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Ensouth

The E-magazine brought to you by

N South

Advocates

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Managing Partner's message

The N South partnership has been reconstituted!

It is with great pleasure that we announce the induction of Mr. Inderraj Gill to full equity partnership of N South. He is a specialist corporate lawyer strongly focused on M&A, Private Equity, Infrastructure and Projects. As has long been the tradition in our law firm, he is substantial litigation experience as well. His brief profile is presented on this link:

<http://www.nsouthlaw.com/Inder.html>

This issue of Ensouth is an exercise in exploring both fundamental rights and Déjà vu!

First, we return (once again, to be sure) to the single biggest problem that has dogged India's developmental ambitions for a decade: the problem of finding land for industry and infrastructure! In **AAP and the Endless Land Acquisition Lament**, we argue that the changes notified into law by the Modi Government are entirely reasonable, and necessary too.

Next, we return (once again!) to the vexed problem of governance in India. In **Uber Rubbish**, we explore the roots of our regulatory and governance failures in the context of the ban on the taxi company Uber.

Finally, in **Home Truths about Home Comings**, we argue that any ban on religious conversion decimates our fundamental right to propagate our faith.

Happy Reading!

Ranjeev Dubey
(Managing Partner)

Print Media

Comment-1

Fine Print: AAP And The Endless Land Acquisition Lament **A critique of the latest changes in the land acquisition law.**

Ranjeev C. Dubey

It seems India will not cease washing its land acquisition laundry in public any time soon! Of the many reasons being ascribed for the resurrection of the Kejriwal bandwagon in Delhi, the Government's attempt to promote growth by cracking the land acquisition logjam is now being cited as one. Why you may ask should that be so? Let's look at the issues.

Of the three times I've delved into this issue for Businessworld in the last decade, perhaps the pithiest identification of the key issues is to be found in Land Acquisition Angst (Businessworld Jan 29th, 2010). Written in response to Manmohan Singh's suggestion that all land acquisition should be 'consensual', I had argued that coercion was an inevitable part of any sovereign asset expropriation. Rather than be antsy about the compulsive side of it, we would better serve both justice and India's development agenda by focusing on the law's two biggest failures: (1) rational pricing of acquired land, and (2) expeditious mechanisms for payment of compensation and rehabilitation.

Mercifully, UPA2's Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 addressed both these issues. Regrettably, it came with bad news: the prescribed "due process" became so stringent as to be unimplementable. It paralyzed the country's development initiatives. Something had to be done about that, and any incoming Government would have done what Modi's government did. But did Modi's Government do the right thing? Let's take it issue by issue.

At the root of it all is a very basic question: in what circumstances is any Government entitled to expropriate private land? Traditionally, in Indian law, the Government could take land whenever it wanted, from whom it wanted, for any purpose it wanted, and then use it for the stated purpose, or for some other purpose, and never pay for it if it didn't want to. It was heartless and unconscionable. The 2013 law changed that. Under this new law, the Government couldn't realistically acquire multi cropped land any more. If Government wanted land for a private project, 80% of the landowners had to agree to become victims of acquisition. If the project was a joint venture with Government, only 75% land owners needed to agree.

As laws went, this was about as suicidal as its possible to be. Culturally speaking, you are never going to get 75% or 80% of any large group in Indian to agree to anything at all! That rang the final death knell of large private projects. All that the Modisarkar has now done is to promulgate that these provisions do not apply if the Government wants land for defence, rural electrification, affordable housing, industrial corridors or social infrastructure projects. You could sneer and say "so what does that leave out?" and I would agree. I don't want to leave anything to consent either. Consent doesn't work. People disagree only because others agree. Then the guys who continue to disagree the longest get paid off the most to agree. To make him agree, you also have to pay off the social workers, the environmental activists and the mofussil lawyer who helps him to disagree with stay orders and Mohammad Ali Jinnah type 'direction action' initiatives. It's a crude kind of legislated extortion while the project cools its heels. I don't like legal extortion.

That takes us to this business of social impact. The old law didn't give two hoots about social impact so the 2013 law made a "Social Impact Assessment Report" mandatory. I don't care two hoots about Social Impact Assessment Reports either. Bluntly speaking, wholesale displacement is always traumatic. What is this report going to tell me that I don't already know even in the most optimistic of circumstances? The real question though is this: do the victims have enough money to rebuild their lives elsewhere? Or are they being moved into a shantytown at the end of the project to rot in a chikungunya pool till they die, taking their compensation claim with them to their funeral pyres?

Which brings us to what I think is the bleeding edge of the land acquisition hatchet: are you going to pay the people enough and on time for the land you grab from them? The old law neither wanted to, nor needed to, nor cared. The 2013 law changed that. First, it recognized that not everyone who lives on the land is an owner of it. For the first time, displaced persons were to be compensated too. Suddenly, the pain of being very poor in India was eased, if only fractionally. Second, this law boosted up the money paid as compensation by orders of magnitude. Curiously, this attracted the most criticism at the time. This is totally understandable. We wealthy Indians don't like to pay for land we grab any more than we like to pay our maids another Rs. 500 a month for back breaking work even as we take in lakhs in salary increments and ride around in BMWs.

Just to get it into perspective, under the 2013 law, Government was now required to acquire land at current market value based on its current use. This value was calculated at the higher of (1) the notified 'circle rates' for registration of properties, and (2) the average of the top 50 per cent of sales registered in the previous three years. Since circle rates are generally well below market rates and not so many people engage in "all cheque" transactions, the law doubled this amount in urban areas (4 times in rural areas) for good measure to establish land value. This value was doubled again to provide solace against the emotional harm of compulsory acquisition.

The Government also had to pay for all the assets developed on the land. It also had to pay 30% of the established value. All delays in payment carried interest at 9 per cent. Best of all, the Government could not take the land till it had paid full compensation! I especially liked the last bit because that I believe is what an honourable nation trying to make honourable laws would do.

All this may sound like a lot of money. It is, as it should be. We aren't just talking about taking land from people: we are talking about taking peoples' lands, their lifestyles, their social milieu, even their lived memories. I still occasionally go back to my home town and look at the building where I was born. It fulfils me, provides spiritual solace and centres my soul again. I don't care a fig about pushing for cheaper land because somebody like me can put up a cheaper factory and correspondingly sell me cheaper toothpaste. It is gratifying to see that the new government has made no attempt whatsoever to succumb to all the screaming solos we hear about land becoming too expensive, etc. Ditto resettlement and rehabilitation: whatever UPA2 did to ease the pain of relocation has been retained by the Modisarkar.

The same can be said for land that is expropriated and then not utilized at all. The old law was happy for the Government to take the land for say an ordnance factory and then either not use it at all or use it to make farmhouses for some very wealthy people. Not anymore. The 2013 law provide that if you don't use the land within five years of taking possession, you have to give it back to the land owners or the state land bank. The latest amendment tweaks it only slightly. Now, because many projects have long gestation lags, the land can be retained for the period specified for a project if that is longer than five years. This seems eminently fair to me.

Any which way I look at it, these changes were necessary to kick restart project activity and push India's developmental ambitions. We needed these changes because we need India to grow. Delhi's electorate understands that too. Delhi isn't overrun by poverty stricken subsistence farmers. It is overrun by ex-farmers, their lands long gone, who want better jobs and better opportunity.

Comment-2

Fine Print: Uber Rubbish

If we want to protect our women, banning Uber and others like it is not the answer. It's the rules and their implementation that we need to fix

Ranjeev C. Dubey

The tragic rape of a girl in an Uber cab triggered the usual tryst with unreality. The Delhi Government's Transport Department immediately 'banned' internet cab aggregators- including Uber, Taxi-for-Sure and Ola- from operating in Delhi. Meanwhile,

Delhi Police registered an FIR against Uber for misleading customers by falsely suggesting that they perform background checks on their drivers. Given the alternatives modes of transport we have, what explains this truly extraordinary response of the authorities?

Let's talk about banning first. The police banned dark film on car windows because girls were molested in it. They don't ban cloth curtains which were quite the rage when I was a boy. Both curtains and solar film are better than wedging newspapers on the insides of car windows on sunny days, as many ladies with sensitive skins do. There is no law against wedged newspapers though it's just as good for molesting girls. Banning rarely makes sense. Girls get molested in homes too but no law forces people to live only in glass houses. Of course, we are not talking dark film here: we are talking about banning the whole cab. No one banned buses after the frightening Nirbhaya rape case.

What is the consequence of this decision? I have a daughter aged 23. She and her friends use Uber at night. I worry about this. They feel it's the best option out there. Their other choices are Radio cabs or the Kaali-Peeli cabs from under the Banyan tree at the edge of the colony. The girls don't like Radio cabs. They are way more expensive and besides, there aren't enough to go around. You can order one, but you are pretty likely to be ditched at the last moment. With the Kaali-Peeli, what you see is what you get but what you get is not worth having. The good news is that both Radio and Kaali-Peeli cabs are regulated. The bad news is the regulations add up to very little. Very briefly, to run a Kaali-Peeli, the driver needs a commercial license and police verification, Full Stop. There is no training and no other meaningful rules. To run a Radio cab, the operator is a registered entity who co-opts drivers. The drivers need proof of residence, commercial insurance and a commercial driving license. The operator verifies the driver's documents, whatever that means. The driver gets some training but mainly in how to use the radio in the radio cab.

This brings us to internet based cab aggregators like Ola, Uber and Taxi-for-Sure. These service providers are completely unregulated because no one thought they needed regulation. Presumably, rules that apply to an individual running a taxi generally apply to them. This makes perfect sense. Uber, Ola, etc are not taxi companies. They don't have any taxis. They are a variation of classified advertisement: like AirBnB, or EBay or Amazon or Jabong or Flipkart. You want an iPhone 5S? Some guy called Speedy Gizmos lists a good bargain on Flipkart. You want shoes? WS Retail is listing them on Jabong. You want an apartment for a week in Edinburgh? Various owners and property managers are listing them on AirBnB and Bookings.com. You want a cab? Uber has one on its list for you. These guys just help you find a cab, that's all. Of exactly what are Flipkart, AirBnB, Amazon, Jabong or Uber guilty if the guy who delivers your phone, shoes, apartment or cab throws in molestation? I'd say the Delhi Police's response isn't legally sound.

This explains why the Delhi Police can do no better than file an FIR premised only on false representation to customers. Legally, that is pretty thin. Even I know better than that. Uber is making a claim they can't possibly execute in Indian conditions. I'd say Uber does background checks on its drivers like Colgate stops bad breath and fights tooth decay. Is there anyone with a toothache out there who used Colgate? Do you feel like filing an FIR today? Courts in India have repeatedly approved of marketing hype as street legal. Then again, the internet is awash with derisive stories about Uber's background checks. Google it! There's this amusing story about the guy who beat the procedure by simply 'sharing' a taxi account with several people. It's amusing because we all love the underdog who beats "the system", and in America too.

The fact remains that if you order an Uber cab, they respond to your request by giving you the number of the incoming cab. You probably don't pay too much attention because your main concern is the model of the car you are getting: is it an Indica or an Audi for the same price? Uber checks that the car doesn't smell of unwashed underwear, because that is what you really care about. You are unlikely to ask if the driver has a postgraduate degree in cryogenics and the morals of Bhisham Pitamaha! It doesn't matter who they say the driver is. Very likely, the driver is a substitute because the main guy went off duty after 12 hours at 8 pm. You aren't likely checking his ID in the middle of the night before getting into the cab. You've maybe had one vodka too many and you just want to go home. If you do ask, the driver will doubtless claim that he is the same Ram Kumar listed with Uber. Getting two driving licenses for two Ram Kumars isn't that hard. You don't have the skill to judge if his ID is real or faked.

At worst, what Uber deals with is no worse than the Kaali-Peeli cabs. Most cabs you pick up at Delhi Airport are owned by wealthy taxi fleet owners. The drivers rent the cars by the day. Ditto Three Wheelers. Wealthy taxi fleet owners have a practical problem. Drivers are a restless lot: this is why they are drivers. They like the rootlessness, the constant movement. It's psychological. The drivers don't own cars. The owners take on the drivers they can get. The drivers do the molesting. What am I accused of if my chowkidar rapes someone? You may say I will be liable for what my chowkidar does unless I follow a bunch of rules. I could live with that, but you have to make the rule that tells me what to do. Till you have those rules, you can't be registering FIRs against cab aggregating companies because they haven't followed a rule you haven't made.

Think about this: what Uber does on the internet is no different from what the Taxi counter does at IGI International Airport New Delhi. That counter has no regulatory guidelines either, and for the same reason that Uber doesn't. I've never heard of counter personnel at IGI Airport suffering FIRs against them for something a cab driver did.

In the circumstances, I am amazed at the heat being generated about driver background checks. Even if you do make a rule about background checks, what will it

really mean? I run a law firm. You can make a law compelling me to do a background check on the court clerks I hire. So I hire this guy and ask for a background check. He gives me his dad's name, village address, adhaar card and wonders of wonders, a character certificate from the local police. Now what do you want me to do? Is there somewhere I can go cross check if each of these certificates is faked? Point me to that place please.

As a lawyer, it is my experience that a lot of bureaucratic procedures require you to get first class magistrate stamps and police certificates. As a father, it is my experience that you need these sorts of things even to apply for school and college admissions. Where are you going to get one? Can you go to a court, send in your business card and have the magistrate entertain you, chat you up and satisfy himself that you tell the truth? If he doesn't personally know you, what is he capable of certifying you for? Is he ever going to personally know every driving license holding villager fresh off the bus from Jharkhand with ambitions of being a driver for Uber? Yet, thousands of such certificates are being minted every day. How does it work? It's simple. You go to the local court and you approach a tout outside the magistrate's office. He quotes you a price and produces a document in 6 hours. You don't know if it's real. You don't care. No one does. Everyone understands this is mindless ass-covering bureaucracy. What makes Uber different?

The accused in the Uber rape case had a character certificate. The police now claim it was "faked". What does "faked" mean: that neither Uber nor the driver personally witnessed the authorized signatory signing it? By that criterion, they are all faked. And where was the certificate faked? It was faked inside a police office. It has authentic stamps and signatures and names. Yes the authorized signatory had been transferred out a while back but which Mathura resident villager has the skill or network to source out official transfer letters and verify the authenticity of certificates? Does Uber have that capacity? Do I need to file an RTI every time a new court clerk I hire brings me a certificate?

The Delhi police is the first to acknowledge the enormous difficulty of verifying anyone or his character. Drivers and domestic workers are mostly migrants. The police can't be doing Bharat Darshans verifying thousands of maids here for just a year before the parents marry them off back home to the local landless peasant. Drivers move between cities a lot too. Delhi Police have a lot of VIPs to protect. Delhi has one cop per 253 people but 47,557 cops protect 14,842 VIPs i.e. three cops per VIP. It's not that Delhi Police loves this VIP protection racket. They have no choice. They have to rely on state police for maid and driver verifications. The state police is equally busy protecting their VIPs.

The truth is that if you want individual verification, your best bet is a centralized human data capture and management tool. It won't be fool proof, but it will come close. This means you need a national level unified ID like Adhaar where everyone's

entire life will be on a hard drive somewhere. If you do this, you will have huge issues around privacy, confidentiality, data ownership, data security and so forth. In a PIL filed by retired Karnataka High Court judge Justice KS Puttaswamy and retired Additional Director General, Discipline and Vigilance, Maj Gen (retd) SG Vombatkere, the Supreme Court held on March 23, 2014 that the Adhaar card could not be made mandatory. That put an end to fool-proof background checks.

More's the pity because forget about background checks, we have a mountain to climb in order only to secure that people driving cars actually have valid driving licenses. You can get a driving license for the price of a tout at the regional transport office. The doctor issuing a certificate there checks that your hands and vision are good. No one check your morals or your jail record because there is nowhere to check. There was no irony in the statement Uber CEO Travis Kalanick issued: "We will work with the government to establish clear background checks currently absent in their commercial transportation licensing programs." The emphasis supplied here is entirely mine. He is being brutal with the truth but this is one of several long term fixes we need to implement.

When you get past the anger management and the angst, it comes down to the same old song: we are a country unfocussed on governance, rules or their enforcement. If we want to protect our women, other than changing our collective attitude, it's the rules and their implementation that we need to fix. If we make sensible enforceable rules, people will comply and our women will be safer.

Comment-3

Fine Print: Home Truths About Home Comings

The moment you ban conversion motivated by benefit, you absolutely ban all conversion. That shoots my Article 25 right to practice a religion of my choosing squarely in the gut

Ranjeev C. Dubey

For ten vociferous years, strident Hindutva activists complained bitterly that their brothers were converting to other religions, mainly Christianity. Six states tried to stem this purported tide by legislating against religious conversion. With the change of political dispensation in Delhi last summer, those who complained about conversions commenced conniving with conversions and "Ghar Wapsi" while those who connived with conversion started complaining. Activists now demand that the Prime Minister take a public position on it. Opposition spokesmen dare the government to come out with a national law against conversion. What's going on?

The short answer undoubtedly is that God makes good politics. No one knows it better than Atal Bihari Bajpayee who made Prime Minister riding on the back of some

mosque busting by religious front liners in Uttar Pradesh. Religion inevitably consolidates votes on either side of every political fault line, but it profits both sides. Historically speaking, religions have achieved mass traction only after they have received state patronage, good examples being Emperor Constantine and Christianity in Europe, Emperor Ashoka and Buddhism in India, and the Soud family and Mohammad Ibn Al-Wahhab for the Wahhabi school of Islam in the Middle East. For the same reason, every major political party has used anti-conversion as an electoral whipping boy at one point or another: the BJP in Gujarat amongst others, the Congress in Himachal Pradesh. The key question that needs answering though is this: where does that leave Article 25 of the Constitution of India which provides:

"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."

When freedom to profess, practice and propagate is constitutionally guaranteed, how are we even competent to make laws preventing conversion? That takes us to the long answer on what's going on. Let's look at the laws that have been created.

First up, we had the Orissa law way back in 1967. It prohibits 'forcible conversion', either directly or indirectly, using force, inducement and fraud. Force for your kind information includes 'threats of divine displeasure'. Inducement by the way also includes offers of any gratification in cash or in kind, and the grant of any benefit, either pecuniary or otherwise. That pretty much set the stage for the following year's law in Madhya Pradesh which replicated the Orissa law, more or less. It took Arunachal a decade to make a third of a perfect initial pair when in 1978, they legislated their own freedom of religion, again following Orissa closely. There the matter rested for the next 25 years.

In the dying years of the National Democratic Alliance, when voters were again encouraged to find their religious eternal truths through the usual hate mongering, Gujarat set up its own law in 2003. It wasn't that far off the Orissa model. 'Inducement' now became 'allurement' defined as offer of any temptation in the form of gift or gratification (in cash or kind) or grant of any material benefit (either monetary or otherwise). Divine displeasure continued as an illegal force. Three years later, Himachal Pradesh and Chhattisgarh both joined the conversion brigade, creating laws along the same lines.

Over the years, the courts have had several occasions to rule on the legality of such laws. *Stanislaus v. State of Madhya Pradesh* [Air 1977 SC 908] is a good example of judicial thinking on it. In this case, two appeals came up together before the Supreme Court. In the first, the Madhya Pradesh government sanctioned the prosecution of Reverend Stanislaus for violation of the law. He claimed that in prosecuting him, the law violated Article 25. The High Court held that such laws

"establish the equality of religious freedom for all citizens by prohibiting conversion by objectionable activities such as conversion by force, fraud and by allurement". In the second case, the Orissa High Court went the other way where priests were prosecuted for 'evangelisation leading to conversion of persons belonging to other faiths by and/or through preaching exhortation'.

The Supreme Court ruled against Orissa. It took the view that Article 25(1) guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion. It found that there exists no fundamental right to convert others, because that would impinge on other persons' 'freedom of conscience'.

This view has been challenged several times since. Twenty Five years after Stanislaus, in Satya Ranjan Majhi and Anr. v State of Orissa [(2003)7SCC 439], members of the Christian Community challenged the legality of the Orissa law because they wanted the unfettered ability to convert others. The court did not agree. Again in 2014, the law was challenged afresh in Digbijaya Missal v. State of Orissa [MANU/OR/0360/2014] when the rules framed under the law came under attack. These rules provide that anyone who wishes to convert has to declare that he is doing it of his own will before a Magistrate. Meanwhile, the Priest doing the converting has to inform the District Magistrate fifteen days in advance. In turn, the District Magistrate must inform the concerned Superintendent of Police who will "ascertain objection, if any, to the proposed conversion by a local inquiry and intimate the same to the District Magistrate". The Petitioners argued that these rules were obstructive and demeaning. The court did not agree. It took the view that these rules are precautionary in that they ensure that the renouncement of one religion and the adoption of another is genuine, voluntary and free from inducement, coercion and fraud.

In the same vein are cases under the general law of the land where the motives for conversion are not quite that spiritually uplifted. In Sarla Mudgal and Ors. V. Union of India [AIR 1995 SC 1531], the court ruled that a Hindu man could not convert to Islam so that he could marry again without obtaining a divorce from the first wife. In M Chandra v. M. Thangamathu & Anr [(2010) 9 SCC .712], an electoral candidate was born a scheduled caste, raised a Christian, reconverted in an Arya Semaj temple to Hinduism and then stood for election to the Legislative Assembly for a scheduled caste reserved constituency. The election was challenged on the ground that the appellant was Christian, not a schedule caste Hindu. The court turned down the challenge, ruling that to prove conversion; two elements needed to be satisfied: that a conversion event took place, and that the community to which that person converted accepted the conversion. The candidate met both tests and her election was upheld.

Which brings us to the curious case of Sardar Syedna Taher Saifuddin Saheb v State of Bombay [AIR 1962 SC 853], triggered by the enactment of the Bombay Prevention of Excommunication Act, 1949. Among those who successfully run a tight community ship are the Dawoodi Bohras whose Dai-ul-Mutlaq is entitled to

excommunicate any member of the community for an offence which, according to his religious sensibilities, justified expulsion. It's an unguided discretionary power, its impact difficult to fathom for those who do not belong to a close knit insular community. The Syedna challenged the law, claiming it violated his Article 25 right. The court was sympathetic. Banning excommunication may promote social reform, it agreed, but may not promote social welfare. In the end, the court struck down the law because the ban was too absolute. If excommunication was a part of Bohra religion, banning it was interfering with religious freedom.

At one level, this decision is way off the curve. The freedom to practice my religion must include the freedom to practice it as I please, while living the life that I please, rather than the manner in which the priest prescribes it. Excommunicating me because I don't live my life or practice my religion by the priest's prescription violates any number of my other fundamental rights. The court took the line that if tradition has allowed members of a religious community to be excommunicated, excommunication is a part of their religion, and protected under Article 25. I cannot but disagree. Tradition is a cunning cur, undermining social justice in many ways, which is after all the law's main business. I can do no better than direct attention to the Hindu 'tradition' of excluding some people from the village water well and burning widows. How far back do you wish to go to find your 'tradition'? Where does religion as a spiritual quest end and the politics of religious organisation begin? To me, the line is very clear. The court has failed to identify that line, leave alone draw it.

This brings us back to our right under Article 25 to propagate our religion. On the face of it, if I am free to propagate my religion, sooner or later, someone will agree with me. Now, if you say I have the right to propagate but not the right to convert, you are really saying that I can propagate till my teeth rattle and fall off but if I succeed, I am breaking the law! That is not only illogical: that is silly. It's also only the beginning of the fundamental flaw in the anti-conversion law construct.

The crux of the difficulty with the anti-conversion law construct comes down to this confounding animal called inducement or allurement. Inducement and allurement, in this world or the next, are at the heart of every religion. Religions are nothing if they are not bargains with divinity. A lot of it is material benefit of the type we actively seek on Diwali. There are also non-pecuniary benefits such as 72 gazelle-eyed women in paradise, or a freedom-from-pain benefit as in Buddhism. What remains after the benefits is the fear of divinity. In that category of fear are thunderbolts from Thor and Satanic rendezvous in hell. What chance of success would you give to a religion that is by law required to offer no value proposition? So, when we talk about religious conversion, there is going to be no sale unless there is a perception of enhanced benefit. Indeed, if there is no perception of benefit, there is going to be no customer for any religion at all. If I didn't stand a better chance to improve my lot, in this life or the next, or in the life after life, if life it is, why would I bother to convert, or practice any religion at all? It strikes me as perfectly obvious that the moment you ban conversion

motivated by benefit, you absolutely ban all conversion. That shoots my Article 25 right to practice a religion of my choosing squarely in the gut.

-X-