(A) Prelude

The preamble to the Constitution of India, *inter alia* promises to secure to all citizens, justice - social, economic and political and equality of status and opportunity. These objectives have been provided with teeth and strength by Parts III & IV of the Constitution which contain many provisions promoting socio-economic justice to women and children.

Article 14 of the Constitution puts an obligation on the State that it shall not deny to any person (which includes women and children) "equality before the law" or "the equal protection of the law" within the territory of India. Discrimination on the ground of "sex" only is prohibited. ¹ Similarly the equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state is assured and there cannot be any discrimination on the ground of sex only. ² On the other hand, state can make special provisions for women and children. ³ No child below the age of fourteen years can be employed to work in any factory or mine or engaged in any other hazardous employment. ⁴ Thus special care has been taken to provide socio-economic justice to women as well as children, in Part III dealing with fundamental rights. ⁵

Directive principles of state policy enshrined in Part IV also aim at providing socio-economic justice to women and children. The state is under an obligation to promote the welfare of the people,

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1. See article 15(1) and 15(2).
2. See article 16(1) and 16(2).
3. Article 15(3) provides: "Nothing in this article shall prevent the state from making any special provision for women and children."
5. The State can also make any law providing for social welfare and reform and that law cannot be declared as unconstitutional on the ground that it violates the right to freedom of religion. See article 25(2) (b) of the Constitution.
including women and children, by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of national life. The State should endeavour to eliminate inequalities in status, facilities and opportunities. Article 39 runs like a golden thread through the entire fabric of socio-economic justice to women and children. It provides that the State shall, in particular, direct its policy towards securing adequate means of livelihood to men and women equally; equal pay for equal work for both men and women. It is further ensured that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. It is also provided that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. The state is also under an obligation to secure just and humane conditions of work and maternity relief. It is also provided that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. And finally the state is expected to provide free and compulsory education to all children until they complete the age of fourteen years. It is the fundamental duty of every citizen of India to renounce practices derogatory to the dignity of women.

In the light of these provisions, a number of legislations have been passed by our Parliament. Some of them have yet to be implemented in their true spirit. But at the same time there has been a lot of judicial activism in securing socio-economic justice to women and children during the recent years.

With this backdrop in mind, an attempt has been made in this Chapter to analyse the various aspects of socio-economic justice to women and children with particular reference to legislative and judicative role

6. Article 38(1).
7. Article 38(2).
8. Article 39(a).
9. Article 39(d).
10. Article 39(e).
11. Article 39(f).
12. Article 42.
13. Article 44.
14a. See Article 51A(e). Article 51A which is titled as "Fundamental Duties" (conted.)
(B) Amelioration of Women And Socio-economic Justice

During the pre-independence period the inferior social status of and discrimination suffered by women are well-known. Manu stated that a woman is not entitled to independence, for, the father protected her in her childhood, the husband in her youth and the son in her old age. The British administration took only half-hearted steps to protect the status of women and provide them socio-economic justice. This was further aided by some Indian reformers like Raja Ram Mohan Roy who pronounced the abetment of sati as a criminal offence and also took steps to eradicate female infanticide. The emergence of independent India marks a watershed in the attainment of socio-economic equality for women. The Parliament of India passed a number of legislations to eradicate discrimination against women and to restore socio-economic justice to them. There are still certain areas, like uniform civil code, where the central legislation is yet to be enacted. However, the judiciary has shown a lot of activism to provide socio-economic justice to women by interpreting the provisions of law positively. The role of the judiciary is praiseworthy because it acted as reformer and conscience keeper of the government when the latter failed to act by implementing the constitutional directives. Therefore, it would be in the fitness of things to study the judicial decisions where socio-economic justice was provided to women.

In Labour Union v. International Franchises, a service rule in the respondent company requiring unmarried women in a particular department to resign on getting married was challenged. As the respondent company was not bound by fundamental rights, the Court groped for a superior norm for invalidating the challenged rule. It was held that the was added by the Constitution(Forty-second Amendment) Act, 1976 w.e.f. 3.1.1977. This provision found its manifestation through the enactment of The Indecent Representation of Women(Prohibition)Act, 1986.


challenged rule should be abrogated in the interest of social justice.

In C.B. Muthamma v. Union of India, a senior member of the
Indian Foreign Service, challenged the validity of rule 8(2) of the
Indian Foreign Service(Conduct and Discipline) Rules, 1961. This rule
required a woman member to marry only after obtaining the prior permi-
sion of the government and entitled it to require a married woman
member to resign if it was satisfied that the domestic commitments were
likely to come in the way of her efficient discharge of duties. Krishna
Iyer, J., speaking for the court held that "at the first blush, this rule
is in defiance of article 16." He advised the government to remove sex
discrimination for service rules without waiting for writ petitions. In
this case, the writ petition was however dismissed on the assurance given
on behalf of the Union of India that a challenged rule would be deleted.
The learned judge also deplored the defiance of the fundamental rights
by the executive while framing this rule. Krishna Iyer, J., also opined:

[M]asculine culture of manacling the weaker sex
for-getting how our struggle for national free-
dom was also a battle against women's thraldom.
Freedom is indivisible, so is Justice...And if
the Executive, as the surrogate of Parliament,
makes rules in the teeth of Part III... the
inference of die-hard allergy to gender parity
is inevitable.20

It is submitted that the Supreme Court in the above stated two
cases, has rightly advanced the socio-economic interests of women. But
it is strange that why the government, which is under an obligation to
protect fundamental rights and secure socio-economic justice for all,
should defy the constitution and its spirit.

Air India v. Nergesh Meerza,21 is yet another important case
which involved the issue of equality between men and women. In this case,
the Court considered the validity of service regulations governing the
air hostesses in Air India and the Indian Airlines. According to Regu-
lations 46 and 47 an air hostess in Air India would be retired on the

various High Courts considered the question that whether a particular
post could be reserved for women or not. The opinion of the various
High Courts seems to be favouring the interests of women.

19. Id. at 1870.
20. Ibid.
following contingencies: (1) on attaining the age of 35 years; (2) on marriage if it took place within four years of service; and (3) on first pregnancy. Also, an air hostess had to retire at the age of 35 years whereas a male steward could work up to 58 years of age. An air hostess, however, could be continued by the Managing Director up to 45 years of age.

Regarding the retiring age of the air hostesses, it was argued that a young and attractive air hostess is able to cope up with difficult and awkward situations more easily than an older person. The court rejected this argument on the ground that it was based on pure speculations and artificial understanding of the qualities of the fair sex. The Court also held that the Regulation conferred a wide and uncontrolled discretion on the Managing Director to extend the retiring age by ten years and hence violated article 14 of the Constitution on the ground of excessive delegation of powers. Thus, this Regulation was struck down. The effect of this striking down was that air hostesses would retire at the age of 45 years if found medically fit. The Court clarified that it is open to the management to frame new rules in this regard.

On the question of bar of marriage within first four years of employment, it was argued that such a bar doubtless constituted "an outrage on the dignity of the fair sex", and *per se* unconstitutional. The Supreme Court did not agree with this argument and upheld the Regulation. Fazal Ali, J. stated:

> We do not think that the provisions suffer from any constitutional infirmity. According to the Regulations, an A.H. (Air Hostess) starts her career between the age of 19 to 26 years...Thus, the regulation permits an A.H to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional A.Hs either on a temporary or on an ad-hoc basis to replace the working A.Hs if they conceive and any period short of four years
It is submitted that any discrimination against women in the name of family planning ought to be avoided. If the family planning programme could be justification for a bar on the air hostesses getting married within four years, it should equally ban the male employees from getting married within four years. Also if a bar like this could be justified on the ground of huge expenditure which the Corporation is required to spend during the maternity leave of the working hostesses, then it could apply to all women employments in general. Such an approach would nullify the principle of equality between men and women. Thus, it is submitted that neither family planning nor the costs of maternity leave can be arguments to uphold the impugned provision, which was palpably discriminatory and violative of articles 14, 15(1), 16(2) and 42 of the Constitution. The Corporation cannot make any unjust provision on the ground that it will suffer a huge expenditure. The Corporation, being within the meaning of "State", is under an obligation to make provision for securing just and humane conditions of work and for maternity relief. The court can, if the state commits a breach of its duty by acting contrary to the directive principles, prevent it from doing so. The judiciary has always shown its concern to maternity benefits to women. The Central government enacted Maternity Benefit Act in the year 1961. Maternity leave is not granted so that the women can have a vacation but because it is necessary for the health of the mother and child. It is heartening to note that the government has taken a decision entitling unmarried women in government service to maternity leave. It is keeping in view not only the changing social conditions but also the need of the mother and child.
attitudes but also the canons of equality and fairplay. Its denial would be particularly unfair to the innocent child. Even if one takes the old-fashioned view that pregnancy outside marriage is immoral, the denial of maternity leave penalises only the women because she carries the child and enables the man to go scot-free, particularly if the woman withholding his name.

Coming to the Regulation which terminated the services of the air hostesses on first pregnancy, the court observed that it amounts to compelling the poor air hostess not to have any children and thus interferes with and diverts the ordinary course of human action. In the opinion of the court, such a condition was unreasonable and arbitrary which shook the conscience of the Court. The Corporation argued that the pregnancy led to a number of complications and to physical disabilities which might obstruct the efficient discharge of her duties. What the Corporation must have meant was that the physical charms of an air hostess were diminished on her pregnancy. Acting sharply to such a suggestion, the court stated:

It seems to us that the termination of the services of an A H(Air Hostess) under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood - the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of civilised society. Apart from being grossly unethical it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of article 14 of the Constitution.30

It is submitted that the Supreme Court rightly struck down a provision which not only promoted inequality but also undermined the status of a woman.

The judiciary has also shown its deep concern for women prisoners. In Sheela Barse v. State of Maharashtra,31 the petition was based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners whilst they were confined in the police lock up in the city of Bombay. The Court appointed a Commissioner to visit the Central Jail of Bombay and to interview women prisoners

30. Supra note 21 at 1851.
lodged therein with a view to ascertain whether women prisoners had been subjected to any torture or ill-treatment and to submit a report to the Court. Bhagwati, J., (as he then was) once again stressed the importance of providing legal aid services to women prisoners. The court speaking through Bhagwati, J. gave detailed directions, with a view to providing adequate protection to women prisoners in particular.

Poonamal v. Union of India, is a case dealing with liberalisation of the rules governing family pensions. Rules 54 and 55 of the Civil Services Pension Rules, 1972 prescribed that a government servant in order to be eligible for family pension should contribute two months' emoluments out of his death cum retirement gratuity. This had in effect meant that the benefit of the family pension would be denied to widow and minor children if the government servant did not accept the condition. Regarding the liberalised rule which did away with this condition, Desai, J., observed that the "promise of socio-economic justice depicted in rosy language in articles 38, 39 and 41 is being translated into a real action oriented programme." He observed this because he said amongst "the neglected sections of the society, women form a bulk. In that bigger class widows are possibly the worst sufferers both socially and economically." As a measure of socio-economic justice, family pension scheme was devised to help the widows tie over the crisis till the minor children attain majority to extend them some succour.

In the matter of B.H.P. & V.Ltd., Visakhapatnam, the rights of the wife came up for consideration. In this case, the husband had taken on lease from the company he was working in, a house owned by the company.

32. See also Hussainara Khatoon v. State of Bihar, A.I.R.1979 S.C.1360. In this case the destitute prisoners were released. It was pointed out that there were quite a few women prisoners in jail without even being accused of any offence. There were some women prisoners who were required for the purpose of giving evidence or they were in "protective custody". The Court pointed out that "protective custody" is really and in truth nothing but imprisonment and violated article 21 of the Constitution. The Court also directed the government to set up welfare and rescue homes to take care of destitute women and children.

33. Supra note 31 at 382.
35. Ibid.
He lived there with his wife and children till the differences between husband and wife led to their estrangement. The wife obtained an order of maintenance from the Court. Infuriated by this, he terminated the lease hoping to have the wife and his own children evicted. The district judge gave an injunction restraining the company from evicting the wife and the husband was asked to pay the rent which would be adjusted against the amount he was ordered to pay for maintenance. On appeal, the High Court upheld the order of the lower court and held that no injustice was caused to the husband who was under an obligation to provide shelter for his wife and children. It also caused no injury to the company and in this case the company was a state instrumentality and, therefore, under an obligation to act in conformity with articles 14 and 21 of the Constitution.

It is submitted that the Court has taken the right view. The positive interpretation of the Court prevented the exploitation of misfortunes and miseries of the wife and children.

In Somithri Vishnu v. Union of India, it was held that section 497 of the Indian Penal Code which defines 'adultery', cannot be said to be violative of article 14 of the Constitution on the ground that it makes an irrational distinction or classification between men and women in that (1) Section 497 confers upon the husband the right to prosecute the adulterer but, it does not confer any right upon the wife to prosecute the women with whom her husband has committed adultery; (2) Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and (3) Section 497 does not take in cases where the husband has sexual relations with an unmarried woman.

It is submitted that this case is an example where the court while protecting the male's right over the matrimonial home and his control over his wife, has forgotten the social justice. The Court did notice that the commonly accepted principle that "it is the man who is the seducer..."
and not the woman" might have undergone some change over the years but it is for the legislature to consider whether section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone. The Law Commission of India in its forty-second report, 1971 had recommended for the retention of section 497 with the modification that even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the legislature. It is submitted that all the three organs of the state, that is, the legislature, executive and the judiciary are equally responsible for promoting social justice and where one organ fails in performing its assigned role, the other organ must fill up the gap.

In Partap Singh v. Union of India, it was held that section 14(1) of Hindu Succession Act, 1956, is not violative of articles 14 and 15(1) of the Constitution. Section 14(1) of the Hindu Succession Act was enacted to remedy to some extent the plight of a Hindu woman who could not claim absolute interest in the properties inherited by her from her husband but who could enjoy them with all the restrictions attached to a widow's estate under the Hindu Law. This provision is also protected by the express provision contained in clause(3) of article 15 of the Constitution, since it is a special provision enacted for the benefit of Hindu women.

Mary Roy v. State of Kerala, is a momentous decision in the regime of Christian Personal Law on intestate succession ending the discriminatory inheritance provisions of the Christian women of Kerala. The discriminatory provisions of the Travancore Christian Succession Act, 1902, were challenged as violative of the equality provisions in article 14 of the Constitution. It was also contended on behalf of the petitioner that with the extension of the Indian Succession Act, 1925 to the territories of the former state of Travancore by virtue of the Part B State(laws)Act, 1951, the Travancore Succession Act was repealed. Under the Travancore Christian Succession Act, a widow was entitled to have only a life interest terminable at death or on remarriage and a daughter would be entitled to one-fourth of the value of the share of sons or an amount of rupees 5000/-, whichever was less. She was not entitled to even this amount if streedhanam was provided or promised to her by the intestate. Under the Indian Succession Act, the widow is entitled

41. Supra note 38 at 1620.
to a one-third share of the property of the intestate and sons and daughters share equally in the remainder.

The Supreme Court, speaking through Chief Justice P.N. Bhagwati, did not examine the issue whether gender inequality in matters of succession and inheritance violated article 14 of the Constitution. Instead, the Supreme Court achieved the gender equality by holding that the Travancore Act was repealed by the Indian Succession Act, 1925, in 1951 when the latter Act was made applicable to that state by the Part-B State(Laws) Act. The decision of the Supreme Court is retrospective in as much as the Travancore Act was held to be repealed from 1 April 1951.

It is submitted that this decision has brought a major victory for Indian women's fight for equality. The retrospectivity of the judgement had led to the anticipation of a flood of litigation by female heirs to their fathers' property which has not so far come about. The Kerala government had applied for a review of the judgement seeking the elimination of the retrospective nature of the ruling mainly on the basis of the administrative difficulties and social tensions likely to be generated by upsetting land transactions of the past. However, the Supreme Court rightly dismissed the review petition on the basis that the grounds for review lacked substance. It is submitted that the Supreme Court's decision is undoubtedly a milestone in gender equality in matters of intestate succession.

Alice Jacob has rightly pointed out that any move by Parliament or state legislature to set at naught the effects of this long overdue decision needs to be thwarted. A great onus now lies particularly on the women's organisations to educate the Christian women of Kerala about their rights to a share in paternal property and provide legal aid and advice for those who cannot afford to take measures for proper implementation of the judgement.

43. See supra note 3.
44. Supra note 42 at 1697-98. See also Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944.
45a. The year of the Act (1092) has been checked both in the judgements reported in A.I.R. as also in (1986) 1 S.C.J.
46. Supra note 45 at 1012.
47. Id. at 1015-16.
48. Id. at 1014.
49. For the critical appraisal of this case, see Alice Jacob, "Equal Inheritance Rights to Indian Christian Women of Kerala", 28 J.I.L.I. 241-45 (1986). See also Sreedhar Pillai, "Syrian Christians-Women's Victory", (conted.)
The woman is too often made to sell her youthful flesh, mostly under duress but sometimes also by the lure of money which proves irresistible because of her economic helplessness. The existence of prostitution is a slur on our socio-economic order, a violation of the International Convention on Suppression of Traffic in Women and Girls, a denial of socio-economic justice promised by the Constitution and an assault on the dignity of Indian womenhood. The Parliament of India passed Suppression of Immoral Traffic in Women and Girls Act, 1956 to prevent the traffic in human beings and protect the dignity of Indian womenhood. But the amelioration of the socio-economic conditions of neglected women has yet to become a reality.

The concern of the judiciary about the plight of woman in India can be seen in the case of C.J.Vaswani v. State of W.B., where Krishna Iyer, J., observed:

No nation, with all its boasts and all its hopes, can ever be morally clean till all its women are really free - free to live without sale of their young flesh to lascivious wealth, or commercialisation of their luscious figures. India, to redeem this "gender justice" and to proscribe prostitution, whereby rich men buy poor women through houses of vice, has salved its social conscience by enacting the Suppression of Immoral Traffic in Women and Girls Act. But the law is so ill-drafted and lacunose that few who follow "the most ancient profession in the world" have been frightened into virtue, and the customers of wine-cum-women are catered to respectably in bars, hotels and night-clubs in sophisticated and subtle ways, especially in our cities.

India Today at 149, 31 March 1986.
51. Id. dated 18.7.86.
52. Supra note 49 at 245. After the judgement of the Supreme Court in Mary Roy v. State of Kerala, supra note 45, Bill No.92 of 1986 was introduced in the Parliament to enact Indian Christian Succession Act, 1986.
53. "Traffic in human beings" is prohibited under article 23 of the Constitution. See also articles 38 and 39 of the Constitution.
55. Id. at 2478.
In Upendra Baxi v. State of U.P., the writ petition was based on a letter addressed by the petitioner. The petitioner pointed out that the conditions in which girls were living in the Government Protective Home at Agra were abominable and they were being denied their right to live with basic human dignity by the State of Utter Pradesh which was running the Protective Home. The Court thereupon made various orders from time to time with a view to improving the living conditions of the girls in Agra Protective Home and ensuring a decent and healthy standard of living for them. The government was shifting the Protective Home during the pendency of writ petition in the Supreme Court for ensuring decent living conditions of inmates of Protective Home. The permission of the Court for this was not sought. Also the conditions in premises where Home was to be shifted were unsatisfactory from all points of view. The Supreme Court gave directions to authorities for improving the conditions in the Home and to state government for constituting Board of Visitors and for formulating a programme of rehabilitation of inmates.

It is submitted that the judiciary has also shown its deep concern for the protection of the dignity of women and to provide socio-economic justice to them. Co-ordination of the three branches - legislative, executive and judicative, is absolutely essential if the beneficial effects of a legislation is to have an impact on the concerned persons. It is not only by examining legislation or machinery for its implementation that one can judge the role of law in ushering social changes. The judiciary plays an important role otherwise also and help in bringing about socio-economic justice.

Indian women had been the victim of social and religious practices as well. The most pernicious practice of sati was felt recently in the wake of the Roop Kanwar tragedy where 18 years old widow was burnt on her husband's pyre in Deorala village in Sikar district of Rajasthan. A section of people supported this as a part of religious ceremony whereas it was condemned as a social evil by the rest of the people and against the dignity of the women. Social organisations and particularly women organisations,

took lead in condemning the act of \textit{sati}. Rajasthan government rose to the occasion and passed Rajasthan Sati(Prevention)Ordinance, 1987, which now has become an Act.\textsuperscript{57} This Act was challenged in the Rajasthan High Court. A division bench consisting of Guman Mal Lodha\textsuperscript{58} and Pana Chand Jain, JJ., delivered a landmark judgement on 1 December, 1987, which is the most serious attempt so far to end the practice of \textit{sati}. The High Court upheld the power of the state to enact an anti-\textit{sati} law to prevent the inhuman and barbaric practice of immolation of widow.\textsuperscript{59} The court observed that Constitution could not give any protection to evil social practice which was against public order, morality and health. The High Court was quite unambiguous in its judgement by holding, and rightly so, that immolation of a widow, whether voluntary or forcible, cannot be defined as religious freedom or ceremony and that freedom of religion cannot in any case go against the fundamental rights enshrined in articles 14 and 15 of the Constitution which promote equality and prohibit discrimination on the ground, \textit{inter-alia}, sex only. The judges observed that they had no doubt in holding that the practice of \textit{sati} or immolation of a widow with her husband was "against all Constitutional provisions".\textsuperscript{60} Even if the act of \textit{sati} by a widow was voluntary, she cannot be allowed to take her own life in the larger interest of the society, the court ruled. The court further maintained that an individual became a heritage of the society. The individual cannot become bigger than the society, and the individual has to be responsible to the society. At the time of the husband's death, the wife is not in a proper frame of mind. She is under the shock of the tragedy. At such a moment her actions

\textsuperscript{57} The Rajasthan Sati(Prevention)Ordinance, 1987 was promulgated on 1 October, 1987. Before this there were only two states, that is, Tamil Nadu and West Bengal, which had so far enacted anti-\textit{sati} legislation.

\textsuperscript{58} It is interesting to note that Justice Guman Mal Lodha, on 3 December 1982 had written the following lines in the visitors' register at Jhunjhunu's Rani Sati temple,"It was a divine and solacing experience to visit the Shri Rani Satiji Temple. The management here is laudable. I wish for the progress of this historical and cultural pilgrimage." See Pankaj Pachauri,"Landmark Judgment", \textit{India Today}, at 58, 31 December 1987.

\textsuperscript{59} See "State's power to enact anti-\textit{sati} law upheld", \textit{Indian Express}, Chandigarh, at 1, 28 November, 1987. See also "\textit{Sati} not a religious act\textsuperscript{HC}", \textit{Indian Express}, Chandigarh, at 1, 27 November, 1987.

\textsuperscript{60} See "Banning \textit{sati}", editorial \textit{Indian Express}, Chandigarh, 1 December 1987. See also "Law is against \textit{sati}", editorial \textit{The Hindustan Times}, New Delhi, 30 November 1987.
are bound to be erratic and desperate and the so-called 'voluntary'.

The falsehood that sati is very much part of Hindu religion has also been exposed. Even if there is some remote reference to sati in some obscure religious books, it need not be taken as a basic tenet of religion. The High Court rightly rejected the contention that religious scriptures have provided sanction for sati. Religion is essentially meant for the reformation of man and not for his degradation. The fight against evil social practices, one of which is sati, is essentially the responsibility of the government and of the society. Even if some people considered sati as acceptable, it could never be an essential and integral part of Hindu religion and the Constitution did not recognise the same, the Court held.

The two-member bench also struck down section 19 of the Rajasthan Sati (Prevention) Act, 1987 which exempted existing temples from the purview of the law banning all glorification of Sati.

It is submitted that the Rajasthan law has rightly been defended by the High Court and it is a step in the right direction. The courts verdict will help not only the State government but also the social organisations, particularly those of women, to check the burning of widows. The High Court has also rightly struck down section 19 of the Act as it was discriminatory and derogatory to women. Further, the Act does not violate the fundamental freedom of religion which is subject to any law providing for "social welfare" and "social reform".

The Supreme Court of India has also admitted two separate petitions by the Joint Women's Action Committee and Karmika, challenging section 19 of the Rajasthan Act. The Supreme Court has asked the Union Government and several state governments to explain why it should not direct the closure of sati temples and seizure of funds raised for the glorification of sati. It

61. One of the contentions of the petitioner was that "Garuda Purana" mentioned the practice of sati. The Court rejecting the above contention observed, and rightly so, that the "Garuda Purana" was not the Constitution of India.

62. See article 25(2)(b) of the Constitution of India.

63. "Plea on Sati Temples admitted", The Hindustan Times, New Delhi, at 1, 2 December 1987.
is only hoped that the Supreme Court will also confirm the decision of the Rajasthan High Court because it is in consonance with the Constitutional spirit.

For the first time, a Central law providing stringent punishment for those who abet or glorify sati and who attempt to commit sati has been enacted. Though the legislation alone cannot eradicate social evils, its absence makes the task more difficult. It is to overcome this difficulty that the Commission of Sati(Prevention)Act 1987 has been passed by the Parliament. The Act was passed partially in response to the country-wide agitations, particularly by women’s organisations following the Deorala incident and is aimed at deterring obscurantist and superstitious forces from promoting sati. One of the significant provisions of the Act is that it seeks to provide death penalty or life imprisonment and fine to those who abet sati, depending upon the extent of their crime. Another welcome step of the Act is the provision disqualifying persons convicted under the anti-Sati Law from contesting elections. This provision is aimed at the role which our politician should play in the society. In Deorala incident, certain politicians instead of fighting against the evil, not only defended sati but also glorified it on religious grounds. The threat of debarring such elements from contesting elections is likely to deter them from encouraging sati for political gains. The sooner we get rid of such people from politics, the better for the country.

It is submitted that there is a need to intensify social information. Social organisation have a major role to play in educating the masses but no less is the responsibility of religious leaders in rescuing the people from superstitions. At the same time, the social awareness can be brought among the masses through strategic legal aid. It is suggested that the legal aid camps be organised in the areas which are more prone to such social evils and women be educated about their rights and duties. In other words, social awareness among the people will definitely help in preventing the further propagation of any social evil and it will, inter alia, promote socio-economic justice to women.

Another social evil, which has operated against the dignity and status of women in India is the dowry system.

63a. The Act received the assent of the President on 3.1.88.
Anathema of Dowry And Its Reflection on the Cinderella Status of Women

The symbol of the women in Indian society has been complex, intermeshing of low legal status, virtual contempt, sophisticated sexual partnership and deification. In fact it is a strange spectacle of our topsy-turvy value system to see Indian parents who have taken all the troubles to nurture and raise a daughter, rushing madly to give their daughter into slavery to another family (without any compensation) to work as a free servant to sweep, to cook, to serve and what not. In addition to this, they give the bride groom many costly gifts including clothes, ornaments, watch, radio, T.V. and car etc., though often they cannot afford. A recent survey report shows that the most common reason for giving dowry was "to get a good match" for the "girls security" and "for setting her in new home".

The practice of dowry has emerged as a major social evil in contemporary India. The disconcerting aspect of the problem is that higher education and economic stability of young men instead of serving to reduce the problem, aggravates it. The gravity of social evil of dowry is reflected in the large number of "dowry deaths" reported from the various parts of the country. Surprisingly, it has spread to other communities which traditionally were not taking dowry. The pernicious evil of dowry in contemporary India has violated the concept of equality and eroded the dignity of women. Unless we eradicate this major social evil, the liberation of women will remain only a teasing illusion.

67. The survey was conducted by Mr. R.D. Naik of the Deptt. of Research Methodology at the Tata Institute of Social Sciences, in Bombay on behalf of the Union Government's Department of Social Welfare, See Indian Express, Chandigarh, at 9, 24 February, 1986.
69. Daily on an average 20 dowry deaths are reported from U.P. alone. See supra note 66 at 210. 113 dowry deaths were reported from Bihar in the year 1987. See The Hindustan Times, at 7, 12 January 1988. In Delhi 42 dowry deaths were reported in six months. See The Hindustan Times, at 5, 25 February, 1988. Some girls are committing suicide in "fear of dowry". See The Tribune, at 7, 22 April 1988.
71. See Article 14. See also supra note 1 to 14.
The general meaning of dowry is the property which the bride brings along with her at the time of marriage. In ancient India, daughter's marriage was considered as gift (Kanyadan) and this was accompanied by some cash or gold which was given by the parents of the bride to the bridegroom. This was known as Varadakshina (gift to the bridegroom). But this was voluntary and without any coercion. It is this concept of Varadakshina which has taken the shape of dowry and made the marriage not a matrimonial settlement, but a commercial transaction.

The pernicious evil of dowry has drastic consequences. It has ill-effects on the marital relationship, social status of women, and the condition of parents of daughter. Quite often increasing demand of dowry leads to child marriage, or to some girls being left unmarried. The economic necessity forces them to adopt the profession of prostitution. This evil has made many homes unhappy and ruined a number of families due to increase in divorce cases. This evil also compels persons to use corrupt practices in their official dealings. Sometimes, the daughter commits suicide to reduce the burden of her affectionate and poor parents. Inspite of this, the dowry system tends to be inseparable from marriage.

Several attempts have been made in India to eradicate this social evil, but the Central legislation to curb this evil came only in 1961. The Parliament realised that there were large number of loopholes in the central legislation and hence it amended the Act in 1984 and subsequently

72. Even the concept of Kanayadan has been considered to relegate the status of women. See supra note 66 at 39.
73. See Report of the Joint Committee of Both the Houses to examine the Question of Working of Dowry Prohibition Act, 1961, Ch. I, Para 1.1.
75. A non-official Bill to curtail the marriage expenses was introduced in the Lok Sabha by M.C. Daga on 12 April 1985. In the statement of objects of the Bill, Mr. Daga mentioned that such a measure was necessary since lavish spending sometimes even upto one crore of rupees in marriages compels persons to use corrupt practices in their official dealings. Recently the government has issued the orders that government employees, arrested or involved in dowry deaths, will be placed under immediate suspension. See The Times of India, at 5, 3 August 1987.
77. See supra note 67.
79. This Act came into operation on 1 July 1961. It repealed Bihar and conted
in the year 1986. Both these amendments have brought considerable changes in the Principal Act of 1961. But still anti dowry law, like many other welfare laws, is only a pretence. It is a slumbering law, observed more in breach than in performance.

Section 2 of the Dowry Prohibition Act, 1961 defines "dowry" as:

[A]ny property or valuable security given or agreed to be given either directly or indirectly

(a) by any party to the marriage to the other party to the marriage.

(b) by the parents of either party to a marriage or any other person, to either party to the marriage or to any other person at or before or (at any time after the marriage) (in connection with the marriage) of the said parties; but does not include dower or mehr in the case of persons to whom the Muslim Personal Law (Sheriat) applies.

From the above definition, it is clear that the main object of the Dowry Prohibition Act is to "prohibit the giving or taking of dowry" or "to stamp out the practice of demanding dowry in any shape or form either before or after the marriage." But one can be reasonably sceptical about the efficiency of the rigmarole language of this provision which claims to define dowry. Because the presents made at the time of a marriage to the either party to the marriage shall not be deemed to be the dowry unless they are given "in connection with the marriage". It is further provided that the presents made to the either party to the marriage or any other person should be of "customary nature" and their value should not be excessive having regard to the financial status of the person by whom or on


80. This amendment Act received the assent of the President on 11 September 1984 but came into force w.e.f. 2 October 1983.
81. This Amendment Act received the assent of the President on 8 September 1986.
82. See Justice Hari Swaroop, For Whom the Law is made, 228(1981).
83. Substituted by the Amendment Act of 1984 for the words "as consideration for the marriage".
84. Substituted by the Amendment Act of 1984 for the words "after the marriage".
87. Supra note 70 at 566.
88. These presents were also permitted by the Principal Act of 1961 in explanation of section 2. This explanation was omitted by the Amendment Act of 1984 but it once again finds its reflection in the newly inserted section 3(2).
89. See proviso to Section 3(2) of the Dowry Prohibition Act, 1961.
whose behalf such presents are given.  

It is submitted that this provision defeats the object of the Act. By making reference to the 'nature of presents' that they should of "customary nature", the Parliament has gone back to the days of origin of dowry. One fails to understand what is meant by the term "excessive" and who will determine this? If this "excessive" term is to be interpreted with reference to the 'financial status' of a person giving such presents, then only those families whose financial status is good will be able to marry their daughters. And the families whose financial status is not good may find difficult to get a suitable match for their daughters. Let us not hesitate in admitting that majority of the Indian population which suffers from this pernicious evil of dowry, does not have the good financial status. Because if the financial status is good then they can afford the dowry. The problem comes only when the bride or her parents cannot afford it.

Another major lacuna in the definition of 'dowry' under the Act is that it does not include the various expenditures of the marriage which are considered as incidental to the marriage, for example, there are various customary ceremonies like Thaka, Sagai, Tikka and Milni etc.

It is, therefore, suggested that a ceiling on marriage expenditure be imposed. The maximum limit of marriage expenditure may be fixed, say for example rupees ten thousand. And further it is suggested that the marriage expenditure should also include the expenses incurred directly or indirectly in connection with any ceremony connect and with the marriage.

Section 3(1) of the Act provides for punishment for a person who gives or takes or abets the giving or taking of dowry. This section was amended by the Amendment Acts of 1984 as well 1986. After the Amendment Act of 1986 the punishment for such offences will be imprisonment for a period of five years with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more.

90. Ibid.
92. See supra note75 where it was proposed that a ceiling on marriage expenses of rupees five thousands for man and of rupees ten thousand for woman be imposed. The Haryana Act 38 of 1976 provides that the aggregate marriage expenditure should not exceed five thousand rupees.
93. See Section 4. The Amendment Act of 1984 enhanced the punishment from six months to two years and the fine from rupees five thousand to ten thousand for demanding dowry.
This is definitely a step in the positive direction as the more stringent punishment would act as deterrent factor. Even the demand for dowry has been made punishable under the Act.

One of the important changes which the Amendment Act of 1984 has brought is that it has deleted the proviso of section 4 of the Act which provided an unreasonable limitation that the court will take the cognizance of an offence only with the prior permission of the State government or of such officer as the State government may specify in this behalf.

This omission was desired particularly when these days the offence of dowry deaths etc., are brought to the knowledge of the court generally by the social organisations. If they were also required to seek the prior permission from the State government, then they might not prove useful to the maximum extent. And hence now all those who want to help in the eradication of dowry will function more effectively. The role of the social organisations has been specifically recognised by the Amendment Act of 1984.

The Amendment Act of 1986 has inserted a new section 4-A which puts a ban on the advertisements for dowry and makes such an offence as punishable. This new addition seems to be a better change because it will prohibit the so called "open-tenders" for dowry through advertisements.

A salutary provision of the Act is section 6 which provides dowry to be for the benefit of the wife and her heirs. The obligation imposed by this section is that if any other person has received dowry before or after the marriage then that should be returned to the wife within three months after the marriage. Failure to comply with this provision has been specifically made punishable. Amendment Act of 1986 has also inserted a new proviso in sub-section 6 which provides that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall, if she has no children, be transferred to her parents, or if she has children, be transferred to such children and pending such transfer, be held in trust for such children.

94. See Section 7(b)(i)(ii). However, an explanation appended after clause (c) of Section 7 provides that social organisations or institutions should be such as are recognised by the Central or State government. It is submitted that since dowry is a social problem, so all the social organisations, whether they are recognised or not, should be allowed to file or report the cases of dowry to the Court. If this suggestion is accepted then all the social organisations can become an important vehicle for eradication of the social evil of dowry.

95. The period of "one year" was reduced to "three months" by the Amendment Act of 1984.

96. Sub-section(2) of Section 6 was amended by the Amendment Act (contd.)
It is submitted that this provision is very innovative. If the woman dies because of dowry harassment then the greedy parents-in-law should not be allowed to take advantage of the property of the wife. It is suggested that if in case she does not leave behind her heirs or parents then her property in the hands of her parents in laws be transferred to the legal aid cells or social organisations which are trying to eradicate this social evil of dowry from our society. But in no case the property should go to the husband or his parents. This suggestion, if implemented, may to some extent prevent the incidents of "bride burning".

Lucy Carroll, has also suggested further amendments to section 6 of the Act. According to the learned author, section 6 should be re-written in such a way that the person receiving the dowry must transfer it to the women on her demand, in the meanwhile holding it in trust for her benefit, failure or refusal so to transfer the property on demand being a criminal offence. It is submitted that the learned scholar has made a very good suggestion and this is also in consonance with the latest judicial trend. Thus, the above suggestion should be implemented at the earliest.

The Amendment Act of 1986 has also brought the following important changes in the Principal Act of 1961.

First, it amended section 8 of the Act and has made every offence under this Act non-cognizable, non-bailable and non-compoundable. A new section 8A has been added which puts the burden of proof, that he did not commit an offence under this Act, on him.

Secondly, one of the main reasons for the failure of the Dowry Prohibition Act was the lack of any proper and effective enforcement machinery which could intervene whenever necessary in averting dowry tragedies by helping the dowry victims. Parliament gave a clarion call by the Amendment Act of 1986 and inserted a new section 8B which provides that the State Government may appoint as many Dowry Prohibition Officers as it thinks fit and specify the area in respect of which they shall exercise their jurisdiction and powers under this Act. The Dowry Prohibition Offi- of 1986 and the punishment was enhanced and it provides that the guilty person shall be punished with imprisonment for a term not less than six months, but may extend to two years or with fine which shall not be less than five thousand rupees but which may extend to ten thousand rupees or with both.

cers shall exercise and perform the following powers and functions, namely:

(a) to see that the provisions of this Act are complied with;
(b) to prevent, as far as possible, the taking or abetting the taking of, or the demanding of dowry;
(c) to collect such evidence as may be necessary for the prosecution of persons committing offences under the Act; and
(d) to perform such additional functions as may be assigned to him by the State government, or as may be specified in the rules made under this Act.

In order to see the efficient performance of the powers and functions of the Dowry Prohibition Officers, it is also provided that the state government may, for the purpose of advising and assisting these officers appoint an advisory board consisting of not more than five social welfare workers, out of whom at least two shall be women from the area in respect of which such officers exercise jurisdiction.

These changes in the Act, it is submitted, will definitely provide teeth to the Dowry Prohibition Law. Because no law can be effective unless it is supported by an effective enforcement machinery or agency.

Thirdly, the Amendment Act of 1986 has also brought some changes in the Indian Penal Code and in the Indian Evidence Act. A new section 304B has been inserted in the Indian Penal Code after section 304A. It provides that where the death of a woman is caused by burns or bodily injury occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. It is further provided that whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. Similarly, in the Evidence Act after section 113A, a new section 113B has been

99. Section 8B(2) of the Act.
100. Section 8B(4) of the Act.
inserted which provides that when the question is whether a person has committed the dowry death of a woman and it is shown that soon after her marriage such women had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death. These changes, in our submission, will help in convicting the person for dowry death.

Judiciary has also been very sensitive to the issue of dowry and it has given positive interpretation to the letter of law so as to eradicate this social evil. Instances are numerous where Indian women have gone through a literal misery of marriage for years rather than go to a court of law and expose themselves to public life. However, whenever any case has been brought to the notice of the court, it has interpreted the law so as to provide socio-economic justice to women.

In M. Abbas v. K. Kunhipathu, the question before the Kerala High Court was as to the effect of giving and taking dowry in contravention of the Dowry Prohibition Act, 1961. Giving benefit to the women, the Court held that the consequence is not that the transaction is invalid. The beneficial interest in the transaction is with the wife and the taker is only a trustee.

In Narotam Singh v. State of Punjab, the Summit Court observed:

It is distressing that dowry or bride price should mar married felicity with feudal cruelty in India, largely because the anti-dowry law sleeps on the statute book and social consciousness is not mobilised to ban effectually its vicious survival. Law, hanging limp, is a slur on the executive, charged with its enforcement and its traumatic consequences...Will the administration awake to the urgency of a campaign so that the people may become participants in the observance of social welfare legislation.

From the above observations of the Summit Court, it is clear that it not only condemned the dowry system but also highlighted the ineffectiveness of the law and its non-enforcement by the administration.

104. Id. at 1543.
In Bhai Sher Jang v. Varinder Kaur, the Punjab and Haryana High Court held that whatever property is given to the wife by way of gift or will, it will constitute her stridhan and she is absolute owner of it. The court also observed that any person who holds the property of the wife and deny it to her, he is guilty of criminal breach of trust and the suit under section 406 of the Indian Penal Code is maintainable. The court also pointed out that section 27 of Hindu Marriage Act, 1955 and section 14 of the Hindu Succession Act, 1956 had not in any way modified the concept of stridhan. In fact, these two legislations have put Hindu female wholly at par with the Hindu Male.

However, in Indu Sain v. State, the Delhi High Court took a narrow view of dowry. It was held that any property or valuable security given after the marriage would not constitute the "consideration for marriage" unless it was agreed at the time of marriage that such property shall be given in future. Hence articles given after the marriage for "smooth sailing and continuance of good marital relations," did not constitute "consideration for the marriage."

Punjab and Haryana High Court also failed to follow the observations of Bhai Sher Jang in the subsequent case of Vinod Kumar v. State of Punjab. In this case the accused was charged under section 405 and 406 of the Indian Penal Code for refusing to return the dowry to the wife and hence committing the breach of trust. The full bench, speaking through Chief Justice S.S.Sandhawalia observed that from time immemorial Hindu Law has recognised the ownership of wife with regard to the property given at the time of marriage and this constitutes the Stridhan of the wife. It was further observed:

[T]hat the very concept of matrimonial home cannotes a jointness of possession and custody by the spouses even with regard to the movable properties exclusively owned by each one of the them...barring a special written agreement to the contrary, no question of any entrustment or dominion over the property would normally arise during the coverture on its imminent break-up. Therefore, the very essential pre-requisites and the core of ingredients would be lacking in a charge of criminal

105. 1979 Cr.L.J.493(P&H).
106. 1981 Cr.L.J.1116(Del.).
107. Id. at 1119. See also Shankarrao Abasaheb and another v. L.V.Jadhav and another, 1983 Cr.L.J.269(Bom.).
breach of trust of property by one spouse against the other.109

So, according to this observation unless there is specific agreement of entrustment, it will not create any trust. And if the husband or any other member of his family refuses to return the property of the women, he will not commit any criminal breach of trust.

It is submitted that the Court took a narrow view of the letter of law. There is a contradiction in the observations of the court in this case. On one hand it observed that the wife is the sole owner of Stridhan and on the other hand if her dowry articles are dishonestly held by her husband or by her in-laws, she has no remedy.

The controversy raised by Indu Sain,110 was set at rest to some extent by the Supreme Court in the case of L.V. Jadhav v. Shankarrao. In this case the Supreme Court observed:

[H]aving regard to the dominant object of the Act which is to stamp out the practice of demanding dowry in any shape or form either before or after the marriage, we are of the opinion that the entire definition of the word 'dowry' should not be imported into Section 4... and liberal construction has to be given to the word 'dowry' used in Section 4 of the Act (which) means that any property or valuable security if consented to be given on the demand being made would become dowry within the meaning of Section 2 of the Act.112

It was further observed:

[T]hat the object of section 4 of the Act is to discourage the very demand for property or valuable security as consideration for a marriage between the parties thereto ... There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence and that offence would take place only when the demand was made again after the party on whom the demand was made agreed to comply with it.113

It is submitted that the court has taken a very healthy view in this case. Before this judgement a person could ask for the dowry after

109. Id. at 384.
110. Supra note 106.
112. Id. at 1223.
113. Id. at 1223-24.
the marriage which may not be consented by the parents of the bride. And still this person could escape the penalty stipulated under the Act for demanding dowry.

The Supreme Court also gave clarion call in Pratibha Rani v. Suraj Kumar,¹¹⁴ in which it finally settled the controversy raised by the Punjab and Haryana High Court in Bhai Sher Jang and Vinod Kumar. The Supreme Court analysed in detail Vinod Kumar. The majority opinion of Fazal Ali and Sabyasachi Mukerji, JJ., categorised it as a "mass of confusion" which "lacks both clarity and coherence."¹¹⁵ They overruled the view that upon entering the matrimonial house the ownership of stridhan property becomes joint with her husband or relations and observed:

[T]hat with regard to the stridhan property of a married women, even if it is placed in the custody of her husband or in-laws they would be deemed to be trustees and bound to return the same if and when demanded by her.¹¹⁶

A detail analysis of the nature of stridhan was done by the judges in this case.¹¹⁷ It was observed that the gifts and other presents made to the wife by the parents or other persons at the time of marriage or before, constitute the stridhan of the wife.¹¹⁸ It was further observed that the concept that the property of a married woman becomes the joint property of both the spouses as soon as she enters her matrimonial home and continues to be so until she remains there even if she breaks in the matrimonial alliance, is in direct contravention of Hindu Law and is inspired by a spirit of male chauvinism so as to exclude the husband from criminal liability merely because his wife has refused to live in his matrimonial home. While referring to Vinod Kumar, it was further observed that the common use and enjoyment of certain articles of dowry and traditional presents by the other members of the joint family with the leave and licence of a Hindu wife, cannot have the effect of extending jointness of control and custody of the couple of undefined and unreasonable limits.¹²⁰ Justice Fazal Ali very aptly remarked that so far as jewellery and clothes including blouses, nighties and gowns were concerned, they could only be used by the wife and were her stridhan. By no stretch of imagination can it be said that the

¹¹⁵. Id. at 639.
¹¹⁶. Ibid., See also at 633,635,636.
¹¹⁷. Id.at 631-637.
¹¹⁸. Ibid.
¹¹⁹. Id. at 637.
¹²⁰. Id. at 638.
ornaments and sarees and other articles can also be used by the husband. The Supreme Court judgement in this case is a major step in dismantling the massive age old apparatus of injustice in the Indian matrimonial world. Taking the spirit of this judgement and section 6 of the Dowry Prohibition Act together, we may say that dowry should always be considered as stridhan of the wife and she should have exclusive right to deal with it. Any body holding the property contrary to the wishes of the wife, should be punished for the criminal breach of trust.

The judiciary has also shown its deep concern for "bride burning cases". In State(Delhi Admn.) v. Laxman Kumar, which is popularly known as "Sudha Goel Bride Burning Case", the Summit Court found the accused guilty of bride burning but imposed only the sentence of life imprisonment in view of the fact that they were acquitted by the High Court and two years had elapsed since their release. This case is a story of twenty one years old woman who was nine months pregnant and was burnt to death on 2 December 1980 by her husband, brother-in-law and mother-in-law. Mr.S.M.Agarwal, additional session judge, who conducted the trial in the above case sentenced the three accused to death. But to the surprise of everybody, the High Court of Delhi, acquitted all the three accused. The High Court judgement was a shot in the arm of dowry seekers and it was a set back to the cause of building public awareness and a sense of moral duty amongst the citizens to monitor and avert the rising wave of domestic violence of which women are victim. It is true that in a murder trial, the court should remain dissociated from

121. Id.at 633. However, Justice Vardarajan gave the dissenting judgement holding: "[T]hat in the absence of a separate agreement and specific entrustment by the wife to the husband and/or his relations and vice versa of the property of the husband to the wife and/or her relations, it would not be possible to draw an inference of instrument of custody or dominion over the property of one spouse to the other and his or her relations so as to attract the provisions of section 406 of IPC." Id. at 650. It is submitted that the majority judgement has rightly overruled the full bench decision of the Punjab and Haryana High Court, though minority still supported this.
122. See "editorial", Indian Express, Chandigarh, at 6, 23 March, 1985.
124. Id. at 266.
125. R.M.Agarwal and Malik Sarief-ud-Din, JJ., constituted the bench.
heat generated outside the court room, but when the murder is the consequence of bride burning, it is submitted that the court should take into consideration the news media and public opinion as well. It is further submitted, though at the cost of repetition, that in all cases of bride-burning which has resulted in the death of the bride, the accused should be sentenced to death.

In Surinder Kumar v. State(Delhi Admn.), the Supreme Court moved on the wave length of Amendment Act of 1986. In this case, the accused was tried for murdering his wife by burning. The incident occurred about ten months after the marriage. The accused took the plea in defence that the death was accidental owing to bursting of kerosene stove. There was also a dying declaration which clearly mentioned that the accused was in the habit of ill-treating his wife and that on the morning of the incident her husband had abused her and beat her. The accused was convicted under section 302 of the Indian Penal Code and the Court awarded him the sentence of life imprisonment. This, obviously, is a healthy decision and in consonance with the legislative intention.

In Joint Women's Programme v. State of Rajasthan, the Supreme Court directed the state of Rajasthan and Haryana by way of an interim order to create a "Special Dowry Cell" at the state level to investigate into the dowry deaths through specialised investigative units. It was further suggested that one or two leading women social workers may be associated with such dowry cells. Let us hope that these "dowry cells" function properly and help in punishing all those who are responsible for "dowry deaths".

In Shoba Rani v. Madhukar Reddy, the Supreme Court held that the demand of dowry by the husband or his parents amounts to cruelty entitling the wife to get a decree for dissolution of marriage. This judgement has

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127. Supra note 123 at 265.
129. See section 304-B of the Indian Penal Code and section 113-B of the Indian Evidence Act. These two sections were inserted by the Dowry Prohibition(Amendment)Act, 1986.
131. Ibid.
132. Id. at 2061.
134. Id. at 127.
been hailed as landmark but it has also laid down a proposition which mark a backward march in the women's fight for a better deal through the role of law.\textsuperscript{135} In this case the judges held that the husband was a party to the repeated demands of his mother for money from the wife's parents, and hence committed the illegal act of demanding dowry which is prohibited under the law. But then they stated that if the demand of the husband from the wife was only for "personal expenses" then they "would have thrown this appeal away".\textsuperscript{136} The judges, therefore, have carved out an exception under the Dowry Prohibition Act of "personal expenses" of the husband which the legislature never provided. Like the Dowry Act loopholes of "customary presents" having no monetary ceiling and no punishment for not preparing the list to show these presents, the judges have provided a gaping loophole of "personal expenses" to escape the charge of cruelty under the Hindu Marriage Act.\textsuperscript{137}

The only way to check the heinous social evil of dowry is to make effective various provisions of the Act and where even the legislature has failed to make desirable changes, the judiciary should fill up the gap by judicial activism. But the judiciary has to be very careful in evolving new principles for combating against dowry. If all the three organs of the state, that is, legislature, executive and judiciary and we the people of India\textsuperscript{138} work together in a united spirit to eradicate this evil of dowry, only then the socio-economic justice can be restored to women.

(ii) Maintenance to Women and Socio-economic Justice

Maintenance of a person is a matter of social importance, particularly for a woman who in the existing social and economic set-up in our country continues to be a weaker section of the society.\textsuperscript{139} Although personal

\textsuperscript{134} Id. at 127.
\textsuperscript{135} For critical analysis of this judgement see, Krishan Mahajan, "Is cruelty Wonderful," The Hindustan Times, New Delhi, at 11, 1 December 1987.
\textsuperscript{136} Supra note 133 at 126.
\textsuperscript{137} See supra note 135.
\textsuperscript{138} Let us not forget that it is the fundamental duty of every citizen of India to "renounce practices derogatory to the dignity of women". See article 51-A(e), supra note 14a.
laws of Hindus and Muslims do contain rules for the maintenance of women,
section 125 of the Criminal Procedure Code, 1973, does away with the
hurdles of personal laws and allows a sum of money by way of maintenance
to the dependent wives, children and parents. Section 127 of the Code
provides for alteration in allowance. These provisions are in the
nature of a welfare law and requires liberal interpretation.

Section 125 has been enacted with the avowed object of preventing
vagrancy and destitution or at least preventing their consequences. It
was enacted to serve a social purpose and imposed on an individual an obli­
gation towards the society to maintain some of his close relations listed
therein so as to prevent vagrancy and destitution. It is a measure which
enacts a uniform law applicable to all persons belonging to any community,
caste or religion. It is essentially of a prophylactic nature and cuts
across the barriers of religion. In other words, section 125 is meant

140. The relevant part of section 125 provides: "If any person having
sufficient means neglects or refuses to maintain
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child whether married
or not, unable to maintain itself, or
(c) his legitimate or the illegitimate child(not being married
dughter) who has obtained majority whether such child, is, by
reason of any physical or mental abnormality or injury unable
to maintain itself, or
(d) his father or mother unable to maintain himself or herself,
a Magistrate of first class may, upon proof of such neglect or
refusal, order such person to make a monthly allowance for the
maintenance of his wife or such child, father or mother, at such
monthly rate not exceeding five hundred rupees in the whole, as
such Magistrate thinks fit...

Explanation: For the purpose of this Chapter,-
(a)...
(b) "Wife" includes a woman who has been divorced by or has
obtained a divorce from, her husband and has not remarried.
(2)...
(3)...
Explanation: If a husband has contracted marriage with another
woman or keeps a mistress, it shall be considered to be just ground
for his wife's refusal to live with him...."

This section corresponds to section 488 of the old Code of 1898.

141. The relevant part of section 127 of the Code provides: "(1) On proof
of a change in the circumstances of any person, receiving under section
125 a monthly or ordered under the same section to pay a monthly allow­
ance to his wife, child, father or mother, as the case may be, the
Magistrate may make such alteration in the allowance as he thinks fit:
(2)...
(3) Where any order has been made under section 125 in favour of a woman
who has been divorced by or has obtained a divorce from, her husband
the Magistrate shall, if he is satisfied that-

(conted.)
to serve a social, economic and moral purpose. It is also projection of equality of sexes and protective discrimination in favour of weaker sections of society, that is, neglected wives and discarded divorcees, abandoned children and needy and hapless parents.¹⁴⁴

In Ramesh Chander v. Veena Kaushal,¹⁴⁵ it was held that provision for maintenance to a wife, including a divorced wife, is a measure of social justice and is especially enacted to protect women and children, and it falls within the constitutional sweep of article 15(3) reinforced by article 39. This provision must accordingly be interpreted in a manner so as to advance the cause of weaker sections like women and children.¹⁴⁶

In Bai Tahira v. Ali Hussain Fissalli,¹⁴⁷ taking recourse to teleological and schematic method of interpretation, Krishna Iyer, J., observed that the meaning of any provision of law should be discerned keeping in view the values of society as legal system. He further observed:

Art.15(3) has compelling, compassionate relevance in the context of S.125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee...
Surely, Parliament, in keeping with Art.15(3) and

(a)...
(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,...".


¹⁴⁵ A.I.R.1978 S.C.1807. In this case the bench was constituted by V.R. Krishna Iyer, V.D. Tulzapurkar, JJ., and R.S. Pathak, J., (as he then was).

¹⁴⁶ Id. at 1809. See also Balan Nair v. Bhavani Amma, A.I.R.1987 Ker.110.

deliberate by design, made a special provision to help women in distress cast away by divorce (or neglect). Protection against moral and material abandonment manifest in Art.39 is part of social and economic justice, specified in Art.38, fulfilment of which is fundamental to the governance of the country(Art.37).148

The learned judge highlighted the underlined scheme of sections 125 and 127 of the Code of Criminal Procedure. He pointed out that these provisions have a "social purpose", that is "ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets."

It appears that the Supreme Court accepted that section 127(3)(b) related to the payment of dower under Muslim Law. This becomes obvious from the following observation of Krishna Iyer, J.:

The payment of illusory amounts by way of customary or personal law requirement will be considered on the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of social obligation, not by a ritual exercise rooted in custom....The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself....There must be rational relation between the sum so paid and its potential as provision for maintenance.150

Finally, the Supreme Court laid down the following proposition.

[N]o husband can claim under section 127(3)(b) absolution from his obligation under section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.151

From the above observations of the learned judge in Bai Tahira it is clear that the purpose of section 127(3)(b) is to imply that a wife cannot claim double benefit. One, of the customary or personal law payment and the other of the payment under section 125. In other words, if the amount of dower paid to the wife is sufficient to provide her maintenance, then she cannot claim maintenance under section 125, but if it is insufficient she can still maintain her claim for maintenance.Also

148. Id. at 365.
149. Ibid.
150. Id. at 365-66.
151. Id. at 366.
The amount of dower-money paid to the wife could be considered in the reduction of the amount of maintenance but could not annihilate that rate unless that was a reasonable substitute. Tahir Mahmood has described Bai Tahira a liberal ruling conforming to the spirit of Islamic law. The following year Krishna Iyer, J., again delivered the judgment for the court in Fuzlunbi v. K.Khader Vali, and reiterated the conclusion of Bai Tahira. The learned judge pointed out that the conscience of social justice, the cornerstone of our constitution, will be violated and the soul of the scheme contained in provisions of section 125 and 127 of the Code of Criminal Procedure will be defiled if judicial interpretation sabotages the true meaning and reduces a benign protection into a damp squible by disentitling a woman from receiving maintenance under the Code, and paying her a paltry sum by way of mehar on divorce, wholly inadequate to yield income sufficient for her to maintain herself.

In Zohara Khatoon v. Mohammad Ibrahim, the Supreme Court held that the Muslim wife who obtained a judicial divorce under the Act of 1939 was entitled to claim maintenance under section 125 of the Code. The decisions in Bai Tahira and Fuzlunbi show how social sensitization of a judge can make him render social justice and make law serve the weaker sections of the society.

Mohd. Ahmed Khan v. Shah Bano Begum was decided by a bench of five judges of the Supreme Court. This appeal raised an issue which was of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction.

152. Tahir Mahmood, Muslim Law of India, 133(1980).
153. A.I.R.1980 S.C.1730. In this case the bench was constituted by V.R.Krishna Iyer, O.Chinnappa Reddy and A.P.Sen, JJ.
155. Supra note 143.
156. This case was listed before a bench consisting of two judges of the Supreme Court, that is, Fazal Ali and A.Varadarajan, JJ. They indicated their dissent from the decisions in Bai Tahira and Fuzlunbi and requested that this case be referred to a larger bench consisting of more than three judges. Hence the case was decided by five judges, that is, Y.V.Chandrabhuj, CJ., A.Desai, O.Chinnappa Reddy, E.S.Venkataramiah, and Ranganathan Misra, JJ.
157. Supra note 143 at 946.
The unfortunate story of Shah Bano Begum was that she was married to an advocate, Mohd. Ahmed Khan, way back in 1927. She gave birth to three sons and two daughters. In 1975 she was driven out of the matrimonial home by her husband. Lacking means of subsistence she knocked the doors of magistrate's court in 1978 claiming maintenance from her husband at the rate of rupees five hundred per month under section 125 of the Code. On 6 November 1978 the husband pronounced talaq on her and pleaded in the Court that since he has divorced her, he is under no obligation to pay maintenance. He also averred that he had paid maintenance to her at the rate of rupees two hundred per month for about two years and had also deposited a sum of rupees three thousand in the Court by way of mehr-money. The magistrate directed the husband to pay a "princely sum" of rupees twenty five per month. On appeal, the High Court enhanced it to rupees one hundred seventy nine and paise twenty per month. The wife had averred that her husband's annual income was rupees sixty thousand. Against this order, the husband landed in the Supreme Court.

The Supreme Court dismissed the appeal and confirmed the judgement of the High Court. It was further held that the respondent could make an application under section 127(1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.158

The most important aspect of Shah Bano judgement is that Chandrachud, C.J., categorically held "there is no conflict between the provisions of section 125 and those of Muslim Personal Law on the question of Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."159 And in case there is any conflict between the personal law and section 125 of the Code, the latter would prevail.160

While Bai Tahira and Fuzlunbi had proceeded on the assumption that deferred Mahr did come within the contemplation of section 127(3)(b) by virtue of being sum payable under Muslim Personal Law on divorce, in Shah Bano, the Court held that Mahr is "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the

158. Id. at 955.
159. Id. at 951.
160. Id. at 949.
marriage", and "an obligation imposed by law on the husband as a mark of respect for the wife". Hence 
Mahr was not an amount payable "on divorce" as contemplated in section 127(3)(b) of the Code. 161

Upholding the decision in Bai Tahira, the Court took exception to Justice Krishna Iyer's statement that "payment of Mahr money, as a customary discharge, is within the cognizance" of section 127(3)(b). Given the present conclusion that mahr was not a sum payable "on divorce", it followed that it did not come within the terms of that section. 162

It is submitted that whether or not it is regarded as a sum payable "on divorce", since it has been in fact paid on divorce, the magistrate will have to take this sum into consideration while fixing the amount of maintenance and if he comes to the conclusion that this amount is sufficient to maintain her, he will have to give a finding that she is not unable to maintain herself and, therefore, no maintenance amount need be given to her. 163 because, under section 125 of the Code, maintenance can be claimed by the wife, including a divorce, who is unable to maintain herself after such divorce. Suppose that a mahr of rupees one lakh or two lakh is paid after the divorce as deferred dower, can we say that the wife will be unable to maintain herself. Let us remember the objective of section 125, that is, to prevent vagrancy and destitution, and thus, before awarding the maintenance, the magistrate has to keep in mind the amount of mahr paid on or after the divorce. Therefore, substantially, the position reached by Justice Krishna Iyer in Bai Tahira, it is submitted, would remain the same after Shah Bano.

However, in Shah Bano, the Court failed to give strength to the social objective of section 125 of the Code. It confirmed the paltry sum of rupees one hundred seventy nine and paise twenty granted by the High Court and left it to the respondent to apply again under section 127(1) for the enhancement of the amount. It is clear from the facts that it took about seven years to get her case decided regarding the payment of maintenance. She was claiming maintenance because she was unable to maintain herself. The Supreme Court expected her to fight again in her old age to get enhanced amount of maintenance. It is submitted that the Supreme Court

161. Id. at 952-954.
162. Id. at 954.
163. See Lucy Carroll, "Mehr and Muslim Divorcee's Right to Maintenance", 
should have enhanced the maintenance allowance in this case itself so as to fulfill the spirit of the section 125 of the Code. Moreover, it is suggested that the maximum amount of rupees five hundred which can be given as maintenance, is insufficient and the suitable amendment should be made in section 125 of the Code to increase this amount at least to rupees fifteen hundred in order to catch up with rising costs and inflation.

It is also suggested that section 125 should be further amended so as to make both the spouses entitled to maintenance on the grounds mentioned therein. In other words, the word "husband" should also be added in section 125 for claiming maintenance from the wife.

It is further suggested that section 125 is a part of Criminal Procedure Code, whereas under the Criminal Law (Indian Penal Code) wife cannot commit adultery. Hence this ground of adultery disentitling the wife for maintenance should be deleted from the provision of section 125 of the Code.

And finally, it is suggested that in view of Shah Bano judgement, section 127(3)(b) should be deleted.

Shah Bano judgement was criticised by certain fundamentalists and it was considered as an interference in their religion. With the avowed purpose of nullifying the Shah Bano decision of the Supreme Court, Parliament has passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. This Act has already been challenged in the Supreme Court.

It has been claimed by the protoganists of the Act that the Muslim women would get much more under the new statute than under section 125 of the Code. A strange argument is advanced that is to impose the responsibility of maintenance of an indigent divorced Muslim wife on one person, that is, husband is an insult to women's dignity. But it seems that it is not an insult to her dignity to leave her destitute, and require her to beg for maintenance from one relation to another, ad infinitum, and failing

which to land for alms from the nearest wakf which itself may be a prey of destitution.  

The Act has been criticised on many grounds and it has been charac-terised as "a retrogressive precedent of dubious constitutionality." Justice Krishna Iyer, whose social sensatisation made him render social justice and make law serve the weaker sections of the society in Nai Tahira and Fuzlunbi, in his letter to the Prime Minister, rightly reminded that not only are secularism and equality non-negotiable constitutional fundamentals but gender justice is a pregnant facet of social justice which too is a guarantee of the suprema lex. The learned judge rightly pointed out that the preambular promise of equality of status and the fundamental right to equal protection of the laws, with special provision for women and children make legal discrimination on the ground of religious denomination anathema and invalid. To keep harrowing Muslim women out of the benign ambit of section 125, when traumatically talaqed by heartless husbands and to promise them the illusory prospect of being freefed from bizarre basket is blatantly unconstitutional and litigatively treacherous.

It is submitted that a classification which excludes divorced Muslim women alone from the protection which all divorced women theretofore enjoyed under section 125 of the Code, is an arbitrary and unreasonable classification based only on the ground of religion. Hence, the Act is violative of articles 14, 15(1) and 15(3) of the Constitution. Viewed from this angle, the Act is deemed to be unconstitutional as being violative of article 13(2)

166. The core section of the Act is Section 4 which imposes an obligation to maintain a divorced unmarried Muslim woman who has no means to maintain herself on her certain relations other than the husband. Maintenance to such a woman is payable by such relatives in proportion in which they would inherit her property. It is further provided that if a divorced woman fails to get maintenance from her relatives or there are no such relatives in existence, then the Magistrate can order payment of maintenance to her from the Wakf Board. For the perusal of this section see Paras Diwan, Dowry and Protection to Married Women, 249-50(1987).

167. Lucy Carroll, "The Muslim Women(Protection of Rights on Divorce)Act, 1986:A Retrogressive Precedent of Dubious Constitutionality", 28 J.I.L.I.364-376(1986). According to the learned author, the Act is open to criticism on at least five grounds, namely, that it, (i) fails to embody accurately Muslim Law; (ii) fails to provide a realistic and practical alternative solution to the genuine hardships faced by divorced Muslim women; (iii) is ambiguously and inaptly drafted; (iv) opens a Pandora's box by establishing a dangerous and retrogressive precedent; and (v) is prima facie unconstitutional. Id. at 364. See also A.G. Noorani, "Muslim Law Reform-I, Glaring Flaws in new Bill", Indian Express, Chandigarh, at 6, 21 March, 1986.


169. Id. at 2.
of the Constitution. On the other hand section 125 of the Code is a secular provision and applies to all women equally. This provision has no relation to liability to maintenance under the personal law. The jurisdiction is different, the jurisprudence is different, the measure and procedure are different. One is rooted in family law and the other in public order and social justice. To contend that section 125 is for or against any religion is a caricature of the scope and purpose of law. Thus, the Act is an injustice to our republic's secular principle. It is an injustice to women's basic rights and, therefore, violative of human rights, it is also an injustice to the egalitarian policy in our Constitution in Articles 14, 21 and 25.

Uniform civil code is the cherished goal of article 44 of the Constitution. Whereas the Act is a step in the opposite direction. The court can, if the state commits a breach of its duty by acting contrary to the directive principles, prevent it from doing so. Directive Principles are constitutional obligations on the state. The state may not have sufficient means available in order to implement some or all the directive principles. Therefore, in accordance with article 37, the directive principles as such are non-justiciable. This certainly does not mean that the state can even act contrary to the obligations contained in directive principles. It is desirable to clearly understand the difference between the implementation of the directive principles and acting contrary to directive principles. The implementation may not be possible for one reason or the other, but the state cannot certainly be allowed to act in violation of the directive principles of state policy. If this were not the position, serious consequences would ensue. It is illustrated by the fact that a law enacted in violation of the directive principles would still be deemed to be constitutional. This would be a threat to the very supremacy of the Constitution as also to that of rule of law. Let us hope that the apex court will

170. Article 13(2) provides: "The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void."

171. Supra note 168 at 3.
172. Ibid.
173. Id. at 5.
174. See supra note 25.
174a. For the detail of this aspect, see supra Chapter IV sub-head -(B).
declare this Act as unconstitutional for the reasons mentioned above.

In Smt. Savitri v. Govind Singh Rawat, the Supreme Court held that keeping in view the social objective of section 125 of the Code, the magistrate has the power to make an interim order directing the husband to pay a reasonable sum by way of maintenance to wife pending final disposal of the case.

In Vijaya v. Kashirao, the Supreme Court held that section 125 of the Criminal Procedure Code enjoined not only the son but also the married daughter to maintain her parents. Since the purpose of section 125 of the Code is to enforce social obligation, the daughters should not be excluded from the obligation to maintain their parents. The Court held:

There can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents.

It was further observed:

Before ordering maintenance in favour of a father or a mother against their married daughter, the Court must be satisfied that the daughter has sufficient means of her own independently of the means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain herself.

It is submitted that from the above observations, there seems to be a contradiction. If it is the "moral obligation" of the daughter to maintain her parents then why it is necessary to have an "independent means of income". A learned scholar has rightly suggested that the Court should have held that the "matrimonial unit, that is, the husband and wife, if able to pay, are legally and morally bound to maintain the wife's destitute parents as of the husband". Thus, the Supreme Court,"In failing to use this opportunity to enunciate the concept of joint matrimonial duties, has missed the bus of son-daughter parity, and in fact in insisting on the "independent means of income" criterion, it has again underscored the generally

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174(b) A.I.R.1986 S.C.984.
176. Id. at 1103.
177. Id. at 1102. (emphasis added)
178. Ibid. (emphasis added).
The Supreme Court in an "outstanding" and "historic judgement" held that if a Muslim husband contracts a second marriage and takes mistress, the first wife is entitled to claim maintenance as well as separate residence. However, this does not affect the husband's right to take more than one wife. It also does not affect the status of the second wife as legally married wife. The Supreme Court in this case expanded the scope of explanation of section 125 of the Code, and gave meaning and content to the "social purpose" of this provision. The Supreme Court rightly observed:

The legal status of woman to whom a husband has transferred his affections cannot lessen her distress or feelings of neglect. In fact, from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress by the husband.

This judgment should be regarded as an important gain for Muslim women who are the worst victims of inequitable family laws. This judgement is an eloquent vindication of two of the most vital principles enshrined in the Constitution of India, that is, equality before the law and the dignity of the individual. It has brought into full play the letter and spirit of our Constitution. The Supreme Court in this case rightly relied on full bench decision of Shah Bano that "section 125 overrides the personal law if there is any conflict between the two." But the judgement leaves unanswered the question of what might happen to the first wife if the husband chooses to escape the maintenance burden by resorting to divorce which has been made easier, thanks to the Muslim Women (Protection of Rights on Divorce) Act, 1986.

180. Id. at 117-18.
184. Id. at 1107-08.
185. See supra note 140.
186. Supra note 183 at 1108. However according to a learned scholar, this proposition of the Supreme Court is intolerable de facto as well as de jure. See Virendra Kumar, "From Shah Bano to Subanu", 29 J.I.L.I.265 at 268(1987).
187. See supra note 160 and supra note 183 at 1107.
188. To this extent, professor Virendra Kumar has rightly expressed his fear against this judgement. See supra note 186 at 270. See also "Shah Bano to Subanu", editorial, The Hindustan Times, 9 April 1987.
In *Yamunabai Anantrao Yadav v. Anantrao Shivram Yadav*, the question before the Supreme Court was that whether the second wife of a Hindu husband is entitled to any maintenance under section 125 of the Criminal Procedure Code. The Supreme Court answered the question in the negative. This is so because her marriage is a nullity under the Hindu Marriage Act. Also under Section 125 of the Code, only "wife" is entitled to maintenance. According to the Supreme Court, the word "wife" in section 125 of the Code means only a "lawfully wedded wife", and this has to be determined on the basis of the "personal law" of the parties concerned.

It is submitted that the Supreme Court, by interpreting the word "wife" literally or narrowly, has given a set back to the positive development which had taken place through judicial activism from Bai Tahira to Subanu. First, the Supreme Court ignored the observations of the five judges bench in *Shah Bano* that there is no conflict between the personal law and section 125 which is a secular provision. And in case if there is any conflict between the two, "section 125 overrides the personal law".

Secondly, it seems that the Court failed to widen the scope of section 125 of the Code, the object of which is to "prevent vagrancy and destitution". The Constitutional mandates that it is the duty of every citizen to renounce practices derogatory to women and the special position given to them for preferential treatment in the fundamental rights have also been ignored.

The judges should have taken judicial notice of the fact of gross illiteracy of women in the country and the disadvantaged position of women and girls both in the parental and matrimonial home. A situation may arise, particularly in the Indian scenario, that the second wife is kept in the dark about first marriage of the husband either by the parents or by her husband. If she is not treated as "wife" of the husband then she fails to claim maintenance and she might go in for vagrancy and destitution and section 125 will fail to protect her or serve its purpose or object.

190. See supra note 143 at 949 and supra note 183 at 1107.
191. See supra note 142.
Also she would go into destitution for the wrong of her husband, who would take advantage of his own wrong by escaping from his obligation to maintain his wife. Once it is agreed that section 125 of the Code overrides the personal law, we should not determine the status of the second wife in accordance with the personal law, Hindu Marriage Act in the present case. Also the expression used in section 125 uses only the expression "wife" and not "legally wedded wife". Since on the basis of legal principles husband cannot take advantage of his own wrong, the judges could have put on the husband the burden of proving the knowledge on the part of the second wife as regards his first marriage. Also there is no suggestion in the judgement regarding the need to have a compulsory registration of marriages to avoid the problem of second marriages as in the present case or at least to ease the proving of a marriage. Thus, the judgement in hand, negates not only the intention of the legislature but more importantly the spirit of the Constitution.

(iii) Uniform Civil Code: A Need of the Time

The directive principles of state policy set out in Part IV of the Constitution are paramount to the governance of the country and mandate the state to implement them without playing political hide-and-seek with them. Article 44 of the Constitution, which is one of the directive principles, provides:

The state shall endeavour to secure for all citizens a uniform civil code throughout the territory of India.

The concept of uniform civil code, in this article, is confined to having a uniform family code for members of all communities living in the country, not merely for the sake of uniformity but also for securing social justice to weaker sections in different communities in the spheres of marriage, divorce, custody, adoption and inheritance. This becomes abundantly clear from the following observations of Dr. B.R. Ambedkar:

[We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code]

operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with the property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts; and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is marriage and succession. 194

Article 44, therefore, appears to be a demonstration of the conviction on the part of its framers that the existence of the different religion-oriented personal laws of ours, were not in tune with the egalitarian philosophy of our new National Charter and required to be replaced by a set of general and territorial laws contained in a uniform civil code. 195 The debates in the Constituent Assembly on draft article 35 (present article 44), show that five Muslim members196 of the Constituent Assembly strongly expressed themselves against this article and moved without success amendments to this article, to secure the exclusion of all personal laws from its operation. 197 One of the Muslim member, Mr. B.Pocker Sahib Bahadur, unhesitatingly branded this article as a "tyrannous measure" which "ought not to find a place in our Constitution". 198 These members also contended that the personal law of a community was part of their religion and way of life; and in any case, so far Muslims were concerned, their law of succession, inheritance, marriage and divorce were completely dependent upon their religion. Accordingly, the imposition of a uniform civil code would not only conflict with the freedom of religious practice199 guaranteed in fundamental rights of the Constitution, but would also amount to tyranny over those who wanted to follow their own personal laws.

Replying to this criticism, K.M. Munshi said that freedom of religious practice was subject to the power of the State to make any law (a)

196. Mr. Mohamad Ismail Sahib, Mr. Naziruddin Ahmed, Meboob Ali Baig Sahib Bahadur, B. Pocker Sahib Bahadur and Mr. Hussain Imam.
197. Supra note 194 at 540-546.
198. Id. at 545.
199. Draft article 19 and present article 25 of the Constitution.
regulating or restricting any secular activity which may be associated with religious practices, (b) for social welfare and social reform. If the personal law of inheritance, succession etc. was considered a part of the religion, then equality to women, which has been guaranteed in the fundamental rights, could never be given. Replying to the argument that it is a "tyrannous measure", he pointed out that nowhere in the advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a Civil Code. He wanted to divorce religion from personal law, from what might be called social relations or from the rights of parties as regards inheritance or succession. He also pointed out the disadvantages that would perpetuate if there was no civil Code, that is, there would be piecemeal legislations on the ground that it affects the personal law of the country. Alladi Krishnaswami Ayyar also supported the views of K.M. Munshi and pointed out that there was no question of religion being in danger.

Soon after the adoption of article 44 by the Constitution Assembly, Chowdhry Hyder Hussain, a prominent Muslim Lawyer, in most eloquent words stated:

Living under the British rule for about two centuries we have come to consider it only natural for Hindus to be governed by Hindu Law and Muslims to be governed by Muslim Law; but it is wholly a medieval idea and has no place in the modern world... I would, therefore, strongly urge the necessity of having one single Code to be named as the Indian Civil Code applicable to everybody living within the territory of the Indian Union irrespective of caste, creed or religious pursuits. This is the juristic solution to the communal problem. It appears to be absolutely essential in the interest of unification of the country for building up one single with one single set of laws in the country.

For decades, after independence, have already passed and the dream of having a uniform civil code is yet to become a reality for millions of Indians. According to P.B. Gajendragadkar:

In any event, the non-implementation of the provisions contained in article 44 amounts to a grave failure of Indian democracy and sooner we take suitable action in that behalf, the better.

200. Supra note 194 at 547. Take for instance Turkey and Egypt.
201. Ibid.
202. Id. at 548.
203. Id. at 549-550.
In the process of evolving a new secular social order, a uniform civil code is a must. In January, 1972, welcoming the delegates to the Indian Law Institute seminar on Islamic Law, Justice Hegde of the Supreme Court observed:

Religion-oriented personal laws were a concept of medieval times....A society which is compartmentalized by its laws can hardly become a homogeneous unit....In the Constituent Assembly, vested interests -Hindu as well as Muslim -had bitterly opposed the enactment of article 44. But the founding fathers of the Constitution, in national interest, refused to bow to their pressure. There is no justification to adopt a different attitude now.206

P.B.Mukherji has examined the importance of the concept of codification in a very rich context by laying stress on the suggestion that article 44 of the Constitution for uniform civil code be transferred from directive principles to fundamental rights in Part III of the Constitution, with suitable variations if the article is to achieve its purpose.207

The lack of uniform Civil Code meant that people of each community are governed by different laws. This seriously affects women's rights since personal laws are primarily concerned with all aspects of the family, that is, marriage, divorce, succession and custody etc. And it is within the family that oppression and discrimination of women is perpetuated in the name of culture and religion. Secular India has upheld freedom of religion at the cost of its women citizens who have had to suffer every kind of humiliation and indignity under personal law which incorporates most obscure and backward customs and usages.208

The women activities at the second National Conference on Women's Studies at Trivandrum appealed "to all democratic sections of society to struggle for the establishment of a uniform civil code which will incorporate the values of gender justice and secularism."209 They were of the belief that no woman should be denied access to justice by reason of her religion, caste or community. Such equality is not possible unless women

209. Ibid.
are released from the oppression perpetuated in the name of religion. That religion which regulates an individual's personal articles of faith should not become a tort of oppression or discrimination.

Thus, the question is not that whether we should have a uniform civil code or not, in accordance with the mandate of article 44 replacing the different discriminatory personal laws operating throughout India. The real issue is, how can we have the uniform civil code, Article 44 directs the state to "endeavour to secure" a uniform civil code. Obviously, the founding fathers were quite alive to the enormous difficulties likely to be encountered in enacting a uniform civil code. But despite difficulties some practical way, which will help the enactment of a uniform civil code, has to be found out. Even without the clear mandate of article 44 of the Constitution, the legislature is competent to enact a uniform civil code in exercise of its power vested in it under List III, Entry 5, of the VII Schedule to the Constitution.210

The Parliament did make some efforts to unify the nation under a common civil code by enacting the Special Marriage Act, 1954; the Hindu Code of 1955-56 and the Dowry Prohibition Act, 1961.

The Special Marriage Act, 1954, puts on the statute book a secular code of marriage, divorce and inheritance.211 It enabled any two Indians, irrespective of their religious pursuasion, desiring to marry each other to give up their personal law without abandoning their religion and to adopt a common and secular law of marriage and inheritance. However, it has been made entirely optional in its application. The optional character of the Act mitigates its effectiveness.

The Hindu Code212 is applicable to Jains, Sikhs, Buddhists and Hindus of all denominations and castes but it does not apply to those who are professing Islam, Christianity, Judaism or the Parsi religion. The only

210. Entry 5 of List III of Schedule VII deals with "Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."


uniform law compulsorily applicable to all citizens of India, so far enacted by the Parliament, is the Dowry Prohibition Act, 1961. Yet, it specifically exempts from its application the payment of Mahr, which is the concept of Muslim Law.

Recently, the Indian Parliament has passed the dubious and questionable enactment, namely, The Muslim Women (Protection of Rights on Divorce) Act, 1986 which is aimed at excluding the application of secular provision of section 125 of the Criminal Procedure Code to Muslims only. This enactment denies the benefit of a secular law to a class of citizens only on the ground of religion. Thus, it is not only a retrogressive step of the Parliament but also against the basic spirit of the Constitution including article 44 of the Constitution. In the course of debate on Muslim Women (Protection of Rights on Divorce) Bill, 1986, the Honourable Law Minister made it clear that even for bringing about reforms in the personal law governing any minority community, the government would like to wait till a demand in that behalf is made and backed up by a majority of the members of the concerned community. Such an attitude of the government was understandable during the British regime but not after four decades of independence, and when social justice is the signature tune of our Constitution and the universal cry of modern times.

There are several important matters where the diversities in the personal laws governing the different communities are so greater, unfair, inequitable and humiliating that there is considerable scope and every necessity to bring uniformity as also to give a feeling to every member of independent nation that he or she enjoys equality of social status irrespective of race, religion, caste or sex.

For example, polygamy and unilateral divorce by pronouncing talaq thrice in the presence of two witnesses, which are peculiar features of Muslim Personal law, are unjust, unfair, derogatory, humiliating and discriminatory against Muslim women on the ground of sex. Similarly, a discriminatory position in regard to the ground of adultery is available under the Indian Divorce Act. For, a Christian husband can get divorce on the ground of adultery simpliciter on the part of his wife, but a Christian wife has to prove one more ground such as cruelty or desertion in addition to adultery on the part of husband in order to obtain divorce against him. No set
of personal laws can be said to be without defects or deficiencies and even the secular law like the Special Marriage Act, 1954, would need some trimming and pruning.

Now if the different personal laws apply to different persons only on the ground of his belonging to or professing the particular religion, then they are discriminatory on the ground of religion only and article 15 of the Constitution forbids any such discrimination. It is, however, argued that the communities governed by different personal laws, like the Muslims, the Hindus and the others are and can be classified into separate classes not on the ground of religion only, but on various other grounds also and, therefore, even if they have been discriminated by their respective personal laws, such discrimination cannot be regarded to be based on religion alone. Thus, they would not be violative of article 15 on that ground. It is argued that the Muslims and the Hindus, for example, are different not only in religion but also in their historical backgrounds, social habits, educational developments, cultural outlook and in various other matters and if the Muslims and Hindus are classified separately and subjected to different set of laws, such classification is not based on religion alone.\(^{214}\) In this regard it is necessary to study the judicial attitude in regard to this matter.\(^{215}\)

In *State of Bombay v. Narasuappa Mali*,\(^{216}\) the Bombay Anti-Bigamy law applicable to Hindus alone was upheld and the challenge on the basis of discrimination on the ground of religion alone was repelled. Former Chief Justice of Bombay High Court, late M.C.Chagla was of the view that "One community might be prepared to accept the work for social reform, another may not yet be prepared for it; and article 44 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise."\(^{217}\)

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214. Supra note 195 at 173.
216. A.I.R.1995 Bom.84.
217. Id. at 87.
Madras High Court in Srinivasa Aiyar v. Saraswati Ammal, the Division Bench upheld the provision of the Madras Anti-Bigamy law applying to Hindus alone as different laws for the Hindus and the Muslims were not on the ground of religion only but on social and other developments and various other considerations peculiar to each of the communities. It was further observed that "the essence of all that classification is not their religion, but that they have all along been preserving their personal law peculiar to themselves." 219

The same view was also expressed by the Punjab and Haryana High Court in Gurudayal Kaur v. Mangal Singh. 220 In this case it was argued that a different and discriminatory custom applying only to the Jat Hindus as a part of the Hindu Law and not applying to the other Hindus was ultra vires, article 15, as being discriminatory on the ground of caste or race. In repelling this contention the Court observed: "If the argument of discrimination based on caste, creed or race could be valid, it would be impossible to have different personal laws in this country and the courts will have to go to the length of holding that only one uniform code of laws relating to all matters and covering all castes, creeds or communities can be constitutional. To suggest such an argument is to reject it." 221

It is submitted that the High Court has taken a narrow view of interpretation of the constitutional mandate. In fact, there are many aspects in different personal laws which are discriminatory. Their applicability to different communities is, in fact, solely on the ground of religion only and, therefore, they ought to be struck down as violative of article 15 of the Constitution, even though as a result "most of the personal laws may have to go" and only "uniform code of laws" relating to the matters covered by the Personal laws may appear to be the only way out, as apprehended by the Court in Gurudayal Kaur. It is wrong to say that Hindus and Muslims are reasonably classified not only on the basis of "religion only", the fact remains that the Hindus are governed by Hindu Law only because they are Hindu by religion and the Muslims are governed by the Muslim law only because

219. Ibid.
221. Id. at 398.
they are Muslim by religion. Similar is the case with Parsis, Christians and other communities. A convert to Islam or Hinduism would be governed by Muslim or Hindu Law, even though he does not have social or cultural outlook or thought common to the community whose religion be adopted. Thus, the direct, inevitable and irresistible effect is that different personal laws apply to different communities on the only ground of their belonging to and professing particular religion and would be void under article 15. And in view of the matter, a uniform civil code replacing the various personal laws both statutory and non-statutory, would not be merely constitutional goal as envisaged in article 44, but would be a dire constitutional necessity in order to save the various discriminatory personal laws from being outlawed as unconstitutional.

However, Shahulameedu v. Subaida Beevi, has been decided in consonance with the constitutional spirit. In this case while interpreting the rule relating to wife's maintenance contained in section 488(3) of the (Old) Criminal Procedure Code, the High Court of Kerala did not deny its benefit to the wife of a bigamous Muslim staying away from him after his second marriage. Specially referring to the mandate of article 44, Justice Krishna Iyer in his judgement observed:

The Indian Constitution directs that the State should endeavour to have a uniform civil code applicable to the entire Indian community, and indeed when motivated by a high public policy, section 488 has made such a law. It would be improper for an Indian court to exclude any section of the community born and bred up on Indian earth from the benefit of that law...

Mohd. Ahmed Khan v. Shah Bano is an epoch-making judgement where the Supreme Court of India has shown its deep regret for the non-implementation of the constitutional directive given in article 44 of the Constitution. It was observed:

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.... A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the state

which is charged with the duty of securing uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so....But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the Courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is far more satisfactory way of dispensing justice than justice from case to case.227

It is submitted that the above observation of the Supreme Court is a timely reminder to the state for fulfilling its constitutional obligation. Tahir Mahmood, while making a powerful plea for enacting a uniform civil code for all citizens of India, has rightly pointed out that "in pursuance of the goal of secularism, the State must stop administering religion based personal laws."228

Jorden Diengdeh v. S.S. Chopra229 is yet another case which focuses attention on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of this case. In the present case, the wife was a Christian and husband was a Sikh. They were married under the Indian Christian Marriage Act, 1872. The wife sought a declaration of nullity of marriage on the ground of impotence of the husband. The petition for divorce was filed under the Indian Divorce Act, 1869.230 The real problem with the Court was that though the marriage appeared to have been broken down irretrievably, yet they would continue to be tied with each other since neither mutual consent nor irretrievable breakdown of marriage is a ground for divorce, under the Indian Divorce Act. If the provisions of the Hindu Marriage Act are compared with the provisions of the Indian Divorce Act, it will be seen that apart from the total lack of uniformity of grounds on which decrees of nullity of marriage, divorce or judicial separation may be obtained under the two Acts, the Hindu Marriage Act contains a special provision for a joint application by the husband

226. Supra note 143.
227. Id. at 954.
230. Id. at 936. The provisions of Indian Divorce Act applies only to cases where the petitioner or respondent professes the Christian religion.
and the wife for the grant of a decree of divorce by mutual consent whereas the Indian Divorce Act contains no similar provision.231 Another very important difference between the two Acts is that under the Hindu Marriage Act, a decree for judicial separation may be followed by a decree for the dissolution of marriage on the lapse of one year or upward from the date of the passing of the decree for judicial separation, if meanwhile there has been no resumption of cohabitation. There is no corresponding provision under the Indian Divorce Act and a person obtaining a decree for judicial separation will have to remain content with that decree and cannot seek to follow it up with a decree of divorce, after the lapse of any period of time.

Thus, it is seen that the law relating to judicial separation, divorce and nullity of marriage is far from uniform. The Supreme Court gave a clarion call when it observed:

Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases....We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform civil code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves.232

It is submitted that the legislative wing of the state should implement the constitutional mandate of article 44 without any further delay, particularly so, when the highest court of the land has reminded it to fulfil its constitutional obligation at the earliest.

231. Section 10 of the Indian Divorce Act prescribes the grounds on which the husband or wife may petition for dissolution of marriage. The ground on which the husband may obtain a decree for divorce is the adultery of the wife. The grounds on which the wife may obtain a decree for dissolution of marriage are change of religion from christianity to another religion and marriage with another woman, incestuous adultery, bigamy with adultery, marriage with another woman with adultery, rape, sodomy or bastality, adultery coupled with cruelty, adultery coupled with desertion for more than two years.

232. Supra note 229 at 940-41(emphasis added)The court also directed that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take.
Mary Roy v. State of Kerala, is yet another important decision of the Supreme Court where it was held that the discriminatory personal law of the Indian Christians of Travancore and Cochin, that is, the Travancore Christian Succession Act, 1925, stood repealed by the provisions of the secular law, that is, Indian Succession Act, 1925.

The Executive has also totally failed in implementing the constitutional mandate of article 44. It is suggested that the government should launch a programme for a uniform civil code and build up public opinion for the uniform civil code. The Union Law Ministry has already admitted that a uniform civil code is necessary for evolving a fullfledged secular society as envisaged in the Constitution, but the concrete steps in this direction have yet to be taken.

Uniform civil code is also paramount from the point of complete national integration, which is the need of the time. One of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life. The virus of communalism has been eating into the vitals of India's Unity and integrity. Justice Tulzapurkar has very aptly observed:

In the context of fighting the poison of communalism, the relevance of a uniform civil code cannot be disputed; in fact it will provide a juristic solution to the communal problem by striking at its root cause. Nay, it will foster secular forces so essential in achieving social justice and common nationality.

Even the framers of the Constitution, while speaking on the draft article on uniform civil code, in the Constituent Assembly had pointed out that "this article actually aims at amity" and they wanted "the whole of India to be welded and united together as a single nation."

When a uniform civil code is contemplated, what has to be sought to be achieved is unification through harmonisation, leaving intact as much of the personal laws as possible, without, however, creating conflicts,

233. Supra note 45.
235. See Nandita Haksar, supra note 208.
236. Supra note 193 at 17.
237. VII C.A.D. 549 (Per Alladi Krishnaswami Ayyar)
but at the same time enacting provisions of law which the consensus of the general community regards as fair and equitable. Professor A.B. Shah has given the following two guiding principles for preparing a uniform civil code.

First, the proposed uniform civil code, should not mean merely the extension of a Hindu Code to the other communities. On the contrary, the opportunity to enact such a code should be utilised to examine the deficiencies of the Hindu Code and to ensure that they are not carried over into the new code. Secondly, the new Code should incorporate the good elements from all the personal laws currently in force in India or abroad. The criterion for deciding whether a particular provision should be part of uniform civil code would be neither religion nor the party politics, but the need to promote the emergence of a liberal integrated and dynamic society in India. The fundamental rights of the citizens embodied in the Constitution, particularly the right to equality provide the necessary guidelines in this regard. If any departure from the principle of equality is considered necessary, it should be in favour of the weaker sections, namely, women and children.

It is submitted that if the above mentioned guidelines are followed in enacting the uniform civil code, then the goal of article 44 will be fulfilled without any difficulty.

It is suggested that uniform civil code should not be voluntary but it should be uniformly applicable to members of all communities. The moment it is made optional, it ceases to be uniform and it would lose its efficacy. It is also suggested that in order to move the public opinion for the immediate enactment of uniform civil code, there should be wide publicity of the existing secular laws. As well as of the recent judicial decisions of the Supreme Court which have given social justice to the weaker

240. See supra note 193 at 24. Justice Tulzapurkar has also suggested that, (1) for the purposes of article 25 of the Constitution the concept of religion should be defined confining it to the individual's faith and belief and his personal relations with his Creator, (2) A proviso to article 29(1) of the Constitution be added to the effect that nothing contained in sub-article (1) should affect the state from making any law providing for social welfare or reform. Ibid.
sections and also emphasised the need for the uniform civil code. According to a survey conducted by a scholar, only 51 per cent of males and 22 per cent of females were aware of the Shah Bano case. This shows that majority of our people are not aware even of the most important decisions of the highest court of land where the benefit was given to a woman under a secular law. For educating the people, for the need of uniform civil code, social organisations and religious leaders can play an important role. Legal aid camps may be organised in those areas where the majority of the people are not aware of the benefits of uniform civil code. Free literature regarding the negative points of various personal laws and about the positive points of uniform secular law may be distributed among the people to make them able to realise that uniform civil code is the need of the time. Television and Radio should be used for making publicity for the need of uniform civil code. And finally, the legislative and executive wings of the state should take immediate steps for enacting the uniform civil code, otherwise, as pointed out by the Supreme Court in Shah Bano, the provision contained in article 44 will become a dead letter.

(iv) Equality in Pay and Work

Article 39(d) of the Constitution enjoins the State to direct its policy towards securing that "there is equal pay for equal work for both men and women." Articles 14 and 16 guarantee the fundamental rights to equality before the law and equality of opportunity in the matters of public employment respectively. But inspite of these constitutional provisions the Supreme Court of Indian in Kishorl Mohan Lal Bakshi v. Union of India, held that "the abstract doctrine of equal pay for equal work has nothing to do with article 14." In this case, the contention raised was that there was discrimination between Class I and Class II Officers in

244. The Preamble of the Constitution of the International Organisation also recognises the principle of "equal remuneration for work of equal value". This system is also recognised by all socialist systems of law. For example, see section 59 of the Hungarian Labour Code; Section 67 of the Bulgarian Code; Section 40 of the Code of German Democratic Republic.
246. Id. at 1141. See also Binoy Kumar Mukherjee v. Union of India, I.L.R. 1973(1) Del.427; Makhan Singh v. Union of India, I.L.R.1975(1)Del. 227.
as much as though they did the same work but their pay scales were different. This, it was said, violated the constitutional provisions of equality. But the court declined to agree with this contention.

Article 39(d) is one of the directive principles which is not enforceable in the court of law but nevertheless it is "fundamental in the governance of the country" and it is the duty of the state to apply directive principles in making laws.247 "Judicial process" is also "state action" and hence it is the duty of the court to apply directive principles in making judgements.248 The non-justiciability of the directive principles does not deter the judiciary from giving effect to the principles of socio-economic justice contained in them. The courts achieve this objective by preferring an interpretation of the scope of fundamental rights, which give effect to the directive principles, over the one which will not.

This meaningful trend of the judiciary is illustrated by P.S.Raju v. State.249 The Court came forward to provide teeth to the directive principle contained in article 39(d) when it observed:

Directive Principles are of course, not justiciable in the sense that the courts compel the making of laws to further the Directive Principles of state policy. But it does not mean that the directive principles have to be ignored by the Courts....They are the guidelines for the legislature and the executive. So they must serve the judiciary as an instrument of interpretation. In interpreting other provisions of the Constitution including the provisions relating to fundamental rights for the purpose of adjudicating upon the constitutional validity of any legislative or executive action, the courts will be well justified in looking to the directive principles for light and guidance or at rate to seek assurance.250

Following the above interpretation, the Court ordered that equal pay should be given to all those doing equal work and forming part of the same cadre of service.

247. See article 37 of the Constitution.
248. See supra note 215. The Supreme Court also makes laws when it declares a judgement. See article 141 of the Constitution.
250. Id. at 67-68.
In order to give effect to the constitutional goal of "equal pay for equal work", the President promulgated on 26th September, 1975, the Equal Remuneration Ordinance, 1975. This Ordinance was repealed by the Equal Remuneration Act, 1976. The object of this Act was to provide for the payment of equal remuneration to men and women workers and for prevention of discrimination on the ground of sex against women in the matters of employment and for the matters connected therewith or incidental thereto.

In 1976, some important changes were also made in the Constitution. The preamble, which is the floodlight illuminating the path to be followed by the "State", was amended and the word "socialist" was added. The principle aim of the new addition of the "socialistic state" is to eliminate inequalities in income, status and standard of life. The basic framework of socialism is to provide decent standard of life to the working people and especially provide security from cradle to grave. With the expanding horizons of socio-economic justice, in the socialistic welfare state which we endeavour to set up, the directive principles must be implemented.

The Supreme Court in Randhir Singh v. Union of India gave content to the directive principle enshrined in article 39(d). This case appears to be a harbinger of a new judicial trend of reading directive principles into fundamental rights. The Supreme Court observed:

Equal pay for equal work is not a mere demagogic slogan. It is a constitutional goal capable to attainment through constitutional remedies, by the enforcement of constitutional rights.

Chinnappa Reddy, J., speaking for the court pointed out that "equal pay for equal work for both men and women means equal pay for equal work for everyone as between the sexes." He also read the directive principle of article 39(d) into the fundamental rights guaranteed by articles 14 and 16 of the Constitution. He was of the view that equality clauses of the

252. See Objects and Reasons of the Act, Ibid.
255. Ibid.
256. Id. at 881.
257. Ibid.
Constitution would be meaningful to the vast majority of the people only if equal pay is given for the equal work; otherwise, it will lead to unrest impelling peace and harmony of the society. The learned judge observed:

(The principle of equal pay for equal work) is deducible from articles 14 and 16 and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

The Court also distinguished Kishori Mohan by pointing out that it pertained to different scales of pay for different grades of service. And the principle of "equal pay for equal work" would be an abstract doctrine not attracting article 14 if sought to be applied to such cases. In other words, the Court in Randhir Singh, removed the misconception that the principle of "equal pay for equal work" is an "abstract doctrine".

What is most significant about Randhir Singh is that it could reach the core of forty-second amendment and relay the pulsation of the legislative intent of constitutional amendment. The court employed pragmatic dynamics to refashion legal norms investing them with socialist content to suit the normatively refurbished "socialist" character of the State. It gave a new turn to the elitist constitutional culture and conveyed the message pervading the amendment impugned in Minerva Mills.

According to S.P.Sathe, the actual decision in Randhir Singh is indisputable but the ratio cannot be easily implemented in the absence of uniform wage policy. The absence of uniform wage policy poses real challenge to the principle of equal pay for equal work. According to him, the goal could be achieved through legislative action. It is submitted that judiciary, being one of the organs of the State, is also under an

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258. Id. at 881, 882.
259. Id. at 882.
260. Id. at 881.
In this case, inter alia, section 4 of the Constitution (Forty-second Amendment) Act, 1976, which amended article 31C and gave primacy to all the directive principles over fundamental rights, was declared unconstitutional.
obligation to implement the directive principles. The judicial decisions also provide the necessary stimulus for legislative action. Thus, Randhir Singh added a new dimension to service jurisprudence.

In Peoples Union for Democratic Rights v. Union of India, the petitioners alleged, inter alia, that the provisions of Equal Remuneration Act, 1976 were being violated and women workers being discriminated. It was held that violation of the provisions of Equal Remuneration Act, 1976 results in the violation of right to equality enshrined in article 14 of the Constitution. The Court directed the Union of India and Delhi Development Authority to see the observance of the provisions of the Act.

Randhir Singh was affirmed by a Constitutional Bench of the Supreme Court in D.S. Nakara v. Union of India in which the relief was given to pensioners. The Supreme Court pointed out that the concept of equality is dynamic with many aspects and dimensions. It cannot be imprisoned within the traditional and doctrinaire limits. It must not be subjected to a narrow, pedantic or lexicographic approach and no attempt should be made to truncate its all embracing scope and meaning for, to do so could be to violate its activist magnitude. It was further observed that the State action must be directed towards attaining the goals set out in Part IV of the Constitution and article 39(d) should be interpreted in the light of the judgement of Randhir Singh.

In P.K. Ramachandra Iyer v. Union of India, the Supreme Court elaborating the underlying intendment of article 39(d) observed that

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266. Id. at 1479.
267. Id. at 1484. See also Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C.802 at 812 where the Supreme Court directed the Central government that it is bound to ensure the observance of various social welfare legislations enacted by the Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of state policy and more so in the context of article 256.
268. Supra note 253.
269. Id. at 133.
construing articles 14 and 16 in the light of the preamble and article 39(d), the principle of "equal pay for equal work" was deducible from those articles. Thus, the Supreme Court struck down the irrational arbitrary differential treatment in the matter of pay scale accorded to some professors by the Indian Council of Agricultural Research and the revised pay scales were granted to them.

However, in Delhi Veterinary Association v. Union of India, the Supreme Court followed somewhat restricted approach with regard to the principle of "equal pay for equal work". In this case, it was contended that the pay scales of veterinary assistant surgeons working in the office of Development Commissioner, Delhi Administration and of those working in the union territory of Chandigarh and under the Central government were different. This was in violation of the constitutional provisions contained in articles 14, 16 and 39(d). The Supreme Court in this case, instead of providing equal pay for equal work to the petitioners, held that the work of refixation of the pay scale should not ordinarily be undertaken by the Court because at that stage Fourth Pay Commission was required to consider the same question. Thus, the question of discrimination raised before the Court was left to be decided by the government on the basis of the recommendations of the Fourth Pay Commission and the writ petition was dismissed.

It is submitted that one fails to understand as to why the Supreme Court failed to apply the principle so clearly enunciated by it in Randhir Singh. As already stated, judiciary being one of the organs of the State, is under an equal obligation to apply the directive principles. If any organ of the State has failed in implementing the directive principles, the judiciary should step in and fill up the gap created by the inaction of other organ of the State. In the present case, the Supreme Court by leaving it up to the government to decide about the unequal pay scales of the petitioners has denied justice to them.

P. Savita v. Union of India, the Supreme Court did not rely on the division made by Third Pay Commission between the pay scales of Senior Draughtmen and Draughtmen. It was held that since both the above mentioned groups were doing the same work and discharging same functions, their grouping into two different classes for the purpose of pay is violative of

271. Id. at 552.
article 14 and all of them are entitled to equal pay for equal work as enshrined in article 39(d) of the Constitution. It is submitted that since the grouping was not on any merit-cum-seniority basis, the Supreme Court rightly applied the concept of "equal pay for equal work" to all the draughtmen.

In Surinder Singh v. Engineer in Chief CPWD, the Supreme Court went a step further when it observed that the doctrine of "equal pay for equal work" is required to be applied to persons employed on a daily wage basis. It was held that persons employed on a daily-wage basis of the C.P.W.D. are entitled not only to daily wage but are entitled to the same wages as other permanent employees in the department employed to do the identical work. The court pointed out that in this connection, it cannot be said that the doctrine of "equal pay for equal work" is a mere abstract doctrine and that it is not capable of being enforced in a court of law. The Central Government, the State Government and likewise, all public sector undertakings are expected to function like model and enlightened employers and argument that principle of equal pay for equal work is an abstract doctrine which cannot be enforced in the court of law, should ill- come from the mouths of the State and State undertakings. Another important aspect of Surinder Singh is that the Supreme Court hoped that the government would take appropriate action to regularise the services of those who have been in continuous employment for more than six months. It is submitted that Surinder Singh will provide socio-economic justice to millions of Indians who are working on daily wage basis. It is also highly unethical and wholly contrary to constitutional philosophy of socio-economic justice to employ workers on daily wages for long years.

Mackinnon Mackenize & Co.Ltd. v. Audrey D'Costa, is yet another landmark decision of the Supreme Court securing "equal pay for equal work"

276. Id. at 584-85. See Dhirendra Chamoli v. State of U.P., (1986) 1 SCC 637 where the Supreme Court directed that the employees working in Nehru Yuvak Kendras as casual labourers should be paid the same wages as to regular employees. See also Daily R.C.Labour, P&T Deptt. v. Union of India, A.I.R.1987 S.C.2542, where the Supreme Court held that to casual labourers in P&T Department, the denial of minimum pay in the pay scales of regularly employed workmen, amounts to exploitation of Labourers and violative of articles 14, 16, 37, 38 and 39(d) of the Constitution. See (contd.)
for men and women performing same work or work of similar nature. In this case, the Supreme Court directed that the lady stenographers and male stenographers working in a company are entitled to the equal remuneration for doing the same work or work of similar nature. It was also pointed out that the fact that difference in pay scale was due to settlement between company and union was no answer. To hold otherwise, will be violative of section 4 of the Equal Remuneration Act, 1976 as well as article 39(d) of the Constitution. The most significant aspect of this case is that the Supreme Court held that the applicability of the Equal Remuneration Act, 1976 does not depend upon the financial ability of the management to pay equal remuneration as provided by it.

Jeet Singh v. M.C.D., further widened the scope of the doctrine of "equal pay for equal work". In this case, the petitioners were in continuous employment for the last so many years and afterwards their services were regularised. It was held that they were entitled to salary and allowances on the same basis as paid to the permanent employees from the date of continuous employment. In other words, the Supreme Court laid down a principle that even the adhoc service of the employee is to be considered, for the purpose of salary and allowances, from the date of his continuous employment. It is submitted that Supreme Court has enunciated a very healthy principle.

Following closely on the heels of Jeet Singh, the Supreme Court in Bhagwan Dass v. State of Haryana, held that once the nature, functions also infra note 287 and 288. See also J.K.Mittal, "Casual Labour And Equal Pay for Equal Work", 28 J.I.L.I. 260(1986).

277. Surinder Singh, Id., at 585.
280. Id. at 1287.
281. Id. at 1289.
283. Ibid.
284. See also Rattan Lal v. State of Haryana, A.I.R.1987 S.C.478 where the Supreme Court strongly deprecated the policy of the State Government under which ad hoc teachers are denied the salary and allowances for period of summer vacations by resorting to the fictional breaks.
and the work of two persons are not shown to be dissimilar, the fact that the recruitment was made in one way or the other would hardly be relevant from the point of view of "equal pay for equal work".  

In Delhi Municipal Karamchari Ekta Union (Regd.) v. P.L. Singh, the Supreme Court once again held that the employees of Delhi Municipal Corporation working on daily wages for more than eight years are entitled to the pay equal to the minimum salary which is being paid to the other employees regularly appointed.

In Jaipal v. State of Haryana, the Supreme Court pointed out that the purpose of article 39(d) is to fix certain social and economic goals for avoiding any discrimination amongst the people doing similar work in matters relating to pay. It was further pointed out that the doctrine of "equal pay for equal work" would apply on the premise of similar work, but it does not mean that there should be complete identity in all respects. If the two classes of persons do same work under the same employer, with similar responsibility, under similar working conditions, the doctrine of "equal pay for equal work" would apply and it would not be open to the state to discriminate one class with the other in paying salary. The difference in the mode of selection will also not affect the application of this doctrine.

From all the above mentioned judgements of the Supreme Court it is clear that the concept of "equal pay for equal work" enshrined in article 39(d) has been treated as a part of fundamental rights under articles 14 and 16 and not a mere "demagogic slogan."

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286 Id. at 2052. The Supreme Court also directed that the pay of the petitioner should be fixed having regard to the length of service with effect from the date of initial appointment by ignoring the break in service arising in the context of the fact that initial orders were for six months and fresh orders were issued after giving a break of a day or two. Id. at 2055.


288b Id. at 1509-10. See also A.C.I.C. & C.E. Stenographers v. Union of India, A.I.R.1988 S.C.1291 where the differentiation in pay scale was justified on the ground of dissimilarity of responsibility, confidentiality and relationship with public.
The building of the nation must start with mother's womb and continue till the child attains adulthood. The concern of the government of India regarding the securing of socio-economic justice to children is contained in the following introductory declaration of the National Policy for Children:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.

If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. In addition to the various constitutional provisions, the United Nations Declaration of the Rights of the Child adopted in 1959 and article 24 of the International Covenant on Civil and Political Rights, 1966, have appropriately recognised the importance of the child. India is a party to these International Charters having rectified the Declarations. It is an obligation of the State to implement the same in the proper way. In fact, it is the obligation of every generation to devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up. Because children as a class constitute the weakest, the most vulnerable and the defenceless section of the human society. For the success of every child in life it is necessary that he should not be denied opportunity of education.

(i) Right to Free and Compulsory Education

In view of article 45 of the Constitution, it is the duty of the

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289. See, National Policy for Children, Resolution No.1-14/74-CDD.

290. See, for example, articles 15(3), 23, 24, 38, 39(e), (f) and 45 of the Constitution of India.

state to impart free and compulsory education to the children in the egalitarian society. The State was expected to provide, within a period of ten years from the commencement of the Constitution, free and compulsory education for all children until they attain the age of fourteen years. But this goal has yet to become a reality even after four decades of independence. In other words, the state has failed to discharge one of its most solemn responsibility. In Brown v. Board of Education, Warren, Chief Justice observed:

> Education is perhaps the most important function of the State and local Governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our society. It is required in the performance of our most basic public responsibilities,...It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and helping him to adjust normally to his environment...Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.293

In re Kerala Education Bill, 1957, the Supreme Court held that article 45 of the Constitution no doubt requires the State to provide for free and compulsory education for all children but there is nothing to prevent the State from discharging that solemn obligation through government aided schools and article 45 does not require that obligation to be discharged at the expense of the minority communities.295

In Rev.Fr.Joseph v. State, the Kerala High Court held that notwithstanding the directive principles of the Constitution and the declared policy of the State government, the State government is under no obligation to impart free education, and they are not, in law, bound either to pay the teachers or to meet any of the expenses incurred by private schools.297

It is submitted that the obligation imposed on the State to impart free and compulsory education is fundamental in the governance of the country and the State is bound to implement either through government aided schools or by giving financial support to other private schools which are helping

293. Id. at 494.
295. Id. at 986.
297. Id. at 297.
to promote this objective. The State cannot bypass its solemn responsibility by taking recourse to financial inability.

The Bombay High Court in *Rani Chand v. Malkapur Municipality*,\(^{298}\) held that article 45 only directs the imparting of free education to the children, but does not prohibit collection of taxes for that purpose to meet the expenses of such education from other resources and further a tax on lands and buildings or a tax on profession, trades and employments, would be other sources for meeting the expenses of free education. Thus, the State can impose tax on citizens for meeting expenses of education and article 45 is no bar.\(^{299}\)

The root cause of the problem that why most of the children do not go to schools or why most of the parents do not send their children to schools, is the socio-economic conditions of those families. Most of the labourers do not send their children to school for even primary education.

The Supreme Court considered this aspect of the problem in *Labourers Working on Salal Hydro Project v. State of J&K*.\(^{300}\) It was pointed out by the Supreme Court that the possibility of augmenting their meagre earnings through employment of children is very often the reason why parents do not send their children to schools and this is also the reason for large dropouts from the schools. This is a socio-economic problem and cannot be solved merely by legislation. On the other hand, it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country.\(^{301}\)

Taking cognizance of the problems of the children of labourers working on the Salal Hydro-Project, the Supreme Court directed the Central government to persuade the workmen to send their children to a nearby school and arrange not only for the school fee to be paid but also provide free of charge books and other facilities such as transportation. The Supreme Court also suggested that wherever the Central government undertakes a construction project which is likely to last for some time, the Central Government should provide that children of construction workers who are living at

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299. Id. at 158.
301. Id. at 183.
or near project site should be given facilities for schooling and this may be done either by the central government itself or if the Central government entrusts the project work or any part thereof to a contractor, necessary provision to this effect may be made in the contract with the contractor.

It is submitted that the suggestion of the Supreme Court is good and it should be implemented into a reality. It is further suggested that all the children upto the primary level should be provided with a free mid day meals and they should be provided with free uniforms. To those children, who come from the labourer's class or from a very poor family, some scholarship in the form of some incentive should also be given. This will encourage more and more parents to send their children to schools. If this is done then the parents will also not send their children to employment for meagre income.

In D.M.K.Public School v. Regnl.Jt.Director of School Education, the government tried to thwart an attempt of a citizen to provide education to dalit children. In this case, a registered society started by an advocate belonging to the scheduled caste established an English medium school for imparting education to dalit children. When recognition for the school was sought for, the state government proceeded, by issuing a show cause notice, to withdraw even the temporary recognition.

K.Ramaswami, J., speaking for the Court held that it is the duty of the State to establish schools in the areas of dalits in the absence of common schools to all sections of the society. In the absence, when a private school is established, it is the mandate of the Constitution to accord permission for such a school. Not only did the judge quash the show cause notice to withdraw the recognition to the school but he enthusiastically went a step ahead and directed the state to recognise and grant it financial assistance despite allegations levelled against it of haphazard running.

It is submitted the decision of the court is a pointer in the right direction. Education is the very foundation of good citizenship and a principal instrument to awaken the child to adjust to the environment. This

302. Ibid. See also section 10 of Child Labour(Benefit and Rehabilitation Fund)Act, 1986, Bill No.66 of 1986.
will also prevent the problem of child labour.

(ii) Prohibition of Employment of Children in Hazardous Concerns

Article 24 read with article 39(e) and (f) prohibits the employment of children below the age of fourteen years in any hazardous employment. It is also provided that the tender age of the children is not abused and they are not forced by economic necessity to enter avocations unsuited to their age and strength. Inspite of these unequivocal constitutional provisions we find that child labour is still there in almost every part of the country. The principal cause of the child labour is poverty. As regards child labour, the International Labour Organisation has adopted many conventions and has made many recommendations to abolish it. In India, many laws have been made in this regard. Judiciary too has shown its deep concern for prohibiting the employment of children, particularly in hazardous employment.

In People's Union for Democratic Rights v. Union of India, the Supreme Court considered the meaning and scope of the phrase "hazardous employment". In this case, inter alia, the question before the Supreme Court was that whether the employment of children in the construction work amounts to employment in hazardous concerns and whether it violated the Employment of Children Act, 1938. The Delhi Administration and the Delhi Development Authority contended that this Act is not applicable in case of employment in the construction work since construction industry is not a process specified in the Schedule and is, therefore, not within the provisions of sub-section(3) of section 3 of the Act, which prohibits the employment of children in hazardous concerns. The Supreme Court pointed out that this was a sad and deplorable omission which must be immediately set right by every state government by amending the Schedule so as to include construction industry in it. This could be done in exercise of the powers conferred under section 3A of the Employment of Children Act, 1938. It was

Construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. This is a constitutional prohibition which, even if not followed up by appropriate legislation, must operate proprio vigore.  

The Supreme Court hoped that every state government would ensure that constitutional mandates in this regard are not violated. It is submitted that the Supreme Court rightly widened the scope of hazardous employment by holding that construction work also comes within its meaning.

In Labourers Working on Salal Project v. State of J&K, the Supreme Court once again held that "construction work" is a "hazardous employment" and no child below the age of 14 years be allowed to be employed in it. The Court pointed out that so long as there is poverty and destitution in the country, it will be difficult to eradicate child labour. But even so an attempt has to be made to reduce, if not eliminate the incidence of child labour. It was conceded by the Court that having regard to the prevailing socio-economic conditions, it is not possible to prohibit the child labour altogether and any such step may not be socially or economically acceptable to large masses of the people.

Keeping in view the problem of child labour, the Parliament enacted the Child Labour (Prohibition and Regulation) Act, 1986. In the Statement of Objects and Reasons it is mentioned that there are number of Acts which prohibit, the employment of children below 14 years in certain specified employments. However, there was no procedure laid down in any law for deciding in which employments, occupations or processes the employment of children should be banned. There was also no law to regulate the working conditions of children in most of the employments. Therefore, Act has been passed to achieve the following objectives.

(i) To ban the employment of children below the age of fourteen years in specified occupations and processes;

308. Id. at 1480.
309. Supra note 300.
310. Id. at 183.
311. Ibid.
312. This Act has repealed the Employment of Children Act, 1938 vide section 22. The Act received the assent of the President on 23.12.1986.
(ii) To lay down a procedure to decide modifications to the Schedule of banned occupations or processes;

(iii) To regulate the conditions of work of children in employments where they are not prohibited from working;

(iv) To lay down enhanced penalties for employment of children in violation of the provisions of this Act and other Acts which forbid the employment of children;

(v) To obtain uniformity in the definition of "child" in the related laws.

Let us hope that this Act helps in protecting the children from exploitation.

(iii) Protection against Moral and Material Abandonment

Article 39(f) specifically provides that the state should direct its policy towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. It is provided that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.\(^{313}\)

This constitutional mandate has not only invited the attention of the legislature but also of the social activists and the judiciary.

In *Lakshmi Kant Pandey v. Union of India*,\(^{314}\) the Supreme Court admitted a letter written by an advocate to one of the judges of the Supreme Court complaining about the malpractices by some social organisations and voluntary agencies engaged in offering Indian children in adoption to foreign parents. The Supreme Court in the absence of any inter-country adoption law, laid down the norms and principles to be followed in such adoption. A learned scholar categorised this decision as "an instance of excessive judicial legislation."\(^{315}\) It is submitted that he applied the apt formulation of "excessive judicial legislation" inaptly.\(^{316}\) Because the judicial process is also state action and the judiciary is bound to apply the directive principles in making laws. Subsequently, the Supreme Court,

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\(^{313}\) See also articles 15(3) and 23 of the Constitution.
\(^{314}\) *A.I.R.1984 S.C.469*.
in view of the difficulties in implementing the norms and principles, made certain further classifications and alterations.  

In Sheela Barse v. Union of India, a writ petition by way of public interest litigation was filed by a social worker seeking the release of children below the age of 16 years who were detained in different jails. The Supreme Court in this case pointed out that there can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. The Supreme Court directed the state governments to set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if sufficient remand homes or observation homes are not there then the children should be released on bail instead of being subjected to incarceration in jail. It was also directed that the trial of children must take place in the Juvenile Courts and not in Criminal Courts. It was recommended that a special cadre of magistrates for Juvenile Courts be created and there should be speedy trial of children. The Court also suggested the Uniform Children Act throughout India instead of Children Acts at the state level and emphasised the necessity of setting up of adequate number of courts and the necessity to set up Institute or Academy for training of judicial officers. The most important direction from the point of implementation was that it directed the Director General of Doordarshan as also of the All Indian Radio to give publicity seeking co-operation of non-governmental social service organisations in the task of rehabilitation of these children. In Sheela Barse v. Secretary Children Aid Society, the Supreme Court gave directions to the Children Aid Society, Bombay to run remand home and observation home properly and again emphasized the necessity of appointment of specially trained judicial officers.

319. Id. at 1777.
321. Id. at 1778-79.
322. Id. at 1777.
324. Id. at 358-59.
In order to achieve some of the objectives of the Supreme Court judgement in Sheela Barse, the Parliament enacted the Juvenile Justice Act, 1986. Let us hope that the government implements the fertile provisions of this Act in the light of the Supreme Court directions and suggestions in Sheela Barse.

(D) An Appraisal

Women and children constitute the weakest sections of the society. There are many provisions in the Constitution of India which aim at providing socio-economic justice to women and children. Though the struggle to put an end to discrimination of women started during British regime, it crystalised into a reality after independence. Parliament has enacted number of legislations to eradicate the discrimination against women and children. Judiciary has also responded well to provide socio-economic justice to women and children by following the course of positive interpretation.

In Muthamma and Nargesh Meerza, the Supreme Court provided equality to women in matters of employment. However, it is suggested that discrimination against women in the name of family planning ought to be avoided. The judiciary has rightly interpreted the provisions of law so as to provide socio-economic justice to women in jails, prisons or protection homes. Sheela Barse and Upendra Baxi are the decisions of the Supreme Court in this direction. Mary Roy is yet another momentous decision liberating the women from the clutches of Christian Personal Law and providing equality to them in intestate succession. Suppression of Immoral Traffic in Women and Girls Act and Vaswani aim at prohibiting traffic in human beings. Shocked by the Roop Kanwar tragedy, who became the victim of social evil of Sati, the legislative wing responded well to pass the Commission of Sati (Prevention) Act, 1987. Rajasthan High Court also gave a clarion call by declaring that Sati was not a part of religious practices. It is suggested that all those who help in propagating the social evil such as Sati should be severely...
punished and they should be debarred from holding any office of profit.

Anathema of dowry is yet another social evil which is a reflection on the Cinderella status of women. This pernicious evil has drastic consequences which have ill effects on not only the marital relationship but also on the social status of women. Though the Central legislation to prohibit this social evil came in 1961, yet it has many loopholes in it. The nature of the presents and the value upto which they can be given to the bride, should be defined in the Act and they should not be of "customary nature". It is suggested that the definition of dowry should be amended and all expenditure incidental to marriage, for example, Thaka, Sagai, Tikka, and Milni etc. should also be included in it and the maximum limit of marriage expenditure should be fixed. The role of the social organisations and other social workers in eradication of the dowry should be recognised. Amendment of 1986 into the Principal Act of 1961 has rightly banned the advertisements for dowry which are in fact "open tenders" for the purchase and sale of young girls. Government has taken a bold step by issuing orders that if any government servant is found guilty for having committed an offence under the Dowry Prohibition law then he should be suspended from the service. The most salutary and innovative provision of the Act is section 6 which enables the wife to get back her articles from her in laws within three months of marriage. It is suggested that where the wife dies due to dowry harassment, then in the absence of heirs and parents, her property should go to legal aid cells and other social organisations who are busy in preventing the social evil of dowry. And in no case it should go to the husband or his family. In fact the dowry articles, should be transferred to her "on her demand", from any person having the possession of the same. Pratibha Rani is a step in this direction. In this case the Supreme Court rightly overruled Vinod Kumar and held that dowry articles of the wife constitute her stridhan and any body refusing to return the same would be guilty of an offence of criminal breach of trust even in the absence of any specific agreement in that regard. This case is a major step in dismantling the massive age old apparatus of injustice to matrimonial world. From the decisions of Laxman Kumar and Surinder Kumar, it is evident that the judiciary has shown its deep concern for "bride burning". As suggested by the Supreme Court in joint Women's Programme, "special dowry cell" should be created by the government to investigate with the dowry deaths. Upholding the dignity of women in the matrimonial home the Supreme Court in Shoba Rani
has gone to the extent of holding that demand of dowry amounts to cruelty entitling the wife to get a decree of divorce. However, the judgement has left a great lacuna by holding that the demand for "personal expenses" of the husband is beyond its scope.

In order to prevent the neglected wife (including the divorced wife), parents and children from destitution and vagrancy, the Parliament enacted section 125 of the Criminal Procedure Code, 1973. This provision is a secular in character, uniform in its applicability, prophylactic in nature and cuts across the barriers of religion. Bai Tahira and Fuzlunbi have rightly interpreted this provision and applied it for providing maintenance to Muslim women. The most significant interpretation of the Supreme Court is that the husband can't be absolved of his duty to maintain his wife by paying merely an illusory amount by way of customary or personal law requirements. Shah Bano gave further impetus in widening the scope of section 125 of the Code. It was rightly pointed out that there is no conflict between personal law and section 125 of the Code. And in case any conflict arises, then the provision of section 125 of the Code will prevail. It is suggested that section 125 be amended and the husband should also be made entitled to the protection of section 125 of the Code if he is unable to maintain himself and wife has sufficient means to maintain. Further it is suggested that in view of the Shah Bano judgement, section 127(3)(b) of the Code should be deleted. However, the positive development of the judiciary suffered a jolting shock when the Parliament passed the Muslim Women(Protection of Rights on Divorce) Act, 1986. This Act is clearly violative of articles 13(2), 14,15,21,25 and 44 of the Constitution and it is hoped that the Supreme Court will strike it down in a petition already pending before it in which the constitutionality of the Act has been challenged. In Vijaya, the Supreme Court rightly pointed out that it is the moral duty of a married daughter as well to maintain her parents who are unable to maintain themselves. But the Supreme Court missed a great opportunity of evolving the concept of "joint matrimonial duty" when it observed that the daughter should have her "independent sufficient means of her income". It is suggested that "independent means" criterion should be done away with. Subanu alias Saira Bano is yet another historic judgement where the Supreme Court has allowed the first Muslim wife to claim maintenance as well as separate residence if her husband contracts second marriage. This judgement is an important gain for Muslim women who are the worst victims of inequitous family laws. On the
other hand, in Yamuna Bai Anant Rao, the Supreme Court has once again followed a literal interpretation of the word "wife" on the basis of personal law and denied the second Hindu wife of the benefits of section 125 of the Code, which amounts to denial of social justice to women and negation of the intentions of the legislature and the spirit of the Constitution.

Uniform civil code for different communities in the country not for the sake of uniformity but for securing social justice to weaker sections in the spheres of marriage, divorce, custody, adoption and inheritance, is yet to come into existence even after four decades of independence. This amounts to great failure of Indian democracy. Due to the religion based personal laws, the society has been compartmentalized into different sections. A secular uniform set of laws will not only solve the communal problems but will also be in the interest of unification of the country. In the absence of the uniform civil code, women are the worst victims of different personal laws. Shah Bano and Jorden Diengdeh are examples of this. Application of different personal laws to different communities on the basis of religion only is discriminatory and is also violative of the fundamental rights in articles 14 and 15(1). In an epoch-making judgements of Shah Bano and Jorden Diengdeh the Supreme Court has rightly highlighted the importance of having the uniform civil code. Unless it is enacted, article 44 will become a dead letter. It is suggested that the legislature should immediately enact a uniform civil code keeping the positive characters of each personal law intact and omitting the discriminatory features of all personal laws. The socio-economic principles incorporated in the Constitution should serve as guidelines for enacting the uniform civil code. It is also suggested that it should not be "voluntary code", otherwise, it will cease to be uniform and it will also lose its efficacy. For moving the public opinion for having a uniform civil code, it is suggested that legal aid camps should be organised in those areas where the people are not aware of the benefits of the uniform civil code. Free literature in this regard should be distributed among the weaker sections. Publicity of the Supreme Court judgements of cases like Shah Bano should also be made on television and radio.
Equal pay for equal work for both men and women was there in the Constitution from the very commencement of it. The Parliament enacted Equal Remuneration Act in the year 1976. But this concept was translated into a reality for millions of Indians by the judiciary in the recent years. Right from Randhir Singh in 1982, down to Delhi Municipal Karamchari Ekta Union in 1988, it has been held that the concept of equal pay for equal work is not a "mere demagogic slogan" but it is a "Constitutional goal capable of attainment through constitutional remedies." The Supreme Court has rightly interpreted the concept of "equal pay for equal work" enshrined in article 39(d) as a part of articles 14 and 16 and evolved the following principles:

First, "equal pay for equal work for both men and women" means equal pay for equal work for everyone as between the sexes.

Secondly, this principle may be applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do the identical work under the same employer.

Thirdly, this concept is required to be applied to persons employed on daily wages basis and they should get the pay equivalent to the minimum of what regular employee in that cadre, doing the same work, gets.

Fourthly, if a person serving on daily wage basis or ad-hoc basis is absorbed permanently into the service, then his salary and allowances are to be paid on the same basis as paid to the permanent employees from the date of continuous employment.

Lastly, it has been laid down that once the nature, functions and the work of two persons are not shown to be disimilar, the fact that the recruitment was made in one way or the other would hardly be relevant from the point of view of "equal pay for equal work."

A specific emphasis has also been laid down in the Constitution for the amelioration of children and providing them socio-economic justice. Article 45 anticipated that the State would provide free and compulsory education to all the children below the age of fourteen years within ten years of the commencement of the Constitution. But this directive principle has yet to be translated into reality after about four decades of independence. One of the main reasons why children do not go school or why parents do not send them to school is their socio-economic condition or poverty.
State should impart free and compulsory education to all children either through government schools or through private schools by providing them financial assistance and recognition. The Supreme Court in Labourers Working on Salal Hydro Project, has gone into the heart of the problem and rightly suggested that whenever any construction project is started by the Government, then it should also establish a school near that site, if the work is to last for some time. It is suggested that government should provide mid day meals, free uniform, free books and other stationary to all the children upto the primary standard. It is further suggested that the government should also provide some scholarship as an incentive to the children who come from socio-economically poor and backward families. This will serve as an incentive for them and will encourage more and more parents to send their children to schools. The government should also welcome the establishment of schools by the private persons in the locality of the poor by providing it financial assistance and recognition as it was directed by the Court in D.M.K.Public School. Education is the very foundation of good citizenship and principle instrument to awaken the child to adjust to the environment in the society.

The Constitution specifically prohibits the employment of children in hazardous employment but in practice it is found that there are large number of child labourers working in one avocation or the other. The principle root cause of the child labour is the poverty. Judiciary also has shown its deep concern for prohibiting child labour in "hazardous employments". In People's Union for Democratic Rights, the Supreme Court rightly expanded the meaning and scope of the phrase "hazardous employment", so as to include in it the construction work as well. Because it is unsuited to the health and strength of the children. The Supreme Court rightly pointed out that this constitutional prohibition, even if not followed up by appropriate legislation, must operate proprio vigore. The Parliament also responded well in consonance with its constitutional obligation by enacting the Child Labour (Protection and Regulation)Act, 1986, which not only puts a ban on the employment of children below the age of fourteen years of age in specified occupations and processes but also regulate the conditions of work of children in employments where they are not prohibited from working. The enhanced penalty for employment of children in violation of this Act will definitely operate as deterrent factor in future.
To protect the children from exploitation and against moral and material abandonment is yet another constitutional goal enshrined in the directive principles. In order to fulfil this goal, the social activists and judiciary have played the most important role. In Laxmi Kant Pande, the Supreme Court laid down the detailed norms and principles to be followed in the inter-country adoption in the absence of any such law by the Parliament. Thus, where one organ of the State, that is, legislature failed to protect the children from moral and material abandonment, the other organ, that is, the judiciary protected them. Let us wish that in future also in judiciary will not turn down the demands of the claimants of twenty-first century and hibernate itself into lofty palaces and finally disappear like dinosaurs under the pretext that "since there is no legislation by the Parliament so we cannot give justice, we cannot protect this solemn document - the Constitution of India".

Sheela Barse is yet another example of public interest litigation where the judiciary has shown its deep concern for the children in jails. It has rightly been pointed out that keeping in view the tender age of the children, they are not to be kept, at any cost, in jails but in observation homes and remand homes. The Court gave timely suggestions of establishing Juvenile Courts and special cadre of magistrates to man them and the necessity of having uniform children Act. The Parliament also gave clarion call and rightly enacted the Juvenile Justice Act, 1986. It is submitted that if all the three organs of the State, that is, the legislature, judicature and executive move together on the wave length of the Constitution, then the socio-economic justice can become the living reality for all, including the women and children.