A constitution is the basic document of a country having a special legal sanctity which sets the framework and the principal functions of the organs of the government of a state and declares the principles governing the operation of these organs. The constitution aims at creating legal norms which are to be effected by fundamental adjustment between individual rights and social interest to achieve the desired social goals.

The Indian constitution is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. This fundamental law of the land assures the dignity of the individuals irrespective of their sex, community or place of birth. The Constitution of India, implemented since 1950, carried the impact of reforms enacted since 19th century and demands made during the freedom struggle for women’s development.¹

With regard to the women, the constitution contains many negative and positive provisions which go a long way in securing gender justice. In India the history of suppression of women is very long and the same has been responsible for including certain general as well as specific provisions for upliftment of the status of women. The framers of the constitution were well conscious of the discrimination and unequal treatment meted out to the fairer sex from the time immemorial. They make specific provisions relating to women. They provided equality of status and of opportunities on par with men. And in some cases women have been allowed to enjoy the benefit of certain special provisions.\textsuperscript{2} Supreme Court in \textit{Madhu Kishwar Vs State of Bihar}\textsuperscript{3} observed that Indian women have suffered and are suffering discrimination in silence. Self-sacrifice and self denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.

In a democratic society, like ours, it is the law which is the instrument for economic and social change. Socio-economic legislation is enacted for the amelioration of the oppressed and downtrodden class within the ambit laid down by the Constitution.\textsuperscript{4} Constitution of India makes provisions for the equal treatment and development of women in every

\textsuperscript{2} Fenela L. Nonglait, \textit{Drops of Tears Women and the Law Women Specific Legislations}, (1\textsuperscript{st} Ed. 2010), p. 5.
\textsuperscript{3} (1996) 5 SCC 148.
sphere of life. The preamble to the Indian constitution contains various
goals including "the equality of status and opportunity" to all the citizens.
This particular goal has been incorporated to give equal rights to the
women and men in terms of the status as well as opportunity. It has been
the basis for many legislations like the Modern codified Hindu laws which
aim at giving equal status and rights to the women.

Part III of the constitution of India deals with the fundamental
rights. The provisions regarding fundamental rights have been enshrined in
Articles 12 to 35, which are applicable to all the citizens irrespective of
sex. However, certain fundamental rights contain certain specific and
positive provisions to protect the rights of women. Constitution is rightly
the most significant touchstone for determining the scope of women's
rights in the post independence period. Equality and non-discrimination
become fundamental and enforceable legal rights. Article 14 of the
constitution provides equality before law. It provides that "the state shall
not deny to any person equality before the law or equal protection of the
law within the territory of India". It embodies the general principle of
equality before law and prohibits unreasonable discrimination between
persons. Article 15 specifically prohibits discrimination on the ground of
sex. Article 15 (1) prohibits gender discrimination and Article 15 (3) lifts

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5 Justice M.Fatima Beevi, "Women and Human Rights", in Women Human Rights and
that rigour and permits the state to positively discriminate in favour of women to make special provisions to ameliorate their social condition and provide political, economic and social justice.\textsuperscript{6} Justice Bhagwat in \textit{Meneka Gandhi Vs Union of India}\textsuperscript{7} said - “These fundamental rights represent the basic values cherished by the people of this country (India) since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent”.

Though the Indian constitution provides equality of status and of opportunity to women, discrimination is persisting in one form or the other. Discrimination against women continues to exist even today as it is so deep rooted in the traditions of the Indian Society. The root cause for the discrimination of women is that most of the women are ignorant of their rights and position of equality assured to them under the Indian constitution and legal system.\textsuperscript{8}

For the enforcement of the rights of women, Indian judiciary plays important role. The task of legislature comes to an end the moment it enacts law. Afterwards, it comes into the hands of judiciary for its enforcement through interpretation. Enactment itself does not fulfil the

\textsuperscript{6} Dr. G. B. Reddy, \textit{Women and the Law}, (5\textsuperscript{th} Ed. 2006), p. 2.
\textsuperscript{7} AIR 1978 SC 597.
object for which, it was enacted. It should be given effect to and implemented properly. For these purpose, the interpretation by the courts giving effect to the intention of the legislature plays a vital role. The framers of our constitution cast the burden of securing rights of women on the judiciary by making these rights justiciable. Since independence, the burden of securing to women their rights was almost entirely on the shoulders of the Indian judiciary.

The Hindu Marriage Act 1955 has introduced the concept of monogamy into Hindu marriage and this provision seems to have caused a great deal of resentment among Hindus. The provision of monogamy was introduced to elevate the status of Hindu women. The challenge to the constitutional provision of equality, came from the Hindu male challenging the provision of monogamy in State of Bombay Vs Narasu Appa Mali. A petition was filed in the Bombay High Court challenging the monogamy among the Hindus imposed by Bombay prevention of Hindu bigamous Marriage Act, 1946. The Act was challenged as contravening the fundamental rights guaranteed under Articles, 14, 15 and 25 of the constitution. It was contended that to introduce monogamy by the impugned legislation the Hindus are deprived to practise and profess their religion as guaranteed under article 25 (1) of the constitution. It was also

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10 AIR 1952 Bom. 84.
contended that by prohibiting, penalizing and invalidating polygamy among the Hindus only, while leaving the rights of Mohamedans to practice such polygamy wholly unaffected, the impugned Act, denied equality before law and equal protection of law. The court observed as follows:- But even assuming that polygamy is a recognized institution according to Hindu religious practice, the right of the state to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution, an institution in which the status is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is very desirable and praise worthy institution. If, therefore, the state of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the state is imposed to legislate with regard to social reform under Article 25 (2) (b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate religion. A question has been raised as to whether it is for the legislature to decide what constitutes social reform. It must of be forgotten that in a democracy the legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the state and it is for them to lay down the policy that the state should pursue. Therefore, it is for them to determine what legislation to put upon the statute book in order to advance the welfare of the State. If the legislature
in its wisdom has come to the conclusion that monogamy tends to the welfare of the state then it is not for the courts of law to sit in judgement upon that decision. Therefore, this legislation does not contravene Article 25 (1) of the constitution. Coming to Articles 14 and 15 (i), it should be borne in mind that these Articles are two facets of the same fundamental right. Both emphasise the equality before the law. Article 15 (1) further emphasises the fact that any discrimination which is based only on the ground of religion, race, caste sex or place of birth can never be a reasonable discrimination. Article 15 (1) itself assumes that there may be discrimination on other grounds. But whether such discrimination is good or not would depend upon principles applicable to the construction of Article 14. It would depend upon the discrimination being based not upon arbitrary, capricious or oppressive grounds, but grounds which are reasonable. There can be no doubt that the Muslims have been excluded from the operation of Bombay Prevention of Hindu Bigamous Marriages Act 1946. Even section 494, Penal code, which makes bigamy an offence applies to Parsis, Christians and others, but not to Muslims because Polygamy is recognised as a valid institution when a Muslim male marries more than one wife. The question that we have to consider is whether there is any reasonable basis for creating the Muslims as a separate class to which the laws prohibiting polygamy should not apply. Now it is an historic fact that both the Muslim and the Hindus in this country have their
own distinctive evolution and which are coloured by their own distinctive backgrounds. Article 44 itself recognises separate and distinctive personal laws because it lays down as a direction to be achieved that within a measurable time India should enjoy the privilege of a common uniform civil code applicable to all its citizen irrespective of race or religion. Therefore what the legislature has attempted to do by the Hindu Bigamous Marriage Act is to introduce social reform in respect of a particular community having its own personal law. The institution of marriage is differently looked upon by the Hindus and Muslims. The state was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Article 14 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. From these considerations it follows that if there is a discrimination against the Hindu in the applicability of the Hindu Bigamous Marriage Act, that discrimination is not based only upon ground of religion. Equally so if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds. Regarding the polygamy under Bombay Prevention of Marriages Act is made cognizable offence, the court
observed that the Hindu Bigamous Marriages Act is attempting to bring about social reform in a community which has looked upon polygamy as not an evil institution, but fully justified by its religion. It is also introducing this measure of social reform in a community where the women have looked upon their husbands with reverence and respect. Instances are not unknown where Hindu wives themselves have insisted upon their husbands marrying a second wife in order that sons may be born to them. Therefore, if prosecution for bigamy was to lie at the instance of the aggrieved Hindu wife, there might have been hardly any prosecution at all, and if offences under the Hindu Bigamous Marriages Act were made compoundable, most Hindu wives out of respect for their husbands would have compounded the offences. Therefore, to make this social reform effective a more severe law was necessary.

Bombay High Court also held that the personal laws are not "laws in force" under Article 13 of the constitution and hence they are not void when they came into conflict with the provision of equality under the constitution.

A similar question arose in the case of Srinivasan Aiyar Vs Saraswati Ammal. In this case the provision of the Madras Hindu (Bigamy Prevention and Divorce) Act 1949 which provides penalising and also invalidating bigamy was challenged as violative of the right of equality

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11 AIR 1952 Mad. 193.
under Article 15 and the right to freedom of religion under Article 25 of the constitution. It was contended that by prohibiting penalising and invalidating polygamy among the Hindus only, while leaving the rights of the Muslims to practice such polygamy wholly unaffected, the impugned Act denied equality before the laws and equal protection of laws to the Hindus, discriminated against them on the ground of religion and violated their rights to freely profess, propagate religion. The Madras High Court held that though subjecting the Hindus and Mahomedans to different sets of laws would amount to classification, the essence of that classification was “not based solely on the ground of religion but based on considerations peculiar to each of the communities”. As to the contention that the impugned Act violated the right to freedom of religion, it was held that the freedom to practice religion was not an absolute right, but, as Article 25 itself states, it was subjected to public order, morality and health and also subject to legislations providing for welfare and reform and that religious practices could be controlled by legislation if the state thought that in the interest of social welfare and reform it was necessary to do so.

Section 9 of the Hindu Marriage Act provides the provision for restitution of conjugal rights as a remedy to a spouse aggrieved by the desertion of the other spouse, without any reasonable cause. It specifically provides that when either the husband or the wife has withdrawn from the
society of the other without reasonable excuse, the aggrieved party may initiate legal proceedings for degree of restitution of conjugal rights. This provision has been challenged as unconstitutional and as violative of Article 14 and 21 of the constitution in *T. Sareetha Vs T. Venkata Subbaiah*. Justice P.A. Chowdhary of the Andhra Pradesh High Court has held that Section 9 of the Act is violative of Article 21 of the constitution. It has been ruled that the remedy of restitution of conjugal rights provided by Section 9 is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the constitution. Hence Section 9 is constitutionally void. Any statutory provision that abridges any of the rights guaranteed by part III of the constitution will have to be declared void in terms of the Article 13 of the constitution. Article 21 guarantees right to life and personal liberty against the state action. Article 21 also prevents the state from treating the human life as that of any other animal. Article 21 protects the right to privacy and promotes the individual dignity mentioned in the preamble to the constitution. The court has proceeded to say that a decree for restitution of conjugal rights constitutes the grossest form of violation of an individual’s right to privacy. It denies the women her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprives a woman

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12 AIR 1983 A.P. 356.
of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Clearly, therefore, the right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal rights. It has further been said that a court’s decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decisions. In our society reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife. The reason for this mainly lies in the fact of the differences between the man and the woman. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievably whereas the husband’s can remain almost as it was before. This practical but the inevitable consequence of the enforcement of this remedy cripples the wife’s future plans of life and prevents her from using that self-destructive remedy. Thus the use of remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband. The pledge of equal protection of laws is thus inherently incapable of being fulfilled by this matrimonial remedy in our Hindu Society. As a result this remedy works in practice only as an oppressive to be operated by the husband for the benefit of the husband against the wife. By treating the wife and husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of laws. For that reason the formal
equality that Section 9 of the Act ensures cannot be accepted as constitutional. Section 9 should, therefore, be struck down as violative of Article 14 of the constitution.

But the Delhi High Court took a totally different position. In Harvinder Kaur Vs Harmander Singh\textsuperscript{13}. Delhi High Court held that there was nothing unconstitutional about the provision of Section 9 of the Hindu Marriage Act, 1955. Section 9 seeks to bring about only a reconciliation if possible, failing which it is a peg to hang a divorce petition. It has also further observed that in the privacy of the home and the married life neither Articles 21 nor Article 14 has any place.

In a sensitive sphere which is at once most intimate and delicate the introduction of the principles of constitutional law will have the effect of weakening the married bond. The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling. It will open to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. The object of the restitution decree is to bring about cohabitation between the estranged parties so that they can live together in the

\textsuperscript{13} AIR 1984, Delhi, 66.
matrimonial home in amity. It also enables the court coax and cajole the parties to resume marital life and is designed to encourage reconciliation.

But these two conflicting decisions of High Courts are not set rest by the Supreme Court. In *Saroj Ramji Vs Sudarshan Kumar Chaddha*[^14^] Supreme Court held that provision of Section 9 of Hindu Marriage Act, 1955 serves a social purpose. The main objective of this provision has always been to ensure conjugality through coercive measures. It can not be said to be violative of Article 14 or Article 21 of the constitution if the purpose of the decree for restitution of conjugal rights in the Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.

The constitution of India expressly recognises that the women are considered unequal and has therefore provided that “special provisions can be enacted and made” for women to overcome their unequal status. This provision has been described as “protective discrimination” for women.

The directive principles of State Policy contained in part IV of the constitution incorporate many directives to the state to improve the status of women and for their protection. Though they are not enforceable by any Court, but they are fundamental in providing welfare to the people. Some

Directives are explicitly intended to improve the status of women and for their protection.

Article 39 (9) directs the State to direct its policy towards securing that citizens, men and women, equally have the right to an adequate means of livelihood.

Article 39 (d) directs the State to secure equal pay for equal work for both men and women.

Article 39 (e) specially directs the State not to abuse the health and strength of workers men and women.

Article 42 directs the State to move provisions for securing just and human conditions of work and for maternity relief.

Article 44 of the constitution requires that State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India. This particular goal is towards the achievement of gender justice. The founding father of the constitution was aware of gender injustice. They incorporated Article 44 of the constitution with the aim that it may be exercised in future at appropriate time. Even though the state has not yet made any efforts to introduce uniform civil code in India, the judiciary has reminded the necessity of having uniform civil code.
In a landmark judgement in *Sarla Mudgal Vs Union of India*\(^{15}\). Supreme Court has passed direction to the Central Government to take a fresh look at Article 44 of the constitution. In this case the question for consideration was whether a Hindu husband married under Hindu law, without dissolving the first marriage, after conversion to Islam can be solemnize a second marriage?

Whether the aposted husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)?

There were four petitions under Article 32 of the constitution before the Supreme Court regarding fake conversion to Islam by Hindu husbands to contract bigamous marriages. Supreme Court observed that marriage is the very foundation of the civilised society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities there under Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilisation can exist.

Supreme Court further observed that till the time we achieved the goal uniform civil code for all the citizens of India- there is an open inducement to the Hindu husband, who wants to enter into second marriage

\(^{15}\) AIR 1995 SC 1513.
while the first marriage is substituting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences. A marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu law the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be Hindu.

It is obvious from the various provisions of the Hindu Marriage Act, 1955 that the modern Hindu law strictly enforces monogamy. A marriage performed under the Act cannot be dissolved except on the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Hindu Marriage Act, 1955 none of the spouses can contract a second marriage. Conversion to Islam and marrying again would not by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Hindu Marriage Act and as such void in terms of Section 494, I.P.C. Any Act which is in violation of
mandatory provisions of law is per se void. Looked from another angle, the second marriage of an apostate-husband would be in violation of the rules of natural justice.

Supreme Court also observed that Article 44 of the constitution is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divert religion from social relation and personal law. Marriage, succession and like matters of a secular character can not be brought within the guarantee enshrined under Article 25, 26 and 27. The personal law of the Hindu, such as relation to marriage, succession and the like have all a sacramental origin in the same manner as in the case of the Muslims or the Christians. The Hindu along with Sikh, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the constitution rejoins the establishment of a "common civil code" for the whole of India. The constitution by guaranteeing freedom of conscience ensured inner aspect of religious belief. And external expression of it were protected by guaranteeing right to freely practice and propogate religion. But no religion permits deliberate distortions. Much misapprehension prevails about bigamy in Islam. To check the misuse many Islamic countries have codified the personal law, "wherein the practice of
polygamy has been either totally prohibited/severely restricted. But ours is a Secular Democratic Republic. Freedom of religion is the core of our culture.

But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. The government would be well advised to entrust the responsibility to the law commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with the modern day concept of human rights for women.

At times, courts were faced with a difficult situation when the two personal laws came in conflict with each other. During the British rule in India no attempt was made to codify the personal laws. Not only there is diversity of laws, the diverse laws have diverse provisions on similar points. The directive under Article 44 of the Indian constitution is now very needed to bring justice to the women. Moreover, the absence of a uniform civil code is resulting into the misuse of the freedom of religion.

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The committee on the status of women in India, in its report entitled “Towards Equality” presented in 1974, evaluating the personal laws from the angle of the women, criticised the British policy towards these laws. According to the committee, the policy had a crippling effect on women; the result of the policy was “to encourage the feeling of separateness and prevent the unity of the two communities; the policy of non-intervention with family law resulted in stagnation with the result that “the two systems could neither absorb nor adjust to socio-economic changes. Social tensions inevitably arise in situations when the law does not in fact answer the needs arising from major social change”. The existence of plurality of marriage laws, of which one of is polygamous amongst other monogamous system converts himself to a religion permitting polygamy and claims privileges there under. The result may be quite unjust for one of the partners.

If women were to be given equality then enactment of uniform civil code is quite necessary. For the first time, the idea of having a uniform civil code was put up by the National planning Committee appointed by congress in the National political debate in 1940. When at the time of discussion in the constitutional Assembly regarding the inclusion of a

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provision on uniform civil code, Muslim members strongly objected. Mahboob Ali Baig Saheb, a Muslim member in the constituent Assembly wanted to add a proviso to clause that "nothing in this clause shall affect the personal laws of a citizen". Mohamad Ismail Sahib also suggested for a proviso that "any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law". Naziruddin Ahmad, another Muslim member wanted the proviso to the clause such as that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law".

But inclusion of such proviso was not accepted in the constituent Assembly. Dr. K.M. Munshi who was member of the constituent Assembly replied to the objection that "we are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices". He also said that even if the religious practices had been construed to cover all aspects of life in the past, the time had come to make a distinction between religion and personal laws or social relations or the right of succession and inheritance. There were many among Hindus who did not like a uniform civil code. They felt that the personal law of inheritance, succession, etc. was really a part of their religion. If that were
so, you can never give, for instance, equality to women. But you have already passed a fundamental right to that effect and you have an Article here which lays down that there should be no discrimination against sex. Looked at Hindu law; you get any amount of discrimination against the women; and if that is part of Hindu religion or Hindu religious practice, you can not pass a single law which would elevate the position of Hindu women to that of men. Therefore, there is no reason why there should not be a civil code throughout the territory of India. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation".

Dr. B.R. Ambedkar stated that in view of the fact that just every aspect of human relations except marriage and succession was regulated by uniform civil codes, it was too late to argue that it was not possible or desirable for the state to enact a uniform civil code. Such diversity violated the principle of fundamental rights that there should be no discrimination between citizens²⁰.

The clause on the uniform civil code became a highly contested issue. Afterwards the rights were divided into two segments i.e. Fundamental Rights which are justifiable rights (Part III of the constitution

and directive principles of state Policy which are not enforceable in the court law (part IV of the constitution). Since the uniform civil code was a politically sensitive issue, the founding fathers of the constitution arrived at a honourable compromise by placing it under Article 44 as a Directive Principle of State Policy. The issue of a uniform Civil code has been controversial right from the very beginning. Not much progress has so far been made towards achieving the ideal of a uniform civil code which still remains a distant dream. With the enactment of a uniform civil code the rights of women can be secured.

Attempts have been made from time to time for enacting a uniform civil code after independence. But the State has shown reluctance to interfere with these laws because religion has been proving to be a formidable barrier to reform the personal laws. The courts have taken a progressive step in that direction. Supreme Court in various cases has been giving directions to the government for implementing Article 44 of the constitution.

In *Mohd. Ahmed Khan Vs Shah Bano Begum*\(^2\) Supreme Court, through Chief Justice Y.V. Chandrachand, held :- “It is also a matter of regret that Article 44 of our constitution has remained dead letter…..There is no evidence of any official activity for framing a common civil code for

\(^2\) AIR 1985 SC 945.
the country. A belief seems to have gained around that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions in this issue. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and unquestionably it has the legislative competence to do so.

Monogamy was introduced among the Hindus through the Hindu Marriage Act in 1955. The only loophole through which a Hindu husband can escape is conversion. But the judiciary has dealt severely with all breaches of monogamy among the Hindus. In *Lily Thomas Vs Union of India*\textsuperscript{22}. Supreme Court observed that in the past several years, it has become very common amongst the Hindu male who cannot get a divorce from their first wife, they convert to Muslim religion solely for the purpose of marriage. This practice is invariably adopted by those erring husband who embrace Islam for the purpose of second marriage but again become reconvert so as to retain their rights in the properties etc. and continue their service and all other business in their old name and religion. Religion is a matter of faith stemming from the depth of the heart and mind. Religion, faith or devotion are not easily interchangeable. If the person feigns to have

\textsuperscript{22} AIR 2000 SC 1650.
adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation, as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution, under Hindu law, Marriage is a sacrament. Both have to be preserved so long as that marriage subsists, another marriage cannot be performed, not even under any other personal law, and on such marriage being performed; the person would be liable to be prosecuted for the offence under Section 494 of Indian Penal Code.

Not much progress has so far been made towards achieving the ideal of a uniform civil code which still remains a distant dream. The only tangible step taken in this direction has been the codification of Hindu law. India has accepted the ideal of a secular State. Hence it is necessary to replace the various systems of personal laws by a Uniform Civil Code. Laws should be equal to all; all kinds of discrimination in the existing laws should be removed. There should not be any discrimination between men and women.

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“There are new enemies of people’s justice. Communalism and religious fanaticism are invasions on social justice, especially gender justice, because our gods are masculine as processed by fundamentalists of every faith. The biggest minority in India is its womanhood subjected to generations of gender injustice.”25 One should not forget that nationhood is symbolized by one Constitution, a single citizenship, one flag and a common law applicable to all citizens. It can be said that in India, it is mainly the personal laws that most intimately continue to affect the lives of millions of women of all communities.26

It is also in the hands of judiciary to interpret to bring justice and secure equality to Hindu Women.

Marriage has been a prominent factor determining the status of women. Traditional India has seen women only as a member of the family or a group – as daughter, wife and mother and not as an individual with an identity of her own. Marriage, according to ancient notions was considered to be an indissoluble union and thus a sacrament. Important changes in this sacramental law are brought by Hindu Marriage Act, 1955. Bigamy becomes unlawful and punishable under this Act. But still Section 17 of the Hindu Marriage Act 1955 needs for the validity of marriage

“solemnization” of marriage. That means it needs to perform essential ceremonies and rites according to Hindu customs. This means the offence of bigamy is committed only if the required ceremonies of marriage are performed. The second marriage cannot be taken to be proved by the mere admission of parties: essential ceremonies and rites must be provided to have taken place. Women have been the worse sufferers of these legal absurdities. In Bhaurao Shankar Lokhande Vs State of Maharashtra. The husband was convicted by the lower courts. But Supreme court acquitted the husband on the ground that essential ceremonies for a valid Hindu Marriage, i.e. vivaha homa and Saptapadi has not been performed in the second marriage. The court held that the bare fact of a man and a woman living as a husband and wife does not give them the status of husband and wife unless valid ceremonies of a marriage have been performed and hence such cohabitation would not warrant conviction under Section 494 of I.P.C. This was again confirmed by the Supreme Court in Priya Bala Ghosh Vs Suresh Chanda Ghosh, it was held that proof of essential ceremonies is a precondition for conviction. This condition must be met even when the husband and the second wife admit the marriage or the fact of cohabitation.

27 AIR 1965 SC 1564.
Such provisions and judicial attitude towards bigamy destroy all hopes of justice and Hindu first wife may have the risk of opening herself to invalidate her own existing marriage.

In this situation it is necessary to make provision for providing compulsory registration of Hindu marriages. In *Seema Vs Ashwani Kumar*\(^\text{29}\). Supreme Court observed that – if the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission for women, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registered. The legislative intent in enacting Section 8 of the Hindu Marriage Act is apparent from the use of the expression “for the purpose of facilitating the proof of Hindu marriages”.

\(^{29}\) (2006) 2 SCC 578.
We live in democracy under a constitution and democracy will flourish if we follow the rule of law. Justice is to be imparted according to law. Court has to set aside the decision in violation of the principles of natural justice. The principle of natural justice is that both the sides should have a full and fair hearing. Courts must give a reasonable opportunity to the parties affected the right of fair hearing or the right to be heard. No man should be condemned unheard. Concept of natural justice always guides Indian judiciary when it discharges judicial functions. In *Meneka Gandhi vs Union of India*\(^{30}\). Supreme Court observed that natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule.

For providing justice to the Hindu women courts also have to apply the principle of natural justice. In *Smt. Binita Bag Vs Tapas Bag*\(^{31}\) the respondent husband filed a suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act 1955 before District Judge Howrah which was transferred to the court of Additional District Judge, First class, Howrah. During the pendency of the suit for restitution of conjugal rights, an application for amendment of the main proceedings thereby praying for converting the same to one for divorce was filed by the husband and was allowed ex-parte. The moment such application for amendment was

\(^{30}\) AIR 1978 SC 597

\(^{31}\) AIR 2009 Cal. 267.
allowed and the proceedings were converted to one for divorce the wife was not given the opportunity to file additional written statement for the purpose of controverting the allegations made in the amended application for divorce not withstanding the fact that on the day the application for amendment was allowed, she was not present. After the amendment was allowed, no further evidence was even adduced by the husband in support of his amended claim of divorce. No further issue was framed after the proceedings were converted to one for divorce. The learned Trial Judge decided the main issue being issue No.2 as to whether the wife withdrew herself from the family and society of the husband voluntarily without any just and reasonable excuse, and answered the issue in favour of the husband and consequently, granted the decree for divorce. In the ordering portion of the judgement, the learned Trial Judge, however, in his handwriting inserted that the suit was decreed on the ground of wife’s wilful desertion and cruelty, although, no such issue on the question of desertion and cruelty was framed. Calcutta High Court held that the learned Trial Judge without following the principles of natural justice granted a decree for divorce by not giving any opportunity to the wife to file additional written statement or to controvert the allegations of cruelty or desertion inserted by way of amendment of the pleading. It is needless to mention that desertion is a ground for divorce provided such desertion is for a period of two years prior to the presentation of the proceeding. In this
case the ground of desertion was incorporated by way of amendment one
day prior to the date of delivery of judgement and there was no issue
framed to that effect and even the husband did not adduce any further
evidence in support of the amended relief than those originally given in
support of the relief of restitution of conjugal rights. Thus court set aside
the judgement and decree impugned and remands the matter back to the
learned Trial Judge for giving an opportunity to the wife to file additional
written statement on the added grounds of divorce after conversion and
thereafter, should give opportunities to the parties to lead evidence on the
question of desertion and cruelty.

Women have a unique position in every society whether developed,
developing or underdeveloped. This is particularly due to the various roles
they play during various stages of their life, as a daughter, wife, mother and
sister etc. Inspite of her contribution in the life of every individual human
being, she still belongs to a class or group of society which is in a
disadvantaged position. The family is viewed as a social unit and taken as a
whole, children are part of family yet they constitute separate entity.
Children deserve separate and special consideration. It is universally
accepted that mother can look after a child of tender age with much care
and affection; in fact, there is no substitute for mother’s care and affection.
The mother’s lap is God’s own cradle for a child
Under the Hindu law the concept of guardianship of a minor during the lifetime of the father was unthinkable. Under the Hindu Joint family, the Karta played an important role even the presence or absence of the father. On the death of the father, the next senior male member became the Karta and could take care of the person and property of the minor.

The constitution of India, prohibits any discrimination solely based on the ground of sex. This prohibition of gender based discrimination has been given the status of a fundamental right. Various other laws have been enacted to deal with the personal matters. Despite constitutional provisions granting equality to women, there are spheres in which she still has a very secondary and subordinate position. With regard to custody and guardian of her children, the Hindu Minority and Guardianship Act 1956, repeats the traditional superiority of men and inferiority of women. Section 6 (a) of the Hindu Minority and Guardianship Act 1956 declares only the father of a minor child as natural guardian to the exclusion of the mother. The father is recognized as the natural guardian of a minor. The mother acquires this right only when the father is either dead or has become completely “incapable” or unfit. However, the law grants natural guardianship to a mother if the child is illegitimate. The right passes to the father only after her death. The judiciary has to play the role in this situation to bring about any kind of an interpretative equality. In “Githa Hariharan Vs Reserve
Bank of India and Vandana Shiva Vs J. Bandhopadhyaya. Supreme Court has given in two separate but concurrent judgement on two petitions involving interpretation of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 and Section 19 (b) of the Guardians and Wards Act 1890. In the first petition, the parents of a minor applied to the Reserve Bank of India for Relief Bonds in the name of their son. In the application, they state that the mother would act as the guardian of the child for purposes of investments made with the money. Accordingly, the mother signed the prescribed form as the guardian. The Bank, however, refused to entertain the application and asked the parents to produce the application form signed by the father or a certificate of guardianship from a competent authority in favour of the mother. This was challenged. In the second petition, divorce proceedings were pending and the father prayed for the custody of their son. He was writing repeatedly to the petitioner - mother asserting that he being the only natural guardian of the child the mother should not take any decision regarding the child, without his permission. The petitioner-mother consequently moved the Supreme Court challenging Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 as being violative of Articles 14 and 15 of the Constitution. Supreme Court held that the wording of Section 6(a) viz. “the father and after him the mother” indeed

32 AIR 1999 SC 1149.
gives an impression that the mother can act as a guardian only after the lifetime of the father. It also held that the constitution adopted in 1950, prohibits gender based discrimination and the Hindu Minority and Guardianship Act came six years later in 1956. Parliament could not have intended to transgress the constitutional limits or the constitution which essentially prohibits discrimination on ground of sex. The word “after need not necessarily mean “after the lifetime” but “in the absence of”. If the father is not in the charge of actual affairs of the minor either because of his indifference or by virtue of mutual understanding between the parents or because of some physical or mental incapacity or because he is staying away from the place where the mother and the minor are living, then, in all such situations, the father can be considered as “absent” for the purposes of the both above mentioned statutes and the mother, who in any case is a recognised natural guardian, can validly act on behalf of the minor as a guardian. Such an interpretation will keep the statute within the constitutional limits otherwise the word “after” if read to mean a disqualification of a mother to act as guardian during the lifetime of father, the same would violate one of basic principles of our Constitution i.e. gender equality. Supreme Court in Jayabhai Vs Pathankhan also held that where the mother and father has fallen out and were living separately

33 AIR 1971 SC 315.
and the minor daughter was under the care and protection of her mother, the mother could be considered as natural guardian of the minor.

The Court adjudicating in matters relating to children acts as a Supreme Guardian of children and that the welfare of children is the paramount consideration.

These judgments have given some relief to mother. But still mother does not have an equal right as father if the father and mother are living together. A legislative amendment is quite necessary to the inequality clauses inherent in Section 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 for giving equal right to both the father and the mother.