A.F.R.

Reserved on: 14.12.2020

Delivered on: 12.01.2021

Court No. - 15

Case :- HABEAS CORPUS No. - 16907 of 2020
Petitioner :- Smt. Safiya Sultana Thru. Husband Abhishek Kumar Pandey & Anr
Respondent :- State Of U.P. Thru. Secy. Home, Lko. & Ors.
Counsel for Petitioner :- Adarsh Kumar Maurya, Archana Singh

Hon'ble Vivek Chaudhary, J.

1. The present Habeas Corpus Petition is filed by Petitioner no.1-wife through Petitioner no.2-husband, claiming that detenue-Petitioner no.1, Smt. Safia Sultana, who after converting to Hindu religion and renamed as Smt. Simran, married Petitioner no.2 as per Hindu rituals. However respondent No.4, her father, is not permitting her to live with her husband. They both are adults, duly married with their free will and desire to live together. Thus the custody of the detenue by her father is illegal. The Court directed for the presence of the detenue and her father. They both appeared in person, wherein, the Petitioner no.1 accepted the averments aforesaid and had shown her desire to live with her husband. The Respondent no.4-father of the detenue also fairly accepted that since she is an adult, has married with her choice and wanted to live with her husband, he also accepts her decision and wished both of them best for their future.

2. This matter could have come to an end at this stage, but, for the views expressed by the young couple while interacting with the Court on their personal appearance, the young couple expressed that they could have solemnized their marriage under the Special Marriage Act, 1954 but the said Act requires a 30 days notice to be published and objections to be invited from the public at large. They

expressed that any such notice would be an invasion in their privacy and would have definitely caused unnecessary social pressure/interference in their free choice with regard to their marriage. The personal laws do not impose any such condition of publication of notice, inviting and deciding objections before solemnizing any marriage. They further state that such a challenge is being faced by a large number of similarly situated persons who desire to build a life with a partner of their own choice. Learned counsel for petitioners also stated that the situation may become more critical with notification of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, as the same prohibits conversion of religion by marriage to be unlawful. Learned counsel for petitioners further argues that looking into the changing pattern of the society, amendments made to the Special Marriage Act, 1954 as well as the law declared by the Supreme Court in the last around a decade with regard to privacy, liberty and freedom of choice of a person, provisions of Special Marriage Act, 1954, directing publication of a notice before marriage and inviting public objections, require a revisit to understand whether now with the said change they are to be treated as mandatory or directory in nature.

3. It is further submitted that such young couples are not in a position to raise these issues before solemnizing their marriages as any litigation further attracts unnecessary attention which invades into their privacy and also causes unnecessary social pressure upon them with regard to their choice of a life partner.

4. Since, the issues raised by the petitioners and their counsels involves right of life and liberty of a large number of persons, therefore, this Court is duty bound to consider their submissions. Suffice would be

to refer to the judgment of the Supreme Court in ***Shakti Vahini vs. Union of India and others***[1]**.** The relevant paragraph reads:

> *"44. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the constitutional courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement."*

5. As the issue involves interpretation of a Central Act, Sri Surya Bhan Pandey, learned Assistant Solicitor General of India was also requested to assist the Court. Heard Sri Adarsh Kumar Maurya, Smt. Archana Singh, learned counsels for petitioners, Sri S.B. Pandey, learned Assistant Solicitor General assisted by Sri Amresh Rai and Sri Santosh Kumar Mishra, learned AGA-I for the State.

6. For the purpose of the present case, following sections of Special Marriage Act, 1954 are of relevance:

> *"**4. Conditions relating to solemnization of special marriages**: Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—*
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> *(a) neither party has a spouse living;*
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> *(b) neither party—*
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> *(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or*
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> *(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or*

1 (2018) 7 SCC 192

(iii) has been subject to recurrent attacks of insanity

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

***5. Notice of intended marriage**: When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.*

***6.Marriage Notice Book and publication:** (1) The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.*

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

7. Objection to marriage: *(1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.*

(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be signed by him or on his behalf.

8. Procedure on receipt of objection: *(1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.*

(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court.

46. Penalty for wrongful action of Marriage Officer: *Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act,—*

(1) without publishing a notice regarding such marriage as required by Section 5, or

(2) within thirty days of the publication of the notice of such marriage, or

(3) in contravention of any other provision in this Act, shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both."

7. The society has an ever changing phenomenon. It keeps changing with time as per its new needs, expectation and other changing aspects. The very purpose of law is to serve the society as per its requirements; therefore, the law also keeps evolving with the changes in society. Thus, it would be appropriate, before coming to the Special Marriage Act, 1954 and its present relevance, to briefly visit the history and development of the law with regard to civil marriages in India.

8. A Bill was introduced by Sir Henry Maine for the first time proposing a law for inter-cast and inter-religion marriages in India. The proposed Bill permitted any two citizens of India to marry under the same instead of their respective personal laws. The Bill was vehemently opposed in the legislature and was vastly modified before it was enacted and enforced on 22nd March 1872 as "Special Marriage Act, 1872 (Act of 1872)". The law, as passed, provided that any two persons after declaring complete severance from their respective faith can marry under the Act of 1872. The Act of 1872 was amended in the year 1923 and thereafter it became permissible for the individuals to marry under the same without renouncing their religion.[2] Section 2 of the Act of 1872 provided the conditions to be fulfilled before any marriage could be performed. Section 6 of the said Act provided procedure for a public notice to be made and thereafter Sections 7 and 8 and further sections provided the procedure for deciding the objections, if any, filed against the proposed marriage which could be filed by any person.

9. With the independence of India and coming into force of a secular Constitution in January, 1950, the Parliament proceeded to revisit the personal laws and laws with regard to marriages and thus along with

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2 Civil Marriage Law: Perspective and Prospects prepared by Tahir Mahmood, under the auspices of Indian Law Institute Chapter 1 (Published by N. M. Tripathi Pvt. Ltd. 1978)

other enactments, it also passed the Special Marriage Act, 1954 (Act of 1954). Under the Act of 1954 any two Indians living wheresoever, and whether professing the same or different religions (or no religion at all), could solemnize their marriage provided that they fulfilled the conditions provided under Section 4 of the said Act. Act of 1954 also provided that an existing marriage, solemnized under whatever law, could be registered under the new law, if the same fulfilled the conditions provided therein. After registration, the marriage stood covered under the provisions of Act of 1954 and not under the personal law wherein it was initially solemnized. The Act of 1954 also prescribed rights of persons concerned with regard to separation, divorce and inheritance etc. including judicial procedures for enforcement of the same and thus came in force a complete code with regard to civil marriages in India. The Act of 1954 was also amended from time to time as per the changing needs of the society. The procedure of publishing a notice and inviting objections from public at large, as was provided under Act of 1872 was, thus, also adopted by the Act of 1954 with minor variations.

10. The golden rule of interpretation of statute is that so far as possible plain reading of the provisions should be accepted. Further, if any penal consequences are provided the provision would be mandatory in nature. In view of aforesaid, more specifically in view of the punitive consequences under Section 46, the publication of notice under Section 6 and inviting objections and decision thereupon under Section 7 was treated as mandatory. Thus the Marriage Officers have always published a notice of intended marriage and invited objections. Marriages under the Act of 1954 were only solemnized after a period of thirty days of notice or after decision on the objections, in case filed.

11. The question raised before this Court is, whether the social conditions and the law, as has progressed since passing of Act of 1872 and thereafter Act of 1954 till now, would in any manner impact the interpretation of Sections 5, 6 and 7 of the Act of 1954 and whether with change the said sections no more remain mandatory in nature. This argument is based on another principle of interpretation, that, an ongoing statute should be interpreted on the basis of present day's changed conditions and not on old obsolete conditions. The Supreme Court considered the said principle in ***Satyawati Sharma vs. Union of India***[3]**.** The Supreme Court, referring to its earlier judgments, held:

> *"32. It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent. It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent. In State of Madhya Pradesh vs. Bhopal Sugar Industries [AIR 1964 SC 1179], this Court while dealing with a question whether geographical classification due to historical reasons could be sustained for all times and observed: (AIR p.1182, para 6)*
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> > *"6. ..Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised, State, did not therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of*

3 (2008) 5 SCC 287

geographical regions for historical reason may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared."

33. In Narottam Kishore Dev Verma vs. Union of India [AIR 1964 SC 1590] the challenge was to the validity of Section 87-B of the Code of Civil Procedure which granted exemption to the rulers of former Indian States from being sued except with the consent of the Central Government. In the course of judgment, it was observed as under: (AIR p.1593, para 11)

"11. ..If under the Constitution all citizens are equal, it may be desirable to confine the operation of Section 87-B to past transactions and nor to perpetuate the anomaly of the distinction between the rest of the citizens and Rulers of former Indian States. With the passage of time, the validity of historical considerations on which Section 87-B is founded will wear out and the continuance of the said section in the Code of Civil Procedure may later be open to serious challenge."

34. In H.H. Shri Swamiji Shri Admar Mutt Etc, vs. The Commissioner, Hindu Religious & Charitable Endowments Department [1979 (4) SCC 642] this Court was called upon to consider the validity of the continued application of the provisions of the Madras Hindu Religious Endowment Act, 1951 in the area which had formerly been part of State of Madras and which had latter become part of the new State of Mysore (now Karnataka) as a result of the State Re-organisation Act, 1956. While declining to strike down the legislation on the ground of violation of Article 14 of the Constitution, the Court observed: (SCC p.658, para 29)

"An indefinite extension and application of unequal laws for all time to come will militate against their true character as temporary measures taken in order to serve a temporary purpose. Thereby, the very foundation of their constitutionality shall have been destroyed the foundation being that Section 119 of the State Reorganisation Act serves the significant purpose of giving reasonable time to the new units to consider the special circumstances obtaining in respect of diverse units.

The decision to withdraw the application of unequal laws to equals cannot be delayed unreasonably because of the relevance of historical reasons which justify the application of unequal laws is bound to wear out with the passage of time. In Broom's Legal; Maxim (1939 Edition, page 97) can be found a useful principle "Cessante Ratione Legis Cessat Ipsa Lex", that is to say, "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

32. In Motor General Traders vs. State of Andhra Pradesh (supra), validity of Section 32(b) of the A.P. Buildings (Lease, Rent and Eviction) Control, Act, 1960 was considered. By that Section it was declared that the provisions of the main Act will not apply to the buildings constructed after 25th August, 1957. The Court noted that exemption had continued for nearly a quarter century and struck down the same despite the fact that validity thereon had been upheld by the High Court in Chintapalli Achaiah vs. P. Gopala Krishna Reddy [AIR 1966 AP 51]. Some of the observations made in the judgment are worth noticing. These are:

"16. What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Article 14 of the Constitution if it is persisted in over a long period without any justification."

"24. ... What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century....We are constrained to pronounce upon the validity of the impugned provision at this late stage because of grab of Constitution which it may have possessed earlier has become worn out and its unconstitutionality is now brought to a successful challenge".

"24. ... As already observed, the landlords of the buildings constructed subsequent to August 26, 1957 are given undue preference over the landlords of buildings constructed prior to that date in that the former are free from the shackles of the Act while the latter are subjected to the restrictions imposed by it. What should have been just an incentive has become a permanent bonanza in favour of those who constructed buildings subsequent to August 26, 1957. There being no justification for the continuance of the benefit to a class of persons without any rational basis whatsoever, the evil effects flowing from the

impugned exemption have caused more harm to the society than one could anticipate. What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad. "Time does not run in favour of legislation. If it is ultra vires, it cannot gain legal strength from long failure on the part of lawyers to perceive and set up its invalidity. Albeit, lateness in an attack upon the constitutionality of a statute is but a reason for exercising special caution in examining the arguments by which the attack is supported."

12. Following ***Satyawati Sharma***[3] in case of ***Kashmir Singh vs. Union of India***[4] the Supreme Court holds:

"55. The superior courts must remember a well-known principle of law that the Court while construing an ongoing statute must take into consideration the changes in the societal condition. It would be a relevant fact. (see ***Satyawati Sharma***[3]*)*

68. For the purpose of giving an effective and meaningful construction of the provisions, the court is bound to take into consideration the situational change...

72. We, therefore, are of the opinion that in view of the situational change, a meaning which could be attributed in the year 1925 cannot be given the same meaning today. For the aforementioned purpose, Sections 40 and 70 of the Act must be read together. Therefore a holistic reading of the entire Act would be necessary."

13. Thus this Court is required to consider the changes in the social and legal aspects, if any, that may impact the interpretation of the provisions of the Act of 1954.

Reports of the Law Commission of India:

14. Touching upon the Act of 1954, the changes occurring in the society over a period of time and need for consequential changes to be

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3 Satyawati Sharma vs. Union of India, (2008) 5 SCC 287

4 (2008) 7 SCC 259

brought in law is aptly emphasised and followed by the Law Commission of India (Law Commission) in its following reports.

15. In its 59th report submitted in the year 1974, the Law Commission, while proposing amendments in the Act of 1954 as well as in the Hindu Marriage Act, 1955, states:

> *"1.11: The object of law, whether personal or public, must be to sustain the stability of the society and help its progress: -*
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> *The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary."*
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> *"1.16: It may sound platitudinous but is nevertheless true that revision of laws is a 'must' in a dynamic society like ours which is engaged on the adventure of creating a new social order founded on faith in the value-system of socio-economic justice enshrined in our Constitution. With the changing times, notions of fairness and justice assume newer and wider dimensions, and customs and beliefs of the people change. These, in turn, demand changes in the structure of law; every progressive society must make a rational effort to meet these demands. Between the letter of the law and the prevailing customs and the dictates of the current value-system accepted by the community, there should not be an unduly long gap. Ranade often said that the story of social reform, which involves reform in personal law, is an unending story; it continues from generation to generation. Each generation contributes to the continuance of the effort of social reform; but the effort is never concluded and the end is never reached in the sense that no further attempt to reform is required. It is in that sense that we believe that the revision of personal laws, and indeed, of all laws, has to be undertaken by modern societies. These thoughts have been present in our mind when we embarked upon the present inquiry"*
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> *"1.20: In any civilised and progressive society, marriage is an institution of great importance. It is the centre of a family which in turn, is a significant unit of the social structure. Children who are born of marriage, also contribute to the stability of the institution of marriage."*

16. Concluding the said report, the Law Commission proposed Marriage Laws (Amendment) Bill of 1974 suggesting amendments in the Act

of 1954 as well as in the Hindu Marriage Act, 1955. The Act of 1954 was duly amended in the year 1976.

17. The Law Commission again submitted a report No.212, in the year 2008, titled "Laws of Civil Marriages in India – A Proposal to Resolve Certain Conflicts". After taking into consideration the changes in the social norms as well as in law, the Law Commission made seven recommendations with regard to Act of 1954. Relevant for our purposes are:

> *"1. The word "Special" be dropped from the title of the Special Marriage Act 1954 and it be simply called "The Marriage Act 1954" or "The Marriage and Divorce Act 1954." The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce and that there is nothing "special" about a marriage solemnized under its provisions. It is in fact marriages solemnized under the community-specific laws which should be regarded as "special."*
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> *2. A provision be added to the application clause in the Special Marriage Act 1954 that all inter-religious marriages except those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not shall be governed by this Act.*
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> *3. The definition of "degrees of prohibited relationship" given in Section 2 (b) in the Special Marriage Act 1954 and the First Schedule detailing such degrees appended to the Act be omitted. Instead, it should be provided in Section 4 of the Act that prohibited degrees in marriage in any case of an intended civil marriage shall be regulated by the marriage law (or laws) otherwise applicable to the parties.*
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> *4. The requirement of a gazette notification for recognition of custom relating to prohibited degrees in marriage found in the Explanation to Section 4 of the Special Marriage Act 1954 be deleted."*

18. Again the Law Commission submitted report No.242, in the year 2012, titled "Prevention of Interference with the Freedom of

Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework." It states:

> *"4.1 The autonomy of every person in matters concerning oneself – a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary.*
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> *4.2 In moments and periods of social transition, the tensions between individual freedom and past social practices become focal points of the community's ability to contemplate and provide for least hurting or painful solutions. The wisdom or wrongness of certain community perspectives and practices, their intrinsic impact on liberty, autonomy and self-worth, as well as the parents' concern over impulsive and unreflective choices – all these factors come to the fore-front of consideration."*

19. It recommended to simplify the procedure under the Special Marriage Act. It says:

> *"9: it is desirable that the procedure under the Special Marriage Act is simplified. The time gap between the date of giving notice of marriage and the registration should be removed and the entire process of registration of marriage should be expedited. The domicile restriction should also be removed. We are aware, that already an amendment is proposed to the Special Marriage Act by the Government of India by introducing a Bill in the Parliament. It is, therefore not necessary to make a detailed study and give specific recommendation on this aspect."*

20. It summarily recommended:

> *"11.1 In order to keep a check on the high-handed and unwarranted interference by the caste assemblies or panchayats with sagotra, inter-caste or inter-religious marriages, which are otherwise lawful, this legislation has been proposed so as to prevent the acts endangering the liberty of the couple married or intending to marry and their family members. It is considered necessary that there*

should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage / intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e., for condemning the marriage with a view to take necessary consequential action, are to be treated as members of unlawful assembly for which a mandatory minimum punishment has been prescribed.

11.2 So also the acts of endangerment of liberty including social boycott, harassment, etc. of the couple or their family members are treated as offences punishable with mandatory minimum sentence. The acts of criminal intimidation by members of unlawful assembly or others acting at their instance or otherwise are also made punishable with mandatory minimum sentence.

11.3 A presumption that a person participating in an unlawful assembly shall be presumed to have also intended to commit or abet the commission of offences under the proposed Bill is provided for in Section 6.

11.4 Power to prohibit the unlawful assemblies and to take preventive measures are conferred on the Sub-Divisional / District Magistrate. Further, a SDM/DM is enjoined to receive a request or information from any person seeking protection from the assembly of persons or members of any family who are likely to or who have been objecting to the lawful marriage.

11.5 The provisions of this proposed Bill are without prejudice to the provisions of Indian Penal Code. Care has been taken, as far as possible, to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law.

11.6 The offence will be tried by a Court of Session in the district and the offences are cognizable, non-bailable and non-compoundable.

11.7 Accordingly, the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 20___ has been prepared in order to effectively check the existing social malady."

21. It appears that the Bills proposed by the Law Commission in its reports No. 212 (year 2008) and 242 (year 2012) are still pending for consideration.

Development of Law:

22. ***Lata Singh Vs. State of U.P. and another***[5] was one of the initial cases which came up before the Supreme Court raising the issue of the right of a person to marry of his own choice. In the said case petitioner solemnized her marriage, with her own free will, with a person of another caste. The said marriage was strongly opposed by her brothers and they also committed violence upon her and her husband. Condemning the same, Supreme Court held:

> *"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished.* ***This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.*** *We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."* *(emphasis supplied)*

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5 (2006) 5 SCC 475

23. Again the issue was considered in the cases of ***Arumugam Servai vs. State of Tamil Nadu***[6]and ***Bhagwan Dass vs. State (NCT of Delhi)***[7]. In both the cases, brutality was caused by "khappanchayat" or family members against the persons solemnizing marriage with their own choice. The Supreme Court referring to the case of ***Lata Singh***[5]strongly condemned and criticized such atrocious acts and directed the State authorities to take immediate steps in all such cases.

24. In ***Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23-1-2014 in Re***[8] the Supreme Court found the right of freedom of choice in marriage to be a fundamental right and an inherent aspect of Article 21 of the Constitution of India. The court declared:

> *"16. Ultimately, the question which ought to consider and assess by this Court is whether the State police machinery could have possibly prevented the said occurrence. The response is certainly a "yes". **The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage**. Such offences are resultant of the State's incapacity or inability to protect the fundamental rights of its citizens." (emphasis supplied)*

25. Another case of honour killing came up before Supreme Court in ***Vikas Yadav vs. State of U.P. and another***[9]. Again Court held:

> *"75. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. **Freedom, independence, constitutional identity, individual choice and thought of a woman, be a wife or sister or daughter or mother, cannot be allowed to be curtailed definitely not by application of***

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6 (2011) 6 SCC 405

7 (2011) 6 SCC 396

5 Lata Singh vs. State of U.P. and another, (2006) 5 SCC 475

8 (2014) 4 SCC 786

9 (2016) 9 SCC 541

> ***physical force or threat or mental cruelty in the name of his self-assumed honour***. *That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl.* ***Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so called brotherly or fatherly honour or class honour by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise.*** *It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions." (emphasis supplied)*

26. In ***Asha Ranjan vs. State of Bihar***[10], the Supreme Court again declared the right of a person in choosing a partner to be legitimate constitutional right recognized under Article 19 of the Constitution of India. The judgment reads:

> *"61. ...****choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking"****. It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion." (emphasis supplied)*

27. Supreme Court considered the matter of the honour killing and right to marry at length in the case of ***Shakti Vahini***[1]. The relevant paragraphs of the said judgment read as under:

> *"41.* ***What we have stated hereinabove, to explicate, is 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. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality****. It does not recognise any space for informal institutions for delivery of justice. It is so since a polity governed by "Rule of Law" only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the khap*

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10 (2017) 4 SCC 397

1 Shakti Vahini Vs. Union of India and others, (2018) 7 SCC 192

panchayat or any panchayat of any nomenclature cannot create a dent in exercise of the said right.

43. Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. ***It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.***

44. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the constitutional courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. ***Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realisation of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.***

45. ***The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation…***

> *52. Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation.* ***Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives and we do so*** *on the foundation of the principle stated in Lakshmi Kant Pandey vs. Union of India reported in (1984) 2 SCC 244, Vishaka Vs. State of Rajasthan reported in (1997) 6 SCC 241 and Prakash Singh Vs. Union of India reported in (2006) 8 SCC 1."*
>
> *(emphasis supplied)*

28. Thus the Supreme Court in the case of ***Shakti Vahini***[1] again held the right to choose a life partner, to be a fundamental right recognized under Article 19 and 21 of the Constitution. Once the said fundamental right is inherent in a person, the same cannot be scuttled. It found that it is the duty of the Court to remove any interference with the legitimate rights of the young couples or anyone associated with them. The Supreme Court also issued preventive, remedial as well as punitive measures to be followed and implemented by the State authorities.

29. In a Habeas Corpus Petition ***Shafin Jahan vs. Asokan K.M. and Others***[11] again right of an individual to marry without any interference came up before the Supreme Court. In the said case, the High Court failed to take appropriate steps for releasing the detenue, a major lady, to live with her own choice, while trying to make out a case of attempts being made for taking her out of the country after change of religion in a clandestine manner. The relevant portions of the judgment read:

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1 Shakti Vahini Vs. Union of India and others, (2018) 7 SCC 192

11 (2018) 16 SCC 368

"52. ***It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating there from on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person.*** *The social values and morals have their space but they are not above the constitutionally guaranteed freedom.* ***The said freedom is both a constitutional and a human right****. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.* ***It has to be remembered that the realisation of a right is more important than the conferment of the right. Such actualisation indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.***

53. ***Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a constitutional court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.***

54. In the case at hand, ***the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his viewpoint or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the appellant.*** *Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the appellant and Respondent 9 when both stood embedded to their vow of matrimony.*

84. A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its

jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. ***The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme****. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground****. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution****. In deciding whether Shafin Jahan is a fit person forHadiya to marry, the High Court has entered into prohibited terrain.* ***Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognisingthem. Indeed, the Constitution protects personal liberty from disapproving audiences.***

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 Justice K S Puttaswamy vs. Union of India reported in (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 (A Regd. Society) vs. Union of India reported in (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.

88. The High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude. The High Court was of the view that at twenty-four, Hadiya "is weak and vulnerable, capable of being exploited in many ways". ***The High Court has lost sight of the fact that she is a major, capable of taking her own decisions and is entitled to the right recognised by the Constitution to lead her life exactly as she pleases.*** *The concern of this Court in intervening in this matter is as*

much about the miscarriage of justice that has resulted in the High Court as much as about the paternalism which underlies the approach to constitutional interpretation reflected in the judgment in appeal. The superior courts, when they exercise their jurisdiction parents patriae do so in the case of persons who are incapable of asserting a free will such as minors or persons of unsound mind. ***The exercise of that jurisdiction should not transgress into the area of determining the suitability of partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty-bound not to swerve from the path of upholding our pluralism and diversity as a nation.****"* *(emphasis supplied)*

30. A conflict in various decisions was found with regard to the right to privacy of an individual and true nature of such a right. The same was thus referred to a nine-Judge Bench in case of ***Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others***[12]. The issue before the Supreme Court can be well understood from the following paragraphs of the judgment:

"2. Nine judges of this Court assembled to determine ***whether privacy is a constitutionally protected value.*** *The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation.* ***If privacy is to be construed as a protected constitutional value, it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection.***

*4. ……****The Attorney General for India urged that the existence of a fundamental right to privacy is in doubt in view of***

12 (2017) 10 SCC 1

two decisions : the first – M P Sharma vs. Satish Chandra reported in AIR 1954 SC 300 ("M.P. Sharma")was rendered by a Bench of eight Judges and the second, in Kharak Singh vs. State of Uttar Pradesh reported in AIR 1963 SC 1295 ("Kharak Singh") was rendered by a Bench of six Judges. Each of these decisions, in the submission of the Attorney General, contained observations that the Indian Constitution does not specifically protect the right to privacy. On the other hand, the submission of the petitioners was that M P Sharma and Kharak Singh were founded on principles expounded in A. K. Gopalan vs. State of Madras reported in AIR 1950 SC 27 ("Gopalan"). Gopalan, which construed each provision contained in the Chapter on Fundamental Rights as embodying a distinct protection, was held not to be good law by an eleven-Judge Bench Rustom Cavasji Cooper vs. Union of India reported in (1970) 1 SCC 248 ("Cooper"). Hence the petitioners submitted that the basis of the two earlier decisions is not valid. Moreover, it was also urged that in the seven-Judge Bench decision in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248 ("Maneka"), the minority judgment of Subba Rao, J. in Kharak Singh was specifically approved of and the decision of the majority was overruled.

5. While addressing these challenges, the Bench of three Judges of this Court took note of several decisions of this Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include : Gobind vs. State of Madhya Pradesh reported in (1975) 2 SCC 148 ("Gobind"), R. Rajagopal vs. State of Tamil Nadu reported in (1994) 6 SCC 632 ("Rajagopal") and People's Union for Civil Liberties vs. Union of India reported in (1997) 1 SCC 301 ("PUCL"). These subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by Benches of a strength smaller than those in M P Sharma and Kharak Singh. Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench. Hence the Bench of three learned judges observed in its order dated 11-8-2015 in K. S. Puttaswamy vs. Union of India (2015) 8 SCC 735:.

……..

13. ***Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is***

better that the ratio decidendi of M.P. Sharma (supra) and Kharak Singh (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength." *(emphasis supplied)*

31. Thus Supreme Court found that there was a conflict situation existing with regard to fundamental right to privacy under the Indian Constitution. Supreme Court in ***Puttaswamy***[12] case considered at length and detailed the right to privacy. To fully appreciate the same it is necessary to refer to the said judgment in some detail. The majority view is given by Dr. Justice D. Y. Chandrachud and in addition concurring judgments are also given by other members of the bench. Relevant portions for our purposes are:

"23. Following the decision in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248, ***the established constitutional doctrine is that the expression "personal liberty" in Article 21 covers a variety of rights, some of which "have been raised to the status of distinct fundamental rights" and given additional protection under Article 19.*** *Consequently, in Satwant Singh Sawhney vs. D. Ramaratham reported in (1967) 3 SCR 525, the right to travel abroad was held to be subsumed within Article 21 as a consequence of which any deprivation of that right could be only by a "procedure established by law". Prior to the enactment of the Passports Act, 1967, there was no law regulating the right to travel abroad as a result of which the order of the Passport Officer refusing a passport was held to be invalid.* ***The decision in Maneka (supra) carried the constitutional principle of the over-lapping nature of fundamental rights to its logical conclusion. Reasonableness which is the foundation of the guarantee against arbitrary State action under Article 14 infuses Article 21. A law which provides for a deprivation of life or personal liberty under Article 21 must lay down not just any procedure but a procedure which is fair, just and reasonable.***

24. The decisions in M. P. Sharma vs. Satish Chandra reported in AIR 1954 SC 300 and Kharak Singh vs. State of U.P. reported in AIR

12 Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others, (2017) 10 SCC 1

1963 SC 1295 adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in A.K. Gopalan vs. State of Madras reported in AIR 1950 SC 27. This view stands abrogated particularly by the judgment in Rustom Cavasjee Cooper vs. Union of India reported in (1978) 1 SCC 248 and the subsequent statement of doctrine in Maneka (supra). The decision in Maneka (supra), in fact, expressly recognized that it is the dissenting judgment of Subba Rao, J. in Kharak Singh (supra) which represents the exposition of the correct constitutional principle. ***The jurisprudential foundation which held the field sixty-three years ago in M. P. Sharma (supra) and fifty-five years ago in Kharak Singh (supra) has given way to what is now a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of State action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that State action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.***

25. ***The doctrinal invalidation of the basic premise underlying the decisions in M. P. Sharma (supra) and Kharak Singh (supra) still leaves the issue of whether privacy is a right protected by Part III of the Constitution open for consideration. There are observations in both decisions that the Constitution does not contain a specific protection of the right to privacy.*** *Presently, the matter can be looked at from the perspective of what actually was the controversy in the two cases."* *(emphasis supplied)*

32. The Supreme Court referred to large number of judgments, two out of which relate to the issues in the present case and are thus quoted:

"62. The Court in R. Rajagopal vs. State of Tamil Nadu reported in (1994) 6 SCC 632 held that neither the State nor can its officials impose prior restrictions on the publication of an autobiography of a convict. In the course of its summary of the decision, the Court held: (SCC pp.649-50, para 26)

"(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article

21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

88. In Ram Jethmalani vs. Union of India reported in (2011) 8 SCC 1: (2011) 3 SCC (Cri) 310 ("Ram Jethmalani"), a Bench of two Judges was dealing with a public interest litigation concerned with unaccounted monies and seeking the appointment of a Special Investigating Team to follow and investigate a money trail. This Court held that the revelation of the details of the bank accounts of individuals without the establishment of a prima facie ground of wrongdoing would be a violation of the right to privacy. This Court observed thus: (SCC pp.35-36, paras 83 & 84)

*"**83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.** We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, **as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well-meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values.***

84. The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21.The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead

to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. ***An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."*** *(emphasis supplied)*

33. The Supreme Court further stated:

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. ***The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).***

118. ***Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions.***

'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. ***Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.***

260. The impact of the decision in Rustom Cavasjee Cooper vs. Union of India reported in (1970) 1 SCC 248 is to establish a link between the fundamental rights guaranteed by Part III of the Constitution. The immediate consequence of the decision is that a law which restricts the personal liberties contained in Article 19 must meet the test of permissible restrictions contemplated by Clauses (2) to (6) in relation to the fundamental freedom which is infringed. Moreover, since the fundamental rights are interrelated, Article 21 is no longer to be construed as a residue of rights which are not specifically enumerated in Article 19. Both sets of rights overlap and hence a law which affects one of the personal freedoms under Article 19would, in addition to the requirement of meeting the permissible restrictions contemplated in clauses (2) to (6), have to meet the parameters of a valid "procedure established by law" under Article 21 where it impacts on life or personal liberty. ***The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights. Coupled with the breakdown of the theory that the fundamental rights are watertight compartments, the post-Maneka (supra) jurisprudence infused the test of fairness and reasonableness in determining whether the "procedure established by law" passes muster under Article 21…***

262. Technology, as we experience it today is far different from what it was in the lives of the generation which drafted the

Constitution. Information technology together with the internet and the social media and all their attendant applications have rapidly altered the course of life in the last decade. Today's technology renders models of application of a few years ago obsolescent. Hence, ***it would be an injustice both to the draftsmen of the Constitution as well as to the document which they sanctified to constrict its interpretation to an originalist interpretation. Today's problems have to be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision suited to a radically different society. We describe the Constitution as a living instrument simply for the reason that while it is a document which enunciates eternal values for Indian society, it possesses the resilience necessary to ensure its continued relevance. Its continued relevance lies precisely in its ability to allow succeeding generations to apply the principles on which it has been founded to find innovative solutions to intractable problems of their times. In doing so, we must equally understand that our solutions must continuously undergo a process of re-engineering.***

264. The submission betrays lack of understanding of the reason why rights are protected in the first place as entrenched guarantees in a Bill of Rights or, as in the case of the Indian Constitution, as part of the fundamental rights. ***Elevating a right to the position of a constitutionally protected right places it beyond the pale of legislative majorities. When a constitutional right such as the right to equality or the right to life assumes the character of being a part of the basic structure of the Constitution, it assumes inviolable status: inviolability even in the face of the power of amendment. Ordinary legislation is not beyond the pale of legislative modification. A statutory right can be modified, curtailed or annulled by a simple enactment of the legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a protective shell that places them beyond the pale of ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory.*** *As a matter of fact, legislative protection is in many cases, an*

acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws. For instance, the provisions of Section 8(1)(j) of the Right to Information Act, 2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual.

291. Having noticed this, ***the evolution of Article 21, since the decision in Rustom Cavasjee Cooper Vs. Union of India reported in (1970) 1 SCC 248 indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression "procedure established by law" in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable.The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself.*** *In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.*

297. What, then, does privacy postulate? ***Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality.*** *The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the*

mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. ***Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations.*** *In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality.* ***It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life.*** *Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.*

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 realization 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 of 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.

316. The judgment in M. P. Sharma vs. Satish Chandra reported in AIR 1954 SC 300 holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. ***The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M. P. Sharma (supra) is overruled to the extent to which it indicates to the contrary.***

317. Kharak Singh vs. State of U.P. reported in AIR 1963 SC 1295 has correctly held that the content of the expression "life" under Article 21 means not merely the right to a person's "animal existence" and that the expression "personal liberty" is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh (supra) also correctly laid down that the dignity of the individual must lend content to the meaning of "personal liberty". ***The first part of the decision in Kharak Singh (supra) which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, Kharak Singh (supra) reliance upon the decision of the majority in A.K. Gopalan vs. State of Madras reported in AIR 1950 SC 27 is not reflective of the correct position in view of the decisions in Rustom Cavasjee Cooper vs. Union of India reported in (1970) 1 SCC 248 and in Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248. Kharak Singh (supra) to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.***

318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

319. Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within

320. ***Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.***

321. Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament.

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. ***Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.*** *Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;"* *(emphasis supplied)*

34. Concurring with the same, Justice Chelameswar in his separate judgment, in paragraph 375 states:

"All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life

and that the authority should be limited by parameters constitutionally fixed. ***Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21."*** *(emphasis supplied)*

35. Again agreeing, Chief Justice S. A. Bobde (then Justice S.A. Bobde) states in paragraphs 402, 403 and 407:

"402. ***"Privacy" is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions",*** *Black's Law Dictionary (Bryan Garner Edition) 3783 (2004). The right to be in this condition has been described as "the right to be let alone", Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 HARV L REV 193 (1890).* ***What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way.*** *These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.*

403. ***Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place.*** *....."*

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. ***Privacy is an essential condition for the exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal***

***liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.*"** *(emphasis supplied)*

36. Justice R. F. Nariman also concurring in his separate judgment states:

"521. ***In the Indian context, a fundamental right to privacy would cover at least the following three aspects:***

• Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;

• Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• ***The privacy of choice, which protects an individual's autonomy over fundamental personal choices.***

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

522. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. ***The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.****"*

(emphasis supplied)

37. Thus, the nine-Judges Bench concluded:

"644. ***The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.***

645. It was rightly expressed on behalf of the petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. ***It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.***

646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. ***In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right.*** *How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right." (emphasis supplied)*

38. Again the issue with regard to the personal rights of an individual came up before a Constitution Bench of Supreme Court in the case of ***Navtej Singh Johar and others vs. Union of India***[13]. The vires of Section 377 I.P.C. came under consideration in the said case. The Court held:

"95. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. ***The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life***

13 (2018) 10 SCC 1

into the Constitution and not render the document a collection of mere dead letters. *The following observations made in Ashok Gupta vs. State of U.P. reported in (1997) 5 SCC 201 further throws light on this role of the courts:- (SCC p.244, para 51)*

> *"51. Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."*

110. ***The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the sentinel on qui vive for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.***

121. An argument is sometimes advanced that what is permissible between two adults engaged in acceptable sexual activity is different in the case of two individuals of the same sex, be it homosexuals or lesbians, and the ground of difference is supported by social standardization. ***Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.***

122. ***The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights.*** *It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However,* ***it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the***

fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.

131. The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, ***it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.***

167. The above authorities capture the essence of the right to privacy. ***There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional.*** *The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.*

613. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. ***In protecting consensual intimacies, the Constitution adopts a simple principle: the State has no business to intrude into these personal matters.*** *Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation." (emphasis supplied)*

39. One of the issues before the court was the considerations to be taken into account by a court when a fundamental right is violated by a law. The Supreme Court held:

"428. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights. This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. ***It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the***

effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights." *(emphasis supplied)*

Thus even in the said judgment, the Constitutional Bench again found that the personal liberty goes not merely with regard to matters of marriage but to the union of two persons, even if they belong to same sex.

40. The law as declared by the Supreme Court, since the case of ***Lata Singh***[5] till the decision in ***Navtej Singh Johar***[13]**,** has travelled a long distance defining fundamental rights of personal liberty and of privacy. "*once a person becomes a major he or she can marry whosoever he/she likes*" ***(Lata Singh***[5]***);*** "*an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage*"(***Indian Woman Says Gang-Raped on Orders of Village Court***[8]***);*** "*choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19"* ***(Asha Ranjan***[10]***);*** "*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…..it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution"****(Shakti Vahini***[1]***);*** *"Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters….. Social approval for intimate personal decisions is not the basis for*

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5 Lata Singh vs. State of U.P. and another, (2006) 5 SCC 475

13 Navtej Singh Johar and others Vs. Union of India, (2018) 10 SCC 1

8 India Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23-1-2014 in Re, (2014) 4 SCC 786

10 Asha Ranjan vs. State of Bihar, (2017) 4 SCC 397

1 Shakti Vahini Vs. Union of India and others, (2018) 7 SCC 192

*recognising them."**(Shafin Jahan[11])*** and finally the nine-judges bench "*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…….privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right."**(Puttuswamy[12])*** is a long chain of decisions growing stronger with time and firmly establishing personal liberty and privacy to be fundamental rights including within their sphere right to choose partner without interference from State, family or society.

41. In view of the changed social circumstances and progress in laws noted and proposed by the Law Commission as well as law declared by the aforesaid judgments of the Supreme Court, it would be cruel and unethical to force the present generation living with its current needs and expectations to follow the customs and traditions adopted by a generation living nearly 150 years back for its social needs and circumstances, which violates fundamental rights recognized by the courts of the day. In view of law settled in ***Satyawati Sharma[3]*** and ***Kashmir Singh[4]***as stated above, it is the duty of this court to revisit the interpretation of the procedure under challenge as provided in the Act of 1954.

42. In ***Githa Hariharan vs. Reserve Bank of India[14],***Supreme Court restates the principle of interpretation of statute, that, where two constructions of the statute are possible court will uphold the one that

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11 Shafin Jahan Vs. Asokan K.M. and others, (2018) 16 SCC 368

12 Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others, (2017) 10 SCC 1

3 Satyawati Sharma vs. Union of India, (2008) 5 SCC 287

4 Kashmir Singh vs. Union of India, (2008) 7 SCC 259

14 (1999) 2 SCC 228

is in consonance with the Constitution of India rather one that would go against it.

> "*9. .....It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.*
>
> *40. ...It is now settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless, of course, the same makes a violent departure from the legislative intent..."*

43. In ***N. Kannadasan vs. Ajoy Khose***[15] again Supreme Court in held:

> *"71. ...Constitutionalism envisages that all laws including the constitutional provisions should be interpreted so as to uphold the basic features of the constitution."*

44. In ***Puttuswamy***[12] also the guidelines provided by the Supreme Court in paragraph 260 *"The law would be assessed not with reference to its object but on the basis of its effect and impact on the fundamental rights……The mere fact that the law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself" and in paragraph 325 are "A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article. An invasion of life or personal liberty must meet the threefold requirement of (i)*

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15 (2009) 7 SCC 1

12 Justice K.S. Puttaswamy (Retd.) and another vs. Union of India and others, (2017) 10 SCC 1

legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."

45. The interpretation of Sections 6 and 7 read with Section 46 containing the procedure of publication of notice and inviting objections to the intended marriage in Act of 1954 thus has to be such that would uphold the fundamental rights and not violate the same. In case the same on their simplistic reading are held mandatory, as per the law declared today, they would invade in the fundamental rights of liberty and privacy, including within its sphere freedom to choose for marriage without interference from state and non-state actors, of the persons concerned. Further, note should also be taken of the fact that marriages in India can be performed either under the personal laws or under the Act of 1954. In fact, even today, majority of marriages are performed under the personal laws. These marriages under personal laws are performed by a priest of the religion followed by the parties. Such marriages under any personal law do not require publication of any notice or calling for objections with regard to such a marriage. The individuals intending to marry approach the priest who performs the marriage as per the customs and rituals of the said religion. Their orally saying that they are competent to marry is regarded sufficient for solemnizing marriage under the personal laws. In case any party violates any condition of the said personal law, for example, if one of the parties conceals his/her marital status and commits second marriage; marriage is barred under any law (one of the parties is a minor and conceals age or marriage is within the degrees of the prohibited relationship etc.); the consent of any party is obtained by deceit or under pressure; or any other such circumstances arises, the issues are later decided by a

court of law. But, the marriage takes place without any interference from any corner, even if it is later to be declared void. However, under Sections 6 and 7 of Act of 1954 the persons intending to solemnize a marriage are required to give a notice and the Marriage Officer thereafter is made duty bound to publish the notice for a period of 30 days and invite objections with regard to the same. Any person can object to the marriage on the ground that it violates any of the condition of Section 4 of Act of 1954. None of the conditions under Section 4 of Act of 1954 is such, violation of which would impact rights of any person in any manner different than the same would in case of a marriage under any personal law. Even if a marriage takes place in violation of any of the conditions of Section 4, legal consequences would follow and the courts can decide upon the same, including declare such a marriage to be void, as they do under the personal laws. There is no apparent reasonable purpose achieved by making the procedure to be more protective or obstructive under the Act of 1954, under which much less numbers of marriages are taking place, than procedure under the other personal laws, more particularly when this discrimination violates the fundamental rights of the class of persons adopting the Act of 1954 for their marriage.

46. However, in case, such individuals applying to solemnize their marriage under the Act of 1954 themselves by their free choice desire that they would like to have more information about their counterparts, they can definitely opt for publication of notice under Section 6 and further procedure with regard to objections to be followed. Such publication of notice and further procedure would not be violative of their fundamental rights as they adopt the same of their free will. Therefore, the requirement of publication of notice under Section 6 and inviting/entertaining objections under Section 7

can only be read as directory in nature, to be given effect only on request of parties to the intended marriage and not otherwise.

47. Thus, this Court mandates that while giving notice under Section 5 of the Act of 1954 it shall be optional for the parties to the intended marriage to make a request in writing to the Marriage Officer to publish or not to publish a notice under Section 6 and follow the procedure of objections as prescribed under the Act of 1954. In case they do not make such a request for publication of notice in writing, while giving notice under Section 5 of the Act, the Marriage Officer shall not publish any such notice or entertain objections to the intended marriage and proceed with the solemnization of the marriage. It goes without saying that it shall be open for the Marriage Officer, while solemnizing any marriage under the Act of 1954, to verify the identification, age and valid consent of the parties or otherwise their competence to marry under the said Act. In case he has any doubt, it shall be open for him to ask for appropriate details/proof as per the facts of the case.

48. Since the matter relates to protection of fundamental rights of large number of persons, the Senior Registrar of this Court shall ensure that a copy of this order is communicated to the Chief Secretary of the State of U.P. who shall forthwith communicate the same to all the Marriage Officers of the State and other concerned authorities as expeditiously as possible.

49. With the aforesaid, the present writ petition stands ***disposed of***.

Order Date:- 12.01.2021

Shubhankar

(Vivek Chaudhary, J.)