

## VALIDITY OF REVERSE ONUS CLAUSES IN THE ANTI-CONVERSION LAWS OF UTTAR PRADESH, MADHYA PRADESH AND UTTARAKHAND

—Pallvi Hooda\*

*Abstract*—Anti-conversion laws in Uttar Pradesh, Madhya Pradesh and Uttarakhand have been enacted to punish forceful, deceitful, fraudulent, coercive, allured conversions and conversions by marriage. Among other controversial and stringent measures, clauses imposing reverse onus of proof on the accused have also been introduced. The paper attempts to trace and highlight the intention, justification, and criticism of reverse onus clauses. While deeply analysing the role of the reverse onus clauses in cases of dowry death and narcotic drugs, and generally analysing the same in other offences, the author outlines the conditions and the background in which the use of reverse onus of proof has been previously considered valid. Provisions of these anti-conversion laws, which impose the burden of proof on the accused, are then put to the test in an attempt to ascertain whether these provisions can be similarly justified. It is pointed out that the imposition of reverse onus clauses has been previously used only against offences that have a documented far-reaching and detrimental effect on society as a whole and where direct evidence is only in the 'special knowledge' of the accused. The paper also calls to attention the fact that such burden of proof shifts onto the accused only after some 'foundational facts' have been proved by the prosecution. Coming to forceful conversions in India, the author argues that there is no concrete, documented and statistical proof of the fact that, presently, such offences are so rampant that basic tenets of criminal jurisprudence such as

---

\* Advocate (Reg. No. D/2759/2020), Delhi High Court, Delhi.[10A, Sagar Apartments, 6-Tilak Marg, New Delhi] <pallvi.hooda2@gmail.com>.

*the presumption of innocence can be dodged as has been done for other widespread and heinous crimes. Generally, in offences with reverse onus clauses, the 'special knowledge' of the accused is used to counter the foundational facts that are first established by the prosecution. A bare reading of these reverse onus provisions also does not mete out any foundational facts. It creates a situation where the accused is expected to deduce negative evidence and disprove a fact that has not been proved in the first instance.*

**Keywords:** Presumption of innocence, burden of proof, justification, reverse onus, anti-conversion law.

## I. INTRODUCTION TO BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

One of the oldest tenets of criminal jurisprudence is that every person is innocent until proven guilty. This is because allegations can be flung at anyone irrespective of their innocence or guilt.<sup>1</sup> A legal requirement of this presumption also helps to ensure that the allegation, arrest and criminal investigation *ipso facto* do not bias the adjudicator in favour of the prosecution.<sup>2</sup> Thus, an accuser seeking to move the criminal justice machinery against another must make out a reason for his request with valid evidence, and the burden of proof lies on him. The landmark judgment of *Woolmington v. Director of Public Prosecutions*<sup>3</sup> held the prosecution's duty to prove the accused's guilt as the "golden thread" throughout the web of English criminal law. Today international instruments such as Article 14 of the International Covenant on Civil and Political Rights, Article 11 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights mandate the presumption of innocence.

Section 101 of the Indian Evidence Act, 1872 ('Evidence Act') states that "*Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*"

<sup>1</sup> *Achhar Singh v. State of H.P.*, 2021 SCC OnLine SC 368.

<sup>2</sup> *Taylor v. Kentucky*, 1978 SCC OnLine US SC 94 : 56 L Ed 2d 468 : 436 US 478, 485 (1978).

<sup>3</sup> 1935 AC 462.

## II. REVERSE ONUS CLAUSES

An exception to the presumption of innocence is found in reverse onus clauses for certain classes of offences. A reverse onus clause shifts onto the accused the burden of proving his/her innocence and creating reasonable doubt regarding his guilt. Such provisions are generally imposed in cases where it is particularly difficult for the prosecution to gather direct incriminating evidence, and the offence in question has such far-reaching and heinous consequences that the State's responsibility to protect innocent citizens outweighs the necessity of the strict presumption of innocence. However, even with reverse onus provisions, the initial burden is on the prosecution to prove specific 'foundational facts'. Only then does the burden shift on to the accused to bring forward evidence of his innocence.<sup>4</sup> For certain sets of crimes, statutory provisions in India provide for a reverse burden of proof. Two significant provisions are discussed for a deep understanding of the intention and justification behind reverse onus clauses.

### III. SPECIFIC PROVISIONS DEALING WITH REVERSE ONUS CLAUSES AND THEIR JUSTIFICATION

#### A. Dowry Death – Section 304B of the Indian Penal Code, 1860 and Section 113B of the Indian Evidence Act, 1972

'Dowry death' refers to a married woman's death (by murder or suicide) caused over a dispute regarding her dowry. Marriages in India are immersed deep in traditional beliefs and ceremonies. One of these traditions is that gifts and cash are given to the groom's family by the bride's family while marrying her off. This practice put a heavy financial burden on parents during daughters' marriages and became a way for the grooms' families to accumulate wealth. Whenever it was felt that this 'economic opportunity' had been wasted on someone who could not give sufficient dowry, the groom's family harassed the bride with more demands. This often involved cruel treatment, beatings, mental & emotional abuse and in extreme cases, murder (or 'bride burning') so that the man could wed again for more dowry. Recognising the far-reaching and harmful impact of such practices on society, the Dowry Prohibition Act, 1961, was enacted, making the demand and transfer of dowry punishable.

***Reasoning for the imposition of the reverse onus clause:*** The Law Commission of India's 91<sup>st</sup> Report<sup>5</sup> published in 1983 addressed the inability of the then-existing legal provisions in effectively dealing with the phenomenon of dowry deaths. It noted the shocking increase in the number of cases where young married women died under highly suspicious circumstances, and as per

<sup>4</sup> *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

<sup>5</sup> 91<sup>st</sup> Report of Law Commission of India on Dowry Death and Law Reforms (1983).

common knowledge, these deaths were associated with the dowry. The report observed that impediments arose while dealing with these incidents with the ingredients of offences already known to law. These were:

- (i) Either the facts did not fully fit into the ingredients of any known offence: This obstacle existed in cases where the woman was driven to suicide due to repeated demands of dowry, her inability to fulfil those demands, cruelty and ill-treatment at the hands of her in-laws and/or husband. There was no definite proof of encouragement or instigation for this to be covered under abetment to suicide. Even though some judgements construed this as 'abetment', the position was not as clear as possible.
- (ii) The peculiarities of the situation were such that direct proof of incriminating facts was difficult: This was dominant in cases where the circumstances raised strong suspicion that the death was not accidental, however, proof beyond reasonable doubt pointing towards homicide may not be likely.

It was urged that “...one of the devices by which the law usually tries to bridge the gulf between one fact and another, where the gulf is so wide that it cannot be crossed with the help of the normal rules of evidence, is the device of inserting presumptions.”<sup>6</sup> Majorly owing to the secrecy around the crime, the difficulty of acquiring stellar proof and the dire need to tackle the problem of dowry deaths in the interest of society, a reverse burden of proof (when certain conditions were fulfilled) was recommended. Section 304B of the Indian Penal Code ('IPC') and Section 113B of the Evidence Act were added through the Dowry Prohibition (Amendment) Act (43 of 1986).

#### **Section 304B of the IPC provided that:**

*“304B. Dowry death. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.*

***Explanation.** – For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*

---

<sup>6</sup> *Ibid.*, para 1.4.

*(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”*

**Section 113B of the Evidence Act, 1972 provided that:**

*“113B. Presumption as to dowry death. —When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation. —For the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).”*

Section 304B IPC imposes a reverse burden of proof on the accused if the death of the woman occurs within seven years of the marriage and is caused by burns, bodily injuries or under unnatural/abnormal circumstance given that she was subjected to cruelty or harassment by her husband or in-laws in connection with dowry demands. The initial burden of proof on the prosecution to establish ingredients is through ‘preponderance of probabilities’<sup>7</sup>. Once that is done, what faces the accused is a rebuttable presumption and it is up to the husband and/or the in-laws to lead the defence and prove that the ingredients of section 304B are not satisfied.<sup>8</sup> Then, it is also for the accused to prove how the death of the deceased did not stem from cruelty or harassment for dowry by the accused persons.<sup>9</sup> Such stringent measures have worked to reduce the prevalence of outright acceptance of bride burning and have had somewhat of a deterrent effect. But still, in 2019, 125298 incidents of cruelty by husband or his relatives (under section 498A IPC) and 7115 incidents of dowry death (under Section 304B IPC) were reported all over India, affecting a total of 133701 women.<sup>10</sup>

**B. Offences related to narcotic drugs and psychotropic substances –  
Section 54 of the Narcotic Drugs and Psychotropic Substances, 1985**

The strategic and geographical location of India is closely connected with the development of its drug trafficking scene. There is a heavy inflow of heroin and hashish through the Indo-Pak border from the west originating from the “Golden Crescent” (consisting of Iran, Afghanistan and Pakistan) which is one of the major illicit drug suppliers in the world. On the east, India has the

<sup>7</sup> *Sher Singh v. State of Haryana*, (2015) 3 SCC 724.

<sup>8</sup> *Ashok Kumar v. State of Haryana*, (2010) 12 SCC 350.

<sup>9</sup> *Pathan Hussain Basha v. State of A.P.*, (2012) 8 SCC 594.

<sup>10</sup> Crime in India, 2019 at p. 2.

“Golden Triangle” (consisting of Burma, Laos and Thailand), which is among the largest suppliers of opium in the world. In the north, Nepal is a traditional source of cannabis, and its wide growth also exists in some States in India.<sup>11</sup> Before the enactment of the Narcotic Drugs and Psychotropic Substances, 1985 (‘NDPS Act’), statutory control over narcotic drugs was exercised through the Opium Act, 1857, the Opium Act, 1878, and the Dangerous Drugs Act, 1930. However, with the developments in the national and international illicit drug trafficking, certain deficiencies in the existing laws came to light. It was observed that the scheme of penalties under the existing Acts was insufficient in deterring and dealing with organised gangs or smugglers; the laws did not invest the power of investigation for the said offences in officers from central agencies like narcotics, customs, central excise etc.; international law dealing with narcotic control had evolved through treaties and protocols, and the new age of addition to psychotropic drugs had come which was not comprehensively dealt with by any existing law in a manner as required by the Convention on Psychotropic Substances, 1971, to which India also acceded.<sup>12</sup> The NDPS Act was enacted to bring a comprehensive and consolidative statute to deal with drug control in a more stringent and efficient manner.

***Reasoning for the imposition of the reverse onus clause:*** One such stringent provision is the reverse onus of proof in certain circumstances, which were enshrined in sections 54 of the NDPS Act.

*“54. Presumption from possession of illicit articles. – In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—*

- (a) *any narcotic drug or psychotropic substance or controlled substance;*
- (b) *any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;*
- (c) *any apparatus specially designed or any group of utensils specially adapted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or*
- (d) *any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,*

*for the possession of which he fails to account satisfactorily.”*

<sup>11</sup> 150<sup>th</sup> Law Commission of India Report on Narcotic Drugs and Psychotropic Substances (1985), para 1.3.

<sup>12</sup> *Ibid.*

The constitutionality of the above provisions was upheld by the Supreme Court of India in *Noor Aga v. State of Punjab*<sup>13</sup> when an Afghan national who was caught carrying 1.4kgs of heroin as a member of the Afghan Airlines crew contended that the reverse onus clauses were against the basic tenets of criminal jurisprudence. While recognising that presumption of innocence is a human right, it was held that putting the burden of proof on the accused in certain circumstances would not render the provision unconstitutional. While dealing with the possible justification of reverse onus provisions, it was observed that *“The constitutionality of a penal provision placing the burden of proof on an accused, thus, must be tested on the anvil of the State’s responsibility to protect innocent citizens. The Court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation.”*

A bare perusal of the provisions under the NDPS shows that the burden of proof would shift on to the accused only when certain circumstances (‘foundational facts’) are proved by the prosecution. They are, that he/she should have been found in possession of:

- (i) A narcotic drug/ psychotropic substance/ controlled substance,
- (ii) Opium/poppy/cannabis/coca plant growing on land which he had cultivated,
- (iii) Apparatus/utensils which are designed/adopted specially for the manufacture of narcotic drugs/ psychotropic substance/ controlled substance,
- (iv) Any materials which have undergone a process towards the manufacture of a narcotic drug/ psychotropic substance/ controlled substance or any residue left of such materials which have been manufactured.

A major reasoning behind this presumption is that if the accused is found to be in possession of a narcotic drug, it is for him to account for such possession.<sup>14</sup> The initial burden of proof, however, is on the prosecution to legally prove possession. The search has to be conducted in accordance with Sections 42<sup>15</sup> & 50<sup>16</sup> of the NDPS Act and an illegal search does not give rise to the presumption under section 54 NDPS Act.<sup>17</sup> Once the prosecution legally proves the possession of illicit materials, it is upon the accused to either justify such possession (for example, with a license/permit) or to prove that such possession

<sup>13</sup> *Noor Aga v. State of Punjab*, *Supra* note 4.

<sup>14</sup> *Avtar Singh v. State of Punjab*, (2002) 7 SCC 419.

<sup>15</sup> Deals with the power of entry, search, seizure and arrest without warrant or authorization.

<sup>16</sup> Deals with conditions under which search of persons shall be conducted.

<sup>17</sup> *Hasan Imam Inamdar v. State of Maharashtra*, 2002 SCC OnLine Bom 477 : (2003) 4 Mah LJ 682.

was not 'conscious'.<sup>18</sup> Thus, it is clear that the mere registration of a case under the NDPS Act *ipso facto* does not shift the burden on the accused.<sup>19</sup>

#### IV. GENERAL JUSTIFICATIONS FOR REVERSE ONUS CLAUSE METED OUT

##### A. Reverse onus subject to the establishment of 'foundational facts' while dealing with offences with far-reaching consequences:

The 47<sup>th</sup> Law Commission of India Report on the Trial and Punishment of Social and Economic Offences shed light on the need for a stringent approach while dealing with social and economic offences where there may be direct individual victims, but the society as a whole is also harmed. For example, when essential commodities are hoarded, food is adulterated, taxes are evaded etc. Social offences affect the material welfare or health of an entire community, and economic offences affect the country's economy and not merely the wealth of an individual. While urging the need for stricter and more effective action while dealing with such crimes against the masses, it was recommended that the burden of disproving *mens rea* be placed on the accused. Even though it is difficult to list all the provisions imposing reverse onus, a few examples are as follows:

- (i) Section 57 of the Wildlife (Protection) Act, 1972<sup>20</sup>
- (ii) Section 123 of the Customs Act, 1962<sup>21</sup>
- (iii) Section 21 of the Terrorist and Disruptive Activities (Prevention) Act, 1987<sup>22</sup>
- (iv) Section 20 of the Prevention of Corruption Act, 1988<sup>23</sup>

<sup>18</sup> *Madan Lal v. State of H.P.*, (2003) 7 SCC 465.

<sup>19</sup> *Gorakh Nath Prasad v. State of Bihar*, (2018) 2 SCC 305.

<sup>20</sup> This provides that when the possession, custody or control of a captive animal, animal article, meat, trophy or uncured trophy was proved, the burden lies on the accused to prove that such possession is not illegal.

<sup>21</sup> This provides that when goods believed to be smuggled are seized, the burden of proving that they are not smuggled is on the person in possession or on the person who claims to be the owner of the goods so seized.

<sup>22</sup> This states that if the arms/explosives/ substances specified under section 3 are recovered from the possession of the accused, and there is reason to believe that they were used in the commission of such offence, or if fingerprints of the accused are found on the site of the offence or on the arms/vehicles connected with the commission of the offence, or is it proved that the accused rendered financial assistance to any accused or suspected person then it shall be presumed that such person has committed the offence until the contrary is proved.

<sup>23</sup> This states that when in a trial for offences punishable under sections 7 (accepting undue advantage with the intention to perform public duty improperly/dishonestly) and 11 (accepting undue advantage without consideration from someone concerned in any proceedings or business transaction with the public servant) it is proved that the public servant accepted or obtained any undue advantage, it will be presumed that such undue advantage was taken as



## **B. Dealing with cases where direct incriminating proof is out of the prosecution's reach ('special knowledge'):**

Analysis of the above provisions brings out the glaring difficulties faced by the prosecution in putting forth direct and incriminating evidence regarding things that happen behind closed doors (like in the case of dowry death or abetment to suicide) or secretly in far and scattered places (for example in organised drug trafficking and smuggling). In such cases, it is more reasonable and in the public interest that people found in certain implicating circumstances justify themselves. Many times, direct incriminating evidence is also hard to find in cases where a large part of the evidence seems to be in the 'special knowledge' of the accused alone. Section 106 of the Evidence Act, 1872 states that:

*"106. Burden of proving fact especially within knowledge.  
– When any fact is especially within the knowledge of any person, the burden of proving the fact is upon him.*

### **Illustrations**

- (a) *When a person does an act with some intention other than which the character and circumstances of the act suggest, the burden of proving the intention is upon him.*
- (b) *A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

All the previously mentioned provisions show the existence of special knowledge with the accused. For example, only the accused found in possession of contraband (narcotics drugs/psychotropic substances) will have the knowledge of the reasons behind such possession. Similarly, in the case of dowry death, only the accused (husband/in-laws) are possessed with the knowledge of the possible reasons for the death since such deaths happen behind closed doors in intimate settings.

## **V. CRITICISM OF REVERSE ONUS CLAUSES**

The presumption of innocence being the "golden thread" in criminal law jurisprudence has been given a constitutional status in several countries. In Canada, it has been declared as a fundamental right by the Canadian Charter of Rights and Freedoms.<sup>24</sup> The South African Constitution also holds it to be a fundamental right.<sup>25</sup> Having been held in such high regard, criticism is bound

a motive or reward for dishonesty/improper public duty unless the contrary is proved by the accused.

<sup>24</sup> Canadian Charter of Rights and Freedoms, 1982, Art. 11(d).

<sup>25</sup> The Constitution of the Republic of South Africa, 1996 Art. 35(3)(h).

to follow when the presumption of innocence is discarded. The following are some popular limitations of reverse onus clauses:

**A. The prosecution has an easier and greater access to investigative resources:**

It is not disputed that the office of the prosecution does not have the resources or access to requisite investigative mechanisms. However, the access to such extensive instruments to an accused will depend on his/her financial capacity to afford them. Therefore, in most cases the prosecution is better equipped to establish guilt than an accused trying to establish innocence (Roberts cited in Gupta 2012).<sup>26</sup> The presumption of innocence is important to level the playing field between the powerful State and the accused.<sup>27</sup>

**B. The wide gulf between knowing and successfully proving:**

Reverse onus clauses presume a positive correlation between the knowledge and the ability to prove it. The justification that an accused shall prove what is exclusively known so that time and resources are conserved is unjust where there is a wide gulf between knowing a fact and successfully proving a fact in Court. While dealing with the prosecution's difficulty in proving what is known only to the accused, it is important that the "proof imbalance" claimed by the prosecution be extraordinary because the asymmetry in adducing proof is generally tackled by giving the accused the benefit of the doubt.<sup>28</sup> In *Megh Singh v. State of Punjab*<sup>29</sup> the accused was convicted because he could not rebut the presumption of conscious possession and his conviction was based solely on the fact that he was found sitting on a gunny bag containing poppy husk.

**C. Stuck in the criminal justice system with the presumption of guilt:**

With the presumption of innocence not accessible to the accused, he/she is invariably trapped in the criminal mechanism till his/her innocence is proved which may take years at end. As per National Crime Records Bureau's Prison Statistics of 2019, our prisons are at a 118.5% occupancy rate, and 69% of the prisoners are Undertrials.<sup>30</sup> Generally, laws prescribing a reverse onus also lay

<sup>26</sup> Juhi Gupta, Interpretation of Reverse Onus Clauses, 5 Nujs L. Rev. 49, 53 (2012).

<sup>27</sup> Ndia Kofele-Kale, Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes, 40(4) Int'l L. Law 909, 922 (2006).

<sup>28</sup> David Hamer, The Presumption of Innocence and Reverse Burdens: A Balancing Act, 66(1) Cambridge Law Journal 142, 158-161 (2007).

<sup>29</sup> (2003) 8 SCC 666.

<sup>30</sup> NATIONAL CRIME RECORDS BUREAU, <<https://ncrb.gov.in/sites/default/files/Executive-Summary-2019.pdf>> (last visited 13 September 2021).

down stringent provisions regarding bail. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) makes certain offences under the Act cognizable and non-bailable. Section 43D of the Unlawful Activities (Prevention) Act, 1967 (UAPA) prescribes that “(4) *Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.*”

*(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:*

*Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.*

*(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.”*

The offence of ‘unlawful conversions’ under the anti-conversion laws in Uttar Pradesh, Madhya Pradesh and Uttarakhand is also termed as cognizable and non-bailable. Such stringent measures coupled with the presumption of guilt have the ability to wrongly imprison innocent persons for decades in a country where there is no compensation for wrongful imprisonment. In 2020, two foreigners were acquitted by the Delhi HC after they had spent 10 years in prison for an NDPS case.<sup>31</sup> This year two men were cleared of UAPA charges after having spent 9 years in prison.<sup>32</sup>

<sup>31</sup> Amiya Kumar Kushwaha, “After Spending Nearly 10 years in Prison, Two Foreigners Acquitted by Delhi HC in NDPS Case”, ANI, (May, 18,2020), <[<sup>32</sup> Mustafa Shaikh, “Two Men, Cleared of UAPA Charges, Regret the 9 years they Lost in Jail”, India Today, \(June, 17,2021\), <](https://www.aninews.in/news/national/general-news/after-spending-nearly-10-years-in-prison-two-foreigners-acquitted-by-delhi-hc-in-ndps-case20200518181934/#:~:text=Representative%20image-.After%20spending%20nearly%2010%20years%20in%20prison%2C%20two%20foreigners%20acquitted,Delhi%20HC%20in%20NDPS%20case&text=%22Laya%20and%20Okafor%20are%20two,order%20issued%20on%20May%2013>.”</a></p>
</div>
<div data-bbox=)

#### **D. No protection against self-incrimination:**

As opposed to general cases where the accused either responds or raises exculpatory defense, in the case of reverse burden of proof, the accused is forced to testify and risk self-incrimination. A failure to testify may be viewed as conclusive evidence of the accused's guilt.<sup>33</sup> Article 20(3) of the Constitution of India provides that "*No person accused of any offence shall be compelled to be a witness against himself.*" The Supreme Court of India in *M.P. Sharma v. Satish Chandra* held that the right against self-incrimination includes the right to remain silent (Roberts cited in Gupta 2012).<sup>34</sup> However, in the case of reverse onus clauses, the accused is presumed guilty until he speaks up. Additionally, even if the standard of proof for the accused is only a preponderance of probabilities, standards vary as per judicial discretion.

### **VI. THE OFFENCE OF FORCEFUL/DECEITFUL/ FRAUDULENT CONVERSIONS**

India is a nation of diverse beliefs and practices. 79.80% of the population is Hindu, 14.23% is Muslim, and 2.30% is Christian<sup>35</sup>. Initially, anti-conversion laws were introduced in the British Colonial period by Hindu princely states to preserve Hindu identity in the face of British Missionaries.<sup>36</sup> After independence, numerous anti-conversion bills were floated, but none of them was permanently enacted. However, mentioning those can give an insight into the intention and apprehension in the minds of the people who proposed them. The Indian Conversion (Regulation and Registration) Bill, 1954, sought to introduce licensing of missionaries and the registration of conversions with government officials. The Backward Communities (Religious Protection) Bill, 1960 sought to check conversions of Hindu to 'non-Indian religious', which included Islam, Judaism, Christianity and Zoroastrianism. The Freedom of Religion Bill, 1979 sought to impose official curbs on inter-religious conversions. The zeal to curb conversions majorly from Hinduism to other religions is very apparent. The motive behind this zeal was not always the preservation of the freedom of religion, but the preservation of the existing social order. Factors to be considered are the fear of abandonment of 'Indian' culture, general Hindu attitude which placed social cohesion above individual freedoms, the politics of separate electorates before independence, disruption of the established patterns of caste, family, and village social life, etc.<sup>37</sup> Today, many states (Odisha,

<sup>33</sup> Gupta, *supra* note 26 at 59.

<sup>34</sup> AIR 1954 SC 300

<sup>35</sup> All India Religion Census Data 2011, <<https://www.census2011.co.in/religion.php>>.

<sup>36</sup> James Andrew Huff, Note, Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws, 10(2) Rutgers J. L. & Religion 1, 4 (2009), <<http://www.lawandreligion.com/sites/lawandreligion.com/files/A10S-6Huff.pdf>>, archived at <<https://perma.cc/TZ7Y-9U8Q>>.

<sup>37</sup> Donald Eugene Smith, *India as a Secular State*, 165 (Princeton University Press 1963).

Madhya Pradesh, Arunachal Pradesh, Chhattisgarh, Gujrat, Himachal Pradesh, Jharkhand and Uttarakhand) have imposed the euphemistically titled 'Freedom of Religion' laws punishing forceful conversions. However, the use of a reverse onus provision has only been made in Madhya Pradesh, Uttarakhand and Uttar Pradesh which is under challenge before Courts, among other provisions of the Acts.

Section 12 of the Madhya Pradesh Freedom of Religion Ordinance, 2020 provides that "*Burden of Proof as to whether a conversion was not effected through misrepresentation, allurement, use of force, threat of force, undue influence, coercion or by marriage or any other fraudulent means done for the purpose of carrying out conversion lies on the accused.*"

Section 13 of the Uttarakhand Freedom of Religion Act, 2018 states that "*The burden of prove as to whether a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage lies on the person so converted and, where such conversion has been facilitated by any person, on such other person.*"

Section 12 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021 provides that "*12. The burden of proof as to whether a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage, lies on the person who has caused the conversion and, where such conversion has been facilitated by any person, on such other person.*"

For the purpose of this paper, only the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021 is discussed in detail as the provisions are similar in nature.

### **A. Anti-conversion law in Uttar Pradesh**

The government of Uttar Pradesh in November 2020 brought the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020. This was replaced by the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021, after it was passed in the Uttar Pradesh Assembly by a voice vote amid fervent protests in February 2021.<sup>38</sup> It will now be sent to the UP Legislative Council for approval before becoming an Act. Section 3 of the Bills states that:

---

<sup>38</sup> Pankaj Shah, "Unlawful Conversion Bill Passed in UP Assembly by Voice Vote Amid Protest", The Times of India, (Feb 25, 2021), <<https://timesofindia.indiatimes.com/city/lucknow/unlawful-conversion-bill-passed-in-assembly-by-voice-vote-amid-protest/article-show/81199678.cms>>.

*“No person shall convert or attempt to convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage nor shall any person abet, convince or conspire such conversion:*

*Provided that, if any person reconverts to his/her immediate previous religion, the same shall not be deemed to be a conversion under this Ordinance.”*

### **Section 12 of the Bill provides that**

*“12. The burden of proof as to whether a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage, lies on the person who has caused the conversion and, where such conversion has been facilitated by any person, on such other person.”*

The Bill also provides that if a person wishes to convert to another religion, he/she (potential convert) and the religious convertor will have to declare such intention to the District Magistrate before such conversion. After this declaration, the District Magistrate will get an inquiry conducted into the real intention of such conversion through the police.<sup>39</sup> Thus, no one can convert his/her religion without the state police inquiring into their intention, motivation and devotion.

### **B. Analysing the provision in light of established circumstances and justifications under which reverse onus clauses have been previously used:**

***Existence of foundational facts:*** Even in offences, for the prosecution of which reverse onus clauses are in place, mere registration of a complaint does not impose the burden of proof on the accused. As discussed above, in most cases, there are certain ‘foundational facts’ that need to be proved by the prosecution for the burden to shift onto the accused. These foundational facts are usually incorporated within the provision. For example, the requirement of proved possession of contraband in section 54 of the NDPS Act, and the requirement of certain circumstances mentioned in section 304B of the IPC, etc. A bare reading of section 12 of the Bill shows that there are no ‘foundational facts’ that need to be proved by the prosecution for the burden to shift onto the accused. While defending himself in such cases, the accused is

<sup>39</sup> Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021, § 8.

expected to adduce negative evidence as to how he did not commit the crime. However, to prove the contrary, the fact sought to be opposed must be established first. Therefore, it is crucial that foundational facts must be established before the burden shifts onto the accused to deduce the negative.<sup>40</sup> In the absence of judicial creativity, the provision would lead to a situation where a mere allegation of a deceitful/ fraudulent/ forceful conversion will put the burden of proving otherwise on the accused.

***When the gravity of the offence and its impact on society is so high that the reverse onus of proof can be justified in the public interest:***

It is not disputed that making someone give up their religious beliefs through coercion/deceit/force, especially under the pretext of marriage, is a serious crime. Such crimes are also not unheard of. India has faced instances of forceful mass conversions several times in the past. During communal riots, members of the aggressive religious groups attacked victims and forced them to convert. Christian missionaries also preyed on the vulnerable groups of society (e.g., the poor, the sick in hospitals, children in schools etc.).<sup>41</sup> Forcible conversions particularly skyrocketed immediately before and after India's partition.<sup>42</sup> In many parts of the country, 'evacuate or convert' approach was taken by religious leaders.<sup>43</sup> Against this backdrop, in November 1947, the Public Safety Act was enacted (as a temporary measure) which provided that conversions could only take place in the presence of a magistrate. This was dropped a year later as it was no longer necessary.<sup>44</sup> Such special and temporary measures taken in special circumstances can be justified. Later, many states enacted laws to surveil religious conversions, some infringing more into the privacy and liberty of citizens than others. The Bill in question is more likely to fall in the latter category. Today also, there are instances of forced conversions; however, the claims of the prevalence of such a practice to the extent that the very fabric of society is endangered are not supported by any concrete proof or statistics.<sup>45</sup> Looking at the census reports of 2001 and 2011, there has only been a 0.7% decrease in the Hindu population (from 80.5% to 79.80%) and a 0.83% increase in the Muslim population in 10 years, while the Christian population has remained the same.<sup>46</sup> Even with apprehension among legislators, there is no

<sup>40</sup> *Sahid Hossain Biswas v. State of W.B.*, 2017 SCC OnLine Cal 5023.

<sup>41</sup> Abhinav Chandrachud, *Republic of Religion: The Rise and Fall of Colonial Secularism in India*, 28, (Penguin Random House India 2020).

<sup>42</sup> *Ibid.*, at 30.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> See Ghazala Wahab, How 'Love Jihad' Went from Being Propaganda to Policy, *The Indian Express* (April 15, 2021), <<https://indianexpress.com/article/opinion/columns/how-love-jihad-went-from-being-propaganda-to-policy-7273946/>> also see <<https://www.foreignaffairs.com/articles/india/2020-12-23/hindu-nationalist-myth-love-jihad>>.

<sup>46</sup> Distribution of population by religion, <[https://censusindia.gov.in/Census\\_and\\_You/religion.aspx](https://censusindia.gov.in/Census_and_You/religion.aspx)>.

concrete proof of rampant, recurring and heinous forceful/deceitful/fraudulent conversions to affect society so gravely that the basic tenets of criminal jurisprudence (presumption of innocence) can be let go. If the extent of such crimes is unknown, it will be difficult to ascertain whether the stringent measures are proportional to the crime being curtailed. In such a scenario, the rights of citizens are curtailed without a clear and clinching cause. According to a Pew Research Center report<sup>47</sup> based on a face-to-face survey of 29,999 Indian adults between 2019-2020 (before the COVID-19 pandemic) conducted all over India, religious conversion is rare in India. Being mindful of the conversions among lower-caste Hindus and the anti-conversion laws in India, the survey found that 98% of the survey respondents identified their birth and current religion to be the same.<sup>48</sup> 0.7% of the respondents stated that even though they were raised Hindu, they now identified differently.<sup>49</sup> 0.8% said that they were not raised Hindu but now identified as Hindu.<sup>50</sup> Thus the conversions are to the extent that the Hindus gain as many people as they lose. However, it was found that 0.4% of Christian survey respondents were born Hindu, and only 0.1% Christians left Christianity.<sup>51</sup> Uttar Pradesh's Eighth Report of VII State Law Commission on Freedom of Religion recommended a draft for the Uttar Pradesh Freedom of Religion bill, 2019.<sup>52</sup> To justify the necessity of an anti-conversion law now, this report majorly relied on:

- (i) Newspaper cuttings dealing with specific cases of forceable conversions,
- (ii) Recommendations of the Law Commission of India with Regard to Freedom of Religion (Report no. 235),
- (iii) Extracts of judgements by the Hon'ble Supreme Court,
- (iv) Proceedings of the UP legislative assembly regarding anti conversion.

The newspaper cuttings presented in the report either deal with certain specific cases or claims by politicians. Recommendations of the Law Commission of India with Regard to Freedom of Religion were pursuant to an invitation by the High Court of Kerala when the Court examined the issue that in the absence of any specific procedure prescribed governing conversion, whether there was a need for a legislative intervention to make the law simpler and user free. The Commission<sup>53</sup>, thus, addressed the limited question "*whether a*

<sup>47</sup> Jonathan Evans and Neha Sahgal, "Key Findings about religion in India", Pew Research Centre (June 29, 2021), <<https://www.pewresearch.org/fact-tank/2021/06/29/key-findings-about-religion-in-india/>>.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> 8th Report of VII State Law Commission on Freedom of Religion (along with draft bill of) The Uttar Pradesh Freedom of Religion Bill, 2019 (<<https://upslc.upsdc.gov.in/MediaGallery/8thReport.pdf>>).

<sup>53</sup> 235th Law Commission of India Report on Conversion/Reconversion to another religion – mode of proof (2010).



*particular mode of proof of conversion as suggested by the High Court should be statutorily prescribed.*" The commission recommended that the converted person, if he/she chooses, can send a declaration to the officer in charge of the registration of marriages in the concerned area and within 21 days of such declaration appear before the registering officer and confirm his/her identity. Thus, this report did not deal with the extent or atrocity of the prevalence of forceful/coercive/allured conversions. The extracts of the Supreme Court judgements produced in the report either deal with the family law aspect of inter-religion marriages or deal with matters where conversions were done without devotion for the sole purpose of marriage. Some cases do point out force/fraud/deceit at play, but it still remains to be determined that even if such acts deserve to be punished, is the imposition of the reverse burden of proof the only way to do so? When reverse onus clauses were recommended for the NDPS and dowry death offences, specific reasons were given for why a reverse onus would be essential to deal with those crimes highlighting the secrecy and the special knowledge involved. The debates of the UP Legislative assembly also do not give reasons as to the necessity of a reverse burden clause while dealing with unlawful conversions.

***Existence of 'special knowledge':*** Despite the criticism that there is a wide gulf between knowing and being able to prove in Court, generally, if a person is found in specific incriminating circumstances, he/she is expected to have special or exclusive knowledge as to how those circumstances can be explained without incriminating him/her. For example, when a young woman dies an unnatural death (subsequent to cruelty in connection with dowry demands by the in-laws) within the house with only the husband/in-laws present, it is considered reasonable to make the husband/in-laws prove their innocence in such incriminating circumstances. However, it is doubtful that the process of forceful conversion to another religion strictly involves such special knowledge.

### **Conversion to Islam**

The only formal step in conversion to Islam is the utterance of '*Shahadah*'. This is an Islamic oath that says, "There is no God but Allah, and Muhammad is his messenger." This statement is required to be made out loud, with total sincerity and full understanding of what it means in front of witnesses.<sup>54</sup> In India, this declaration is generally made after approaching the '*maulvi*' of the jurisdiction at his office, which is usually a public place. There also, the *maulvi* has to confirm with the potential convert thrice that he is not acting under any coercion or threat. In a process this open and public, anyone alleging force/deceit/fraud is bound to have positive evidence of such facts.

<sup>54</sup> Shahadah: The Statement of Faith, BBC, (Aug. 23, 2009), <<https://www.bbc.co.uk/religion/religions/islam/practices/shahadah.shtml>>.

### Conversion to Christianity

Although different sects of Christianity perform different rituals/ceremonies while conversions, the most common step is baptism. The process initially involves attending Sunday classes at church, familiarisation with the Bible and its teachings and getting involved in the church community. After some time, baptism is done by sprinkling or pouring water on the head or immersing the head in water, either partially or fully.<sup>55</sup> This again is a very public and open process that rarely shows the existence of any special knowledge with the facilitators of the conversion. Allegations of force/deceit/fraud can and must be accompanied with positive evidence of certain foundational facts.

### Conversion to Hinduism

Even though generally no ceremony is required for adopting Hinduism, many organisations facilitate conversions and perform some ceremonies. Arya Samaj temples perform a ritual done in front of the fire which involves chanting certain hymns from the Vedas after which a certificate of conversion is given.<sup>56</sup> The ISKCON foundation does not convert people but believes in transforming people's hearts.<sup>57</sup> The VHP performs a '*havan*' (ritual in front of the holy fire) and name change ceremonies.<sup>58</sup>

Section 4 of the Bill states that any aggrieved person or his relative can lodge an FIR against such a conversion. Section 3 holds accountable any person who converts or attempts to cause such a conversion either directly or indirectly. In this scheme of things, any relative can make a mere allegation that the conversion was forced, and the facilitators of the conversion can be put behind bars (Section 7 provides that all offences under the Bill shall be cognisable and non-bailable) until they are given a chance to deduce negative evidence as to their innocence. Looking at the process of conversion currently prevailing in India, can it really be said that the persons causing the conversion are possessed of some special knowledge of which the rest of the world is deprived? At the very least, the informer is bound to have some information/evidence as to the force, deceit or fraud involved in the conversion which can be used by the investigating authorities and the prosecution to establish certain 'foundational facts' before the burden of proof shifts onto the accused.

<sup>55</sup> How to Convert from Hinduism to Christianity, WIKIHOW, (June 29,2020) <<https://www.wikihow.com/Convert-from-Hinduism-to-Christianity#:~:text=To%20start%20the%20conversion%20process,religious%20leaders%20or%20fellow%20Christians>>.

<sup>56</sup> KREATELY, <<https://kreately.in/process-re-conversion-and-ghar-wapsi-sanatan-samaj/>> (last visited September 14th, 2021).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

## VII. CONCLUSION

A comprehensive analysis of the use of reverse onus clauses in Indian legislations shows that it is done only in grave offences endangering societal balance, where such claims are backed by reliable data and where there is ‘special knowledge’ only in possession of the accused, subject to the establishment of certain foundational facts that put the accused in those incriminating circumstances. *Firstly*, looking at the insufficient data available to back the claims of rampant unlawful conversions, it cannot be ascertained whether the stringent measure of the reverse onus is proportional to the crime that we are dealing with. *Secondly*, the reverse onus clauses in the anti-conversion laws of Uttar Pradesh, Madhya Pradesh and Uttarakhand lack the concomitant requirement to establish any foundational facts. *Thirdly*, the accused (mostly the facilitator of the conversion) has no particular special knowledge as to the crime in a scenario where a third party informs the police that force/deceit/allurement has been used to secure a conversion. Even otherwise, the prosecution must put forth sufficient evidence before the burden of proof shifts onto the accused, even in cases where such reverse onus is justified. Provisions such as a police inquiry into the intention, motivation and devotion of a potential convert only work to harass and discourage even genuine conversions. On top of this, an unjustified reverse onus gives the authorities a free pass at harassing any religious convertors/facilitators at a mere allegation by a third party, irrespective of the fact that the facilitator and the convert may have already undergone the prescribed police scrutiny. Since all the three laws (of Uttar Pradesh, Madhya Pradesh, and Uttarakhand) term the offence of forceful conversions as cognizable and non-bailable, the accused is most likely to undergo a prolonged undertrial imprisonment since he/she is presumed to be guilty, and no foundational facts need to be proved by the prosecution. There has to be a negotiation between upholding the principle of presumption of innocence and a policy decision in public interest. Such a negotiation should be done by relying on facts, data, and statistics rather than feelings. Indiscriminate use of stringent provisions for offences that are only apprehended and not proved to be rampant can have dangerous consequences on the freedom of citizens and is a more significant threat to the public interest.