CONSTITUTIONALITY OF FAMILY LAWS OF INDIA
An Insight into The Challenges And The Response Of The Judiciary

By

Dr. Poonam Saxena
Associate Professor
Faculty of Law, University of Delhi

Introduction:

The Indian Constitution guarantees equality before law and equal protection of laws to all Indian citizens irrespective of their caste; creed, sex, place of birth, domicile etc. Described as a progressive social document it encompasses within it the concept of gender equality expressly forbidding sex based discrimination. Art. 16 enjoins equality of opportunity between men and women in matter of public employment. While guaranteeing equality of status and opportunity to women, the constitution also provides for affirmative action in their favour empowering the state to make special provision for women and children, Laws providing for maintenance legal protection to female workers in matters such as wages, maternity benefits, social security and child care passed by the legislature, and the judiciary as the prime movers in enhancing the status of women by protecting them against exploitation and discrimination.

Subordination of women and challenges to gender discriminatory provisions of family laws:

Subjugation of women is a global phenomenon and India is no exception to it. Parties to the perpetration of this subordination are primarily the family members including women themselves; social; cultural and religious factor; and sometimes the judiciary as well as the legislature. It is interesting to note that the same courts which very strongly disapprove gender related discrimination in matters of employment or sexual harassment at work place, hesitate to enter the family for safeguarding a woman from her own family members and thus tacitly approve her exploitation. Courts in India have displayed an extremely cautious approach when asked to deal with gender issues coming in conflict with the interests of the family as an institution or the rights of men. It is as if there is a veil around a home which the court would lift only when either a life is lost or some other drastic thing happens. Cases where the wife is chained like an animal or is starved till she is reduced to a mere skeleton shock the nation when they are exposed by the media, but make little headway in according her justice in the snail paced justice delivery system . The physical or mental torture of a woman inside her home is more often dismissed as a normal wear and tear of the family life than a matter of serious concern. Women seldom go to the police station for lodging a report against their husbands for beatings or even go to the doctor for medical treatment. Yet, her complaints are not taken seriously. Yet her pleas for some amount of respect for her own body or life is ignored. Her usefulness for the entire family and the home demands that she be subjugated, something that even the courts do not forget and therefore a woman trying to take decisions for protecting her life or for the betterment of her life at the cost of her husband's right to command her services is

strongly looked down upon not only by the society, but even by the judiciary. It is again a curious feature of our family laws that despite wide diversity in their content, one commonality shared by nearly all family laws is the general subjugation of woman. It is not surprising therefore that majority of the challenges to family laws are from women, and with respect to the gender discriminatory provisions contained therein.

Multiplicity of Family laws in India

The process of codification of personal laws started during the pre-Independence era and was carried forward by the independent Indian legislature soon after the year 1947. A separate family law governs each of the major religious community in India. There is further divergence, in some cases depending upon the sect within the community, domicile, and sometimes even with the form of the marriage the parties might have undergone through. Laws relating to the various communities in India were clearly demarcated even before the Britishers actively interfered with them. Almost the entire legislation governing the Christians community, was enacted by the British Indian Parliament, and was generally based on the British statues of the Victorian era. For the Parsi community, laws governing Marriage and Divorce and succession were unified, systematized and codified by the colonial regime. Hindus were governed by their uncodified customary, law which were later codified by the Indian legislature in 1955-56 and the Muslims were governed by Quranic law. All enactments have been updated consistently after independence, though Quranic law as applicable to Muslims has remained unchanged. However other changes for Muslims at the behest of the legislature, with the exception of the Dissolution of Muslim Marriage Act, 1939, have done more harm than good to an Indian Muslim women. It is also a fact that due to political constraints and lack of political will, legislature in India hesitates to take the initiative to try to reform the Muslim personal law. It is a fact, well recognized by all, that Indian family laws, the son centered economy, family structure, family values, and family culture put too many demands on a woman, leave very little time for herself, are harsh on them yet the harshness is not only often justified but is glorified as an essential and exclusive attribute of an Indian Woman. That she is no longer prepared to be befooled by this lip service, is very conveniently ignored by the authorities who time and again try to measure her conduct by this stereotyped caricature that they themselves have given to her.
Confronted with this cultural, social and legal maze, the constitutional mandate of equality and the courts remain the only hope for a marginal respite for an Indian woman in her persistent fight for justice and equality.

The question that remains to be seen is, what does the Indian constitution mean for an Indian woman trapped in her family surrounded by her own family members, discriminatory laws and their matching interpretations? What is the message that the courts give to her when she encouraged by reading the various provisions of the constitution tries to raise her voice to point out the discriminatory provisions of the family laws with a hope to get justice?

Challenge To Family Laws And The Response Of The Courts.

Family laws and their provisions have time and again been challenged[1] by citizens as violative of the constitutional provisions of equality. In majority of cases the

challenge came from women[2] of the provisions that discriminate against them, while few of them were general.[3] The hesitancy of the courts to even adjudicate on these issues was apparent, as it was only in few instances that the court declared the impugned provisions as unconstitutional. The responses of the courts have been varied and can be divided into five categories:

1. Declaration that family laws are personal laws and are not covered within the meaning of "laws" under Art. 13 of the Constitution. Therefore the whole realm of family laws are outside the scope of constitutional guarantees of equality.
2. The courts treated Family laws as "laws" within Art. 13 of the Constitution, agreed that they have to pass the test of constitutional validity; analyzed their provisions in ;light of Art. 14 but found them constitutionally valid,
3. The courts were convinced that the provisions were discriminatory but did not declare them unconstitutional. However, they gave a modified interpretation to bring the impugned provision within Art, 13.
4. The courts were convinced that the provisions are discriminatory but stopped short of declaring them void and held that the remedy does not lie with them but with the legislature,
5. The court declared the impugned provisions as unconstitutional.

1. Declaration that family laws are personal laws and are not covered within the meaning of "laws" under Art. 13:

The line of argument that does maximum damage to a challenge of a provision is the exclusion of family laws from the term "laws" appearing in Art. 13. This kind of immunity results in the dismissal of an impugned provision without its appraisal on merits. The starting point was State of Bombay v. Narasu appa Mali,[4] where the provisions of Hindu Bigamous Marriages Act, 1946, were challenged. State had passed a law abolishing polygamy for members of Hindu community. As the Act did not apply to Muslim polygamous men, it was challenged as violative of Art. 14 , which prohibits discrimination on grounds of religion. Bombay High Court held that the personal laws of the Hindus and Muslims were -not "laws" within the meaning of the expression "laws In force" as used in Art. 13 of the Constitution as well Art. 372(1). The petitioners also sought a direction from the courts to be given to the state to come up with similar legislations for Muslim men also. The court dismissed the petition and held that personal laws are not included in the term "laws" used in Art. 13 of the Constitution, and said,

"Section 112, Government of India Act deals with the law to be administered by the High Courts and it provides that the High Court shall in matters of inheritance and succession to lands, rent and goods and in matter of contracts and dealing between party and party, when both the parties are subject to the same personal law or custom having the .force of law decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore a dear distinction is drawn between personal law and custom having the force of law. This is a provision in the Constitution Act, and having this model before them the constituent assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This in our

opinion is a very clear pointer to the intention of the constitution making body to exclude personal laws from the purview of Art. 13.

The court further observed:

"There are other pointers also. Article 17 abolishes untouchability and forbids its practice in any form. Art. 25(2)(b) enables the state to make laws for the purposes of throwing open of Hindu Religious institutions of a public character to all classes and sections of Hindus. Now if Hindu personal law became void because of any of its provisions contravening any fundamental rights, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravene Arts. 14 and 15. This clearly shows that only in certain respects has the constitution dealt with personal law.

The very presence of Art. 44 in the constitution recognizes the existence of separate personal laws and entry no. 5 in the concurrent list gives power to the legislatures to pass laws affecting personal laws. The scheme of the constitution therefore seems to be to leave personal laws unaffected except where specific provision is made with regard to it and leave it to the legislatures to modify and improve it and ultimately to put on the statute book a common and uniform code. We have come to the conclusion that "personal laws" is not included in the expression "laws in force" used in Art. 13(1)".

The line of approach and the verdict of the court was incorrect and exposes a naivete not expected of rationale judges. Reading something that is absent from the constitution and ignoring clear pointers do not make effective arguments and justified reasons to come to an unconvincing conclusion.
The reason why the constitutional framers did use these two different terms is to denote the distinction between "personal laws" and "custom and usage" and not to denote the difference between the general laws and personal laws as there is none between the two.

A direction to the state to eventually enact a uniform civil code has nothing to do with the continuation or upholding of discrimination perpetrated by the laws. Acceptability and recognition or even permissibility to have diversity or co-existence of multiplicity of family laws is not synonymous to acceptance of the provisions against the constitutional principles. What it actually means is that each of the disparate community is allowed to be governed by their separate laws and it does not mean that the constitutional framers ever wanted this large realm of laws governing a very wide area of family relations to skip the test of constitutional validity. Permission of diversity is not a permission of discrimination. We cannot read something in the constitution which is not there. There is not even a single provision in the constitution which says that Family laws are outside the purview of part III. On the other hand the very presence of family laws related subjects in the concurrent list is a clear pointer of their parity with any other laws or subject matter present in the same list. The constitution expressly provides for continuity of all laws as were in force on the date when the constitution was promulgated provided they were not inconsistent with the provisions of the constitution. Nearly all family laws were inconsistent with the provisions of equality of the constitution and could not have passed this test. With the exception of quranic law, all the major laws governing family relations are codified, and were passed by the British Indian or independent Indian parliament. They are

man made laws and have no longer any element of divinity attached to it to make them sacrosanct or even worthy of any special or differential treatment than any other legislation.

The other contention that was raised before the court was that polygamy in itself discriminates on grounds of sex, as it is only men who are allowed to be polygamous while the women have to be compulsorily monogamous. While holding that it does not discriminate against women, the court said,

"The legislature with an eye on social reform and with intent to ameliorate the status of women passed this Act". [5]

The argument in itself is weak and exposes its hollowness. Why would an independent legislature be so insensitive to Muslim women to not ameliorate their status and selective and partial to only Hindu women to safeguard their interests This in itself would violate the provisions of the constitution as there is a discrimination against Muslim women on grounds of religion. If they had an eye on social reform why social reform only for Hindu men why not for all Indian men. Are Muslims not part of the society that needed social reform? Or in plain and simple words whether the legislature wanted to enhance the status of only the Hindu women or were they afraid of taking the privilege from Muslim men.

The Supreme Court of India in Krishna Singh v. Mathura Ahir,[5] also observed that Part III of the Constitution does not touch upon the personal laws of the parties.

Challenge to Indian Divorce Act, 1869

Under the Indian Divorce Act, 1869, applicable to the Christian community, the whole process of obtaining dissolution of marriage is cumbersome and extremely difficult. A decree of dissolution passed by the District Courts remains ineffective until confirmed by a bench of the High Court. Before such confirmation the High Court can order further inquiry or take additional evidence and then only it would proceed to confirm the decree or pass another order. A minimum of six months must expire between the date of pronouncements by the lower courts and its confirmation. A further waiting period of six months is provided since such confirmation, before the parties can remarry. The Constitutional validity of Sec. 17, which prescribes this procedure was challenged in Mathew v. Union of India,[6] on the ground that as this legal formality applies only to Indian Christians and to the member of no other religious community, it is discriminatory, arbitrary and violative of Art. 13, 14, 15(1) and 21 of the Constitution of India (Art. 14 condemns discrimination not only of substantive law but also of the law of procedure). Even if the parties are not interested to appeal, the mandatory waiting period further delays their right to get remarried and violates Art. 21 also. It also leads to additional expenses and prolongs the agony of parties. The division bench comprising of A.R. Lakshmanan and K. Narayana Kurup JJ, accepted that the confirmation procedure prescribed by Sec. 17 prolongs the agony of the affected parties .even though none of them is desirous of filing an appeal and that there is no justification for its continuation specially when no such procedure is prescribed by other matrimonial legislations like Special Marriage Act, Hindu Marriage Act, etc.. They also accepted the urgent need for making suitable amendments in the Act but held that personal laws do not fall within Art. 13(1) of the Constitution. and are not "laws" as defined in Art. 13(1). The courts also concluded

that the remedy does not lie with the courts but with the legislature and directed the Kerala government to bring in the necessary and appropriate amendment.

It must be noted that despite directions to the state governments by the various High Courts in the past, calling for modification of Sec., 17, not much progress had been made by majority of these states. The court here was influenced primarily by the opinion of the Supreme Court and also the Bombay High Court [7] that personal laws are not included in the term "laws in force" within the meaning of Art. 13 of the Constitution. Art. 372 indicates that all laws in force before the promulgation of the Constitution would continue to be in force unless repealed by the state. IDA is one of such Acts that was passed by the British Indian parliament and has not been repealed. By no stretch of imagination it can be called anything but a "law' and would be covered under Art. 13. The court's stand that family laws are not laws within the meaning of Art. 13 therefore appears to be incorrect.

2. The courts did discuss the provisions on merits but found them constitutionally valid.

The second approach taken by the courts is to not outrightly dismiss a challenge to a provision of the family laws as outside their jurisdiction but to discuss its constitutional validity on merits. In most of the cases the courts have held that there is a permissibility of equality only amongst equals and as men and women are basically unequal, laws giving them unequal rights might not offend the equality mandate of the constitution.

Hindu Adoptions and Maintenance Act, 1956:

In Lalita Ubhayakarv v. Union of India [8] , a married woman challenged Sec. 8 of the Hindu Adoptions and Maintenance Act as violative of Constitution Under this provision the primary authority to adopt a child amongst married couples is with the husband. However his power to adopt can be exercised only after taking a consent from the wife. The wife on the other hand wanting to adopt a child cannot do so on her own as her role in the process of adoption is limited to giving of the consent to or veto the decision taken by her husband.[9] . Thus, according to the Act, a married woman has been deprived of the right to take a child in adoption, by the same Act, which confers this right to a man -A woman's role is limited to giving a consent only, whether express or implied. The High Court of Karnataka, held the alleged provision non-discriminatory and said,

"Where Sec. 7 gives the wife a right to give the consent, It also granted it the power to refuse consent. The child was adopted to the family and not to an individual. Sec. 8 of the said Act, was enacted to make a specific provision in regard to a woman under Art. 15 of the Constitution of India without which no adoption for woman was possible at all."

The court further held that there was no discrimination on account of sex, having regard to Art. 14 of the Indian Constitution. As long as the woman was in a position to "induce her husband" to give consent to adoption, it could not be said that she is aggrieved and rejected the petition.

Indian Divorce Act, 1869

The constitutional validity of unamended [10] Sec. 10 of the IDA was first challenged before the Madras High Court in Dwarka Bai v. Prof. Nainan.[11]. Sec. 10 provides for grounds of divorce to put an end to a Christian marriage. It provides that the husband can obtain divorce from his wife if she is guilty of committing adultery. However, the wife is incapable of seeking divorce from her husband on his committing adultery, as according to this section, adultery simpliciter by the husband is not a ground for divorce. It must be coupled with some other specified grounds.[12] It was challenged as discriminatory on grounds of sex alone as it does not allow a woman to put an end to her marriage if the husband commits adultery but allows the husband to do so. Adopting an extremely anti woman posture, the court ruled that the discrimination is based on a sensible and reasonable classification after taking the abilities of men and women into account and the results of their acts and hence is not discriminatory. The court explained the logic as follows:

"Adultery by a man is different from adultery by wife. A husband commits adultery somewhere but he does not bear a child as a result of such adultery, and make it a legitimate child of his wife to be maintained by her. He cannot bear a child nor is the wife bound to maintain such a child. A husband cannot bear a child and make it a legitimate child to be maintained by a wife. But if the wife commits adultery she may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be bound to maintain it".

Thus the ability of the wife to bear a child became a determining factor or the basis of a reasonable classification, which according to the court was not based on sex but on a sensible classification. If it is not based on sex on what else it is based. In fact it is based on sex and sex alone. A man cannot bear a child only because he is biologically unable to do so. M Further the husband is not bound to maintain his wife's illegitimate child whom he has not fathered. The court further observed,

"I am satisfied that if the petitioner(wife) goes back to the respondent(husband), he will make her life miserable and that this couple can never live together in peace and amity on earth. But unfortunately that conclusion will not do for granting a divorce or judicial separation when the law will not allow it".

The Supreme Court in Murthy Match Works Etc. v. Assistant Collector of Central Excise [13] has observed,

Every differentiation is not a discrimination but classification can be sustained only if it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. If it rests on a difference which bears a fair and just relation to the objects for which it was proposed it is conditional. To put it differently the means must have nexus with the ends',

In 1994, Sec. 10 was again challenged[14] this time by the husband on the ground that under it the husband can proceed only on one ground while the wife can file a petition on several grounds and therefore it is arbitrary and violative of Art. 14 of the constitution. The court discussed the case on merits and held,

Taking into consideration the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking

dissolution of the marriage. For the same reason it can hardly be said that on that account the provisions of Section 10 of the Act are discriminatory as against the husband."

Hindu Marriage Act, 1955

Thew spousal conflict in matters of choice of place of employment by the wife against the husband's consent, has been a consistent battle for an Indian woman since the remedy of restitution of conjugal rights is still existing on paper. More often, husbands use this remedy to harass their wives. More so as it has been held in a number of cases that even employment of the wife at a place other than the residence of the husband amounts to her withdrawal without a reasonable excuse. In such cases, the wife has been asked to resign from her job and assume domestic responsibilities. Though the remedy is available to a man also, in majority of cases it is used by a man against his wife when, either she files a suit for maintenance against him in case she is financially dependent or when she is economically active but her place of residence is different from that of her husband due to her employment. On a challenge to Sec. 9 of the Hindu Marriage Act, 1955, the Delhi High Court held in Harvinder Kaur v. Harminder Singh [15], that the object of the restitution decree is to bring about cohabitation between the estranged parties i.e. so that they can live together in matrimonial home in peace and amity. Thus they upheld the validity of Sec. 9. What is more important was their observation on the constitutionality of this provision. They observed,

One *general observation must be made. The introduction of constitutional law in the home is most inappropriate. It is like introduction of a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 should have any place. In a sensitive sphere, which is at once most intimate and delicate, the introduction of the cold principles, of Constitutional law will have the effect of weakening the marriage bond. The house to everyone is to him, his castle and fortress. The spouses can claim a sort of sacred protection behind the door. The introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relation and will be a fruitful source of dissension and quarreling. It will open the door to unlimited litigation in a relationship which should obviously as far as possible be protected from possibilities of that kind".*

The matter went to the Supreme Court in Saroj Rani v. Sudarshan,[16], wherein they propounded more or less the same views as that of the Delhi High Court. They also held that Sec. 9 does not violate the basic principle of the constitution and is therefore valid. They said.

"Sec. 9 *is not violative of Art. 14 or Art. 21 of the constitution if the purpose of the decree of restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of execution in case of disobedience is kept in view""*

MWA, 1985:

In Bishnu Charan Mohanty v. Union of India [17] the Orissa High Court held that the Muslim Women's Protection of Rights on Divorce Act, 1985, does not discriminate on grounds of religion and is therefore intra vires the proviso of the Constitution.

The courts were convinced that the provisions were discriminatory but did not declare them void, rather gave a modified interpretation to the impugned provision to bring it within Art. 13.

In some cases the courts were convinced that the impugned provisions suffered from discrimination and could not pass the test of constitutional validity as such, yet instead of striking them down as unconstitutional, the courts gave a modified interpretation so that meaning of the provisions could fall within the constitutional mandate of equality.

Hindu Minority and Guardianship Act, 1956

In Githa Hariharan v. Reserve Bank of India, [18], the provisions of Guardian and Wards Act, and the Hindu Minority and Guardianship Act, 1956 were challenged as unconstitutional and discriminatory against the mother. Under this Act the natural guardian of the child is the father and the turn of mother to act as a guardian comes only when the father is either dead or is legally disqualified to be a guardian. The legal disqualification is attached to the father when he ceases to be a Hindu by religion, has renounced the world or has been declared by a court of competent jurisdiction to be of unsound mind. Even where the parties are divorced and the custody of the child with the mother she can not act as the guardian, which means that she is incapable to deal with the property matters of the child. In absence of the father only the mother can act as the guardian. In Githa Hariharan's case the mother was managing the affairs of the minor son of the couple. She and her husband, the father of their minor son applied jointly to the Reserve bank of India, for 9% Relief bonds in the name of the minor son. They had expressly stated that mother would act as the guardian of the minor for the purposes of investments made with the money held by the minor son. Accordingly in the prescribed application form the mother signed as the guardian. The bank advised them to either produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. This led to the filing of the writ petition by the mother with prayer to strike down Sec. 6(a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890 as violative of Art. 14 and 15 of the constitution of India and to quash and set aside the decision of the Bank refusing to accept the deposit from the mother and to issue a mandamus directing the acceptance of the same after declaring her as the natural guardian of the minor.

The second petition related to the case of a mother of a minor son who had filed a petition for seeking divorce against her husband that was pending before the District court. According to the mother he had been repeatedly writing to her and the school in which the minor was studying asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. The mother has in turn filed, an application for maintenance for herself and the minor son. She has filed the writ petition for striking down Section 6(a) of the HMG Act, and Sec. 19(b) of the GW Act as violative of Art. 14 and 15 of the Constitution.

In the first case the Bank had questioned the authority of the mother even when she had acted with the concurrence of the father because in its opinion she could function as the guardian only after the lifetime of the father and not during his lifetime. The questions posed by the court were; Is this the correct way of understanding this section? Do the words in the section ""after" mean only "after the life time of the

father" If yes, then the section is liable to be struck down as void as undoubtedly it violates gender equality, one of the basic principles of our Constitution. The court observed;

"The Hindu Minority and Guardianship Act came into force in 1956, i.e. six years after the constitution. Did the Parliament intend to transgress the Constitutional limits to ignore the fundamental rights guaranteed by the Constitution, which essentially prohibits discrimination on grounds of sex? In our opinion...No. It is well settled that if on one construction a given statute will become unconstitutional whereas on another construction which may be open statue remains within the constitutional limits the court will prefer the later on the ground that the legislature is presumed to have acted in accordance with the constitution and courts generally lean in favour of the constitutionality of the statutory provisions. We are of the view that section 6(a) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean after the lifetime in the context in which it appears in Section 6(a). It meant "in the absence of" the word absence therein referring to the father's absence from the care of the minor property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother the later is put exclusively in charge of the minor or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity. In all such like situations the father can be considered to be absent and the mother being a recognised natural guardian can act validity on behalf of the minor as guardian. Such an interpretation will be the natural outcome of harmonious construction of S.4 and S.6 of HMG Act without causing any violence to the language of Sec.6(a)".

The court noticed that the father was not taking any interest in the affairs of the minor daughter and it was actually the mother who was managing the minor's affairs. Though the father was alive it was as good as he was non existent as far as the minor was concerned. They reiterated that when normally the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian.

Chhota Nagpur Tenancy Act 1908:

The case of Madhu Kishwar v. Union of India, [19] is again an example of a display of conflict of juristic opinion between the reformist and the conservatives. Madhu Kishwar along with two tribal women form Singhbhum District of Bihar, challenged the constitutional validity of the provisions of Chhota Nagpur Tenancy Act, 1908 which deals with succession to the tenancy rights of the property in this tribal area. They sought a declaration that Sections 7,8,76 of the Chhota Nagpur Tenancy Act are ultra vires Articles 14,15 and 21 of the Constitution of India. They contended that the customary law operating in Bihar state and other parts of the country excluding tribal women form inheritance of land or property belonging to her father or husband and conferment of right of inheritance to the male heirs or lineal descendants being found solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. Their discrimination based on the customary law of inheritance is unconstitutional, unjust unfair and illegal. Even unsufructory rights conferred on a

widow or an unmarried daughter become illusory due to diverse pressures brought to bear the brunt at the behest of lineal descendants or their extermination. They elaborated several incidents before the court where the women were either forced to give up their life interests or become the target of violent attacks or murdered. These petitioners had sought police protection for their lives and filed the writ petitions in the court.

The primary occupation of the people living in this area is agriculture. Men only own the land but both men and women do the tilling. According to the Act, on the death of the male member who is the owner of the land, only his sons would inherit the tenancy rights. In absence of the sons but in presence of his widow, daughter or even his mother the land passes to the male collaterals. In absence of a male collateral, but in presence of the above mentioned female members, the land passes to the village and becomes the community property. The complete exclusion of the son less family takes place the moment the male member dies. The petitioner contended, that in light of the constitutional guarantees of equality this blatant discrimination, which deprives the females even a means of livelihood in this manner should no longer be permitted. The three-member bench, who heard the matter, refrained from striking down this offensive provision of the Act, but did come to different conclusions. The minority view was propounded by J.Ramaswamy. He explored the entire tribal custom and the hardships resulting from the above exclusion to the females and held that as the statute appeared to be directly in conflict with the constitution the same can no longer be permitted to continue as such. He further looked into the possibility of giving this statute an interpretation which would bring it in conformity with the equality principles of the constitution and found that it was possible provided the words "males" used in the Act would be read as including females also. He preferred this interpretation and held that the expression males used in the Act would include females also. The result of that interpretation is that on the death of a male tenant the right to hold on to the land would be available to both males as well as female descendants in equal terms. This interpretation does remove the unwanted discrimination and brings it in conformity with the Constitution. The hon. Judge said, *"When women are discriminated only on ground of sex in the matters of intestate succession to the estate of the parent or the husband, the basic question is whether it is founded on intelligible differentia and bears reasonable or rationale relation or whether the discrimination is just and fair. It can be answered as no and emphatically no".*

However the majority view was different. The court first directed the Bihar government to look into the matter and explore the feasibility of possible changes in the Act. The state level Tribal Advisory Board consisting of the Chief Minister, Cabinet Ministers, legislators and parliamentarians (probably all men) representing the tribal areas, met on June 23, 1988 and decided as under:

"The tribal society is dominated by males. This however does not mean that female members are neglected. A female member in the tribal family has the right to usufruct in the property owned by her father till she is unmarried and the same is the property of her husband after marriage. She does not have any right to transfer her share to anybody by any means whatsoever,..."

Thus the representatives and the inhabitants (possibly all men) reported that the time was not ripe for any change in the statute. Even otherwise though the court did concede that the statute is discriminatory they accepted the discrimination as normal and not unusual. The worst part of the judgement was that the court did not appear to feel concerned about the statute being violative of the basic provisions of the

Constitution. The only mercy that they showed was that they did concede that the women also had a right to sustain themselves. To that extent they did modify the statute introducing in it something that was not existing in it previously. The court did grant her a right to hold on to the holdings till her life time but only as a limited owner. The tenancy rights of the male collaterals would be suspended till the immediate female relative of the original tenant died. The court overlooked the reality presented by the petitioners, that the moment a male member died without leaving a male heir, the collaterals by force would dispossess the widows and other female relatives of the land, thus depriving them of their only means of livelihood.

Further the only concession the courts usually show towards women is not the recognition of their rights but an attempt to give them just sufficient enough to prevent them from starvation. Nothing further is to be given which can make them self sufficient or economically independent. The court said

"female dependents be given some saccour so that they do not become vagrant or destitutes...Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non uniformities would not in all events violate Article 14. Judge made provisions over and above the available legislature should normally be avoided..,... Traditionally and historically, the agricultural family is identified by the male head and this is what Section 7 and 8 recognise. But on his death his dependent family females such as his mother widow daughter, daughter in law, grand daughter and others joint with him have under Section 7 and 8 to make way to a male relative within and outside the family of the deceased entitled there under, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right which the female enjoyed in common with the last male holder of the tenancy. We would rather on the other hand refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring chaos in the existing statute of law".

Thus, on paper they held that the women should be prevented from becoming destitute and vagrant. . However they ignored the harsh reality and did exactly what they aimed to prevent. It is like taking from poor what rightfully belongs to him to give to an already rich man. These are cases involving two parties on two entirely different platforms. Men form the landowning class and the women without any ownership. Collaterals having land of their own pounce upon the land of the deceased the moment he dies to increase land under their power and take the only means of livelihood that the women had. On what basis should this be allowed to continue? The court does admit that it is the women who work on the field in the same manner as a man. Then why should a law be allowed to continue under which a woman is deprived from ownership or (tenancy rights) of the land in which their deceased husband or father had ownership? Do they lack the ability, will or skill to till the land or lack the brains to manage the affairs? The answer to all of them is in the negative. What has the right to a dignified means of livelihood to do with the sex of a person? Why is the legislature by passing the archaic laws and the judiciary by giving a matching interpretation insists on imposing a complete financial dependency on a woman making her life subhuman? Why should only a woman be asked to live on the borrowed land? If a man dies leaving behind a two months old son, the property will remain in the family but in absence of a son, but presence of mature and willing women, the property will go out of the family to families having male members? How can we blame people for showing a dear preference to haying son and rejoicing at the time of his birth as through him only the conservation of property within the family is possible. This is exactly the reason why couples keep on producing six or even seven daughters adding to an already menacing population

explosion or adopting practices of female foeticide in order to get a son as through the son only the hope of the enjoyment of the property by the rest of the family members is possible. Deprivation of the property rights is the root cause of the secondary status of woman In India. The government may come up with several schemes for her up-liftment. She may get education, but if she does not have the capability to secure a roof over her head or own the land for agricultural purposes, (with more than 75% of the land in India being agricultural property), is not given a chance to take decisions relating to her own land, there is no use of coming up and publicizing schemes of education and upliftment as none of them is going to benefit her. If all that she is going to learn by getting education is that she has no right to own land only because she is "she" and not "he" there is no use to educate her. It would merely make a woman more frustrated and would make her wonder about the need to have any thing like part three of the constitution for her.

The court further said,

"We would rather on the other hand refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring chaos in the existing statute of law".

The apprehensions of the court are without any basis. Men in India are supposed to obey laws. Judgements telling women who constitute half of the population that they do not have rights are obeyed by them, then how do the court feel that the judgement giving them rights would create chaos in the existing statute. When Parsi law was amended in 1991 giving absolute parity to a Parsi woman in matters of inheritance there was no chaos in the then existing laws. Why will it happen now Even if something like what the aftermath of Shah Bano's judgement happens and the legislature feels that time was not ripe for undoing the injustice and that they should be perpetrated on the weaker sex for a long time period they can always undo the effect of a just judgement by passing an enactment. A socially progressive or even a rationale judgement never brings chaos in the existing statute of law if the firmness to deliver the judgement is evident. On the other hand, people are encouraged to take law in their own hands when courts falter showing an evident helplessness to adjudicate on issues taking the plea of probable consequences. Property related disputes usually have very tragic endings. Eagerness to dispossess the physically vulnerable having only a life interest is very tempting when the ownership is given to the physically powerful, and would have disastrous results. Judges therefore must do, for what the courts are constituted. They must dispense away justice and not take shelter behind imaginary future consequences and strengthen the hands of an already powerful category and weaken the already deprived category.

In a recent judgement of Daniel Latifi v. Union of India, (writ petetion No. 868 of 1996) the five bench judgement of the Supreme Court gave a modified interpretation to MWA, but refrained from striking it as unconstitutional. Holding that the responsibility of a Muslim husband to provide maintenance to his wife and to make provision for her is to be discharged during the time period of iddat and is not confined to the period of iddat, they tried to give some relief to her. The husband is now legally bound to make provision for her future needs extending beyond the period of iddat, till she remarries or dies, but must make payment to her of this entire amount within the period of iddat. The traditional interpretation to this controversial enactment had been that the responsibility of a Muslim husband to maintain his divorced wife extends only till the time of the iddat period and not after that.

4. Passing the buck and shifting of the responsibility:

The courts were convinced that the provisions »re discriminatory but stopped short of declaring them void and held that the remedy does not lie with them but with the legislature.

Yet another line *of* approach taken by the judiciary is to shift the responsibility, on some other machinery despite being convinced of the unconstitutionality of the provisions.

Indian Divorce Act, 1869:

In 1970, the Madras High Court held in Bashiam v. Victor, [20] that the Indian Divorce Act, is wholly out of date. In 1989, a special bench of the Calcutta High Court ruled in Swapna Ghosh v. Sadanand Ghosh, [21] that the offensive provision smacks of sex discrimination. They observed,

"If *the husband is entitled to dissolution on grounds of adultery simpliciter on part of the wife but the wife Is not so entitled unless some other matrimonial fault is also found to be super added then It Is difficult to understand as to why this provision should not be held to be discriminatory on the grounds of sex alone and ultra vires Art. 15 of the Constitution counter minding any discrimination on such grounds".*

The Judgement also quoted with approval the recommendations of the Ninetieth report of the law commission white It observed that if Parliament does not amend the offensive provision the courts would be compelled to strike it down as unconstitutional. It however stopped short of doing so.

In 1997, Ahmedabad Women Action Group (AWAG) along with YWCA and the Lok Sevak Sangh,[22] filed a public interest litigation challenging the constitutionality validity of various discriminatory provisions of family laws as void.

a) to declare the provisions of Muslim Personal law which allows polygamy as offending Art. 14 and I5 of the Constitution as void;

b) to declare Muslim personal law which enables a Muslim male to give unilateral talaq to his wife without her consent and without resort to judicial process of courts, as void offending Art. 13, 14 and 15 of the constitution.

c) to declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void as infringing Art. 15 and 16 of the Act.

d) to declare that the provisions of Sunni and Shia laws of inheritance which discriminates against females in their share as compared to the share of males of the same status void as discriminating against females only on ground of sex;

e) to declare Sec. 2(2), 5(ii) and (iii), 6 and explanation to Sec. 30 of Hindu Succession Act, 1956, as void offending Articles 14 and I5 of the Constitution of India.

f) to declare Sec. *2* of the Hindu Marriage Act, 1955 as void offending Articles 14 and 15 of the Constitution of India;

g) to declare Sees 3(2), 6 and 9 of the Hindu Minority and Guardianship Act, 1956, read with Section 6 of the Guardians and Wards Act, as void;

h) to declare the unfettered and absolute discretion allowed to a Hindu spouse to make testamentary disposition without providing for an ascertained share of his or her spouse and dependent void;

i) to declare Sections 10 and 34 of Indian Divorce Act and to declare Sections 43 to 46 of the Indian Succession Act, void.

The court said clearly, in unequivocal terms that these writ petitions do not deserve disposal on merits. The main reason that the court gave was that it involved a matter of state policy and the courts are not competent to do the needful. The courts are not the appropriate doors to knock at.

The statement of the court was amazing. The honourable court failed to note that the actual and in fact the only remedy lies with the court. It is only the courts who have the competency to declare the impugned provisions as unconstitutional. No other institution has such powers. They cannot and should not shift their responsibility on some other agency. Testing the validity of the constitutionality of a particular provision can be done by no other institution than the courts.
Even in Mathew v. Union of India, the courts despite being convinced that the mandatory confirmation procedure prescribed by Sec. 17, of IDA prolongs the agony of the affected parties even though none of them is desirous of filing an appeal and that there is no justification for its continuation specially when no such procedure is prescribed by other matrimonial legislations, concluded that the remedy does not lie with the courts but with the legislature and thus directed the Kerala government to bring in the necessary and appropriate amendment.

MWA,1985

In Maharshi Avadesh v. Union of India, [22] the Supreme Court dismissed a petition under Art. 32 of the constitution praying for enactment of a Uniform Civil Code, and for declaration of Muslim Women's Act, as unconstitutional and as void as arbitrary and discriminatory and violative of Art. 14 and 15. The court held that those are matters for the legislation. The court overlooked the feet that it is no longer a matter for legislation. The legislature did its job by passing an enactment which was challenged on the ground that it is contradictory to the injunctions laid down in Art. 14. The matter was with the court and the court only should have decided whether it did or did not conflict Art. 14. That is the thing that the courts had to decide. By shifting its responsibility to the legislature, the court avoided discharging its function of upholding the constitutional principles.

5. The court declared the impugned provisions as unconstitutional.

Indian Divorce Act, 1869

In 1990, in an interim application in Mary Soniz's case [23], the Kerala High court set a time frame and directed the Government of India to give effect to the recommendation of the law commission within six months of the order. However, the government of the centre ignored these directions. So in February 1995, the full bench of the Kerala High Court struck down Sec. 10 as violative of Art. 14 and 21 and held,

"The legal effect of the provisions of Sec. 10 is to compel the wife who is deserted or is cruelly treated to continue a life as the wife of a man she hates. Such a life will be a sub human life without dignity and personal liberty. It will be humiliating and oppressive and without the freedom to remarry and enjoy life in normal course. Such a life can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless, deserted or cruelly treated Christian wife, quite against her will and will be a life without dignity and liberty ensured by the Constitution. Hence the provisions which requires the Christian wives to prove adultery along with desertion and cruelty are violative of Art. 21 of the Constitution of India".

Since it was a High Court ruling, the effects were confined to only the State of Kerala. So in the year 1995-1996 Christian women filed similar petitions in the Bombay High Court and by a full bench judgement delivered on April 6*, 1997., the Bombay High Court also struck down Sec. 10 as violative of the Constitution.

The Punjab Preemption Act, 1930

In Atam Prakash v. State of Haryana,[24] testing the validity of Section 15 of the Punjab Preemption Act, 1930, the court held that the right of pre-emption based on consanguinity is a relic of the feudal past It is totally inconsistent with the constitutional scheme. It is inconsistent with modem ideas. The reasons, which justified its recognition, quarter of century ago, namely the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession are today irrelevant Classification based on unity and integrity of either the village community or the family or on the basis of agnatic theory of succession cannot be upheld. Due to the march of history, the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family oriented society is permissible. Accordingly Section 15(1) clauses (1) to (3) violates fundamental rights and were declared ultra vires. When male member has the right to seek partition and at his behest, fragmentation of family holding is effected why not the right of inheritance/succession be given to females?

The Hindu Marriage Act, 1955

The constitutional validity of Sec. 9 of the Hindu Marriage Act, 1955, was challenged in T. Sareetha v. Venkatasubaiah,[25]. The Andhra Pradesh High Court, held that it is a barbaric and a savage remedy and violates the right of privacy of a woman. It forces sexual intercourse on an unwilling woman and takes from her a right to take decision regarding her own body. They observed,

"A decree of restitution of conjugal rights constitutes the grossest form of violation of an individual's right to privacy. It denies the women her free choice where, when and how her body is to become the vehicle for the procreation of another human being. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither state coercion can soften the ruffled feelings nor clear the misunderstanding between the parties".

the learned judge further added that Sec. 9 did not promote any legitimate public purpose based on any concept of social good and thus being arbitrary was violative of Art. 14 of the Constitution.

They noted that the section on the face of it does not appear to be discriminatory and observed,

"Section 9 does satisfy the equality test in form and does not offend the classification test in as much it made no discrimination between the husband and the wife, on the other hand by making the remedy of restitution equally available to both husband and the wife, it apparently satisfied the equality test. But bare equality of treatment regardless of the inequality of realities was neither justice nor homage to constitutional principles. As this remedy was found, used almost exclusively by the husbands and was rarely resorted to by the wife ".

The court also quoted with approval the observation of J. Krishna Iyer

"Equal treatment of unequal groups may spell invisible yet substantial discrimination with consequences of unconstitutionality. That dissimilar things should not be treated similarly in the name of equal justice is of Aristotelian vintage and has been by implication enshrined in our constitution".

This was the first judgement ever given whereby one of the provisions of Hindu Marriage Act, 1955 was ever declared void. The learned judge also deviated from the earlier judgements wherein it was held that personal laws are outside the scope of the constitutional validity test. However the effect of this judgement was minimized and later nullified totally by the Supreme Court.

The Indian Succession Act, 1925;

Sec. 118 of the Indian Succession Act, 1925 was held discriminatory and violative of Art. 14 and 15 by the Kerala High Court in Preman v. Union of India,[26]. This section which is applicable to non Hindus and non Muslim testators, specifies a particular procedure to be adopted in case of certain bequests. As this procedure does not apply to Hindus and Muslims, it was challenged as discriminatory.

International conventions:

Tbe message of the international instruments - Convention of the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all states parties to take appropriate measures to prevent discrimination of all forms against women are quite dear. India is a signatory to CEDAW having accepted and ratified it. The interpretation that is placed on Section 6(a) gives effect to the principle contained in these instruments. The domestic courts are therefore under an obligation to give due regard to International Convention and Norms for construing domestic laws when there is no inconsistency between them.

Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated by the universal declaration of human rights. Democracy, development and respect for human rights and fundamental freedom are interdependent and have mutual reinforcement. The human rights for women including girl child are therefore inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political social economic and cultural life are concomitants for national development, social and family stability and growth culturally, socially and economically. All forms of discrimination on grounds of gender are violative of fundamental freedom and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was ratified by the UNO on December 18,1979. The Government of India who was an active participant to CEDAW ratified it on June 19,1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5{e), 16(1), 16(2) and 29 thereof. The preamble of CEDAW reiterates that discriminates against women, violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country, hampers the growth of personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of woman is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women. Article 1 defines discrimination against women to mean, "any distinction, exclusion

or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women irrespective of their marital status, on a basis of equality, on the basis of equality of men and women, all human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field".

Article 2(b) enjoins the state parties while condemning discrimination against women in all its forms, to pursue by appropriate means without delay, elimination of discrimination against women by adopting appropriate legislative and other measures including sanctions where appropriate, prohibiting ail discrimination against women" to take all appropriate measure including legislations, to modify or abolish existing laws, regulations, customs and practices which constitutes discrimination against women. Clause (c) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women.

Article 3 enjoins State parties that it shall take in all fields in particular in the political, social, economic and cultural fields; all appropriate measures including all legislations to ensure full development and advancement of women for the purposes of guaranteeing them the exercise of enjoyment of human rights and fundamental freedom on the basis of equality with men. Article 13 states that "states parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure on a basis of equality of men and women". Article 14 lays emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play "in the economic survival of their families including their work in the non monetized sectors of economy and shall take.... All appropriate measures to secure a just order for them....."Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development program to organise self groups and cooperatives to obtain equal access to economic opportunities through employment or self employment etc. Article 15(2) enjoins to accord to women equality with men. Before the law, in particular to administrate property..."

Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(b) defines human rights to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution. Embodied in the international conventions and enforceable by courts in India". Thereby the principles embodied in CEDAW and concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act, and become enforceable. Section 12 of Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of human rights and fundamental freedoms.

These conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the state to eliminate obstacles and prohibit all gender based discrimination as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW the state should by appropriate measure including legislations, modify law and abolish gender based discrimination in-the existing laws, regulations, customs and practices which constitute discrimination against women.

Constitutional provisions safeguarding the rights of women:

By operation of Article 13(3)(a) of the Constitution "law" includes custom or usage having the force of law. Article 13(1) declares that the pre constitutional laws so far as they are inconsistent with the fundamental rights shall to the extent of such inconsistency be void. The object thereby is to secure paramountcy to the constitution and give primacy to fundamental rights. Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15 prohibits gender discrimination. Article 15(3) lifts that rigour and permits the state to positively discriminates in favour of women to make special provisions to ameliorate their social, economic and political justice and accords them parity. Article 38 enjoins the state to promote the welfare of the people, men and women by securing social order in which justice - social, economic and political - shall inform of all the institutions of national life. Articles 30(a) and (b) enjoin that the state policy should be to secure that men and women equally have the right to an adequate means of livelihood and the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 38(2) enjoins the state to minimize the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities not only among individuals but also amongst groups of people. Article 46 accords special protection and enjoins the state to promote with special care the economic and educational interests of the scheduled castes and scheduled tribes and other weaker sections and to protect them from social injustice and other weaker sections and to protect them from social injustice and all forms of exploitation. The preamble to the constitution charters out the ship of the state to secure social, economic and political justice and equality of opportunity and of status and dignity of person to everyone.

Conclusion:

1) The judicial opinion on this issue as to whether the validity of Family laws can be tested in light of the constitutional provision, has been confusing and perplexing as in some cases the courts have gone ahead and have decided the issue of the constitutionality of the impugned provisions of family laws on merits. The courts must give a clear verdict on whether family laws are laws or not? If they are not laws, what else can be there proper description? Does our Constitution provide for two types of legislations? Some within and some outside Art. 13 or the courts themselves feel that the basic law of the land should have no applicability in family matters? .

2) The courts are the only ray of hope to correct the imbalance perpetrated on the disadvantaged section of the society by the antique legislation and by archaic and bygone customs of the venerable era. Women who constitute more than half of the population of India have been deprived of the basic rights to live a life of dignity as nearly all the family laws contain gender discriminatory provisions. Living a life of complete dependency their life is not going to improve if the judiciary does not shed its right stand and come up with rationale judgements paying real homage to the principles of the constitution. A woman in India does not need a right to be maintained by her husband and be a burden on him. She does not need a paltry sum of money thrown on her by an unwilling husband who does not flicker an eyelid while commanding her free services for himself and his entire family. What she needs is self reliance, to stand on her own feet to be financially independent. The judiciary should stop upholding any law which deprives a woman of a basic right of sustenance. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, and right to equal status and dignity of person. Therefore, the state should create conditions and

facilities conducive for women to realise the right to economic development including social and cultural rights.

In India agricultural land forms the bulk of the property. In most of the agricultural and the tenancy laws women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy rights. These reasons whether are tenable or not in the present times have to be seen by the court from an angle of the effect of it on the economic condition of a woman and not merely from the point of view of the family or its unity. For how long will an Indian woman's quest to live a life of dignity continue to be sacrificed for the sake of the unity of the family or for the convenience of the family members and the institution of the family as such?

The. judiciary must answer a fundamental question. What is the relevance of Part III of the Constitution for Indian women who constitute more than half of the population of India? Is it merely a fairy tale book giving glimpses of equality provisions from a distance or can any of its provisions be implemented for her benefit within the family? The answer to it must be given keeping in mind that for a majority of women, life outside the home and relations outside her family have no meaning, it is not her right with respect to strangers but her place inside the family, her right to live a life of dignity within the family amongst her relations, that has to be kept in view.

References:

1. *the areas of challenge included: Indian Divorce Act, 1869, Sees. 10 and 17. ;Hindu Bigamous Marriages Act. 1952; Hindu Marriages Act, 1955; Sec. 2: and Sec. 9, Restitution of Conjugal Rights; Hindu Religious and Charitable Endowment Act. Hindu Adoptions and Maintenance Act. 1956; Guardians and Wards Act, coupled with Hindu Minority and Guardianship; Act, 1956; Indian Succession Act; Muslim Women's Protection of Rights on Divorce Act, 1986; Muslim personal law; provisions relating to polygamy; unilateral right of Muslim husbands to pronounce talaq, and the unequal rights of inheritance under Muslim Law.*
2. *In most of the cases the challenge has come form women. See Ahmedabad Women Action Group v. Union Of India, AIR 1997 SC 3614*
3. *The challenge to Sec. 10, Indian Divorce Act, 1869.*
4. *AIR 1952 Bom 84.*
5. *AIR 1980 SC 707*
6. *AIR 1996 SCW 507, where validity of Sections 15,16,17,29(5) and 144 of A.P, Charitable Hindu Religious and Endowment Act, 1987 were challenged*
7. *AIR 1999 Ker 345;*
8. *AIR 1994 Kant 186,*
9. *See Sec. 8, The Hindu Adoptions and Maintenance Act, 1956,*
10. *Sec. 10 was amended by the legislature in September, 2001.*
11. *AIR 1953 Mad 79Z*
12. *See Sec. 10, The Indian Divorce Act, 1869.*
13. *AIR 1974 SC 497.*
14. *Anil KumarMansi v. Union of India, (1994) 5 SCC 704.*
15. *AIR 1984 Del 66.*
16. *AIR 1984 SC 1562.*

17. *AIR 1993 Ori 176.*
18. *AIR 1999 SC I149*
19. *1996(5) SCC 125,*
20. *AIR 1970 Mad 12.*
21. *AIR 1989 Call,*
22. *(1994) Supp JSCC18*
23. *AIR 1997 SC 3614.*
24. *1990(1) K.L.T. 130.*
25. *AIR 1986 SC 859*
26. *AIR 1983 A.P.356.*
27. *AIR 1999 Ker 93..*