IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA

WRIT PETITION NO.6263 OF 2021
(REV. SURESH CARLETON & ORS. VS. THE STATE OF M. P.)

&

WRIT PETITION NO.1018 OF 2021
(AMRATANSH NEMA VS. THE STATE OF M. P.)

&

WRIT PETITION NO.3339 OF 2021
(L. S. HERDENIYA & ORS. VS. THE STATE OF M. P.)

&

WRIT PETITION NO.5217 OF 2021
(AZAM KHAN VS. THE STATE OF M. P.)

&

WRIT PETITION NO.7492 OF 2021
(RICHARD JAMES & ORS VS. THE STATE OF M. P.)

&

WRIT PETITION NO.8810 OF 2021
(ARADHANA BHARGAVA VS. THE STATE OF M. P.)

&

WRIT PETITION NO.12238 OF 2021
(SAMUEL DANIEL VS. THE STATE OF M. P.)

Dated : 14-11-2022

Mr. Manoj Sharma, Senior Advocate with Ms. Lija Merin John, Advocate and Dr. Umesh Manshori, Advocate for the petitioners in W.P.No.6263/2021.

Mr. Manoj Sharma, Senior Advocate with Mr. Quazi Fakhruddin, counsel for the petitioner in W.P.No.12230/2021.

Ms. Sandhya Rajak, Advocate for the petitioner in W.P.No.5217/2021.

Mr. Himanshu Mishra, Advocate for petitioner in W.P.No.3339/2021.

Mr. Prashant Singh, Advocate General with Mr. H.S.Ruprah, Additional Advocate General, Mr. Bharat Singh, Additional Advocate General, Mr. Suyash Thakur, Government Advocate, Mr. Ankit Agrawal, Government Advocate and Mr. Aakash Malpani, Advocate for the respondents/State.

Heard on the question of admission and interim relief.

2. Learned Advocate General raised objection regarding maintainability of the petitions on twin grounds. *Firstly*, the relief claimed in the petitions is vague and Clause 7(2) of prayer clause does not specify as to which provisions of **Madhya Pradesh Freedom of Religion Act, 2021** (hereinafter referred as 'Act of 2021') are unconstitutional. In absence of any specific relief being prayed for, the whole Act cannot be declared as *ultra vires*. Moreso, when petitioners are unable to show that whole Act is brought into force by the State without their being any legislative competence for the same. *Secondly,* the impugned Act of 2021 is almost similar to **Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968** (hereinafter referred as "1968 Adhiniyam"). The constitutionality of 1968 Adhiniyam was called in question before this Court and

ultimately matter travelled to Apex Court. The said case was decided by a Constitution Bench of Supreme Court in **REV – Stainislaus vs. State of Madhya Pradesh and others, 1977 (1) SCC 677**. The constitutionality of the 1968 Adhiniyam was upheld by the Supreme Court. The impugned Act of 2021 is almost similar and enacted by changing the 'flavour' (कलेवर) of 1968 Adhiniyam and hence petition is not maintainable.

3. Faced with this, Mr. Manoj Sharma, learned Senior Advocate submits that relief claims in W.P.No.6263/2021 is very specific which reads as under :-

> "7.1 Strike down Sections 2(a), 2(b), 2(c), 2(d), 2(e), 2(i), 3, 4, 5, 6, 10 and 12 of the Madhya Pradesh Freedom of Religion Act, 2021.
>
> 7.2. Stay the operation of the Madhya Pradesh Freedom of Religion Act, 2021 as in direct contrast and opposition to the fundamental rights guaranteed under Articles 14, 19(1)(a), 19(1)(g), 21 and 25 of the Constitution of India.
>
> 7.3. Pass any other or further order(s) as this Court may deem fit and proper in the circumstances of the case."

4. So far rest of the petitions are concerned, he prays for and is granted permission to file appropriate applications to amend the petition/relief clause. Since one petition is clearly pregnant with specific relief clause, the respondents are not taken by surprise and were made aware about offending sections and grounds as taken by

the petitioners. Thus, we are not inclined to dismiss these petitions based on the *first* objection raised by learned Advocate General.

5. So far *second* objection of State is concerned, Shri Manoj Sharma, learned Senior Advocate submits that in the case of **REV – Stainislaus (supra),** the constitutionality of 1968 Adhiniyam was called in question only on the ground of alleged violation of Article 25 of the Constitution of India. If the provisions of impugned Act are examined in juxtaposition to the 1968 Adhiniyam, it will be clear that various provisions are differently worded.

6. Thus, Act of 2021 is not verbatim same if compared with the 1968 Adhiniyam. Apart from this, as per the legal journey, the constitutionality of provisions can now be tested on the anvil of legislative competence, breach of fundamental rights and right to privacy and other new grounds which are available to the petitioners. It is argued that in **AIR 1951 SC 318 (State of Bombay vs. F. N. Balsara),** the constitutionality of a statutory provisions was called in question. The Apex Court *declared* the law within the ambit of Article 141 of the Constitution. The similar question cropped up before Gujarat High court in **W.P. (PIL No.12/2019) Peter Jagdish Nazarath vs. State of Gujarat.** Learned Advocate General raised similar objection that since validity of Act in question has already been upheld by the Supreme Court in **F. N. Balsara** (supra), the constitutionality of the same again cannot be tested. The Gujarat High Court in its detailed order dated 23/08/2021 opined that there

are new grounds available now on the anvil of which constitutionality of same Act can be tested. This includes ground of 'right of privacy'. The Gujarat High Court opined that personal food preferences are related with 'right to privacy'. Thus, petitions cannot be dismissed as not maintainable. The impact of previous adjudication will be considered at appropriate stage i.e. final hearing.

7. We are in respectful agreement with the view taken and course adopted by the Gujarat High Court in the case of **Peter Jagdish (supra)**. Resultantly, *second* objection raised by the learned Advocate General cannot be accepted at this stage. The writ petitions contain arguable points.

8. Accordingly, the petitions are **admitted** for final hearing.

9. Learned Advocate General prayed for and is granted three weeks' time to file para-wise return.

10. Rejoinder, if any, may be filed within 21 days' therefrom.

11. We have also heard the parties on the question of interim relief. The petitioners have prayed that impugned act is clearly unconstitutional and therefore during the pendency of these matters, the respondent/State be restrained from prosecuting anyone under the impugned **M.P. Freedom of Religion Act, 2021** (Annexure-P/1).

12. To elaborate, learned counsel for the petitioners contended that the relevant provisions of 1968 Adhiniyam and impugned Act of 2021 are reproduced in juxtaposition in tabular form under para 5.16 of W.P. No. 12238/2021. The stand of the petitioners is that almost

similar enactment was introduced by Government of Gujarat which is called in question in a group of petitions including R/SCA No. **10304/2021 (Jamiat Ulema-E-Hind v. State of Gujarat)**. A Division Bench of Gujarat High Court headed by Hon'ble Chief Justice Mr. Vikram Nath (as his lordship then was) protected the petitioners. Similar protection is prayed for by the present petitioners' counsel.

13. In addition, it is urged that by State of Himachal Pradesh, the **H.P. Freedom of Religion Act, 2006** (Act No. 5 of 2007) was introduced. The said Act and Rules made thereunder became subject matter of challenge in **C.W.P. No. 438/2011 (Evangelical Fellowship of India Vs. State of H. P.).** The Division Bench of the High Court allowed the petition to limited extent and Section 4 of the impugned Act of H.P. and Rule 3 of relevant Rules were held be violative of Article 14 of the Constitution. Rule 5 was also partly held to be *ultra vires*. Rest of the Act and Rule 3 were declared to be *intra vires*. Shri Manoj Sharma, learned Sr. counsel submits that the State Government assailed this judgment of Himachal Pradesh High Court before the Supreme Court but their appeal was dismissed for want of prosecution and no efforts were made by the State for its restoration. Thus, judgment (**Evangelical Fellowship of India. supra)** reported in **2012 SCC online H.P. 5554** has attained finality. By placing reliance on various paragraphs of this judgment, it is argued that the aim, object and foundation of impugned provisions of M.P. Act are almost similar and founded upon same logic. For this

reason also, the impugned act needs to be interfered with. A comparative chart is placed before us containing the relevant provisions applicable in State of M.P., Gujarat and H.P.

14. It is common ground of learned counsel for the petitioners that by way of introducing present Act unbridled, uncanalized and arbitrary powers are given to the authorities. The fundamental right of citizen to practice a religion, marry a person of his choice irrespective of caste and religion of his spouse is sought to be interfered with and taken away. If the impugned act is permitted to stand it will not only infringe the valuable fundamental rights but will disturb the harmony of the society. Every citizen has a valuable right not to disclose his belief. The citizen is under no obligation either to disclose his own religion or his intention to switch over to another religion. The religious belief is a matter personal to a citizen. State has no right to compel a citizen to disclose about his personal belief. Disclosure of religion or intention to change the religion may rather lead to communal tension and may endanger the life or limb of the convertee. The requirement of prior information before conversion as par the Act of 2021 violates fundamental right of a citizen.

15. Learned Senior counsel further contended that Section 5 of the impugned Act shows that in case of contravention of Section 3 imprisonment for a term which shall not be less than 1 year is prescribed but proviso thereof shows that if contravention is in relation to a minor, a woman or a person belonging to reserved category, the term of

imprisonment shall be for a period of two years. Thus, men and women and other categories are treated differently which is unconstitutional in nature.

16. The 'burden of proof ' is placed on the shoulders of a convertee or a person who has allegedly violated the provisions of the impugned Act. This runs contrary to the settled principle of criminal jurisprudence. If these provisions are permitted to stand, it will have 'chilling effect' on the citizens.

17. In support of his submissions learned Senior counsel placed reliance on **Shreya Singhal Vs. Union of India 2015 (5) SCC 1**, **Shayara Bano Vs. Union of India and Ors. 2017 (9) SCC 1**, **Joseph Shine Vs. Union of India 2019 (3) SCC 39 (para 107).** For the purpose of showing 'standard of judicial scrutiny' and ‘doctrine of proportionality’, petitioners relied upon **Anuj Garg and Ors. Vs. Hotel Association of India and Ors. 2008(3) SCC 1**, **Om Kumar and ors. Vs. Union of India 2001(2) SCC 386**. The judgments of Supreme Court reported in **Shafin Jahan Vs. Asokan Km 2018 (16) SCC 368** and **Laxmibai Chandaragi B. and Anr. Vs. State of Karnataka and Ors. 2021 (3) SCC 360** were cited to contend that impugned enactment is *perse* unconstitutional therefore, petitioners are entitled to get interim protection. The whole intention shown for bringing the new Act is to take care of 'public order' submits Shri Manoj Sharma, learned senior counsel. No action in violation of impugned law will attract 'public order’ at all. For this purpose, **Ram Manohar Lohia Vs. State of Bihar and Anr. AIR 1966 SC 740** and **Arun Ghosh Vs. State of West Bengal 1970 (1) SCC 98** were relied upon.

18. Sounding a *contra* note, Shri Prashant Singh, learned Advocate General for the State submits that the petitioners are unable to establish that the impugned Act is introduced by the respondents without there being any competence for the same. The petitioners are claiming a blanket interim relief which cannot be granted. If interim relief is granted, it will amount to giving them final relief. It is contended that endeavour of the Court should be uphold the constitutionality of the enactment. Even if some portion of the enactment is unconstitutional, the remaining portion can be separated and upheld by applying the doctrine of severability. For the same purpose, **Suresh Kumar Koushal and Anr. Vs. Naz Foundation and Ors. AIR 2014 SC 563** is relied upon. In addition, it is submitted that if it is possible to apply the principle of 'reading down', while examining a statutory provision, attempt should be made to clarify and read it down rather setting it aside.

19. At the cost of repetition, learned Advocate General for the State submits that the impugned Act is almost similar to 1968 Adhiniyam, constitutionality of which has been tested till Apex Court. Hence, these petitions are not maintainable.

20. The respondents have also prepared a comparative chart containing relevant provision of the impugned Act of Madhya Pradesh and Gujarat Freedom and Religion Act 2003 with its amendment upto 2021. By taking this court to the said comparative chart, Learned Advocate General urged that the previsions of Gujarat Act are more stringent whereas in Madhya Pradesh due care has been taken to ensure that Act cannot misused by anyone. It is further submitted that the interim protection granted by Gujarat High Court in the case of **Jamait Ulma-E-Hind Gujarat (supra)** is based on the line of argument of the Advocate

General. However, in the present matter, the line of argument of State is different and, therefore, since the provisions and argument both are different, said interim order dated 26.8.2021 is of no assistance to the petitioners.

21. The petitioners have not placed on record any material to show that the impugned Act has been misused by the authorities. The definition of 'fraudulent' in the Act of 2021 is founded upon the principle flowing from Section 25 of the Indian Penal Code (IPC). Thus, no fault can be found in the impugned Act. During the course of argument, learned Advocate General fairly submitted that in State of M.P. The relevant rules under the Act 2021 have not been notified till date. After obtaining instructions, it is submitted that rules are under preparation and will be introduced within two weeks. In nutshell, learned Advocate General opposed the interim relief.

22. Learned Advocate General also relied upon on **Vijay Singh Gond and Ors. Vs. Union of India and Ors 2007(3) SCC 519** and **Health For Millions Vs. Union of India and Ors. 2014 (14) SCC 496** to bolster his submission that no interim relief is due to the petitioners. **Cellular Operators Association of India and Ors. Vs. Telecom Regulatory Authority of India and Ors. 2016(7) SCC 703** is pressed into service to show the scope of judicial review of subordinate legislation.

23. Learned counsel for the parties confined their arguments to the extent indicated above.

24. We have heard learned counsel for the parties on the question of interim relief at length.

25. The parties brought to our notice the different Acts introduced in the State of Madhya Pradesh, Gujarat and Himachal Pradesh (H.P.). The aim and object of the aforesaid acts is almost same. In order to appreciate the relevant provisions applicable in aforesaid three States, we deem it proper to reproduce the relevant portion from the comparative chart produced by the parties, which reads as under :-

S. No.	**Madhya Pradesh**	**Gujarat**	**Himachal**
1.	Section 2 (1)(a) "allurement" means and includes an act of offering of any temptation in the form of any gift or gratification, or material benefit, either in cash or kind or employment or education in school run by any religious body, "**better life style, divine pleasure or the promise of it thereof or otherwise.**"	Section 2(a) "allurement" means 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;	Section 2(d) "inducement" shall include the offer of any gift or gratification, either in cash or in any kind or grant of any kind benefit either pecuniary or otherwise.
3.	Section 2(1)(c) "Conversion" means renouncing one's own religion and adopting another religion; but the return of any person already converted to the fold of his parental religion shall not be deemed conversion.	Section 2(b) "convert" means to make one person to renounce one, religion and adopt another religion;	Section 2(a) "Conversion" means renouncing one religion and adopting another
4.	Section 2(1)(d) "force" includes a show of force or a threat of injury of any kind…. **including threat of**	Section 2(c) "force" includes a show of force or a threat of injury of any kind including	Section 2(b) "force" shall include show of force or threat of injury or threat of divine displeasure or

	divine displeasure or social ex-communication;	threat of divine displeasure or social ex-communication	social ex-communication
5.	Section 2(1)(e) "Fraudulent" includes **misrepresentation of any kind** or any other fraudulent contrivance.	Section 2 (d) "fraudulent means" includes misrepresentation or any fraudulent contrivance impersonation by false name, surname, religious symbol or otherwise.	Section 2(c) "fraud" shall include misrepresentation or any other fraudulent contrivance;
7.	Section 3(1) (a) "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 any of these means or by promise of **marriage**, nor shall any person abet or conspire such coversion:	Section 3 No person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by use of force or by allurement or by any fraudulent means nor any fraudulent means or by marriage or by getting a person married or by aiding a person to get married nor shall any person abet such conversion.	Section 3 No person shall covert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by inducement or any any other fraudulent means nor shall any person abet any such conversion: Provided that any person who has been converted from one religion to another, in contravention of the provisions of this Section, shall be deemed not to have been converted.
10.	Section 5 (1) Whoever contravenes the provisions of Section 3 shall, be punished with imprisonment of either description for a term not less than one year but which may extend to five	Section 4(1) whoever contravenes the provision of section 3 shall, without prejudice to any civil liability, be punished with imprisonment for a	Section 5 Any person contravening the provisions contained in section 3 shall, without the prejudice to any civil liability, be punishable with

	years and shall also be liable to fine of rupees twenty five thousand: Provided that whoever contravenes the provisions of Section 3 in respect of a **minor or a woman or a person belonging to the Scheduled Caste or Scheduled Tribe** shall be punished with imprisonment of either description for a term which shall not be less than two years, but which may extend to ten years and shall also be liable to fine of rupees fifty thousand. Provided further that whoever contravenes the provisions of section 3 in respect of mass conversion shall be punished with imprisonment for a term of which shall not be less than five years, but which may extend to ten years shall also be liable to fine of rupees one lakh. Provided also that in case of a second or subsequent offence mentioned in this section is committed, the term of imprisonment shall not be less than five years, and which may extend to 10 years and also fine	term, which may extend to three years and also liable to fine, which may extend to "rupees fifty thousand: provided that whoever contravenes the Provisions of Section 3 in respect of a minor, a woman or a person belonging to Scheduled Caste or Scheduled Tribe shall be punished with imprisonment for a term which may extend to four years and also be liable to fine which may extend to rupees one lakh.	imprisonment of either description which may extend to two years or fine which may extend to twenty five thousand rupees or with both: **Provided that in case the offence is committed in respect of a minor, a woman or a person belonging to Schedule Castes or Schedule Tribes, the punishment of imprisonment may extend to three years and fine may extend to fifty thousand rupees.**
12.	<u>Section 10</u> (1) **One who desires to**	Section 5(1) & (3) (1) whoever converts	Section 4 & Rule 3, 5 (1) **A person**

	convert his religion, shall give a declaration to that effect 60 days prior to such conversion to the District Magistrate in such form as maybe prescribed. (2) Any religious priest who intends to organize conversion shall give 60 days prior notice to the District Magistrate **in such form as may be prescribed.** (3) The District Magistrate, after receiving the information under sub-section **(1) and (2)** shall give acknowledgment of such **prior notice in such manner as may be prescribed.** (4) Whoever contravenes the provisions of sub-section (2) shall be punished with imprisonment for a term which shall not be less than three years but may extend to five years and shall also be liable to fine which shall not be less than rupees fifty thousand. (5) No court shall take cognizance of the offence committed under this section without prior sanction of the concerned District Magistrate.	any person from one religion to another either by performing any ceremony by himself for such conversion as a religious priest or takes part directly or indirectly in such ceremony shall take prior permission for such proposed conversion from the District Magistrate concerned by applying in such form as may be prescribed by rules. (3) Whoever fails, without sufficient cause to comply with the provisions of sub-sections (1) and (2) shall be punished with imprisonment for a term, which may extend to one year or with fine which may extend to rupees one thousand or with both	**intending to convert from one religion to another shall give prior notice of at least thirty days to the District Magistrate** of the district concerned of his intention to do so and the District Magistrate shall get the matter enquired into by such agency as he may deem fit: Provided that no notice shall be required if a person reverts back to his original religion. (2) Any person who fails to give prior notice, as required under sub-section (1) shall be punishable with fine which may extend to one thousand rupees. Rule 3 (1) Any person domiciled in the State, intending to convert his religion, shall give a notice to the District Magistrate of the District in which he is permanently resident, prior to such conversion, Form-A . (2) The District Magistrate shall cause all notices received under sub- rule (1) of rule 3 to be entered in a Register of Notices and Complaints of

			conversion in Form-B, and may within fifteen days from the receipt of said notice, get the matter enquired into by such agency as he may deem fit and record his findings as regards the particulars of notice given: Provided that the person giving notice and any other person likely to be prejudicially affected shall be given adequate opportunity to associate himself with any such enqiury. Rule 5 If after enquiry under rule 3 or rule 4, as the case may be, the District Magistrate records a finding that a conversion has taken place or is likely to take place through the use of force of inducement or without the requisite notice, he shall enter the particulars of the case in the Register of Forced conversion in Form-C and refer the case alongwith all material adduced during the course of the enquiry to the police station in which the person is resident or where the

			conversion is intended or done for registration of a case and its investigation.

26. *Prima facie*, a comparative reading of Section 3 of impugned Act of 2021 with corresponding provision of Gujarat Act shows that promise of marriage or marriage is also a facet which may attract Section 3(1)(a) of the Act in Madhya Pradesh like corresponding provision of Gujarat Act. The Division Bench of Gujarat High Court in the case of **Jamait Ulma-E-Hind Gujarat Vs. State of Gujarat (R/ Special Civil Application No. 10304 of 2021) dated 26.08.2021** consisting of Hon'ble the Chief justice Vikram Nath (as His Lordship then was) and Hon'ble Mr. Justice Biren Vaishnav passed an interim order. Relevant portion of which reads as under :-

> "8. We are therefore of the opinion that, pending further hearing the rigors of Sections 3, 4, 4A to 4C, 5, 6 and 6A shall not operate merely because of a marriage is solemnized by a person of one religion with a person of another religion without force or by allurement or by fraudulent means and such marriages cannot be termed as marriages for the purposes of unlawful conversion".
>
> **(Emphasis supplied)**

27. The Apex Court in catena of judgments poignantly held that if two adults decide to solemnize marriage, it is their personal choice which is integral to Article 21 of the Constitution of India. In **Lata Singh Vs. State of Uttar Pradesh and Ors. (2006) 5 SCC 475** this right of adults was duly recognized by the Apex Court. After following the judgment of

9 Judges Bench delivered in **K.S. Puttaswamy Vs. Union of India 2017(10) SCC 1**, in a recent judgment in **Laxmibai Chandaragi B** (Supra) the Apex Court held as under:-

> **"11.**We are fortified in our view by earlier judicial pronouncements of this Court clearly elucidating that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock and that their consent has to be piously given primacy. [*Shakti Vahini*v.*Union of India*, (2018) 7 SCC 192 : (2018) 3 SCC (Civ) 580 : (2018) 3 SCC (Cri) 1] It is in that context it was further observed that the choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. Such a right or choice is not expected to succumb to the concept of "class honour" or "group thinking". [*Asha Ranjan* v. *State of Bihar*, (2017) 4 SCC 397 : (2017) 2 SCC (Cri) 376]
>
> **12.** In *Shafin Jahan* v. *Asokan K.M.* [*Shafin Jahan* v. *Asokan K.M.*, (2018) 16 SCC 408 : (2020) 1 SCC (Cri) 884] this Court noticed that the society was emerging through a crucial transformational period. [*Lata Singh* v. *State of U.P.*, (2006) 5 SCC 475 : (2006) 2 SCC (Cri) 478] **Intimacies of marriage lie within a core zone of privacy, which is inviolable and even matters of faith would have the least effect on them. The right to marry a person of choice was held to be integral to Article 21 of the Constitution of India.** In this behalf, the judgment of the nine-Judge Bench in *K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India* [*K.S. Puttaswamy (Privacy-9 J.)* v. *Union of India*, (2017) 10 SCC 1] may also be referred to where the autonomy of an individual inter

alia in relation to family and marriage were held to be integral to the dignity of the individual.

(Emphasis supplied)

28. Para 298 of **K.S. Puttaswamy (Supra)** is worth mentioning :-

> **"298.** Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. **Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood**. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of

personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. **The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy.** An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, **the faith one will espouse** and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. **The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world**. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to

> the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy : this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."
>
> **(Emphasis supplied)**

29. A conjoint reading of aforesaid judgments of Supreme Court makes it clear like noon day that marriage, sexual orientation and choice in relation to these aspects are in the realm of right to privacy and it has a direct relation with the dignity of the individual.

30. Justice Deepak Gupta (as His Lordship then was) speaking for Division Bench of **H.P. High Court in Evangelical Fellowship of India and Anr. Vs. State of H.P. 2012 SCC Online HP 5554** has opined as under :-

> "37. A person not only has a right of conscience, the right of belief, the right to change his belief, but also has the right to keep his beliefs secret. No doubt, the right to privacy is, like any other right, subject to public order, morality and the larger interest of the State. When rights of individuals clash with the larger public good, then the individual's right must give way to what is in the larger public interest. However, this

does not mean that the majority interest is the larger public interest. Larger public interest would mean the integrity, unity and sovereignty of the country, the maintenance of public law and order. Merely because the majority view is different does not mean that the minority view must be silenced.

38. It has been strongly urged By Mr. R.K. Bawa, learned Advocate General, on behalf of the State that the right to privacy is not an indefeasible right. There can be no quarrel with this proposition. However, the State must have material before it to show what are the very compelling reasons which will justify its action of invading the right to privacy of an individual. A man's home is his castle and no invasion into his home is permissible unless justified on constitutional grounds. A man's mind is the impregnable fortress in which he thinks and there can be no invasion of his right of thought unless the person is expressing or propagating his thoughts in such a manner that it will cause public disorder or affect the unity or sovereignty of the country.

39. Why should any human being be asked to disclose what is his religion? Why should a human being be asked to inform the authorities that he is changing his belief? What right does the State have to direct the convertee to give notice in advance to the District Magistrate about changing his rebellious thought?

40. A person's belief or religion is something very personal to him. The State has no right to ask a person to disclose what is his personal belief. The only justification given is that public order requires that notice be given. We are of the considered view that in case of a person changing his religion and notice

being issued to the so called prejudicially affected parties, chances of the convertee being subjected to physical and psychological torture cannot be ruled out. The remedy proposed by the State may prove to be more harmful than the problem.

41. In case such a notice is issued, then the unwarranted disclosure of the voluntary change of belief by an adult may lead to communal clashes and may even endanger the life or limb of the convertee. We are not, in any manner, condoning or espousing conversions especially by "force", "fraud" or "inducement". Any conversion, which take place by "force", "fraud" or "inducement", must be dealt with strictly in accordance with law which we have held to be valid. At the same time, the right to privacy and the right to change the belief of a citizen cannot be taken away under the specious plea that public order may be affected. We are unable to comprehend how the issuance of a notice by a convertee will prevent conversions by "fraud", "force" or "inducement". In fact, this may open a Pandora's box and once notice is issued, this may lead to conflicts between rival religious outfits and groups. No material has been placed on record by the State to show that there has been any adverse effect on public order by any conversion in the State whether prior to or after the enactment of the Himachal Pradesh Act. In fact, till date only one case has been registered under this Act.

42. As observed by us above, conversions may not require any ceremony in some religions and how will the Government determine when the thought process of a person has changed. A person who belongs to A religion and willingly wants to convert to B religion will not change his religion overnight, except in case of forced conversions or conversions which take place

due to payment of cash or other material gifts. Change of religion, when it is of its own volition, will normally be a long drawn out process. If a person of his own volition changes his religion, there is no way that one can measure or fix the date on which he has ceased to belong to religion A and converted to religion B. This has to be an ongoing process and therefore, there can be no notice of thirty days as required under the Himachal Pradesh Act.

43. Furthermore, we are of the view that the proviso to Section 4 is also discriminatory and violative of Article 14 of the Constitution of India. "Original religion" has not been defined in the Himachal Act. According to Dr. Subramanian Swamy, the original religion is Hindu religion alone. We cannot accept this submission of his. The general consensus of opinion used was that the original religion would be the religion of the convertee by birth, i.e. the religion he was born into.

44. We fail to understand the rationale why if a person is to revert back to his original religion, no notice is required. It was urged before us that since he was born in his religion and knows his religion well, therefore, it was thought that while reverting back to his original religion, no notice be issued. This argument does not satisfy the parameters of Article 14 of the Constitution of India. Supposing a person born in religion A converts to religion B at the age of 20 and wants to convert back to religion A at the age of 50, he has spent many more years, that too mature years, being a follower of religion B. Why should he not be required to give notice?

45. Another question which is troubling us is if a person born in religion A, converts to religion B, then converts to religion C and then to religion D. If he

converts back to religion B or C, he is required to give notice, but if he converts back to religion A, then no notice is required. This also, according to us, is totally irrational and violative of Article 14 of the Constitution of India."

(Emphasis supplied)

31. In **Joseph Shine (Supra)** it was ruled as under :-

"103. Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman's husband is obtained — the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the "licensor", namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject-matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has "seduced" her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt, as has been held by this

Court in *Shayara Bano* v. *Union of India* [*Shayara Bano* v. *Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] , as follows : (SCC p. 99, para 101)

> "*101*. … Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

107. The dignity of the individual, which is spoken of in the Preamble to the Constitution of India, is a facet of Article 21 of the Constitution. A statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also."

(Emphasis supplied)

32. The judgment of **Puttaswamy (supra)** was again followed in the case of **Shafin Jahan (supra)** the following paragraphs are relevant :-

> **"86.** The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core

of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. **These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.**

87. In *K.S. Puttaswamy* v. *Union of India* [*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1] , this Court in a decision of nine Judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality: (SCC pp. 498-99, para 298)

> "*298*. … The autonomy of the individual is the ability to make decisions on vital matters of concern to life. … The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. … The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."

A Constitution Bench of this Court, in *Common Cause* v. *Union of India* [*Common Cause* v.

Union of India, (2018) 5 SCC 1] , held: (SCC p. 194, para 346)

> "*346*. … Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives."

The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."

(Emphasis supplied)

33. In **Amish Devgan Vs. Union of India and Ors. (2021) 1 SCC 1** the Supreme Court again followed the ratio decidendi of K.S.Puttaswamy (supra) and came to hold regarding curtailment of fundamental right and scope of judicial review as under :-

> **"57.** We need not elaborate on this principle in view of the limited controversy involved in the present case, albeit the formulation recognizes the benefit and need for least intrusive measure when it comes to curtailment of fundamental rights and for this purpose the Court can examine the reasonableness of the measures undertaken and whether they are necessary, in that there are no alternatives measures that can achieve the same purpose with a lesser degree of restriction. Secondly, there has to be proper proportionality or balance between the importance of achieving the proper measure and

social importance of preventing the limitation on the constitutional right."

(Emphasis supplied)

34. Way back in 1962 the Constitution Bench of Supreme Court in **Sardar Syedna Taher Saifuddin Saheb Vs. State of Bombay (AIR 1962 SC 853)** poignantly held that '*a person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious belief, by the State or by any other person*'.

35. The Himachal Pradesh High Court in aforesaid judgment expressed its inability to give its stamp of approval to the impugned provisions of the enactment where a citizen was required to disclose his religion and where he was asked to inform the authorities about his intention to change his belief or religion. The provision directing the convertee to give notice in advance to the District Magistrate about changing his religion could not sustain judicial scrutiny. The belief of a citizen regarding the religion is held to be a personal belief of citizen. Interference of State in this personal arena was disapproved. In Para 40 and 41 of the said judgment, High Court held that right to privacy of a citizen and the right to change the belief cannot be taken away under the garb of maintaining 'public order'. If this is permitted, it will open the pandora box and this may lead to conflicts between the rival outfits and groups.

36. We will be failing in our duty if the judgments cited by the learned Advocate General are not considered. There cannot be any quarrel about the limited scope of judicial review available against an enactment or a

statutory provision. It is equally settled that interim relief against legislation cannot be granted on mere asking. However, there is no rule of thumb that no interim relief can be granted if a strong case is made out showing the enactment *ex facie* unconstitutional and also by taking into account the balance of convenience, irreparable injury and public interest. Relevant portion of para-13 of the judgment of **Health for millions (Supra)** on which heavy reliance is placed by learned Advocate General reads as under :-

> **"13.** We have considered the respective arguments and submissions and carefully perused the record. Since the matter is pending adjudication before the High Court, we do not want to express any opinion on the merits and demerits of the writ petitioner's challenge to the constitutional validity of the 2003 Act and the 2004 Rules as amended in 2005 but have no hesitation in holding that the High Court was not at all justified in passing the impugned orders ignoring the well-settled proposition of law that in matters involving challenge to the constitutionality of any legislation enacted by the legislature and the rules framed thereunder the courts should be extremely loath to pass an interim order. At the time of final adjudication, the court can strike down the statute if it is found to be *ultra vires* the Constitution. Likewise, the rules can be quashed if the same are found to be unconstitutional or *ultra vires* the provisions of the Act. **However, the operation of the statutory provisions cannot be stultified by granting an interim order except when the court is fully convinced that the particular enactment or the rules are *ex facie***

> **unconstitutional** and the factors, like balance of convenience, irreparable injury and public interest are in favour of passing an interim order.
>
> **(Emphasis supplied)**

37. The Constitution of India is *suprema lex*. A written Constitution pregnant with a bill of rights, like our Constitution recognises certain human rights and fundamental freedoms beyond the clutches of ordinary laws for the simple reason that these rights are not outcome of any statutory law. Indeed, such rights flow from the fountain head of all laws i.e. Constitution of India. Hon'ble Justice Chandrachud in **Kesavananda Bharati vs. State of Kerala AIR 1973 SC 1461**, set the tone in this regard in following words:-

> "What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal process. But that does not bear on their relative importance… The basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV… if the State fails to create conditions in which the fundamental freedoms can be enjoyed by all, freedom of the few will be at the mercy of the many and then all freedoms will vanish."
>
> **(Emphasis supplied)**

38. In the judgment of Supreme Court in **Lata Singh (Supra), Laxmibai Chandaragi B. (Supra)** it was recognised that marriage lie

within a core zone of privacy of a citizen which is inviolable. Right to marry a person of choice is held to be integral to Article 21 of the Constitution. In **K. S. Puttaswamy (supra)**, the nine judges Bench has drawn the curtains on this aspect by holding that the family, marriage, procreation and sexual reorientation are all integral to the dignity of the individual. An individual has a fundamental right to decide the form of expression which includes his right to remain silent. Silence postulates a realm of privacy. The right to remain silent includes the right to decide the preferences on various aspects of life including the faith one will espouse. The Constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. The H.P. High Court in case of **Evangelical Fellowship of India (supra)** declared the offending statutory provision as illegal wherein citizen was required to inform the authorities about his wish to change the religion.

39. Considering the aforesaid judgments, in our considered opinion, a strong *prima facie* case is made out by the petitioners for grant of interim protection in relation to marriage of two adult citizens on their volition and against any coercive action for violation of Section 10 of the Act of 21. Section 10 makes it obligatory for a citizen desiring conversion to give a declaration in this regard to the District Magistrate which in our opinion ex facie, unconstitutional in the teeth of aforesaid judgments of this Court. Thus, till further orders, respondent shall not prosecute the adult citizens if they solemnize marriage on their own volition and shall not take coercive action for violation of Section 10 of Act of 21.

40. The State shall file its para-wise return within three weeks. Parties shall complete their pleadings at the earliest. Liberty is reserved to the parties to file appropriate application seeking out of turn final hearing of this matter after completion of pleadings.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

manju