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THE SPECIAL MARRIAGE ACT AND LOVE JIHAD ORDINANCE ARE TWO SIDES OF THE SAME COIN: A PATERNALISTIC CRITIQUE

ABSTRACT

The recent implementation of the Prohibition of Unlawful Religious Conversion Ordinance by the Uttar Pradesh Government has sparked controversy and debate around the country. Introduced with the aim to curb "love-jihad" practices, wherein allegedly a Muslim man forces his Hindu wife to convert to Islam before their marriage, the Ordinance has been heavily criticised for constituting a gross violation of privacy and autonomy of individuals. In light of this, through a paternalistic critique, I attempt to draw parallels between this Ordinance, and the Special Marriage Act, 1954. This paper will focus specifically on paternalism as a concept and how it has been interpreted, both by renowned scholars, and by the Indian judiciary. Following from this, paternalism will be used as a standard to critique both the Special Marriage Act, as well as the Ordinance, in order to highlight their problematic and invasive nature.

INTRODUCTION

On October 31, 2020, the Chief Minister of Uttar Pradesh proposed to bring in a law against "love jihad", a slur which is politically used by the Hindu right-wing community to refer to inter-faith marriages involving a Muslim man and a Hindu Woman. He issued a warnings and threats that if they (Muslim men) did not mend their ways and leave their "Hindu sisters and daughters" alone, then their "Ram Naam Satya Yatra" (funeral processions) would be carried

out.[1] In furtherance of this, The Prohibition of Unlawful Religious Conversion Ordinance ('the Ordinance') was passed by the Uttar Pradesh Government on November 24, 2020.[2] The ordinance provides an elaborate and strenuous procedure for religious conversions within Uttar Pradesh,and incorporates several provisions which are similar to The Special Marriage Act, 1954 ('the Act').[3] The Act contains provisions for civil marriage for all citizens, irrespective of the religion or faith followed by either party. The main purpose behind the introduction of the Act was to cater to inter religious marriages, which could not be solemnized according to religious customs.

In this paper, I will attempt to show that both the Act and the Ordinance share a particular attribute, that being that they both bid to establish an unjustifiable level of control over the individuals who are applying under them, in the name of ensuring the individuals own safety. Whereas the Act operates under the garb of ensuring harmonious and consensual marriages, and the Ordinance is all for safe and conscious conversions. This is what State Paternalism is. It involves restricting an individual's freedom to protect him from himself. It subscribes to the view that it is permissible for the State to control certain actions to prevent individuals from inflicting severe physical or emotional harm on themselves.[4] Such laws may include a penalty for not wearing a seat belt or helmet, or a ban on the consumption of certain drugs.[5]In this paper, I will not argue against State Paternalism as a whole, however, will attempt to critique the context that it is being used in regarding the Act and the Ordinance.

In Part II of this paper, I will usethe restrictions have been placed on paternalistic laws by renowned scholars, such as John Mill and Gerald Dworkin, to highlight the unjustifiably paternalistic nature of the Act and the Ordinance. Part III will attempt to analyse the Act and the Ordinance through Judicial precedent regarding paternalism and the triple test laid down in *Justice K.S.Puttaswamy(Retd) vs Union Of India*, ('Puttaswamy'),[6] whereas Part IV will offer concluding remarks.

SCHOLARS CRITIQUE ON PATERNALISM

[1]The Indian Express, *Yogi warning: End love jihad, or get ready for Ram naam satyahai*, November 1, 2020, available at https://indianexpress.com/article/india/yogi-adityanath-warning-love-jihad-6911901/(Last visited on January 31, 2021).
[2]The Prohibition of Unlawful Religious Conversion Ordinance, 2020 (November 24, 2020).
[3]The Special Marriage Act, 1954.
[4]JULIAN LE GRAND & BILL NEW, GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND?(2015)
[5]*Ibid.*
[6]K.S. Puttaswamy v. Union of India (2019) 1 SCC 1.

This part will focus on theories ofpaternalismpropounded by scholars such as HLA Hart, John Mill, Gerald Dworkin and Joel Feinberg. I will then attempt to show that both the Act and the Ordinance fall short of such standards which have been placed on paternalistic laws by the aforementioned scholars.

John Stuart Mill was fundamentally opposed to paternalism as a concept, as he believed that individual autonomy, freedom and privacy is paramount in a liberal society. He strongly rejected paternalism as, in his opinion, an individual should never be forced to act against his own will in order protect himself.[7] However, both HLA Hart and Gerald Dworkin criticised Mill's view on paternalism. Their main criticism stemmed from the common observation that men are not always rational, that is, they will not always act in their best interests, despite being educated about the consequences of their actions.[8] Hart found Mills view to be extremely narrow, and therefore favoured a paternalistic form of governance. He relied on various phycological studies to show that individuals do not know, nor havetheir own best interests in mind when undertaking a certain action.[9] Thus, according to him, paternalistic laws were extremely necessary in society to protect man from himself.

Gerald Dworkin and Joel Feinberg however, attempted to find the middle ground between the Mills and Hart, and propound certain restrictions on these paternalistic laws.[10] Joel Feinberg bases his theory on the assumption that any individual who chooses to risk unnecessary harm is 'unfree' is his decision making.[11]He concluded that only those individuals who voluntarily choose to risk unwarrantedserious physical harm are incapable of choosing freely, and therefore may be considered as good candidatesfor justifiable paternalism.[12]Dworkin, on the other hand, uses societal standards of normalcy and rationality to detail his theory. He describes a rational individual as one who can both, develop rational ends, and discern the means necessary for achieving that end.[13] Dworkin stresses that it is essential for the privacy and freedom of individuals to be maintained, and therefore paternalism may only be justified when an individual is irrational and unfree, and the paternalistic law promotes the goal the unfree individual would have desired if he were free and rational is his decision making. At all times however, an individuals privacy and right to basic decision making must not be compromised. Dworkin was also critical of paternalistic laws that provided government

[7]J.S. MILL, ON LIBERTY 92 (1983).
[8] H. L. A HART, LAW, LIBERTY, AND MORALITY (1963).
[9]*Id.*
[10]KaiMöller, *Proportionality: Challenging the critics*,10 International Journal of Constitutional Law 3 (2012).
[11]Joel Feinberg, *Legal Paternalism*, 1 Canadian Journal of Philosophy 1(1971).
[12]*Id.*
[13]Gerald Dworkin, *Paternalism*, 56 The Monist 1 (1972).

officials with the status of expert protectors in society. An expert protector is one who enjoys the power to impose their decisions on others, regarding what safety risks an individual should or should not undertake in the private sphere.[14]

Now, coming to the Act and theOrdinance, it becomes apparent the paternalistic conditions laid down by Dworkin and Feinberg are not fulfilled. Firstly, it is evident that an individual who wishes to choose their partner of choice in marriage is not 'unfree', and thus does not risk great physical harm. While the fundamental right to choice of partner in marriage will be elaborated upon further in the paper, if one converts their religion when their marriage is solemnized, or chooses a partner of different faith, that does not imply that they are doing so out of compulsion, or are acting irrationally. These are personal, conscious and wilful choices an individual makes which cannot be labelled as "unfree", and thus must lie outside the sphere of paternalistic laws. For the State to simply treat every religious conversion before marriage as unlawful, and requiring certification and justification, is an untenable encroachment of an individual's liberty, and cannot fall under the umbrella of justifiable paternalism. This is seenin §3, §5 and §6 of the Ordinance, and in §5, §6 and §7 of the Special Marriage Act.[15] Furthermore, the aforementioned sections confer the State with unbridled policing power over any individual's personal right to choose their respective life partner or religion, essentially elevating them to the status of 'expert protectors'.[16] Thus, it is evident that the Love Jihad law has failed the test placed on paternalistic laws to examine its validity, by Feinberg and Dworkin.

THE INDIAN COURTS ON PATERNALISM

The Indian courts have also attempted to strike a balance between personal liberty and privacy, and the need for paternalistic laws. This part will first explore the restrictions and checks placed on paternalistic laws, and then highlight how the Act and the Ordinance fall short of these checks.

In *Anuj Garg* vs. *Hotel Association of India*,the Court held that for a paternalistic legislation to be justified, it should be of absolute necessity, andthere should be a minimal trade-off or adverse impact of the legislation on an individual's life.[17]In Puttaswamy,[18]the Supreme Court

[14]M. Smiley, *Paternalism and democracy*, Journal of Value Inquiry 23 (1989).
[15]The Special Marriage Act, 1954, §5,6,7.
[16]The Prohibition of Unlawful Religious Conversion Ordinance, 2020, §3, 5, 6 (November 24, 2020).
[17]Anuj Garg v. Hotel Association of India (2008), 3 SCC 1 ¶29.

laid down the triple-test as a check on paternalistic laws. This entailed the requirement of legality, a legitimate social need, and proportionality of the law. Firstly, if any legislation is to restrict a right, it must have a legitimate goal and suitable means of furthering this goal. Secondly, the proposed action must be necessary in a democratic society to rectify an urgent need, and thirdly, there must again be a rational nexus between the objectives of the law, and the means adopted to reach them. The third test is also know as the proportionality test, as it ensures that the rights of individuals affected must be in proportion with the need for the law, and any fundamental rights violation must not be excessive in nature. Therefore, through the judgements pronounced in Puttaswamy, the Court has recognised the danger posed by paternalistic laws, and have attempted to keep the same in check. The following subparts will illustrate the blatant violation of the Act and the Ordinance regarding the triple test, and other judicial precedent.

A. NECESSITY

The Chief Minister emphasised the need for having a law that could get rid of prevailing love jihad practices.[19] However, the Special Investigation Team that was set up by the government, along with the National Investigation Agency and Ministry of Home Affairs, provided no firm proof or conclusion that instances of forced conversion in the name of marriage are prevalent.[20]The State also cited 2 decisions of a single-judge bench of the Allahabad High Court, wherein it was held that conversion simply for the sake of marriage is invalid, to showcase the need for urgency in the promulgation of the ordinance.[21] This provision was further incorporated into the Ordinance by way of §6.[22] However, this was soon held to be as bad law by a division bench of the Allahabad High Court, as the State does not have the authority to object to the relationship of two consensual major individuals, irrespective of the religion they follow.[23] In reality, there was no urgency or need for the

[18] K.S. Puttaswamy v. Union of India (2019) 1 SCC 1 ¶417.
[19]*Supra* note 1.
[20]The Hindu, *SIT in Kanpur does not find conspiracy in 'love jihad' cases*, November 24, 2020, available at https://www.thehindu.com/news/national/other-states/sit-in-kanpur-does-not-find-conspiracy-in-love-jihad-cases/article33164381.ece (Lastvisited on January 31, 2020); The Hindu, '*Love jihad' not defined under law, says Centre*,February 5, 2020, available athttps://www.thehindu.com/news/national/love-jihad-not-defined-under-law-says-centre/article30736760.ece(Last visited on3 February, 2020).
[21] Smt. Noor Jahan Begum @ Anjali vs State Of U.P. Writ C No. - 57068 of 2014; Priyanshi @ Km. Shamren and others v. State of U.P, Writ C No. 14288 of 2020.
[22]The Prohibition of Unlawful Religious Conversion Ordinance, 2020, §6 (November 24, 2020).
[23] Salamat Ansari v. State of U.P. 2020 SCC OnLine All 1382 ¶15.

promulgation of the ordinance, the thus necessity element of the Triple test provided by the Courts has not been fulfilled.

B. PROPORTIONALITY TEST

Next, the Act and the Ordinance also fail the proportionality test, as the consequences of the encroachment of personal liberty and privacy are not in proportion to the aim and objective sought by the law. While the aimsof the Act and the Ordinance may be to ensure consensual marriages and conversions respectively, to simply treat all interfaith marriages with an overwhelming amount of suspicion and scepticism is erroneous and extremely detrimental to the secular nature of the Indian democracy. The following subpart will discuss the proportionality aspect of the triple test.

Under §6 and §7 of the Act, the persons intending to solemnize a marriage are required to give a notice of the intended marriage, and the Marriage Officer thereafter is made duty bound to publish the notice for a period of 30 days and invite objections with regard to the same.[24] However, these provisions have recently been declared as a direct violation of privacy, as the Allahabad High Court held that such a provision must only be directive in nature, and may only be given affect on the request of the parties. This is because the decision to marry is personal decision which cannot merit interference from the State.[25]This judgement has an underlying tone of paternalistic critique running through it, as it questioned the States approach to adopting overtly protective measures, which consequently violate the autonomy and freedom of individuals. The Court has, by highlighting that the measures and means adopted by the Act are disproportionate to the aim sought by the provision, stressed on the need for laws to pass the paternalistic test.

Similar to §6 and §7 of the Act, §9 of the Ordinance mandates that any individual must first provide the District Magistrate with an advance notice of sixty days of his intention to convert, which will then be followed by a police enquiry.[26] This obligation on the individual to first seek permission for the conversion is unjustifiably paternalisticas it is fundamentally a violation of the right to privacy and choice. In *Shafin Jahan* v. *Ashokan K.M*, the Supreme Court held that “Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.” It has also been held that every individual has the right to belief,

[24]The Special Marriage Act, 1954, §6,7.
[25]Smt. Safiya Sultana Thru. Husband Abhishek Kumar Pandey &Anr v. State Of U.P. Thru. Secy. Home, Lko. &Ors., HABEAS CORPUS No. - 16907 of 2020.
[26]The Prohibition of Unlawful Religious Conversion Ordinance, 2020, §9 (November 24, 2020).

the right to change his belief by his free will and the right to keep that change private in the exercise of their autonomy.[27]This provision however strips away this fundamental right to choose ones own religion, as such a decision is now subject to state scrutiny. While done with the aim to ensure safe and consensual conversions, such an encroachment on an individuals freedom may not and cannot be justified under paternalism.

This issue ties into the overarching aim of paternalism and the problems that arise with it. While it is the States duty to ensure the safety of its individuals, how far can it take this duty while undermining the rights of the individuals. In *Shakti Vahini* v. *Union of India*, the Court explicitly held that:

> "*If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship. […] And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.*"[28]

However, this is not the case that is being advocated by the Act and the Ordinance. Both these laws attempt to strictly regulate interfaith marriages, and in doing so grossly violate the fundamental right to privacy and autonomy, and turn a blind eye to judicial precedent regarding the same.Thus, that the measures adopted by the Act and the Ordinance are a blatant encroachment on a citizen's freedoms and privacy, and cannot be justified in the name of paternalism.

CONCLUSION

The State's policing powers, under the Act and the Ordinance, go against the fundamental rights provided to people, including privacy, freedom to convert one's religion and to choose their life partner autonomously. Through this paper, I have attempted to show that such laws cannot be justified in the name of individuals safety. It has been reiterated that if any law infringes upon the fundamental rights of individuals, then there must be strict measures in place to ensure that there remains a balance between the right and the restriction on the right. While scholars and courts may differ in the standards and measures that should be used to check the effect of paternalistic laws, there is an underlying agreement among them that if

[27]Evangelical Fellowship of India v. State of H.P., (2013) 4 RCR (Civ) 283.
[28]Shakti Vahini vs. Union of India,(2018) 7 SCC 192.

any law completely violates such standards, then such a law would strike at the core of our democratic society, and could not be justified under the umbrella of paternalistic laws.

Unfortunately, this is the situation currently, as the Act and the Ordinance have turned a blind eye to all judicial precedent regarding the proportionality triple test and its requirements, as well as the well-accepted checks placed on paternalistic laws by Dworkin and Feinberg. It has been argued that through various provisions in the Act and Ordinance, the privacy and autonomy of individuals is being compromised to an untenable degree. More than that however, the State is intervening in the fundamental freedom to choice as to who to marry, or what religion to convert to, and that is what makes the Act and the Ordinance unjustifiably paternalistic in nature.