

RELIGIOUS FREEDOM IN INDIA AND ANALYSIS OF THE
CONSTITUTIONALITY OF ANTI-CONVERSION LAWS
By James Andrew Huff¹

I. Introduction

This note will analyze the constitutional validity of anti-conversion laws in India. Anti-conversion laws are ostensibly intended to prevent people from being unethically converted from one religion to another. They have a long history in India and some princely states enacted them as early as the 1930s.² In the 1980s some states enforced anti-conversion laws primarily against Muslims.³ Since the late 1990s these states have begun to enforce these laws against Christians.⁴ The Indian Constitution provides for freedom of religion, and the supporters of anti-conversion laws believe that they help to promote religious freedom by protecting people from forced conversions.⁵ Those against anti-conversion laws believe that the laws infringe on the fundamental right to freedom of religion because they prevent people from being able to convert to a religion of their choice.⁶ In addition propagation of religion is not a major tenet of Hinduism, but is a major tenet of Islam and Christianity.⁷ As a result Christians and Muslims feel that anti-conversion laws disproportionately affect the free practice of their religions.⁸

Anti-conversion laws have become an important issue now because authorities in states with strong Hindu Nationalist Party influences have begun to enforce anti-conversion laws under the Indian Penal Code to fine and imprison

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² Faisal Mohammad Ali, *Christian Anger at Conversion Law*, BBC News (Central India), Aug., 2006, available at http://news.bbc.co.uk/2/hi/south_asia/5246328.stm.

³ Arpita Anant, *Anti-conversion Laws*, THE HINDU, Dec. 17, 2002, available at <http://www.hinduonnet.com/thehindu/op/2002/12/17/stories/2002121700110200.htm>.

⁴ *Id.*

⁵ INDIA CONST. art. 25-28.

⁶ US STATE DEPARTMENT, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *India: International Religious Freedom Report 2007*, Sept. 14, 2007, available at <http://www.state.gov/g/drl/rls/irf/2007/90228.htm>.

⁷ Robert D. Baird, *Traditional Values, Governmental Values, and Religious Conflict in Contemporary India*, 1998 BYU L. REV. 337, 349–50 (1998).

⁸ *Id.*

Christian missionaries and some converts.⁹ In addition there have been reports of violence against Christians based on conversion activities.¹⁰ The Hindu Nationalist Party is attempting to preserve the Hindu caste system by preventing Dalits, untouchables, from converting from Hinduism.¹¹ This is a serious threat to the Caste System, the Hindu religion, and the power of Hindus in India, and the Hindu nationalist movement feels the need to fight against conversions to achieve its goal of making India a Hindu state.¹²

Hindus from higher castes have traditionally discriminated against Dalits.¹³ Discrimination has traditionally been such a serious problem that Article 17 of the Indian Constitution abolishes Dalits' untouchable status.¹⁴ However, discrimination still exists, thus Dalits have a strong interest in escaping the Hindu caste system by converting to other religions.¹⁵ While many converted to Islam in the past, the recent expansion of American Christian missionary activities throughout India has created a new threat to Hindu nationalists.¹⁶

This note will analyze the tension between Hindus and other religions, especially, Christianity, that has led to the proposal and passage of anti-conversion laws in eight Indian states. These states are Orissa, Madhya Pradesh, Arunchal Pradesh, Tamil Nadu, Gujarat, Chhattisgarh, Himachal Pradesh, and Uttarakhand. The note will also look at Hindu nationalism, Hindutva, and the Bharatiya Janata Party (BJP), which is the main driving force behind anti-conversion legislation.¹⁷ The note will then look at the history of anti-conversion laws, which goes back to the British colonial period.¹⁸

⁹ US STATE DEPARTMENT, *supra* note 6.

¹⁰ *Id.*

¹¹ Anant, *supra* note 3.

¹² Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41, 68 (Spring 2003).

¹³ US STATE DEPARTMENT, *supra* note 6

¹⁴ INDIA CONST. art. 17.

¹⁵ Smita Narula, *Gary Jeffrey Jacobsohn's The Wheel of Law: India's Secularism in Comparative Constitutional Context*, 4 INT'L J. CONST. L. 741, 744 (October 2006)(book review) [hereinafter Narula, Book Review].

¹⁶ Anant, *supra* note 3.

¹⁷ US STATE DEPARTMENT, *supra* note 6.

¹⁸ Anant, *supra* note 3.

Next, the note will look at Article 25, Freedom of conscience and free profession, practice and propagation of religion, under Part III, fundamental rights, of the Indian Constitution. The note will then explore international law sources like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to see how they interact with the Indian Constitution in regard to the constitutionality of anti-conversion laws. Next, the note will look at relevant Indian cases. Finally, the note will analyze the constitutionality of anti-conversion laws ahead of challenges that are coming from the Dalits, “untouchables,” and Christian communities throughout India.¹⁹

¹⁹ Ecumenical & Interfaith Network – PCUSA, Religious Conversion, 2006, *available at* <http://www.eif-pcusa.org/InterfaithRelations/ReligiousConversion.html>.

II. The History of Anti-Conversion Laws

Anti-conversion laws have arisen from a long history of religious activity in India.²⁰ These laws were first seen during the British colonial period, although the government did not promulgate any anti-conversion laws.²¹ However, Hindu princely states enacted them during the British colonial period in an attempt to preserve Hindu religious identity in the face of British missionaries.²² In particular, princely states, now part of Chhattisgarh, passed anti-conversion laws as early as the 1930s.²³ The Raigarh State Conversion Act 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act 1946 are other examples of these laws.²⁴ Other “laws were enacted in Bikaner, Jodhpur, Kalahandi and Kota and many more were specifically against conversion to Christianity.”²⁵ For example, “[t]he Vanvasi Kalyan Asharam was first established in the princely state of Jashpur to counter Christian missionary activity and to awaken tribesmen [to] their true Hindu identity.”²⁶ These early anti-conversion laws may have been the foundation and inspiration of post-colonial Indian anti-conversion laws.

²⁰ Hinduism has traditionally been viewed as a very tolerant religion and its history of Parsees, Buddhists, Christians, Muslims, Jews, and Hindus living together relatively peacefully together attests to this. When Muslims invaded around 1206 AD they began to forcefully convert Hindus, although, the conversions were not considered too oppressive. Later as Portuguese and Dutch missionaries arrived, their attempts to convert Indians to Christianity were rebuffed because of their lack of respect for local religions. The British East India Company did not allow British missionaries in India, and missionaries did not arrive until after 1813. These missionaries were equated with the colonial government, so their activities were considered a threat to both Hindu and Muslim Indians. Since then, Hindu leaders have felt threatened by Christian missionary activity, which helps to explain why Hindu Nationalists are reacting so negatively to Christian missionary activity now. Jonathan K. Stubbs, *Persuading Thy Neighbor to be as Thyself: Constitutional Limits on Evangelism in the United States and India*, 12 UCLA PAC. BASIN L.J. 360, 363-68 (1994).

²¹ Anant, *supra* note 3.

²² *Id.*

²³ Ali, *supra* note 2.

²⁴ Anant, *supra* note 3.

²⁵ *Id.*

²⁶ Ali, *supra* note 2 (internal citations omitted).

The first of the post-colonial anti-conversion laws were passed in the states of Orissa and Madhya Pradesh in the 1960s.²⁷ The Orissa Freedom of Religion Act of 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam of 1968 are examples of anti-conversion laws still in existence.²⁸ It will be useful to take a close look at these anti-conversion laws as other states have used them as a starting point for their own anti-conversion laws.

The Orissa Freedom of Religion Act 2 of 1968 prohibited forcible conversion, stating, “no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion.”²⁹ Conversion was defined as “renouncing one religion and adopting another.”³⁰ Force was defined as “a threat of injury of any kind including the threat of divine displeasure or social ex-communication.”³¹ Fraud was defined as “misrepresentation or any other fraudulent contrivance.”³² Finally, inducement was defined as “the offer of any gift or gratification either in cash or in kind, . . . including the grant of any benefit, either pecuniary or otherwise.”³³

Similarly, The Madhya Pradesh Act “prohibited forcible conversion through the use of force, fraud, or allurement.”³⁴ Allurement was defined as an “offer of any temptation in the form of – (i) any gift or gratification either in cash or kind; (ii) grant of any material benefit, either monetary or otherwise.”³⁵ The “Act required that a person overseeing the religious ceremony of a convert inform the district magistrate by completing a form prescribed in the Act.”³⁶ This law was mimicked by the State of Arunachal Pradesh in The Arunachal Pradesh

²⁷ Stubbs, *supra* note 20, at 378-80.

²⁸ *Id.*

²⁹ *Id.* (internal citations omitted).

³⁰ *Id.* (internal citations omitted).

³¹ *Id.* (internal citations omitted).

³² *Id.* (internal citations omitted).

³³ *Id.* (internal citations omitted).

³⁴ *Id.* at 379 (internal citations omitted).

³⁵ *Id.* (internal citations omitted).

³⁶ *Id.* (internal citations omitted).

Freedom of Indigenous Faith Act of 1978.³⁷ With these laws as a foundation, Indian states have more recently begun to pass their own anti-conversion laws.

One example is the state of Tamil Nadu, which passed the Prohibition of Forcible Conversion of Religion Ordinance on October 5, 2002.³⁸ However, the Tamil Nadu legislature has recently revoked its anti-conversion law due to a public outcry against its perceived restriction on the freedom of religion.³⁹ Another example is that of Himachal Pradesh where, “[t]he State Assembly passed the Himachal Pradesh Freedom of Religion Act 2006 in December 2006.”⁴⁰ The Governor signed it into law on February 19, 2007.⁴¹ This law is unique because the secular Congress party generated and passed it, while states ruled by the BJP, the Hindu Nationalist Party, has enacted all of the other anti-conversion laws.⁴² The law states that, “[n]o person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by inducement or by any other fraudulent means nor shall any person abet any such conversion”.⁴³ The law stipulates punishment of up to two years imprisonment and/or a fine of \$625 (25,000 INR).⁴⁴ If minors are involved, five years imprisonment and/or \$1,250 (50,000 INR) fine is the penalty.⁴⁵ Any members of a religious group wishing to change his or her religious beliefs is required to give 30 days prior information to district authorities or otherwise face punishment of one month imprisonment and/or \$25(1,000 INR) fine.⁴⁶ “However, returning back to a previous religious group is not considered violating this law.”⁴⁷ This last section makes the law appear improper and guided at strengthening Hinduism rather than protecting a person’s religious freedom. For

³⁷ Tahir Mahmood, *Religion, Law, and Judiciary in Modern India*, 2006 B.Y.U. L. REV. 755,761 (2006).

³⁸ Ecumenical & Interfaith Network, *supra* note 19.

³⁹ *Id.*

⁴⁰ US STATE DEPARTMENT, *supra* note 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

instance, a person might have converted to Christianity many years previously, but could convert back to Hinduism without this law's substantive provisions applying.⁴⁸

A similar law was passed in Rajasthan in April of 2006, which prohibited the use of allurement, force, or fraudulent means to convert people.⁴⁹ "The law is applicable only in case of conversion from the 'original religion' and keeps out of its purview reconversion to 'the religion of one's ancestors.'"⁵⁰ "Though 'original religion' is not clearly defined, social activists fear it may mean a non-Hindu could freely reconvert to Hinduism while those assisting a Hindu to convert to another religion may be punished."⁵¹ The governor, however, did not give his assent to the bill, so it has not come into force.⁵² Although that is a victory for those opposed to anti-conversion laws, it could be short lived should a new governor decide to enforce it.

Chhattisgarh state passed a law in 2006. This law requires official approval of any religious conversion.⁵³ An amendment was added allowing Christians intending to "reconvert" to Hinduism to be exempted from the requirement.⁵⁴ The governor did not sign the amendment, so it too is not in force.⁵⁵ Of course, like the Rajasthan bill, a different governor could enact it in the near future. In addition the part of the bill that requires official approval for a conversion seems to take a great deal away from a person's freedom to convert to another religion. These worries are also present in proposed legislation in other Indian states.

⁴⁸ Anant, *supra* note 3.

⁴⁹ *Anti Religious Conversion Bill in Indian State Hits Roadblock*, DEUTSCHE PRESSE-AGENTUR, May 20, 2006, available at http://www.monstersandcritics.com/news/southasia/news/article_1165423.php/Anti_religious_conversion_bill_in_Indian_state_hits_roadblock.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Ali, *supra* note 2.

⁵³ *Id.*

⁵⁴ US STATE DEPARTMENT, *supra* note 6.

⁵⁵ *Id.*

For example, the legislature in Uttarakhand proposed an anti-conversion law as recently as May of 2007.⁵⁶ Gujarat was the latest state to propose an anti-conversion law when it did so in August of 2007.⁵⁷ In August 2007, the state government of Gujarat passed a bill to bring their dormant 2003 anti-conversion law into enforcement.⁵⁸ “Under terms of the 2003 Act, anyone wishing to convert from one religion to another needs prior permission from the district magistrate.”⁵⁹ The law is still waiting for legislation that will allow enforcement, so it is inactive.⁶⁰ All of this active, inactive, and proposed anti-conversion legislation has come about primarily through the BJP, the Hindu Nationalist Party.⁶¹

Hindu nationalists are waging a concerted campaign to create religious tensions so that they can retain political and economic power.⁶² The power of these laws is that they have “made forced conversion a cognizable offence under sections 295A and 298 of the Indian Penal Code that stipulate that malice and deliberate intention to hurt the sentiments of others is a penal offence punishable by varying durations of imprisonment and fines.”⁶³ The state legislatures and the state governors have played a large role in whether these bills will be enforced,

⁵⁶ *Id.*

⁵⁷ US STATE DEPARTMENT, *supra* note 6.

⁵⁸ Ecumenical & Interfaith Network, *supra* note 19.

⁵⁹ Vishal Arora, *State in India Modifies Anti-Conversion Law: Christians in Gujarat Fear Legislation will be Misused to Restrict Religious Freedom* (2006), available at <http://www.secularindia.com/news/2006/09/23State.htm>.

⁶⁰ US STATE DEPARTMENT, *supra* note 6.

⁶¹ *Id.*

⁶² Narula, *supra* note 12.

⁶³ Anant, *supra* note 3. Here are some examples of the enforcement of these laws:

On April 5, 2007, authorities in Andhra Pradesh arrested three pastors and filed cases under IPC 295A and 298 for hurting religious sentiments. Local residents alleged that the pastors led 26 foreign tourists, including several Americans, into the Chikadpally slum in Hyderabad where they engaged in conversions, and made derogatory remarks against Hindu Gods”....On March 20, 2007, Bangalore police arrested two Christian missionaries, including one American citizen, for allegedly making slanderous statements ridiculing Hindu deities. Both missionaries were released on bail the next day....According to reports, in December 2006 the Bajrang Dal allegedly assaulted a pastor and 20 other Christians in Chhattisgarh who were singing Christmas carols. Five individuals were seriously injured. The pastor and 10 others were subsequently arrested for forcibly converting others.

US STATE DEPARTMENT, *supra* note 6.

amended, or repealed. Although the Indian Supreme Court has created a precedent for these laws, one can see from the diversity of action on them that anti-conversion laws are very controversial, and that religious conversion has inflamed passions.⁶⁴

⁶⁴ Here is one example of the violence and injustice related to this issue:

According to religious media, on September 21, 2006, a day after the Gujarat State Assembly passed an amendment to the 2003 'anti-conversion law,' a group of extremists attacked eight Christians belonging to the Indian Missionary Society. The Christians filed a complaint against nine attackers and the police sub-inspector for physical abuse. Subsequently, authorities arrested the attacked on charges of engaging in forced conversions and carrying weapons.

US STATE DEPARTMENT, *supra* note 6.

III The Indian Constitution

Before introducing the particular article of the Indian Constitution at issue, it is important to explain some of the fundamental aspects of the Indian Constitution. Converse to the American Constitution, the Indian Constitution is a very long and detailed document, and contains more guidelines for the administration of the government.⁶⁵ While the American Constitution describes many broad principles and allows the courts to determine the details, the principles of the Indian Constitution are more detailed and the courts have less room to maneuver.⁶⁶ However, this does not mean that Indian Courts have no role to play, and in fact the Indian Courts have been called on to interpret parts of the Constitution many times.

Beyond the aforementioned, the Indian Constitution creates a system of government that is similar in form, yet quite different, from the American system.

P.B. Gajendragadkar, describes the system this way:

The scheme of the Constitution is that it makes appropriate provisions for the institution of legislative, executive and judicial machinery in the different States which constitute the Union of India. Three lists are attached to the Seventh Schedule. They contain respectively the topics on which the legislative power of the Union Legislature, the State Legislatures and both Legislatures can be exercised.⁶⁷

The Union Legislature is a parliament that is equivalent in the United States to the Senate and the House.⁶⁸ The state legislatures are equivalent to the state legislatures in the United States except that they are parliamentary in nature.⁶⁹ The Seventh Schedule is one of nine schedules, which are part of the Indian Constitution. Each schedule provides a list referring to particular articles of the Constitution.⁷⁰ The Union government has one list of items on which, only it has

⁶⁵ P.B. GAJENDRAGADKAR, THE CONSTITUTION OF INDIA 63 (1969).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

the power to legislate.⁷¹ The states have their own list on which to legislate, and then there is a list of subjects on which both can legislate.⁷²

In the United States, the federal government has certain enumerated powers, and the states or the people have all the remaining powers reserved to them.⁷³ While the federal government in the US has a great deal of power, the states still retain a great deal of power. By contrast the Indian system of government appears to provide more central control and less state control.⁷⁴ The Union Government has greater power than the US Federal Government, and the Indian States have less power than the American states.⁷⁵ Gajendragadkar shows the essence of this power relationship in reference to Article 3 of the Indian Constitution concerning states and territory. The author states that, “The Supreme Court has held that this would empower the Parliament even to extinguish the existence of a State, and that clearly shows that the States cannot be regarded as constituting a federal union.”⁷⁶ The federal government must have a great deal more power than the states, if the federal legislature can extinguish the existence of the individual states.

With this understanding of the fundamental structure of the Indian Constitution and government, it is now possible to look at the text of the Indian Constitution to provide a solid foundation for understanding the constitutional issue raised by anti-conversion laws. To begin with, the Preamble to the Constitution states,

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith, and worship;

⁷¹ *Id.*

⁷² *Id.*

⁷³ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.” U.S. CONST. art. X.

⁷⁴ GAJENDRAGADKAR, *supra* note 65, at 65.

⁷⁵ *Id.*

⁷⁶ *Id.*

EQUALITY of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;⁷⁷

The Preamble shows that one of the main concerns of the Constitution is to provide for the liberty of belief, faith, and worship, which seems to encompass the fundamental right to freedom of religion contained within the Universal Declaration of Human Rights.⁷⁸

Part III contains the articles defining each of the fundamental rights, granted to all persons.⁷⁹ This section of the Constitution includes: Article 13, Laws inconsistent with or in derogation of the fundamental rights; Article 19, Protection of certain rights regarding freedom of speech, etc.; Article 25, Freedom of conscience and free profession, practice and propagation of religion; and Article 32, Remedies for enforcement of rights conferred by this Part.⁸⁰ Beyond the section on fundamental rights, it is also important to analyze Part XI, Relations between the Union and the States. Another important provision is Article 246. It lies in Chapter I, Legislative Relations, subsection, Distribution of legislative powers. Article 246 is titled, “Subject-matter of laws made by Parliament and by the State Legislatures.”⁸¹ This article is supplemented with lists that exist in another part of the Constitution called the Schedules. Schedule Seven in particular contains 3 lists that are part of Article 246: List I is the Union List, List II is the State List, and List III is the Concurrent List.⁸²

With this foundation, one can analyze the particular constitutional issue in regard to anti-conversion laws. It relates to the propagation of religion referred to in Article 25 of the Indian Constitution, Freedom of conscience and free profession, practice and propagation of religion. The Article states,

⁷⁷ INDIA CONST. pmbi.

⁷⁸ Baird, *supra* note 7, at 337.

⁷⁹ INDIA CONST. Pt. III (Fundamental Rights).

⁸⁰ *Id.*

⁸¹ INDIA CONST. art. 246.

⁸² INDIA CONST., schedule seven.

25. Freedom of conscience and free profession, practice and propagation of religion.—

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.⁸³

The plain language of the article states that a person should be free to propagate that person's religion except when concerns for public order, morality, or health dictate otherwise.⁸⁴ This article has created tension in Indian society,

⁸³ INDIA CONST. art 25.

⁸⁴ INDIA CONST. art 25, § 1. The difficulty in determining proper exceptions to the right to freedom of religion allowed under this article can be shown through two examples: first, the Bombay High Court found, “an Act to prevent bigamous marriages was not violative of religious freedom since it fell under Cl. 2(b)”; second, “[b]ut an Act which prohibited the practice of ex-communication in a certain community was held invalid as not falling within the exception.” V.N. SHUKLA, *THE CONSTITUTION OF INDIA* 102 (1964).

which has caused many difficulties.⁸⁵ “The textual arrangement evinces a clear founding purpose that seeks to reconcile the securing of religious freedoms included in the document with the achievement of social justice.”⁸⁶ “There is no protection [for] activities which are economic, commercial, or political in their character, though they are associated with religious practices.”⁸⁷ Article 25 can be used to void a law contrary to any fundamental right because of Article 13, which states,

13. Laws inconsistent with or in derogation of the fundamental rights.—

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.⁸⁸

As the plain language states, any fundamental right, including Article 25’s freedom of religion, is protected by the Constitution by Article 13. Under Article

⁸⁵ Baird, *supra* note 7, at 351.

⁸⁶ GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 33 (2003).

⁸⁷ SHUKLA, *supra* note 85, at 101.

⁸⁸ INDIA CONST. art. 13.

13, any law with legal effect contrary to a fundamental right is considered void.⁸⁹ A law in this context means any statutory law, customary law, or executive order that affects the legal rights of citizens.⁹⁰

Another fundamental right guaranteed by the Constitution, which would also be protected by Article 13, is Article 19, Protection of certain rights regarding freedom of speech etc., which is important in regard to anti-conversion laws. It states,

(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

.....

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the right conferred by the said sub-clause.

⁸⁹ SHUKLA, *supra* note 85, at 21.

⁹⁰ *Id.* at 22.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.⁹¹

The plain language of this article shows that there is a fundamental right to freedom of speech and expression, which goes hand in hand with propagating religion.⁹² Article 19 also shows that the government may reasonably curtail any of the rights listed in the article to protect public order and national security.⁹³ It suggests that a person ought to be able to preach about that person's religion and that a person ought to be able to profess that person's desire to change that person's religion.

If this right of freedom of speech or the rights granted in Article 25 were restricted by executive rather than legislative means, then a person could use

⁹¹ INDIA CONST. art. 19.

⁹² INDIA CONST. art. 19, § 1(a).

⁹³ INDIA CONST. art. 19, § (2).

Article 32 for relief. The plain language of Article 32, Remedies for enforcement of rights conferred by this part, states,

1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.⁹⁴

As Article 32 falls under Part III Fundamental Rights of the Constitution, the plain language allows a person to access the Supreme Court of India for redress of a grievance, related to the restriction of a fundamental right, regardless of whether there is a specific legislative or executive enactment that restricts the right.⁹⁵

When a legislative enactment is at issue to restrict a fundamental right, Article 13 can be used to invalidate it.⁹⁶ However, one must look at the subject of the law as well as the legislative body enacting it to determine whether the enacting body was competent to enact the law in the first place.⁹⁷ This is accomplished by turning to Article 246, Subject-matter of Laws made by Parliament and by the Legislatures of States. It states,

⁹⁴ INDIA CONST. art. 32.

⁹⁵ INDIA CONST. art. 32, § 1.

⁹⁶ INDIA CONST. art. 13, § 2.

⁹⁷ INDIA CONST. art. 246.

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.⁹⁸

This article of the Constitution shows that powers listed in the Seventh Schedule in List I are reserved to the Union government,⁹⁹ the powers listed in Schedule II are reserved to the State governments,¹⁰⁰ and the powers listed in Schedule III are shared by both the Union and the State governments.¹⁰¹

After the enumeration of these parts of the Indian Constitution, it is easier to look at the interpretation of the freedom of religion provided in it. There seems to be a strong difference between the American idea of religious freedom and the Indian idea of religious freedom. The Indian idea seems to be based on Indian Secularism.¹⁰² The American idea seems to focus on making sure that each person is able to practice that person’s religion without interference from the

⁹⁸ *Id.*

⁹⁹ INDIA CONST. art. 246, § 1.

¹⁰⁰ INDIA CONST. art. 246, § 3.

¹⁰¹ INDIA CONST. art. 246, § 2.

¹⁰² Stubbs, *supra* note 20, at 374.

government,¹⁰³ while the Indian concept seems to focus more on providing religious equality rather than making sure each person can practice that person's religion without interference from the government.¹⁰⁴ For example, the government in India is active in religious institutions.¹⁰⁵ In addition religion is pervasive throughout the government and cannot be separated from it.¹⁰⁶

Beyond this, religious freedom can be subjugated to the project of social reform in India.¹⁰⁷ Based on all of the decisions that have been passed by the Indian Supreme and High Courts, the Indian courts have been described as, "schizophrenic defender[s] of constitutional secularism."¹⁰⁸ Because of the difficulty in deciding what legitimate exceptions to the freedom of religion to propagate based on public order are, the Indian Constitution's Article 25 can be interpreted to either allow or disallow anti-conversion laws. However, it seems that the majority of anti-conversion laws currently in place and those proposed are contrary to the Indian Constitution and, therefore, are not valid exceptions to the right to propagate.

¹⁰³ *Id.*

¹⁰⁴ GAJENDRAGADKAR, *supra* note 65, at 40.

¹⁰⁵ Stubbs, *supra* note 20, at 374.

¹⁰⁶ Narula, Book Review, *supra* note 15, at 743.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 746.

IV. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

India has made a commitment in its Constitution to international law, especially in regard to Human Rights. Article 51 of the Constitution states that India will “foster respect for international law and treaty obligations.”¹⁰⁹ The Indian Supreme Court has stated, “Our Constitution guarantees all the basic and fundamental rights set out in the Universal Declaration of Human Rights 1948, to its citizens and other persons.”¹¹⁰ Although the Declaration is not legally binding, the Supreme Court has suggested that the Indian Constitution contains articles that have created the same rights as the Declaration.¹¹¹

Article 18 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”¹¹²

In addition to this Declaration, India also acceded to the International Covenant on Civil and Political Rights on March 27th, 1979.¹¹³ The ICCPR is legally binding on the states that ratify it.¹¹⁴ It states in pertinent part in Article 18,

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community

¹⁰⁹ Susan L. Karamanian, *India and International Law*, Edited by Bimal N. Patel. Leiden: Martinus Nijhoff Publishers, 2005, 101 AM. J. INT’L L. 538, 540 (2007)(book review).

¹¹⁰ *Id.* at 541.

¹¹¹ P.C. RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW, 140 (1993).

¹¹² The Universal Declaration of Human Rights, United Nations General Assembly, Dec. 10, 1948, available at <http://www.un.org/en/documents/udhr/>. [hereinafter Universal Declaration].

¹¹³ RAO, *supra* note 111, at 141.

¹¹⁴ *Id.*

with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹¹⁵

Much of the language of Article 18 tracks that of Article 25 of the Indian Constitution.¹¹⁶ Those that support anti-conversion laws could make the argument that they are following these treaties in addition to Article 25 of the Indian Constitution because they are limiting the propagation of religion due to public safety and order as is suggested in ICCPR, Article 18 (3). They could further argue that they are using anti-conversion laws to protect the fundamental rights of others to practice their religion free from being forcefully converted as is also seen in ICCPR, Article 18 (3).

Opponents of anti-conversion laws would of course argue that the Universal Declaration of Human Rights has taken on the level of customary international law, and that in connection with the ICCPR, which is binding on its treaty signatories, India has an obligation that goes beyond the Indian Supreme Court's interpretation of the Indian Constitution in regard to Article 25. They would argue that these provisions should be seen as aiming for religious freedom

¹¹⁵ International Covenant on Civil and Political Rights, United Nations Treaty, Mar. 23, 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

¹¹⁶ *Id.*; Universal Declaration, *supra* note 112.

rather than religious equality as is the case with the Indian Constitution.¹¹⁷ Therefore, they would argue that these objects of international law should lend support to finding anti-conversion laws unconstitutional.

¹¹⁷ GAJENDRAGADKAR, *supra* note 65, at 40.

V. Indian Supreme and High Court Cases

The aforementioned sections have built the foundation to analyze Indian Supreme and High Court cases that interpret Article 25 of the Indian Constitution to begin with, one needs to look at what the freedom of propagation entails. Then one needs to look at the interpretation of the breadth of the public order exception to the freedom to propagate. Then it will be possible to properly evaluate the constitutionality of these Indian anti-conversion laws.

The leading case that dealt with the interpretation of Article 25's freedom to propagate religion is the Indian Supreme Court case of *Rev. Stainislaus v. State of Madhya Pradesh*.¹¹⁸ This case came from the High Court of Madhya Pradesh and was combined with *State of Orissa v. Hyde*, which was heard in the High Court of Orissa.¹¹⁹ Both states analyzed the constitutionality of their respective anti-conversion laws, which were functionally identical as has been seen previously in Part II. In *Stainislaus*, a Catholic priest, Father Stainislaus, challenged the Madhya Pradesh anti-conversion law on the basis that it was unconstitutional because the state legislature did not have the competence to pass the law.¹²⁰ He had been convicted of forcible conversion.¹²¹ In *Orissa*, a group of eight petitioners challenged their state's law, based on civil violations.¹²² The High Court of Madhya Pradesh found the anti-conversion law constitutional, while the Orissa High Court found the opposite. The Indian Supreme Court agreed with the Madhya Pradesh High Court. The Indian Supreme Court ruled that, It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to

¹¹⁸ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908.

¹¹⁹ *Id.* at 912.

¹²⁰ *Id.* at 909.

¹²¹ *Id.* at 908.

¹²² Stubbs, *supra* note 20, at 378.

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.¹²³

The court relied on *Ratilal v. State of Bombay* for a “distinction between conversion and propagation simply for ‘the edification of others.’”¹²⁴ A commentator on the case, wrote, “[w]hatever else might be said about these bills and their treatment by the Supreme Court, they at least present a constriction upon religion as constitutionally understood.”¹²⁵

In taking up the question of interpreting the meaning of the exception for public order, “The Court stated that ‘public order’ has a ‘wide connotation,’ and that the state legislatures could pass laws prohibiting forcible conversion if such conversion would have ‘created public disorder in the States.’”¹²⁶ The Indian Supreme Court concluded, in effect, that the right to transmit or spread the tenets of one's religion is subordinated where that right conflicts with the public order, which was defined as the “state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the government which they have established.”¹²⁷ Therefore, a person does not have the right to convert someone else to that person’s religion, but has the right to explain that person’s beliefs to another person.¹²⁸

The Court felt, that the wide connotation of the public order exception in conjunction with the concept that no one has the right to convert another person meant, that the states had a right to pass anti-conversion laws.¹²⁹ As a result they ruled that anti-conversion laws regulate public order and fall under Entry I of List II of the Seventh Schedule, and, therefore, are properly the subject of state regulation. The Orissa High Court on the other hand found that the anti-conversion laws regulated religion and fell under Entry 97 of List I, which

¹²³ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908.

¹²⁴ *Ratilal v. State of Bombay*, A.I.R. 1954 S.C. 391.

¹²⁵ Baird, *supra* note 7, at 353.

¹²⁶ Stubbs, *supra* note 20, at 381.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 912.

reserves to the Indian federal government all powers not given to or shared with the states.¹³⁰

The aforementioned shows that the Supreme Court has created a wide understanding of the public policy exception to the religious freedom granted in Article 25. In addition this means that there is a constriction on the propagation of religion. The constriction is that one can profess one's religion but does not have the right to convert another as this would infringe on the right to freedom of conscience.

Another major case that helps in understanding the constitutionality of anti-conversion laws is *Ramji Lal Modi v. The State of Uttar Pradesh*. In this case, the High Court held that a person could be constitutionally subjected to criminal punishment for infringing on another person's right to freedom of religion.¹³¹ The court also held that you could limit free speech to encourage public order.¹³² The court upheld the conviction of an editor of a magazine under Section 295A of Indian Criminal Code because the editor "deliberately and maliciously" outraged the religious feelings of a particular religious class, in this case, Muslims.¹³³ This could also affect someone who was preaching about that person's religion and incidentally making other people upset.¹³⁴

Another case with important implications for this issue is *In Commissioner of Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*, where the Indian Supreme Court stated, "freedom of religion in our Constitution is not confined to religious belief only; it extends to religious practices as well, subject to the restrictions which the Constitution itself has laid down."¹³⁵ Addressing the restrictions that the Constitution delineates, the Court stated that "restrictions by the State upon free exercise of religion are permitted both under articles 25 and 26

¹³⁰ *Id.* at 910.

¹³¹ *Ramji Lal Modi v. The State of U.P.*, AIR 1957 S.C. 623.

¹³² *Id.* at 622.

¹³³ *Id.* at 621.

¹³⁴ Stubbs, *supra* note 20, at 376.

¹³⁵ *In re Commissioner of Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*, A.I.R. 1954 S.C. 283.

on grounds of public order, morality and health.”¹³⁶ Accordingly, the state can “regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and . . . in addition can legislate for social welfare and reform even though by so doing it might interfere with religious practices.”¹³⁷

The foregoing shows that Indian Courts seem to favor public order over religious freedom when it comes to a person’s right to propagate that person’s religion.¹³⁸ When the Indian courts focus on the Indian Constitution, they see its main purpose as not providing religious freedom, but rather providing religious equality.¹³⁹ In addition religious freedom seems to be subjugated to the project of social reform.¹⁴⁰

Secularism seems to have a strong hold over religion in India, and courts have generally been objective and impartial in regard to religious judgments.¹⁴¹ However, there have been some aberrations.¹⁴² While India seems to be fundamentally a secular state, the courts will make compromises in their decisions to maintain traditional religious values, so that public order is maintained.¹⁴³ As a result Indian courts are not doing enough to perform their role of making sure that all the religions in India are treated equally.¹⁴⁴ The courts are allowing Hindu nationalists to impose regulations that impose on the idea of Indian Secularism.¹⁴⁵ The courts have had a difficult time balancing the interests of Hindu nationalists with those of preserving the Constitution.¹⁴⁶ The decisions that it has passed down seem to favor the Hindu Right and to run contrary to the Indian Constitution by reducing the rights granted under Article 25 for freedom of religion. In addition

¹³⁶ *Id.*

¹³⁷ Stubbs, *supra* note 20, at 375.

¹³⁸ *Id.*

¹³⁹ GAJENDRAGADKAR, *supra* note 65, at 40.

¹⁴⁰ Narula, Book Review, *supra* note 15, at 741.

¹⁴¹ Mahmood, *supra* note 37, at 775.

¹⁴² *Id.*

¹⁴³ Baird, *supra* note 7, at 337.

¹⁴⁴ Brenda Cossman & Ratna Kapur, *Secularism’s Last Sigh?: The Hindu Right, The Courts, and India’s Struggle for Democracy*, 38 HARV. INT’L L.J. 113, 168 (1997).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 169.

these decisions do not seem to favor the ideal of equality of religions. With this in mind it is time to analyze the constitutionality of anti-conversion laws.

VI. Constitutionality of State Anti-Conversion Laws

State anti-conversion laws should be held to be unconstitutional because states are using them to prevent people from converting to other religions by criminally penalizing converts and holy men, who are exercising their constitutional rights to propagate and exercise their religions. The Hindu Right is interested in maintaining and expanding the power of Hinduism in India and is abusing anti-conversion laws to prevent Dalits, low caste Hindus, from converting to Christianity.¹⁴⁷

While forcible conversion ought to be prevented, state anti-conversion laws are not designed for that purpose. The Orissa High Court, which was overruled by the Indian Supreme Court in *Stainislaus v. State of Madhya Pradesh*., correctly ruled that anti-conversion laws are unconstitutional.¹⁴⁸ The Indian Supreme Court should not have overruled the case because the states of Orissa and Madhya Pradesh did not have the constitutional competence to pass their anti-conversion laws. Anti-conversion laws are constitutionally within the competence of the Union Government rather than the state governments because they are religious matters rather than public order matters.¹⁴⁹

On their face most anti-conversion laws appear to be unconstitutional, however, the Indian Supreme Court has ruled in favor of some anti-conversion laws in the past.¹⁵⁰ The Indian Supreme Court has construed the meaning of the words “Public order” in Article 25 of the Indian Constitution in a broad sense.¹⁵¹ It has also created a jurisprudence that regards Hinduism as a way of life and, therefore, not merely a religion.¹⁵² By granting Hinduism a special status apart

¹⁴⁷ *Id.* at 130.

¹⁴⁸ *State of Orissa v. Hyde*, A.I.R. 1973 Orissa 117.

¹⁴⁹ *Id.*

¹⁵⁰ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908.

¹⁵¹ *Id.* at 912.

¹⁵² JACOBSOHN, *supra* note 86, at 35.

from a pure religious status, the Indian Supreme Court has opened a door for Hindu nationalists.¹⁵³

This has led, as cited in Part II, to local authorities arresting missionaries and converts for violating anti-conversion laws.¹⁵⁴ Even after local citizens have attacked Christian missionaries and recent converts, the missionaries and converts have been penalized rather than the attackers.¹⁵⁵ In these cases, the victims are subject to criminal sanctions.¹⁵⁶ The victims' crimes are for disturbing the peace through unauthorized conversion activities and for not filing proper paperwork to get permission from local authorities to convert others.¹⁵⁷

These abuses may be why some states have not enforced their anti-conversion laws and why some governors have refused to sign them.¹⁵⁸ This shows that some decision makers in India believe that anti-conversion laws are invalid and, perhaps, contrary to the promise of religious freedom that appears in the Indian Constitution. Beyond that the Indian Supreme Court has made a compromise with Hindutva to maintain the supremacy of the Hinduism in India, while also purporting to hold the ideals of religious freedom and tolerance in India in a high position.¹⁵⁹

To investigate the importance of religious freedom in India, one should look first at Article 25, Freedom of conscience and free profession, practice and propagation of religion. This article falls under Part III Fundamental Rights, Right to freedom of religion. As Article 25 falls under the Fundamental Rights section, it ought to be one of the most important rights that Indian Citizens have. Indeed, Article 32, Remedies for enforcement of rights conferred by this part, exists also under Part III to allow people a special method for appeal to the Indian Supreme Court when there is a concern over the abridgement of a fundamental right.¹⁶⁰ In

¹⁵³ *Id.*

¹⁵⁴ US STATE DEPARTMENT, *supra* note 6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Anti Religious Conversion Bill in Indian State Hits Roadblock*, *supra* note 49.

¹⁵⁹ Cossman, *supra* note 144, at 169.

¹⁶⁰ INDIA CONST. art. 32.

addition the preamble itself speaks of liberty of belief, faith, and worship, which are all associated with the fundamental right of freedom of religion.¹⁶¹ The preamble of a Constitution informs the rest of the document and can be read as the spirit of the entire document. Therefore, the right to freedom of religion should hold a very important place in Indian constitutional jurisprudence.

Furthermore, the Indian Supreme Court has also decided that the Universal Declaration of Human Rights is substantially espoused in the Indian Constitution.¹⁶² The declaration provides for the freedom of religion as explained previously in Part IV. Although the Universal Declaration of Human Rights is not considered to be binding on its signatories, the writers of the Indian Constitution provided a special place for international law in the Indian Constitution.¹⁶³ The Indian Constitution specifically states that it respects international law in Article 51. In addition the Universal Declaration of Human Rights has arguably attained the level of customary international law.¹⁶⁴ This means that even if the Universal Declaration of Human Rights is not binding itself, that the principles it espouses are binding in general.¹⁶⁵ India has also signed onto the International Convention for Civil and Political Rights, discussed previously in Part IV, which provides for freedom of religion and is binding on its signatories.¹⁶⁶

Due to the important place of international law and the right to freedom of religion in Indian constitutional jurisprudence, the Indian Supreme Court in its holding in *Stainislaus* should have lent more weight to the importance of the fundamental right to freedom of religion. This importance should be taken into account by Indian state legislatures concerned with anti-conversion laws. State legislatures should not wait for the Indian Supreme Court to overturn its ruling in *Stainislaus*. Instead they should look to the Orissa High Court's opinion in *State*

¹⁶¹ *Id.* at pmb1.

¹⁶² Karamanian, *supra* note 109, at 541.

¹⁶³ United Nations Convention on the Law of Treaties, art. 35, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Convention on the Law of Treaties]; INDIA CONST. art. 51.

¹⁶⁴ Karamanian, *supra* note 109, at 540; RAO, *supra* note 111, at 140.

¹⁶⁵ Convention on the Law of Treaties, *supra* note 163, at art. 38.

¹⁶⁶ *Id.* at art. 35.

of Orissa v. Hyde.¹⁶⁷ This was the case combined with *Stainislaus* when that case was taken to the Supreme Court.¹⁶⁸ The Orissa High Court held that the State of Orissa did not have the constitutional competence to pass its anti-conversion law because anti-conversion laws are religious in nature and are, therefore, within the competence of the Union Government.¹⁶⁹

In *Orissa* the petitioners asked the Orissa High Court to review the Orissa Freedom of Religion Act of 1967, an anti-conversion law.¹⁷⁰ The Court found that Entry 97 of List I of the Seventh Schedule of the Indian Constitution applied to this type of law.¹⁷¹ List I, as was explained previously, is the list of activities that is reserved solely to the Union government under Article 246 of the Indian Constitution. The Court held that the Orissa legislature's Act was invalid as a matter of constitutional law.¹⁷² Entry 97 of List I states, "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."¹⁷³ In other words, any matter not contained in List II or List III of the Indian Constitution is a subject reserved to the Union government and is not constitutionally within the competence of any state government.¹⁷⁴

The Orissa High Court found that anti-conversion laws are laws regulating an issue that had not been explicitly included in any of the lists.¹⁷⁵ That issue was the regulation of religion.¹⁷⁶ Entry 97 of List I is a reservation of powers clause, which acts in favor of the Union Government as the 10th Amendment in the United States Constitution does in favor of the American States. Therefore, Indian state governments, according to the Orissa High Court, do not have the constitutional competence to legislate on matters related to the freedom of

¹⁶⁷ AIR 1973 Orissa 116.

¹⁶⁸ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908.; *State of Orissa v. Hyde*, AIR 1973 Orissa 116.

¹⁶⁹ *State of Orissa v. Hyde*, AIR 1973 Orissa 117 .

¹⁷⁰ *Id.*

¹⁷¹ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 910.

¹⁷² *Id.*

¹⁷³ INDIA CONST., schedule seven, List I, Entry 97.

¹⁷⁴ *Id.*

¹⁷⁵ *State of Orissa v. Hyde*, A.I.R. 1973 Orissa 117.

¹⁷⁶ *Id.*

religion.¹⁷⁷ Unfortunately, and incorrectly, this decision was overruled in the Indian Supreme Court case of *Stainislaus v. State of M.P.*, which took its name from the *Madhya Pradesh* case, rather than the *Orissa case*, when decided.¹⁷⁸

The Supreme Court found, the “Acts...[c]learly provide for the maintenance of public order for, if forcible conversion had not been prohibited, that would have created public disorder in the States.”¹⁷⁹ The Court found, therefore, that the two anti-conversion laws from Madhya Pradesh and Orissa were laws relating not primarily to religion, but rather to public order.¹⁸⁰

Public order lies within the competence of the state governments as it falls under List II of the Seventh Schedule.¹⁸¹ Entry 1 states, “Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).”¹⁸² The main reason that the court gives for its holding that anti-conversion laws should be read as pertaining to the regulation of public order does not stand up to strong scrutiny. This is especially true when looking at what has happened since the *Stainislaus* case in the State of Madhya Pradesh.

Under the Madhya Pradesh Act, conversion by force, fraud, or allurement is prohibited.¹⁸³ In one incident two priests and a nun were criminally penalized for converting local Hindus without registering the conversions with a local official.¹⁸⁴ This occurred even though local officials including the police had received signed letters from the people converted, expressing that they had done so of their own volition.¹⁸⁵ What possible issue of public order is being protected by criminally penalizing religious figures and converts freely converting? Not registering with a local official does not affect whether people have been

¹⁷⁷ *Id.*

¹⁷⁸ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 908.

¹⁷⁹ *Id.* at 911-912.

¹⁸⁰ *Id.* at 911.

¹⁸¹ INDIA CONST., schedule seven, List II, Entry 1.

¹⁸² *Id.*

¹⁸³ *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R. 1977 S.C. 910.

¹⁸⁴ Anant, *supra* note 3.

¹⁸⁵ *Id.*

defrauded, allured, or otherwise forcibly converted to Christianity. In addition, should people be prosecuted for helping people to convert to Christianity because it is possible that others in the local community will feel uncomfortable and protest or riot? Should a fundamental right that is so central to the Indian Constitution really be subordinated to the interest of public order, especially when public order comes from intolerance? The Indian Supreme Court has not followed the spirit of the Indian Constitution in deciding the *Stainislaus* case.

None of the examples of the enforcement of anti-conversion laws as mentioned previously in footnote 63 show how people are being protected from forcible conversion by these laws. Rather, these examples show that maintaining public order is an excuse to disregard the Indian Constitution, so that local authorities can abuse their powers to promote Hindu nationalist goals.¹⁸⁶ People freely choosing to convert and people propagating their religions by helping people to convert are being unconstitutionally punished.

With the previously described abuses in mind, it is apparent that anti-conversion laws have much less to do with the maintenance of public order and much more to do with the regulation of religion. In addition these laws go against the Indian Constitution's desire for equality of religious practice.¹⁸⁷ There is no equality because propagation of religion is not a major tenet of Hinduism, but is very important in Christianity and Islam.¹⁸⁸ Therefore, these laws disproportionately affect Christians and Muslims.

Although the Indian Supreme Court has found anti-conversion laws to be constitutional, the reasons for finding so are not convincing and do not properly support the Court's holding in *Stainislaus v. State of Madhya Pradesh*. These anti-conversion laws are not constitutional because they deal primarily with religion

¹⁸⁶ Narula, *supra* note 12. “[What is] [l]ess obvious to the outside world, though increasingly well-documented by India’s human rights community, is that these so-called riots are guided by the goal of creating a Hindu state, and executed in close cooperation with state officials.” *Id.*

¹⁸⁷ INDIA CONST. art. 25.

¹⁸⁸ Baird, *supra* note 7, at 350.

rather than public order, and therefore, Indian states do not have the legitimate constitutional competence to pass these anti-conversion laws.¹⁸⁹

¹⁸⁹ *State of Orissa v. Hyde*, A.I.R. 1973 Orissa 117.

VII. Conclusion

Anti-conversion laws have existed throughout India since the Colonial period and do not seem to have been intended to defend the fundamental right of freedom of religion. Rather, these laws seem to have been intended to ensure that Hinduism would not decrease in importance throughout Indian society. The princes of Hindu states used anti-conversion laws to counteract the work of Christian missionaries in their states. They wanted to keep Hinduism alive and strong within their princely states. Today Hindu nationalists also want Hinduism to be the most important religion in India. Indian courts seem to have been influenced by the importance of Hinduism and have bowed to the influence of Hindu nationalists by interpreting Article 25 of the Indian Constitution to benefit the interests of Hindutva.

Hindu nationalists are concerned with the destruction of their culture through the loss of Hindus converting to other religions. By preventing conversions, they feel that they will be able to stop Dalits, members of the lowest caste, from opting out of Hindu culture. Hindu nationalists see this as the beginning of a collapse of the caste system. If the lowest castes slowly disappear through conversion, then Hindus in other castes may begin to lose faith in the system and opt out as well.

The anti-conversion laws, which were used by Hindu princely states during the British colonial period are, therefore, being brought back to deal with the problem of Hindus converting to other religions, especially Christianity. These laws ostensibly are created to prevent the forced conversion of people. The laws, therefore, are seen as protecting people from unethical practices, which allure or physically force them into converting. Indian jurisprudence seems to suggest that there is a fundamental right guaranteed under Article 25 to propagate religion. However, there can be no right to convert others to a religion because that would in turn violate that person's right to freedom of religion and conscience.

Of course, it seems that the real purpose of these anti-conversion laws is to criminally penalize Christian missionaries for propagating their faith to help stem the tide of Dalits converting to Christianity. As most of the violence regarding conversions seems to be borne by Christians and recent converts, these anti-conversion laws seem to only ostensibly maintain public order. Public order is being maintained by submitting to the intolerance of Hindu nationalists, so that they will not riot and commit acts of violence. Submitting to intolerance is not a good reason to continue to allow states to enact and enforce anti-conversion laws.

In addition, the Indian Constitution, by itself and with reference to international law, makes freedom of religion one of the most fundamental rights of people in India. The Indian Supreme Court should, therefore, rethink its position and overrule *Stainislaus v. State of Madhya Pradesh*. The Court should find that anti-conversion laws regulate religion and, therefore, are laws that fall properly to the Indian Union government as reserved powers. As the right to freedom of religion, embodied in Article 25 of the Indian Constitution, protects the exercise and propagation of religion, the Indian Supreme Court should rethink its broad interpretation of the public order exception to fundamental rights. In future court contests, the Supreme Court of India should fully respect the fundamental right to freedom of religion for persons in India by finding that state anti-conversion laws are unconstitutional.