions introduced by the newer laws

Act/ Provisions	Notice/ intimation by the convert	Penalty for not complying	Burden of proof	Who besides the victim can initiate proceedings?
Chhattisgarh Freedom of Religion Act, 1968 (as amended in 2006)	Intimation to the district magistrate within 30 days after the ceremony.	Up to one year's imprisonment and a fine of up to ten thousand rupees		
Gujarat Freedom of Religion Act, 2003 (as amended in 2021)	Intimation to the district magistrate within 10 days after the ceremony.	Up to one year's imprisonment and a fine of up to one thousand rupees	Reverse onus clause on the accused	Victim's parents, brother, sister or any other person related by blood, marriage or adoption
Himachal Pradesh Freedom of Religion Act, 2006 (repealed in 2019)	Notice to the district magistrate 30 days in advance.	Fine of up to one thousand rupees		

Jharkhand Dharm Swatantra Act, 2017	Prior permission is required from the district magistrate.	Up to one year's imprisonment and a fine of up to five thousand rupees	Reverse onus clause on the accused	Victim's parents, brother, sister or any other person aggrieved.
Uttarakhand Freedom of Religion Act, 2018	Prior permission is required from the district magistrate.	Imprisonment of six months to two years and fine		
Himachal Pradesh Freedom of Religion Act, 2019			Reverse onus clause on the accused	Victim's parents or siblings, and with the court's permission, any other person who is related by blood, marriage or adoption, guardianship or custodianship

The most significant change in the newer laws is the additional requirement for individuals to give notice to (or take permission from) the state before changing their religion (see Column 2 of Table 2). This opens up a new constitutional infirmity and ground for a challenge—unlike *Stainislaus*, which was restricted to *propagation*, it strikes at the right to *profess* religion under Article 25 of the Constitution. This, it is submitted, really forms the core of religious freedom under Part III—the “*freedom of conscience*”—for

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

unless one can profess *any* religion without fear of penalty, there is no scope for exercising any of the other rights under Article 25 of the Constitution.

C. THE LEGAL CHALLENGE THUS FAR: THE DECISION IN *EVANGELICAL FELLOWSHIP*

The only one of the newer laws that has been subject to the final judicial determination is the Himachal Pradesh Freedom of Religion Act, 2006 (“**2006 Act**”),³⁰ which was challenged before the Himachal Pradesh High Court in 2011. In its judgment in 2012, the High Court, bound by *Stainislaus*, declined to go into the validity of provisions that were in *pari materia* with the older laws. However, by drawing on privacy jurisprudence from the Supreme Court, it found that the prior notice requirement imposed under Section 4 of the 2006 Act violated both the freedom of conscience and the right to privacy of the individual.³¹ In doing so, it rejected the argument of public order advanced by the state, holding that public disclosure of conversion could, in fact, *cause* public order issues and be counterproductive:³²

“A person’s belief or religion is something very personal to him. The State has no right to ask a person to disclose what is his personal belief. The only justification given is that public order requires that notice be given. We are of the considered view that in case of a person changing his religion and notice being issued to the so called prejudicially affected parties, chances of the converttee [sic] being subjected to physical and psychological torture cannot be ruled out. The remedy proposed by the State may prove to be more harmful than the problem. (...) In case such a notice is issued, then the unwarranted disclosure of the voluntary change of belief by an adult may lead to communal clashes and may even endanger the life or limb of the converttee.”

The Court also held that the state’s invocation of public order had to be justified in order to fit within the exception to Article 25 of the Constitution:³³

³⁰ Himachal Pradesh Freedom of Religion Act, 2006, No. 5, Acts of Himachal Pradesh State Legislature, 2007.

³¹ *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 41.

³² *Id.* ¶¶ 41–42.

³³ *Id.* ¶¶ 37–38.

“A person not only has a right of conscience, the right of belief, the right to change his belief, but also has the right to keep his beliefs secret. (...) the State must have material before it to show what are the very compelling reasons which will justify its action of invading the right to privacy of an individual. (...) A man’s mind is the impregnable fortress in which he thinks and there can be no invasion of his right of thought unless the person is expressing or propagating his thoughts in such a manner that it will cause public disorder or affect the unity or sovereignty of the country.”

Relying on the Supreme Court’s 1975 *Gobind* judgment on privacy and state surveillance of the individual,³⁴ it held that in order to infringe on the individual’s privacy, the state was required to both show a compelling interest and adopt the most restrictive means to achieve it.³⁵ In this case, it found that even assuming the interest of the state in protecting public order was legitimate, the means adopted did not achieve the interest at all, let alone in the most restrictive manner.³⁶

The 2006 Act also contained a proviso (to Section 4) carving out an exception from its penal provisions in case a person “*reverts back to his original religion*”. The Court held that this exception violated Article 14, being both vague (since “*original religion*” was not defined) and arbitrary (since there was no reason for treating these two classes of conversion separately).³⁷ It thus struck down the entirety of Section 4 and the Rules framed thereunder. In sum, neither of the post-*Stainislaus* additions—a prior notice/permission requirement, and an exception for “*reconversions*” could withstand constitutional scrutiny in this case. The implications of the High Court’s decision in *Evangelical Fellowship* are strengthened by subsequent developments in the Supreme Court’s privacy jurisprudence, which are discussed in the following section.

³⁴ *Gobind v. State of M.P.*, AIR 1975 SC 1378, ¶ 22.

³⁵ *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 32.

³⁶ *Id.* ¶¶ 32–34.

³⁷ *Id.* ¶ 47.

THE DEVELOPMENT OF THE RIGHT TO PRIVACY AND ITS IMPLICATIONS FOR RELIGIOUS FREEDOM

A. A BRIEF HISTORY OF PRIVACY JURISPRUDENCE IN INDIA

The right to privacy in Indian jurisprudence had not fully developed at the time of the Supreme Court's decision in *Stainislaus*. Consequently, it did not appear to be raised as a ground at the time, either before the High Courts or the Supreme Court. Moreover, as discussed earlier, the litigation leading up to *Stainislaus* had focused on only one set of actors involved in conversion—*i.e.*, from the perspective of the preacher. The right of an individual to change their religion was not an issue at the time—but, as stated before, it assumes seminal importance in light of the new laws' requirement for an individual to give prior notice or take permission before changing their religion. An argument against these requirements would rely heavily on the right to privacy—similar to what was upheld by the High Court in *Evangelical Fellowship*.

The right to privacy in India had been considered in various judgments right from the Supreme Court's 1954 decision in *MP Sharma*.³⁸ However, very few of these explicitly engaged with the issue and none in detail. In *Evangelical Fellowship*, as discussed earlier, the High Court accepted the petitioners' arguments on privacy, relying on the Supreme Court's 1976 decision in *Gobind*, which was one of the few judgments to explicitly engage with privacy. Since then, the jurisprudence on privacy has advanced substantially by virtue of the Supreme Court's nine-judge bench *Puttaswamy* judgment in 2017.³⁹ A brief analysis of this judgment's implications for the freedom of religion is therefore in order, as it is being relied on by a number of petitioners who have challenged the newer laws in different courts.

B. INDIVIDUAL RELIGIOUS FREEDOM AS AN ELEMENT OF THE RIGHT TO PRIVACY

The decision in *Puttaswamy* was unanimous in its recognition of a right to privacy inherent in the Indian Constitution. Six opinions were delivered,

³⁸ M. P. Sharma v. Satish Chandra, 1954 AIR 300; Kharak Singh v. State of U.P., 1963 AIR 1295; Gobind v. State of Madhya Pradesh, 1975 AIR 1378.

³⁹ Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

concurring with each other on important aspects. One of these, perhaps the most critical to religious freedom—was the right to individual decisional autonomy, articulated as an integral aspect of privacy in all the opinions.⁴⁰ In the judgment, decisional autonomy, or the freedom to make decisions for oneself, was articulated as an integral aspect of individual autonomy, “*perhaps the central concern of any system of limited government*”.⁴¹ This freedom to make choices was held to be vital to the exercise of liberty.⁴²

“To exercise one’s right to privacy is to choose and specify on two levels. It is to choose which of the various activities that are taken in by the general residue of liberty available to her she would like to perform, and to specify whom to include in one’s circle when performing them (...) Exercising privacy is the signalling of one’s intent to these specified others - whether they are one’s co-participants or simply one’s audience - as well as to society at large, to claim and exercise the right.”

Furthering both of the above articulations, a plurality of judges also recognised privacy as being essential to the dignity of the individual, with decisional autonomy being central to this.⁴³

“Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture.”

The Court’s grounding of privacy within this “*dignity-liberty-autonomy triangle*” is also central to its exposition of privacy not inhering in any particular Article within Part III of the Constitution but rather permeating all of them.⁴⁴ As stated in one of the opinions, privacy is, therefore, a “*basic*,

⁴⁰ John Sebastian & Aparajito Sen, *Unravelling the Role of Autonomy and Consent in Privacy*, 9 INDIAN J. CONST. L. 1 (2020).

⁴¹ Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 355 (per Nariman, J.).

⁴² *Id.* ¶ 279 (per Bobde, J.).

⁴³ *Id.* ¶ 188 (per Chandrachud, J.).

⁴⁴ Sebastian & Sen, *supra* note 40, at 3–5.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

irreducible condition” and “*the inarticulate major premise*” that is necessary for the exercise of the freedoms guaranteed in Part III of the Constitution.⁴⁵

In this context, privacy becomes a natural element of Article 25 of the Constitution, especially in relation to the freedom of conscience and the right to profess any religion of one’s choice (or none at all). Several of the opinions deal with this aspect, but the essence of the point is most succinctly articulated by the plurality, which states that the “*right to freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world*”.⁴⁶

C. RESTRICTIONS ON PRIVACY AND PROCEDURAL STANDARDS THEREFORE

While the nine judges in *Puttaswamy* were fairly clear and unanimous in their articulation of privacy as a substantive right, they were neither unanimous nor clear in relation to the procedural aspects of the right—*viz.*, the situations in which it could be restricted and the standard to be satisfied by the State for any such infringement.⁴⁷

The first of these is hardly moot in respect of Article 25 of the Constitution, as the grounds of restriction are provided in the Article itself: public order, morality and health. And since the decision in *Stainislaus* upheld the legislative competence of the states to enact anti-conversion laws on the ground of public order, it is that ground that principally forms the basis of these laws, both old and new. As a critique of this ground has been attempted earlier in this article, we will for now focus on the second aspect: the standard of scrutiny that the State must satisfy.

As noted earlier, the High Court in *Evangelical Fellowship* adopted a strict scrutiny standard, relying upon the decision of the Supreme Court in *Gobind*. However, *Puttaswamy* did not adopt the strict scrutiny standard—it

⁴⁵ Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 261 (per Bobde, J.).

⁴⁶ *Id.* ¶ 188 (per Chandrachud, J.).

⁴⁷ See Maryam Kamil, *Puttaswamy: Jury Still Out on Some Privacy Concerns?*, 1(2) INDIAN L. REV. 190 (2017).

is adverted to in only one opinion and that too for limited cases.⁴⁸ Other opinions range between the standard prescribed under individual Articles of Part III (Article 25 has none). However, a majority of judges adopted the requirement of “*proportionality*” for testing infringements into the right to privacy.⁴⁹ While proportionality as a standard itself has been an evolving act in Indian constitutional law,⁵⁰ and the Supreme Court’s application of it has been subject to critique by scholars,⁵¹ the test as it stands is derived from a prior (to *Puttaswamy*) Constitution Bench decision in *Modern Dental College*.⁵² As recapitulated in *Puttaswamy*, this comprises four strands:⁵³

“(i) *The action must be sanctioned by law;*

(ii) *The proposed action must be necessary in a democratic society for a legitimate aim;*

(iii) *The extent of such interference must be proportionate to the need for such interference;*

(iv) *There must be procedural guarantees against abuse of such interference.”*

Following this discussion, we now proceed to venture into an analysis of the constitutionality of the remaining provisions of the newer laws in the final section of this paper.

⁴⁸ Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 236 (per Chelameswar, J.).

⁴⁹ These are the plurality opinion of Chandrachud, J. (¶ 188) and the opinion of Kaul, J. (¶ 490), together comprising five of the nine judges on the Bench.

⁵⁰ See Vikram Aditya Narayan & Jahnvi Sindhu, *A Historical Argument for Proportionality under the Indian Constitution*, 2(1) INDIAN L. REV. 51 (2018); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2d ed. Edward Elgar 2018).

⁵¹ See Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, 3(2) U. OXFORD HUM. RTS. HUB J. 55 (2020); Shruti Bedi, *Proportionality and Burden of Proof: Constitutional Review in India*, 10 INDIAN J. CONST. L. (2021).

⁵² *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353.

⁵³ Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 490 (per Kaul, J.) The plurality opinion authored by Chandrachud, J. only adverts to the first three, but also adds that in the context of art. 21 “*an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable*”. Notably, none of the judges in *Puttaswamy* cited the decision in *Modern Dental College*.

ANALYSING THE CONSTITUTIONALITY OF THE NEWER LAWS

To recapitulate, the newer anti-conversion laws have four main features (see Table 2): (i) a requirement for an individual to give prior notice or take permission from the state to change religion; (ii) expanding the definition of “*forced conversion*” while creating an exception for “*reconversion*”; (iii) rendering marriages following “*forced conversion*” voidable; and (iv) permitting persons other than the individual converted to initiate criminal proceedings. These are now dealt with in turn.

A. THE PRIOR NOTICE/PERMISSION REQUIREMENT

The prior notice/permission requirement was struck down in *Evangelical Fellowship*, following the strict scrutiny standard, for want of compelling state interest and not using the least restrictive means to achieve it.⁵⁴ In light of *Puttaswamy*, the standard to be applied is now one of proportionality, but it is submitted that this should not change the outcome. As discussed in the previous section, “*even at its lowest level of scrutiny, proportionality requires the court to determine that the measure was legitimate, suitable, necessary and balanced.*”⁵⁵

Applying this to the provisions of the newer laws, it is clear that the prior notice/permission requirement for changing one’s religion would fail the latter three prongs of the proportionality test: there is no justification as to why prior notice (in addition to the criminal penalty) is necessary to prevent forced conversions; the requirement, as *Evangelical Fellowship* has shown, is disproportionate and in fact, could prove counterproductive to the purpose of maintaining public order; and there is no procedural safeguard—to the contrary, many of the newer laws contain reverse onus clauses. One of the newer laws (Uttar Pradesh) has a requirement to make a public declaration after conversion, which is an even more egregious violation of the right to

⁵⁴ *Evangelical Fellowship of India v. State of H.P.*, 2012 SCC OnLine HP 5554, ¶ 47.

⁵⁵ Chandra, *supra* note 51, at 61.

privacy than prior notice and will fail the proportionality standard for the same reasons.⁵⁶

B. THE EXPANSION OF THE DEFINITION OF “FORCED CONVERSION” AND THE “RECONVERSION” EXCEPTION

As discussed earlier, the definition of “*forced conversion*” is something that was never quite examined by the Supreme Court in *Stainislaus*, even though it was scrutinised by the Orissa High Court in prior proceedings, and parts of it were found suspect for vagueness.⁵⁷ The question, it is submitted, is thus still open, especially with respect to the newer laws, which have widened the definition beyond the scope of even the older laws that were challenged in *Stainislaus*. The exceptions to “*reconversion*” are also, for the reasons illustrated in *Evangelical Fellowship*, arbitrary and egregious violations of Article 14 because there is no justifiable reason for treating two sets of converts differently based on the religion they converted to.⁵⁸

C. RENDERING MARRIAGES BASED ON “FORCED CONVERSION” VOIDABLE

A number of the newer laws have similarly (poorly) worded provisions rendering “*marriage done for sole purpose of unlawful conversion*” void.⁵⁹ Such restrictions on marriage by inter-religious couples, it is submitted, are in the teeth of two Supreme Court decisions that uphold individual autonomy in matters of marital choice. In *Lata Singh*,⁶⁰ the Supreme Court quashed criminal proceedings initiated against an inter-caste couple by their relatives who disapproved of the marriage. It also noted that violence against inter-caste and inter-religious couples was a violation of their fundamental right

⁵⁶ UP Prohibition of Unlawful Conversion of Religion Ordinance, 2020, § 8 (Nov. 24, 2020).

⁵⁷ Yulitha Hyde v. State of Orissa, 1972 SCC OnLine Ori 58, ¶ 25.

⁵⁸ Evangelical Fellowship of India v. State of H.P., 2012 SCC OnLine HP 5554, ¶ 41.

⁵⁹ UP Prohibition of Unlawful Conversion of Religion Ordinance, 2020, § 6 (Nov. 24, 2020); Madhya Pradesh Freedom of Religion Bill, 2021, Bill No. 1 of 2021, § 6 (Feb. 11, 2021); Uttarakhand Freedom of Religion Act, 2018, § 6, No. 28, Acts of Uttarakhand State Legislature, 2018; Haryana Prevention of Unlawful Conversion of Religion Bill, 2022, § 5, Bill No. 1 of 2022 (Feb. 26, 2022).

⁶⁰ Lata Singh v. State of UP, (2006) 5 SCC 475, ¶ 16.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

of marital choice and held that the State was under an obligation to protect the choices of these individuals:⁶¹

“This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes (...) We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.”

In *Shafin Jahan*,⁶² another case involving an inter-religious couple, one of whom converted to the other's religion prior to the marriage, the Supreme Court held that the right to choose one's religion was an essential aspect of individual liberty that was constitutionally protected:⁶³

“It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity (...) The said freedom is both a constitutional and a human right (...) Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.”

(emphasis supplied)

Drawing on *Puttaswamy*, the Court also extended this logic to the individual's right to choose an intimate partner, holding that the Constitution afforded a guarantee that “each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.”⁶⁴

Consequently, with both the right to choose one's religion and one's partner constitutionally protected, it follows that restrictions placed on

⁶¹ *Id.* ¶ 16.

⁶² *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

⁶³ *Id.* ¶ 53 (per Misra, J.).

⁶⁴ *Id.* ¶ 22 (per Chandrachud, J.).

marriages by the new laws will have to be read narrowly and subject to the exception in *Sarla Mudgal*,⁶⁵ where the Supreme Court held that conversion solely for the purpose of subjecting oneself to Muslim personal law and contracting a bigamous marriage would be void.⁶⁶

D. INITIATION OF CRIMINAL PROCEEDINGS BY PERSONS OTHER THAN THE CONVERT

The most insidiously problematic provisions in the new laws are those which permit the registration of an FIR regarding the alleged offence, not just by the “*victim*” of the alleged forced conversion but also by the parents, siblings or any other relative, *even if the victim is a major* (see Column 5 of Table 2). This, it is submitted, is a body blow to personal autonomy and is being used particularly to strip young women of their autonomy to decide both their religion and choice of partner.⁶⁷ As discussed earlier, this decisional autonomy is a core element of the right to privacy, as articulated in *Puttaswamy* and reiterated in *Shafin Jahan*. The test of proportionality articulated in the former judgment would extend to both substantive and procedural provisions that have the effect of infringing upon individual provisions. In this respect, it is submitted that the provisions of the newer laws permitting third parties to initiate criminal proceedings without the consent of the individual convert are wholly disproportionate.

In conventional criminal jurisprudence, all crimes are considered to be committed against the State, which gives any member of the public the right, and sometimes the duty to report an offence. But a forced conversion is more than just a simple criminal offence—it is also a violation of a fundamental right to make an intimate personal decision and can thus only be claimed by the victim. Putting it another way, if the victim, in this case, has decisional autonomy, then an essential aspect of this autonomy is that

⁶⁵ *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, ¶ 31.

⁶⁶ The judgment in *Sarla Mudgal*, it should be clarified, was in response to a Public Interest Litigation seeking protection for women from unscrupulous Hindu men who converted to Islam to attempt contracting a second marriage without legally dissolving their first marriage (since bigamy, under Indian law, is prohibited in Hinduism but not Islam). It does not lay down a general bar against conversion for marriage in other circumstances.

⁶⁷ See Saumya Uma & Niti Saxena, *Juxtaposing ‘Honour’ with Women’s Agency: Rights and Wrongs of Anti-conversion Law(s)*, 56(1) ECON. & POL. WKLY. 15 (2021); Jenkins, *supra* note 5, at 123–24.

EVALUATING INDIA'S NEW ANTI-CONVERSION LAWS

she alone can decide if and when it has been violated. To substitute her decision for anybody else's (whether family or otherwise) would, it is submitted, amount to a further violation of her privacy. The only necessary and proportionate manner of solving this would be to permit the victim to report the violation herself and take assistance from others if she feels the need to (which is anyway allowed under ordinary criminal procedure). Thus, empowering third parties to make this decision on an adult convert's behalf, without her consent, takes away her decisional autonomy—an unnecessary, disproportionate action.

ONGOING LEGAL CHALLENGES

There has been no High Court decision after *Evangelical Fellowship*, which remains to date the only decision on the validity of the newer anti-conversion laws. However, the Gujarat High Court, in 2020, passed an interim order staying various provisions of the Gujarat Freedom of Religion Act, 2003, citing the decision in *Shafin Jahan* (although it did not refer to the decision in *Evangelical Fellowship*).⁶⁸ The decision in *Shafin Jahan* was also invoked by the Allahabad High Court in its interim orders while hearing challenges to the invocation of a similar law in Uttar Pradesh.⁶⁹ A legal challenge at the Supreme Court to the law in Uttarakhand, where no interim order has been obtained, remains pending.⁷⁰ In Himachal Pradesh, the Legislative Assembly replaced the 2006 Act with a new one in 2019, which reinstated many of the provisions that were struck down by the High Court in *Evangelical Fellowship*. In Rajasthan, which has no anti-conversion law, the High Court issued “*guidelines*” in 2018, the legal validity of which is highly suspect.⁷¹ In recent months, the Legislative Assemblies of Haryana

⁶⁸ *Mujahid Nafees v. State of Gujarat*, Special Civil Application 10305/2021, order dated 19.08.2021 (Gujarat High Court).

⁶⁹ See Sarita Santoshini, *Uttar Pradesh's Beacon Of Hope For India's Interfaith Couples*, ARTICLE-14 (Jan. 18, 2021), <https://www.article-14.com/post/uttar-pradesh-s-beacon-of-hope-for-india-s-interfaith-couples>; LiveLaw News Network, *Upholding Love: In Last One Month, Allahabad High Court Grants Protection To Over 125 Inter-Faith/Caste Couples*, LIVE LAW (Dec. 1, 2020), <https://www.livelaw.in/top-stories/allahabad-high-court-grants-protection-to-over-125-inter-faithcaste-couples-166645>.

⁷⁰ *Vishal Thakre v. Union of India*, Writ Petition (Criminal) 405/2020.

⁷¹ *Chirag Singhvi v. State of Rajasthan*, 2018 (3) RLW 2270 (Raj.).

and Karnataka have also passed similar laws,⁷² which may also be subject to legal challenges in the future.

THE WAY FORWARD

As the preceding discussion has illustrated, all of the newer anti-conversion laws are constitutionally suspect for a number of reasons. Choosing one's religion is an act of constitutionally protected decision making, and consequently a limited number of restrictions can be placed on it on the specific grounds provided in Article 25 of the Constitution. If conversions present a problem to public order, the remedy must focus on the group creating public disorder rather than the individual doing the conversion. Any allegation of "*force*" must be premised on a violation of individual consent that creates a necessity for intervention. Such interventions must, however, be achieved through a proportionate remedy, which is only possible when legal recourse is made available to the victim without overbroad substantive or procedural provisions that further infringe the rights of the victim or other parties.

Ironically, the concerns expressed by Tajamul Hussain in the Constituent Assembly, quoted at the beginning of this article, are now manifesting in the reverse direction through the new anti-conversion laws. Rather than keeping religion "*a private matter between oneself and his God*", the newer laws seek to bring it out into the open and subject it to the scrutiny of not just the State but one's fellow citizens as well. The provisions of the older laws, upheld in *Stainislaus*, perhaps mark the furthest limit to which an infringement is permitted into the right of propagation under Article 25 of the Constitution. Anything beyond that—as attempted by the newer laws—is an unconstitutional invasion into the private sphere, and the decisions in *Evangelical Fellowship*, *Puttaswamy*, and *Shafin Jahan* have laid out a clear path for subsequent courts to follow. For this reason, the interim orders of the Gujarat and Allahabad High Courts are steps in the right direction and must be taken to their logical conclusion.

⁷² Haryana Prevention of Unlawful Conversion of Religion Bill, 2022, Bill No. 1 of 2022 (Feb. 26, 2022); The Karnataka Protection of Right to Freedom of Religion Bill, 2021, Bill No. 50 of 2021 (Dec. 20, 2021).