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PERSONAL CHOICES, THE CONSTITUTION'S ENDURANCE

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

In a short and well-reasoned order, the Allahabad High Court declared last month that religious conversions, even when made solely for the purposes of marriage, constituted a valid exercise of a person's liberties. The High Court ruled that the freedom to live with a person of one's choice is intrinsic to the fundamental right to life and personal liberty. In holding thus, the order recognised that our society rested on the foundations of individual dignity, that a person's freedom is not conditional on the caste, creed or religion that her partner might claim to profess, and that every person had an equal dominion over their own senses of conscience.

None of this ought to need spelling out in a secular, democratic republic. Not least over 70 years after its founding. But such are the times that we live in, with various State governments undertaking projects to outlaw what they describe pejoratively as "Love Jihad", that this decision is an important reminder of the Constitution's goals and promises.

Editorial | Policing faith: On 'love jihad' laws

The High Court's order makes it clear that it is neither the province of the state nor any other individual to interfere with a person's choice of partner or faith. By invoking the Supreme Court's judgment in Puttaswamy, the High Court held that an individual's ability to control vital aspects of her life inheres in her right to privacy, that this promise includes the preservation of decisional autonomy, on matters, among other things, of "personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation".

The petitioners, Salamat Ansari and Priyanka Kharwar, had approached the High Court seeking orders to quash a First Information Report (FIR) that was lodged against them. This FIR alleged that a series of crimes had been committed, including one under Section 366 of the Indian Penal Code, which criminalises the abduction of a woman with an intent to compel her to marry against her will. The petitioners claimed that they were both adults competent to contract a marriage, and had, in fact, wedded in August 2019, as per Muslim rites and ceremonies, only after Ms. Kharwar had converted to Islam. They said, they had been living together for more than a year, and that their peace and happiness had been threatened by the prospects of prosecution.

The State resisted these claims. It argued that Mr. Ansari and Ms. Kharwar's partnership had no sanctity in the law, because a conversion with a singular aim of getting married was illegitimate. In making this argument, the government relied on a pair of judgments delivered by single judges of the Allahabad High Court, in particular on the judgment in Noor Jahan v. State of U.P. (2014). There, the High Court had held that a conversion by an individual to Islam was valid only when it was predicated on a "change of heart" and on an "honest conviction" in the tenets of the newly adopted religion. Additionally, the High Court had ruled that the burden to prove the validity of a conversion was on the party professing the act.

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Therefore, in *Salamat Ansari*, it was argued that it was for the woman to establish that her conversion was borne out of her conscience and out of a deep-seated belief in the teachings of

her new religion. The Division Bench rejected this theory. It held that the judgment in *Noor Jahan* was incorrectly delivered. Marriage, the High Court said, is a matter of choice, and every adult woman has a fundamental right to choose her own partner. Even if such a decision encourages other concomitant decisions, including a choice of religion, the state can have little to do with it. According to the High Court, the Constitution is violated every time matters of intimate and personal choice are made vulnerable to the paternal whims of the state.

Important as these findings might be, the verdict in *Salamat Ansari* is not a product of any interpretive ingenuity. Article 25 of the Constitution expressly protects the choices that individuals make. In addition to the right freely to profess, practise and propagate religion, it guarantees to every person the freedom of conscience. By its dictionary definition, "conscience" refers to each person's own sense of moral right and wrong. It is an emotion that cannot be judged from the outside. It is certainly not something that the state can examine as a function of its sovereign authority.

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Moreover, the idea of protecting one's freedom of conscience goes beyond mere considerations of religious faith. This much is evident when we ask ourselves why the Constitution accords any protection at all to religious beliefs. Contrary to what some might think, the safeguard that the document affords to religion is not because there is something innate in religious faith that demands special security. On the other hand, this liberty is promised because questions of conscience — which include choices of faith — are matters of ethical autonomy. The provision's ultimate *raison d'être* is to allow individuals the freedom to lead their lives as they please.

On this understanding, we see that to tether a person's choice of religion to her knowledge of that faith is to render nugatory the ability of a person to express her own sense of conscience. In overruling *Noor Jahan*, the Division Bench of the High Court said that it did not see "Priyanka Kharwar and Salamat as Hindu and Muslim," but it saw them rather "as two grown up individuals who out of their own free will and choice are living together peacefully and happily..."

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How long, though, can this tenuous peace last? Already, seemingly in response to the judgment, the government of Uttar Pradesh has introduced an ordinance which makes not only religious conversions that are forcefully obtained an offence but that also declares void any conversion found to be made solely for marriage. In supporting the law, the State will likely rely on a 1977 Supreme Court judgment in *Rev. Stainislaus v. State of Madhya Pradesh*.

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There, the Court upheld, on grounds of public order, two of the earliest anti-conversion statutes in India: the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968, and the Orissa Freedom of Religion Act, 1967. These laws required that a District Magistrate be informed each time a conversion was made and prohibited any conversion that was obtained through fraud or illegal inducement. We cannot doubt the proposition that no person should be compelled to choose a certain religion, but to open up to scrutiny every act of conversion by placing on individuals the burden to prove that their decision was conscientious entrenches a form of hard paternalism, where purely private choices are made subject to the State's ultimate sanction.

Today, it is hard to see how *Rev. Stainislaus* constitutes good law. In his treatise on constitutional law, the jurist, H.M. Seervai, wrote that the "judgment is clearly wrong, is productive of the greatest public mischief and ought to be overruled". Since then, a nine-judge

Bench ruling of the Supreme Court, in *Puttaswamy*, has recognised that every individual possesses a guaranteed freedom of thought; that at the core of liberty is the rights of persons to decide for themselves how they want to lead their lives. When we fail to acknowledge and respect the most intimate and personal choices that people make — choices of faith and belief, choices of partners — we undermine the most basic principles of dignity. Our Constitution's endurance depends on our ability to respect these decisions, to grant to every person an equal freedom of conscience.

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