IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO 1000 OF 2020
(PIL UNDER ARTICLE 32 OF THE CONSTITUTION)

IN THE MATTER OF:
Ashwini Kumar Upadhyay

...Petitioner

Verses

1. Union of India
   Through the Secretary,
   Ministry of Home Affairs,
   North Block, New Delhi-110001,
2. Union of India
   Through the Secretary,
   Ministry of Law & Justice (Legislative Department)
   Shastri Bhawan, New Delhi-110001,
3. Union of India
   Through the Secretary,
   Ministry of Women and Child Development,
   Shastri Bhawan, New Delhi-110001, ...Respondents

PIL FOR UNIFORM GROUNDS OF ADOPTION & GUARDIANSHIP FOR ALL CITIZENS IN SPIRIT OF THE ARTICLES 14, 15, 21 & 44

To,
THE HON'BLE CHIEF JUSTICE
AND LORDSHIP'S COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this writ petition as a PIL under Article 32 seeking 'Uniform Grounds of Adoption and Guardianship' for all citizens throughout the territory of India in spirit of Articles 14, 15, 21 and 44 of the Constitution of India and International Conventions.

2. Petitioner has not filed any other petition either in this Court or in any other Court seeking same or similar directions as prayed.

3. Petitioner's full name is Ashwini Kumar Upadhyay. Residence at:

4. The facts constituting cause of action accrued on 13.09.2019 and continue, when this Hon'ble Court in Jose Paulo Coutinho Case once again pressed the need of common law and cited the example of Goa but Centre failed to provide common law on adoption Guardianship. It is necessary to state that Article 14 guarantees equality before law & equal protection of the laws. Article 15 prohibits discrimination on grounds of religion, race, caste, sex, place of birth and enables State to make special provisions for women & children. Article 16 secures equality of opportunity and Article 21 guarantees life and liberty. Article 25 clarifies that right to profess practice & propagate religion is subject to public order, morality and health and Article 37 clarifies that directives are nevertheless fundamental in the governance of

the country. Article 38 directs the State to eliminate inequalities in status, facilities and opportunities and Article 39 directs the State to direct its policies towards securing that men-women equally, have the right to an adequate means of livelihood. Article 44 directs the State to implement a uniform civil code for all citizens & Article 45 directs the state to provide early childhood care to the children. Article 46 directs the State to promote economic interest of weaker sections and protect them from social injustice and all forms of exploitation and Article 47 directs to raise standard of living of its people and consider it as primary duty. Moreover, under Article 51A, State is obligated to promote harmony and spirit of brotherhood amongst all citizens transcending religious linguistic, regional or sectional diversities; renounce the practices derogatory to dignity of women; and, develop scientific temper humanism and spirit of inquiry and reform. Furthermore on 26.11.1949, we had solemnly resolved to constitute India a sovereign socialist secular democratic republic and to secure to all its citizens: Justice, social economic political; Liberty of thoughts, expression, belief, faith, worship; Equality of status and of opportunity; and to promote among them fraternity assuring dignity of the individual and unity and integrity.

However, despite the above well-expressed provisions, State has failed to provide uniform grounds of adoption and guardianship for all citizens. Therefore, petitioner is filing this PIL, seeking direction to Centre to remove anomalies in the grounds of Adoption and Guardianship and make them uniform for all citizens without bias on the basis of religion, race, cast, sex or place of birth in spirit of Articles 14, 15, 21, 44 and international conventions. Alternatively, being custodian of the Constitution and protector of fundamental rights, the Court may declare that the discriminatory grounds of Adoption and Guardianship are violative of Articles 14, 15, 21 and frame uniform guidelines for all. Alternatively, the Court may direct the Law Commission of India to examine the laws of adoption & guardianship and suggest 'Uniform Grounds of Adoption and Guardianship' in spirit of Articles 14, 15, 21, 44 within 3 months, while considering international laws & international conventions.

5. The injury caused to the public is very large because adoption and guardianship is one of the most crucial elements of life of human being but even after 73 years of independence, adoption and guardianship procedures are very complex cumbersome and neither gender nor religion neutral. Hindus Buddhists Sikhs Jains are dealt

with Hindu Adoption & Maintenance Act and Hindu Minority and Guardianship Act and Muslim, Christian and Parsis have their own personal laws. Couples belonging to different religions have to seek adoption under the JJ Act 2000. NRIs, Overseas Citizens and foreign prospective adoptive parents, living in a country which is signatory to Hague Adoption Convention and wish to adopt Indian child, can approach Authorized Foreign Adoption Agency or concerned Central Authority as case may be and will be subject to be governed by Adoption Regulation 2017. So, grounds of adoption-guardianship are neither gender nor religion neutral. Muslims are bound to follow Kafala system under which a child is placed under a Kafil (guardian) who takes care of child's upbringing, marriage, well-being but child continues to remain the descendant of his biological parents and not adoptive ones. An adopted child cannot inherit guardian's property and retains his biological name. If child's family is not known, only then he can carry the name of adoptive family whereas in Hindu law adopted child turns to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption. Christians-Parsis have different grounds of adoption-guardianship which is against spirit of Articles 14, 15, 21, 44 of the Constitution.

6. Custody, guardianship, adoption, maintenance, minimum marriage age, grounds of divorce, succession and inheritance, are the secular activities. Hence it is duty of the State to ensure that every citizen including third gender have uniform adoption & guardianship right, uniform minimum age of marriage, uniform grounds of divorce, uniform maintenance & alimony, uniform succession & inheritance in spirit of Articles 14, 15, 21, 44 & International Conventions. Uniformity is essential to secure fraternity, equality and dignity of child but State has not taken steps in this regard till date. Therefore, petitioner challenges blatant ongoing form of discrimination that is the discrimination in adoption and guardianship rights.

7. The Juvenile Justice Care & Protection Act, defines the adoption as: *"The process through which adopted child is permanently separated from his biological parents and becomes lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child"* but in Islamic jurisprudence there is concept of "KAFALA" which is not similar to the adoption, but just to take care of child; and adopted child always remains son/ daughter of his biological parents. In fact, this is one of the root causes of polygamy, practiced in Muslim community.

8. JJ Act has been declared as secular law in Shabnam Hasmi Case. Court held that Muslim couple can also adopt under the Act: *"To us, the act is a small step in reaching the goal enshrined by Article 44 of the Constitution (Uniform Civil Code). Personal beliefs and faiths, though (they) must be honoured, cannot dictate the operation of the provisions of an enabling statute."* The act is not mandatory, which means that a Muslim or Parsi couple that wants a ward-guardian relationship with a child can continue to do so but either he has to go with JJ Act for adoption or to go with customary principle of Kafala, which is against the interest of mother & child.

9. Current practice of adoption is discriminatory on its very face as Hindus have codified law of adoption but Muslims, Christians, and Parsis do not have. Adopted child has right to inherit property under the Hindu law but not under the Muslim, Christian and Parsi law. Adopted child by the Hindus can become a legal heir whereas adopted child by Christians, Muslim, Parsis cannot. Adopted child by Hindus turn equivalent to biological child of adoptive parents whereas it's just the opposite in Muslims, Christians and Parsis. Adoptive parents can be natural guardian of adopted son and his wife under Hindu Law but not in Muslim, Christian and Parsi Law.

10. It is essential to tackle gender bias present in "Guardians & Wards Act" which is applicable to all communities and current version could conflict with the welfare of the child. For example, Section 7 gives power to Court to appoint/declare guardian of a minor or their property, whereas Section 19(a) states that if the husband of the minor is not fit, then the Court cannot appoint any other person as guardian. The problem is twofold. First, the wife is being treated as the property of husband. Secondly, law does not take into consideration the welfare of husband if he is also a minor.

11. Section 6(a) of Hindu Minority &Guardianship Act has remained in controversy for a long time since the reading of law portrays that father is the natural guardian of minor. Mother could be the natural guardian when father dies. Thus, on the face of it, the law violates Articles 14-15. The Court in Githa Hariharan Case [AIR 1999 SC 1149] held that the word *"and after him"* should be read as "*in the absence of"* and observed: *Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word after in the section would have no significance, as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while*

determining the question as regards custody and guardianship of the minor. The word after need not necessarily mean "after the lifetime. In the context in which it appears in Section 6(a), it means "in the absence of", the word absence therein referring to the father's absence from the care of the minor's property or person for any reason whatever". The judgment is considered to be gender just and give Hindu women equal right in matters of custody-guardianship. However, a closer reading of judgment indicates that the father is default guardian, and only after him, the mother could be a natural guardian. The judgment addresses situations where either one of the parties is at fault. However, what happens when both the parents are equally taking care of the minor and are fit for custody and guardianship of the minor? How then would section 6(a) of the Act be applied? By default, *father will be given preference,* as he is alive and not absent from the life of minor. Even if the principle of paramount interest of the child is applied, father would be the first choice according to the language of the said section. Further, section 6(a) and 6(b) seem to be indicating two different perspective of the same person. On the one hand, it is indicating that a mother is to be treated inferior to father; on the other hand, if child is illegitimate,

mother shall be the natural guardian. Therefore, when child is legitimate, mother is considered incapable to be guardian but deemed capable when child is illegitimate. Probably the logic may be that if and when tracing the father of a child born out of wedlock is difficult the mother should be guardian. Again, responsibility is given to the mother when either the father is not traceable or is not ready or unable to take the responsibility. In other words, *father is absent from the scene.* However, ideally where both the parties are fit and deserving, for fair application of the principle of welfare of the child, they should be on equal footing. Petitioner submits that not placing mother and father on same pedestal, is discriminatory and contrary to Articles 14, 15, 21 and 44 of the Constitution.

12. Law Commission of India in its 133rd report has observed as thus: *"the provisions contained in section 6(a) of the Hindu Minority and Guardianship Act is extremely unfair and unjust and has become irrelevant and obsolete with the changing times."* A plain reading of section 6 indicates that a woman does not have authority on herself. She is to be under guardianship throughout her life. A father and after him mother, is to be guardian of an unmarried daughter and a husband to be the guardian of his wife. Relevant portion of the said

sections are: (a) in a case of a boy or *an unmarried daughter*-the father and after him, the mother... (b) in case of illegitimate boy or *illegitimate unmarried daughter:* the mother, and after her the father; (c) in the case of *married girl-* husband' One of the ideas behind bringing a codified Hindu Law was to do away with the discrimination against women. While the law has now recognized certain rights, it has, at the same time either bluntly or latently, kept women at the lower pedestal than men. The notion, men being superior and thus in control, still persists. This is against the spirit of Articles 14-15 of the Constitution of India.

13. Muslims, Christians and Parsis don't have adoption laws even after 73 year of independence and 71 years of India becoming a democratic republic. Due to lack of a common law for all, Muslims, Christians, Parsis approach the Court under Guardians & Wards Act 1890. Muslims, Christians and Parsis can take a child under the said Act only under foster care. Once a child under foster care becomes major, he can break away all his relations. Moreover, such a child doesn't have legal right of inheritance, which creates lot of hardship and confusion among citizens, which can very easily be solved by having uniform law of adoption and guardianship for all citizens.

14. Earlier, Indians were governed by Hindu law based on Shastras, Puranas, Manu Smriti and ancient Scriptures. Later, Muslim law with Muslim invasion established its root in India and then lastly English law with British peoples came in India. Initially all affairs like crime, trade, procedure, contract, commerce were governed by religious laws but gradually religious domination on affair started contracting and pieces of legislature took its place. Personal laws are not only governing marriage but also secular activities maintenance guardianship, adoption, succession & inheritance, which is against the spirit of Articles 14, 15, 21, 44. Adoption-Guardianship are most crucial and pivotal because they are directly related to and affect the mental health and psychological well being of the children. Uniform Adoption & Guardianship will strengthen constitutional spirit which is regarded as heart and soul of the Constitution. It is necessary to state that Article 44 directs the state to secure for the citizens a uniform civil code throughout the territory of India but State has not been able to enforce it even after 74 year of independence and 71 years of India turning democratic republic. Therefore, by virtue of the custodian of the Constitution and protector of the fundamental rights, this Hon'ble Court can't be a mute spectator.

15. Adoption in Hindus is governed by Hindu Adoption & Maintenance Act & guardianship is governed by Hindu Minority & Guardianship Act. Both laws are not gender neutral and discriminatory provisions are applicable to Hindu, Buddhist, Jain, Sikhs. In Muslim Law, there is no concept of adoption, as it is understood in general sense in Hindu Law. In Muslim law, there is concept of Kafala and guardian is kafil. In fact in Hindu law also, there was no such codified principle of adoption but has been developed by Courts in British India. Now it's codified, leaving no scope of miscarriage of interest of child and harming mental, social or spiritual wellbeing of child.

16. In Vishaka Case, [(1997) 6 SCC 241, paras 7 & 15] the Court held that content of basic rights contained in the Constitution must be informed by International Human Rights obligations. Accordingly, provisions of convention on the rights of child, which India ratified in 1992, is reflected in Articles 14, 15 and 21 of Indian Constitution. Universal Declaration of Human right (UDHR) under Article 25 proclaims that childhood is entitled to special care and assistance and in Preamble of the Convention on the rights of Child, state parties take "due account of importance and cultural values of each people for protection and harmonious development of child".

17. The Shariat Application Act, 1937, provides that in the matter of custody and guardianship, Muslim personal law shall prevail. The rules governing the matters of custody-guardianship under Muslim Law, however, are not expressly codified and governed according to the prevailing customs and usages. The custody and guardianship of a minor varies among different schools of Muslim. According to *Hanafi* law, mother will take care of her daughter until she has her menses. Son will be under his mother's care until he is able to eat, drink, dress and attend to the call of nature on his own. After this, his father will have the right to bring him up. Mother is entitled to bring up her son until he is 7 years old. Important point is that if the mother is engrossed in immorality or sinfulness in a way that may adversely affect the child, she will lose her right. If mother marries someone who is not child's mahram, she will lose right to custody.

18. The Indian Majority Act, 1875, as a general rule, under section 3 declares that a person of eighteen years of age is a major. At the same time, giving enough space to the communities to practice their personal laws. Section 2 stipulates that provisions contained in the Act, are not to affect the capacity of a person to act in the matters of marriage, dower, divorce and adoption and it shall also not interfere

with religious rites. The Muslim Personal Law Application Act, 1937, states that it shall govern the matters relating to marriage, divorce, dower, guardianship and others. Under the law, the age of majority is calculated based on attainment of puberty. The moment a child attains puberty, she is said to be major in eyes of the personal law and is considered competent to perform marriage divorce dower. The age prescribed for determining majority differs among various schools of Muslim law. For example, Shias consider a boy to attain puberty at the age of fifteen years and a girl at the age of nine years. Whereas, the Hanafi school consider it to be fifteen years for both.

19. In Shias, mother is entitled for the custody of a boy until the age of two years and girl until she attains seven years of age. The custody after the prescribed period dwells upon the father and after him to grandfather how highsoever. The rationale given is that after birth, mother might have custody of child but father has the guardianship, entitling him for the right to take any decision for the future of the child. He has the ultimate authority to decide matters regarding future of the child be it his education or contracting marriage. That is why mother living far from residence of father was one of the grounds for disqualification of the mother for taking custody.

20. In Gulamhusain Kutubuddin Maner v Abdulrashid Abdulrajak Maner, *the Court, observed that during the lifetime of the father, mother cannot be the guardian of the minor to accept gift on his behalf...we are of the view that where the father of a minor is alive, the mother of a minor cannot be appointed as a guardian of a minor to accept the gift on his behalf. Thus, during the lifetime of father, mother cannot accept a gift for the minor, or take any other decision for the welfare of the child as a guardian".* The role prescribed here indicates typical division of the rights based on gender. It flows from the notion that a man is provider of family and he has ultimate responsibility to protect them; on the other hand, a woman is to look after the house and the needs of the children. This may have been acceptable in a specific context or a point in history but at present such gender stereotypes is against Articles 14, 15 and 21. Petitioner submits that if both spouses are earning, then financial responsibility of the child should also be shared. At the same time mother should also have the equal right to decide the matter related to the welfare of the minor. She should not only take physical or emotional care of the child, but also have equal say in the matters deciding the future and matter of interest of the minor.

21. The other type of guardianship, Muslim Personal Law talks about is guardianship in marriage. The guardian has the right to contract the marriage of a minor. If guardian is of the opinion that marriage is for welfare of minor, then he has right to contract such marriage. Even the consent of the minor, whose marriage is to be contracted, is not relevant in this situation. This form of marriage is called *jabar* marriage. The guardian can impose the marriage on minor before she attains puberty and this too would be covered by overriding effect of the Prevention of Child Marriages Act, 2006. The Court is not entitled to appoint a guardian for the marriage, though it can appoint a guardian for person or property. In some cases, the *kazi* can act as a guardian for the purpose of marriage but guardian is to act for welfare of child as per his understanding what is subjugated is liberty of individual. Under Hanafi School, the father has right to contract the marriage of the minor. After him the right dwells upon the grandfather how highsoever. In absence of these two, the right is given to the brother and other male relations on the father's side in the order of inheritances. In the absence of all above mentioned male relations, the right belongs to the mother, maternal uncle or aunt. Under Shia law, however, the right is vested upon the father

and after him the father's father how highsoever. Even the consent of the mother is not acknowledged. The right of the mother over her child is given preference when there is no male from paternal side. Allocation of right in such manner indicates that mother is not capable of taking decision for the welfare of child and therefore if there is any possibility of locating a male member, preference is given to him. Though, under the Prohibition of Child Marriage Act, 2006, the child marriage is prohibited but not applied on Muslims. Father or grandfather have right to marry even their minor children. Petitioner is citing these examples only to highlight the prevailing gender injustice, gender inequality, patriarchal, orthodoxy and irrational practices in all personal laws. In **Voluntary Health Association of Punjab [(2013) 4 SCC 1, Para 19]** the Apex Court observed: *"A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership."* It is therefore suggested that mother should be treated as natural guardian of the minor in personal laws and both should be at an equal footing. Further, in the matter of custody, father should also get an equal opportunity to be considered as a custodian.

22. IMPACT OF INTERNATIONAL CONVENTION ON CARA.

It is generally considered a progressive law in accordance with international principles, such as the United Nations Convention on the Rights of the child, to which India Government became a signatory in 1992. In signing the Convention, the Government accepted obligations to bring all state laws and policies in the line with the main principles of children's rights, namely best interest, non discrimination and child's voice. This Act has incorporated the provision of adoption of child as an alternative to institutional care.

23. Christians have no adoption laws and have to approach court under the Guardians and Wards Act, 1890. Christians can take a child under the said Act only for foster care. Once a child under foster care becomes major, he is free to break away all his relations. Besides, such a child does not have legal right of inheritance. The general law relating to guardians and wards is contained in the Guardians and Wards Act, 1890. It clearly lays down that father's right is primary and no other person can be appointed unless the father is found unfit. The Act also provides that the Court must take into consideration the welfare of the child while appointing a guardian under the provisions of this Act.

24. The Parsi law also does not recognize adoption. In the present world when the society has changed a lot, the present law do not meet the requisite demand. Section 49 provides that the court has the power to decide interim custody of child. The court can prescribe such terms and conditions, which it deems necessary for welfare of the child. The court can also pass order with regard to maintenance and education of the minor. However, section 50, stipulates that in case of adultery committed by the wife, the court can pass a decree of divorce or judicial separation. In that case, if any property is devolving upon the wife, one half of the same can be reserved for welfare of the child. This is discriminatory and contrary to Articles 14-15 simply for not providing the same for husband.

25. The Act 1890 recognizes only guardian-ward relationship. It does not provide same status as that of a natural-born child. Under the Act, child becomes a ward, not an adopted child. Anyone under the age of eighteen can be ward and both spouses can be guardians. Once the individual turns twenty-one, they lose the status of a ward. The child does not have the same status as that of a biological child and also does not have right of inheritance. The male Guardian can bequeath towards through a will, but any blood relative of the male

guardian can contest this will. Unlike the Hindu Adoption and Maintenance Act 1956, there are no age restrictions for single males /females to take child in guardianship. This discrimination does not have any reasonable nexus, hence needs to be done away.

26. India is a signatory to various International Conventions pertaining to Children welfare including Declaration on Social Legal Principles relating to Protection & Welfare of Children with Special Reference to Foster Placement & Adoption Nationally & Internationally. The relevant Articles are: **Article 3:** The first priority for a child is to be cared by his own parents. **Article 4:** When care by child's own parents is unavailable/inappropriate, care by relatives of parents, by another substitute-foster or adoptive-family or if necessary, by an appropriate institution should be considered. **Article 13:** Primary aim of adoption is to provide the child who cannot be cared by his own parents with a permanent family. Convention on the Rights of the Child was adopted and ratified by India on 20.11.1985. The Preamble refers various other declarations and conventions with regard to the child. **Article 20:** Speaks about the special protection of child and assistance by State to children in need of special care and protection.

27. Article 3(1) Of Convention on Right of Child (CRC) stipulates that for an institution while taking action for welfare of child, its primary consideration should be the interest of child. This Hon'ble Court in National Legal Services Authority [(2014) 5 SCC 438], Pravasi Bhalai Sangathan [(2014) 11 SCC 477] and Jeeja Ghosh v Union of India [(2016)7SCC 761] held that right to live with dignity implies right not to be perceived as unequal or inferior individuals in society. It implies right to equal social standing and perception, whereas better status of Hindu adopted child in comparison to other sect following child can lead feeling of inferiority and sense of subjugation and being over-dominated under custom.

GENDER JUSTICE, GENDER EQUALITY& DIGNITY OF WOMEN

28. **Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125] Para 12:** *"Right to life as a fundamental right stands enshrined in the Constitution. Right to livelihood is born of it. In Olga Tellis v Bombay Municipal Corporation [(1985)3SCC545: AIR 1986 SC 180] this Court defined it ..."* **Para 20:** *"Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigour and permits the*

State to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords them parity. Article 38 enjoins the State to promote the welfare of the people (obviously men and women alike) by securing social order in which justice – social, economic and political – shall inform of all the institutions of national life. Article 39(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 minimise inequalities in income and to endeavour to eliminate inequalities in status, facilities, 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 Scheduled Castes and Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of exploitation. The Preamble charters out the ship of the State to secure social, economic, political justice and equality of opportunity and of status and dignity of person to everyone." **Para 22** *"Article 1(1)*

assures right to development – an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized. Article 6(1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion... ...Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.." **Para 23:** *"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 freedoms 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, 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 is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (for short 'CEDAW') was ratified by the UNO on 18-12-1979. The Government of India who was an active participant to CEDAW ratified it on 19-6-1993 and acceded to CEDAW on 8-8-1993 with reservation on Articles 5(e), 16(1), 16(2) and 29 thereof. Preamble of CEDAW reiterates that discrimination 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 the personality from society and family and makes it more difficult for the full development of potentialities of women in service of their countries and of humanity..." **Para 24:** *"Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(d) defines human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and*

*the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms."***Para 25:** *"Article 5(a) of CEDAW on which Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-à-vis Articles 1, 3, 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality & elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender-based discriminations 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 measures including legislation, modify law and abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women."***Para 26:** *"Article 15(3) of the Constitution positively*

protects such Acts or actions. Article 21 reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that gives meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual & collective activities as enjoined in Article 51-A(h) and (j) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender-based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create

conditions and facilities conducive for women to realize the right to economic development including social and cultural rights." **Para 37:** *"..The public policy & constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social economic political and cultural rights on equal footing. ...If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable..."*

29. **VISHAKA v. STATE OF RAJASTHAN [(1997) 6 SCC 241]**

Para 7: *"In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with fundamental rights*

and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil." **Para 15:** *"In Nilabati Behera v. State of Orissa[(1993) 2 SCC 746 : 1993 SCC (Cri) 527] a provision in the ICCPR was referred to support the view taken that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right", as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution which embody the basic concept of gender equality in all spheres of human activity".*

Para 36: *"Women would be as vulnerable without State protection as by the loss of freedom because of impugned Act. Present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a democratic society."* **Para 37:** *"Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf"* **Para 43:** *"Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. Its State's duty to ensure circumstance of safety which inspires confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other policy inference (such as one embodied under Section 30) from societal conditions would be oppressive on women and against the privacy rights."* **Para 46:** *"It is to be borne in*

mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means."

31. **Voluntary Health Association of Punjab [(2013)4SCC 1] *Para 19:***

"A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of prenatal diagnostic technique for purposes of detecting genetic abnormality metabolic disorders chromosomal abnormality or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualized and its object fruitfully realized when the authorities under the Act

*carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society."***Para 23** *"In Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125 : AIR 1996 SC 1864] this Court had stated that Indian women have suffered and are suffering discrimination in silence."28. ... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28).."*

32. National Legal Service Authority[(2014)5SCC438]*Para 73*

"Article 21 is the heart and soul of the Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to persons on account of being humans. ***Para 74:*** *"...The recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part*

of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution..." **Para 75:** *"Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution."*

33. **Laxmi v. Union Of India [(2014) 4 SCC 427]** ***Para 14:*** *"We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of State Government/UTs) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. Chief Secretaries of the States and Administrators of the UTs shall ensure compliance with above direction."*

34. **PRAVASI BHALAI SANGATHAN[(2014)11SCC477]*Para 20:***

"This Court has persistently held that our Constitution provides for separation of powers and the court merely applies the law that it gets from legislature. Consequently, Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot rewrite, recast or reframe the legislation for very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts has raised public eyebrows time & again. Though judicial activism is regarded as active interpretation of existing provision with view of enhancing the utility of legislation for social betterment in accordance with the Constitution, courts under its garb have actively strived to achieve the constitutional aspirations of socio-economic justice. In many cases, this Court issued various guidelines/directions to prevent fraud upon statutes, or when it was found that certain beneficiary provisions were being misused by undeserving persons, depriving

*the legitimate claims of eligible persons..."***Para 22:** *"..This Court has consistently clarified that the directions have been issued by the Court only when there has been a total vacuum in law i.e. complete absence of active law to provide for the effective enforcement of a basic human right. In case there is inaction on the part of executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce the law. In case of vacuum to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation. Thus, direction can be issued in situation where will of elected legislature has not yet been expressed.*

35. **Shamima Faruqui v. Shahid Khan [(2015) 5 SCC 705]** ***Para 14:***

"...It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there have to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to

mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If husband is healthy, able-bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right..."

36. **STATE OF MP v. MADAN LAL [(2015) 7 SCC 681]** ***Para 18:***

"We would like to clearly state that in a case of rape or attempt to rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are the offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay..." ***Para 19:*** *"We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the élan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility..."*

37. **Supreme Court Women Lawyers Association [(2016) 3 SCC 680]**

Para 5: *"At the very outset, we must make it clear that the courts neither create offences nor they introduce or legislate punishments. It is the duty of the legislature. The principle laid down in Vishaka case [Vishaka v. State of Rajasthan(1997)6SCC241] is quite different, for in the said case, the Court relied on the International Convention,*

namely, "Convention on Elimination of All Forms of Discrimination against Women" especially articles pertaining to violence and equality in employment and further referred to the concept of gender equality including protection from sexual harassment and right to work with dignity and on that basis came to hold that in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against the sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms can be laid down in exercise of the power under Article 32, and such guidelines should be treated as law declared under Article 141..."

38. **Shayara Bano v. Union of India [(2017)9SCC 1]*Para 392:***

"In view of the position expressed above, we are satisfied that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142. We therefore hereby direct the Union of India to consider appropriate legislation, particularly with reference to "Talaq-e-Biddat". We hope and expect that contemplated legislation will take into consideration advances in Muslim Personal Law—"Shariat", as have been corrected by legislation the world over, even by theocratic Islamic States.

When British Rulers provided succour to Muslims by legislation, and when remedial measures have been adopted by Muslim world, we find no reason, for independent India, to lag behind. Measures have been adopted for other religious denominations even in India, but not for Muslims. We would, therefore, implore legislature to bestow its thoughtful consideration to this issue of paramount importance. We would beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation." **Para 393:** *"..Till such time as legislation in matter is considered, we are satisfied in injuncting Muslim husbands from pronouncing "Talaq-e-Biddat" as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before expiry of period of six months and a positive decision emerges towards redefining "Talaq-e-Biddat" (three pronouncements of talaq at one, same time), as one, or alternatively, if it is decided that practice of "Talaq-e-Biddat" be done away with altogether, the injunction would continue till legislation is finally enacted. Failing which, the injunction shall cease to operate.*

39. **KS Puttaswamy v Union of India[(2017)10SCC1]Para 525:**

"...The dignity of individual encompasses the right of individual to develop to the full extent of his potential. And this development can only be if individual has autonomy over fundamental personal choices & control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights, reflects each of these constitutional values in full, and is to be read in consonance with these values and with international covenants that we have referred to. In the ultimate analysis fundamental right to privacy which has so many developing facets, can only be developed on a case-to-case basis..." **Para 526:** *"This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, drill of various articles to which the right relates must be scrupulously followed..."* **Para 534:** *"It is clear that international covenants and declarations, namely, the 1948 Declaration and the 1966 Covenant both spoke of the right to life and liberty as being "inalienable". Given the fact that this has to be read as being part of Article 21 by virtue of the judgments referred to*

supra, it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were "inalienable"; that they inhere in every human being by virtue of the person being a human being;.." **Para 547:** *"..It is, therefore, the duty of the courts and especially this Court as sentinel on the qui vive to strike a balance between the changing needs of the society and the protection of the rights of the citizens as and when the issue relating to the infringement of the rights of the citizen comes up for consideration. Such a balance can be achieved only through securing and protecting liberty, equality and fraternity with social and political justice to all the citizens under the rule of law..."*

40. **Pawan Kumar v. State of Himachal Pradesh [(2017) 7 SCC 780] Para 47:** *"Eve teasing, as has been stated in Inspector General of Police v Samuthiram [(2013) 1 SCC 598], has become a pernicious, horrid and disgusting practice. The Court therein has referred to the Indian Journal of Criminology and Criminalities (January-June 1995) which has categorized eve teasing into 5 heads (1) verbal eve teasing; (2) physical eve teasing; (3) psychological harassment; (4) sexual harassment; and (5) harassment through some objects. Present case eminently projects a case of psychological harassment. We are at*

pains to state that in civilized society eve teasing is causing nuisance to women in educational institutions, public places, parks, railway stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as man has. She enjoys as much equality under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed under Article 21 cannot be violated by indulging in obnoxious act of eve teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman under Article 14 of the Constitution. That apart it creates an incurable dent in the right of a woman which she has under Article 15. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognised. It has to be socially respected. No one can compel a woman to love. She has absolute right to reject." **Para 48:** *"In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are*

perceptible from Article 15. When the right is conferred under the Constitution, it has to be understood that there is no condescension. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has to be regarded as the summum bonum of the constitutional principle in this context. The instant case portrays the deplorable depravity of the appellant that has led to a heart-breaking situation for a young girl who has been compelled to put an end to her life. Therefore, the High Court has absolutely correctly reversed the judgment of acquittal and imposed the sentence. It has appositely exercised jurisdiction and we concur with same."

41. **SHAKTI VAHINI V. UNION OF INDIA[(2018) 7 SCC 192] Para 41:**

"..we have stated hereinabove, to explicate, is that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality. It does not recognise any space for informal institutions for delivery of justice. It is so since a polity governed by "Rule of Law" only accepts determination of rights and

violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the khap panchayat or any panchayat of any nomenclature cannot create a dent in exercise of the said right.." **Para 40:** *"..Is necessary to mention here that honour killing is not the singular type of offence associated with the action taken and verdict pronounced by the khap panchayats. It is a grave one but not the lone one. It is a part of honour crime. It has to be clearly understood that honour crime is the genus and honour killing is the species, although a dangerous facet of it. However, it can be stated without any fear of contradiction that any kind of torture or torment or ill-treatment in the name of honour that tantamounts to atrophy of choice of an individual relating to love and marriage by any assembly, whatsoever nomenclature it assumes, is illegal, cannot be allowed moment of existence."* **Para 43:** *"..Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognised under Articles 19 and 21. Such a*

right has the sanction of the constitutional law and once that is recognised, the said right needs to be protected and cannot succumb to conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy" **Para 44:** *"..The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the constitutional courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. Fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realisation of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is*

*a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person..."***Para 45:** *"..The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the*

laws of this country do not countenance such an act and, in fact, the whole activity is illegal & punishable as offence under criminal law.."

42. **Navtej Johar v. Union of India [(2018) 10 Scc 1] *Para 248:***

"..We, first, must test the validity of Section 377 IPC on the anvil of Article 14. What Article 14 propounds is "all like should be treated alike". In other words, it implies equal treatment for all equals. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse, yet the classification, including the one made under Section 377 IPC, has to satisfy the twin conditions to the effect that the classification must be founded on an intelligible differentia and the said differentia must have a rational nexus with the object sought to be achieved by the provision, that is, Section 377..." ***Para 268.1:*** *"..The eminence of identity which has been luculently stated in Nalsa [(2014)5SCC438] very aptly connects human rights and the constitutional guarantee of right to life, liberty with dignity. With same spirit, we must recognise that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination,*

realisation of one's own abilities visualising the opportunities and rejection of views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible.." **Para 268.4:** *"...The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, society is dissuaded from indulging in any form of discrimination so that nation is guided towards a resplendent future..."* **Para 268.5:** *"...Constitutional morality embraces within its sphere several*

virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even single individual, for foundation of constitutional morality rests upon recognition of diversity that pervades the society...".

43. **JOSEPH SHINE v. UNION OF INDIA [(2019) 3 SCC 39]**

Para 30: *"...As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extramarital relationship with an unmarried woman or a widow. The dictionary meaning of "adultery" is that a married person commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, "adultery" is the voluntary sexual intercourse of a married person with a person other than offender's*

husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to think so, as it does not treat a woman as an abettor but protects a woman, simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil

action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary..." **Para 48:** *"...From the aforesaid analysis, it is discernible that the Court, with the passage of time, has recognised the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21..."* **Para 162:** *"...Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect "institution of marriage", it provides no justification for not*

recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy/agency. Manifest arbitrariness is writ large on the provision..." **Para 75:** *"...Article 15 prohibits the State from discriminating on grounds only of sex. The petitioners contend that (i) Section 497, insofar as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15..."* **Para 182:** *"...Implicit in seeking to privilege the fidelity of*

women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values..." **Para 189:** *"...Article 15(3) encapsulates the notion of "protective discrimination". The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of "protection". This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate non-discrimination principle. Neither Article 15(1) nor Article 15(3) allow discrimination against women. Discrimination which is*

grounded in paternalistic and patriarchal notions cannot claim protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was "seduced" into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to "protect" her. The "protection" afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in garb of protecting women.." **Para 191:** *"...The law on adultery is but a codified rule of patriarchy. Patriarchy has permeated the lives of women for centuries. Ostensibly, society has two sets of standards of morality for judging sexual behaviour. [Nandita Haksar, "Dominance, Suppression and Law" in Lotika Sarkar and Sivaramayya, Women and the Law: Contemporary Problems] One*

set for its female members and another for males. [Nandita Haksar, "Dominance, Suppression and the Law" in Lotika Sarkar and Sivaramayya, Women and Law: Contemporary Problems] Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity. [Nandita Haksar, "Dominance, Suppression and Law" in Lotika Sarkar and Sivaramayya, Women and the Law: Contemporary Problems, (Vikas Publishing House 1994).] Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex determination and infanticide. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising women to a pedestal conditioned by male notions of what is right and what is wrong for a woman. The notion that women, who are equally entitled to protections of the Constitution as their male counterparts, may be treated as objects capable of being possessed,

is an exercise of subjugation and inflicting indignity. Anachronistic conceptions of "chastity" and "honour" have dictated the social and cultural lives of women, depriving them of guarantees of dignity and privacy, contained in the Constitution..."

SUPREME COURT JUDGMENTS ON UNIFORM CIVIL CODE

44. **MOHD. AHMED KHAN V SHAH BANO BEGUM[(1985)2 SCC 556]** ***PARA 33.*** *"Dr Tahir Mahmood in his book Muslim Personal Law (1977 Edn., pp. 200-02), has made a powerful plea for framing a uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion-based personal laws." He wants the lead to come from the majority community but, we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to Muslim community; "Instead of wasting their energies in exerting theological political pressure in order to secure an immunity for their traditional personal law from state's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India."*

45. **Ms.Jorden Diengdeh v. S.S. Chopra[(1985)3SCC 62]Para 7**

"It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. Meanwhile, let notice go to the respondents".

46. **SARLA MUDGAL v. UNION OF INDIA[(1995) 3 SCC 635]**

Para 45 *"The problem with which these appeals are concerned is that many Hindus have changed their religion and have become*

convert to Islam only for purposes of escaping the consequences of bigamy. For instance, Jitendra Mathur was married to Meena Mathur. He and another Hindu girl embraced Islam, obviously because Muslim law permits more than one wife and to the extent of four. 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 or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context"). But ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. "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 oppressed, promotion of national unity and solidarity. But the first step should be to rationalise the personal law of minorities to develop religious and cultural amity. 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 a comprehensive legislation in keeping with modern day concept of human rights.

47. **Ahmedabad Women Action Group [(1997) 3 SCC 573]*Para 10.***

In Sarla Mudgal v. Union of India [(1995)3 SCC 635] Court observed: (SCC pp. 649-50, para 33) "Article 44 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 divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of Hindus, such as relating 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 Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a 'common civil code' for the whole of India."

48. **Lily Thomas v Union of India [(2000) 6 SCC 224] *Para 65.***

Besides deciding the question of law regarding the interpretation of

Section 494 IPC, one of the Hon'ble Judges (Kuldip Singh, J.) after referring to the observations made by this Court in Mohd. Ahmed Khan v. Shah Bano Begum requested Government of India to have a fresh look at Article 44 of the Constitution of India and "endeavour to secure for the citizens uniform civil code throughout the territory of India". In that behalf direction was issued to the Government of India, Secretary, Ministry of Law & Justice to file an affidavit of a responsible officer indicating therein the steps taken and efforts made towards securing a uniform civil code for the citizens of India. On the question of a uniform civil code, R.M. Sahai, J. the other Hon'ble Judge constituting the Bench suggested some measures which could be undertaken by the Government to check the abuse of religion by unscrupulous persons, who under the cloak of conversion were found to be otherwise guilty of polygamy. It was observed that: "Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre." It was further remarked: "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 a comprehensive legislation in keeping with modern-day concept of human rights.

Para 44 *Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India, it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It*

is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing contradictions based on ideologies.

50. **State of Tamil Nadu v K. Shyam Sunder[(2011) 8 SCC 737]**

Para 22. *The propagators of this campaign canvassed that uniform education system would achieve code of common culture, removal of disparity and depletion of discriminatory values in human relations. It would enhance the virtues and improve the quality of human life, elevate the thoughts which advance our constitutional philosophy of equal society. In future, it may prove to be a basic preparation for the uniform civil code as it may help in diminishing opportunities to those who foment fanatic and fissiparous tendencies.*

51. **ABC v. State NCT of Delhi, [(2015) 10 SCC 1]** ***Para 20.*** *...It would be apposite for us to underscore that our Directive Principles envision the existence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation.*

52. **Jose Paulo Coutinho v Maria Luiza Valentina [(2019) SCC 1190]**

Para 23. *It is interesting to note that whereas the founders of the Constitution in Article 44 in Part IV dealing with the principles of*

directive policy had hoped and expected that the State shall endeavor to secure for citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956 there has been no attempt to frame a Uniform Civil code applicable to all citizens of the country despite exhortations of this court in the case of Mohd. Ahmed Khan v Shah Bano and Sarla Mudgal v union of India. **Para 24.** *However, Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights. It would also not be out of place to mention that with effect from 22.12.2016 certain portions of the Portuguese Civil Code have been repealed and replaced by the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 which, by and large, is in line with the Portuguese Civil Code. The salient features with regard to family properties are that a married couple jointly holds the ownership of all the assets owned before marriage or acquired after marriage by each spouse. Therefore, in case of divorce, each spouse is entitled to half share of the assets. The law, however, permits pre-nuptial agreements which may have a different system of division of assets. Another important aspect, as pointed out*

earlier, is that at least half of the property has to pass to the legal heirs as legitime. This in some ways akin to concept of coparcenary in Hindu law. However, as far as Goa is concerned, this legitime will also apply to the self-acquired properties. Muslim men whose marriages are registered in Goa cannot practice polygamy. Further, even for followers of Islam there is no provision for verbal divorce.

DIRECTION TO THE LAW COMMISSION TO PREPARE REPORT

53.Gujarat Urja Vikas Nigam Ltd v. Essar Power[(2016) 9 SCC 103]

Para 41. *We are, thus, of the view that in the first instance the Law Commission may look into the matter with the involvement of all the stakeholders.* ***Para 43.*** *The questions which may be examined by the Law Commission are:* ***43.1.*** *Whether any changes in the statutory framework constituting various tribunals with regard to persons appointed, manner of appointment, duration of appointment, etc. is necessary in the light of the judgment of this Court in Madras Bar Association [(2014)10SCC 1] or on any other consideration from the point of view of strengthening the rule of law?* ***43.2.*** *Whether it is permissible and advisable to provide appeals routinely to this Court only on a question of law or substantial question of law which is not of national or public importance without affecting the constitutional*

*role assigned to the Court having regard to desirability of decision being rendered within reasonable time?**43.3.** Whether direct statutory appeals to the Supreme Court bypassing the High Courts from the orders of Tribunal affects access to justice to litigants in remote areas of the country?**43.4.** Whether it is desirable to exclude jurisdiction of all courts in the absence of equally effective alternative mechanism for access to justice at grass root level as has been done in provisions of TDSAT Act (Sections 14-15).**43.5.** Any other incidental or connected issue which may be appropriate.* ***Para 44.*** *We request Law Commission to give its report as far as possible within one year. Thereafter matter may be examined by authorities concerned.*

54. **BCCI v. Bihar Cricket Association [(2016) 8 SCC 535] Para 93.** *We are not called upon in these proceedings to issue direction insofar as the above aspect is concerned. All that we need say is that since BCCI discharges public functions and since those functions are in the nature of a monopoly in hands of BCCI with tacit State and Centre approvals, the public at large has right to know/demand information as to activities and functions of BCCI especially when it deals with funds collected in relation to those activities as a trustee of wherein the beneficiary happens to be the people of this country.*

As a possible first step in the direction in bringing BCCI under the RTI, we expect the Law Commission to examine the issue, make recommendation. Beyond that we do not consider it necessary to say anything at this stage. ***Para 94.*** *So also the recommendation made by the Committee that betting should be legalised by law, involves the enactment of a law which is a matter that may be examined by the Law Commission and the Government for such action as it may consider necessary in the facts and circumstances of the case.*

55. Babloo Chauhan v Govt of NCT Of Delhi [(2017) SCC DEL 12045]

*"**Para 11.** Third issue concerns the possible legal remedies for victims of wrongful incarceration and malicious prosecution. The report of Prof. Bajpai refers to the practice in United States of America and the United Kingdom. He points out that that there are 32 states in the USA including District of Columbia (DC) which have enacted laws that provide monetary and non-monetary compensation to people wrongfully incarcerated. There are specific schemes in the UK and New Zealand in this regard.**17.** The Court, accordingly, requests Law Commission of India to undertake a comprehensive examination of the issue highlighted in paras 11 to 16 of this order and make its recommendation thereon to the Government of India."*

56. **AP Pollution Control Board v MV Nayudu**[(2001)2 SCC 62]

Para 73. *Inasmuch as most of the statutes dealing with environment are by Parliament, we would think that the Law Commission could kindly consider the question of review of the environmental laws and the need for constitution of Environmental Courts with experts in environmental law, in addition to judicial members, in the light of experience in other countries. Point 5 is decided accordingly.*

57. **Mahipal Singh Rana v. State of U.P.** [(2016) 8 SCC 335] ***Para 58***

In view of the above, we request the Law Commission of India to go into all relevant aspects relating to regulation of legal profession in consultation with all concerned at an early date. We hope that the Government of India will consider taking further appropriate steps in the light of the report of the Law Commission within six months thereafter. The Central Government may file an appropriate affidavit in this regard within one month after expiry of one year.

58. **Naresh Kumar Matta v DDA** [2013SCC ONLINE DEL 2388]

5 years delay in computing cost of a flat is totally incomprehensible. This Court is of the opinion that the Law Commission should consider preparation of enactment to recover damages/compensation from officers who take unduly long time in taking decisions.

59. **Pravasi Bhalai Sangathan [(2014) 11 SCC 477]** ***Para 29.***

However, in view of the fact that the Law Commission has undertaken the study as to whether the Election Commission should be conferred the power to derecognise a political party disqualifying it or its members, if a party or its members commit the offences referred to hereinabove, we request the Law Commission to also examine the issues raised herein thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to Parliament to strengthen Election Commission to curb the menace of "hate speeches" irrespective of whenever made.

60. There is no civil, criminal or revenue litigation, involving petitioner, which has/could have legal nexus, with issue involved in this PIL.

61. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this PIL. It is not guided for gain of any other individual person, institution or body.

62. Petitioner has not submitted any representation to the respondents because issue involved is the interpretation of the Constitution.

63. There is no requirement to move any government authority for the relief sought in this PIL. There is no other remedy available except approaching this Hon'ble Court by way of the PIL under Article 32.

PRAYER

It is respectfully prayed that this Hon'ble Court may be pleased to issue a writ order or direction or a writ in nature of mandamus to:-

a) direct respondents to remove anomalies in the grounds of 'adoption and guardianship' and make them uniform for all citizens without discrimination on the grounds of religion, race, cast, sex or place of birth in spirit of Articles 14, 15, 21, 44 and international conventions;

b) alternatively, being custodian of the Constitution and protector of the fundamental rights, declare that the discriminatory grounds of 'adoption and guardianship' are violative of Articles 14, 15, 21 of the Constitution and frame a uniform guidelines for 'adoption and guardianship' for all citizens, while considering the best practices of laws of 'adoption and guardianship' and international conventions;

c) alternatively, direct Law Commission of India to prepare report on 'Uniform Grounds of Adoption & Guardianship' in spirit of Articles 14, 15, 21, 44 within 3 months, while considering the best practices of laws of 'adoption & guardianship' and international conventions;

d) pass such other order(s) or direction(s) as Hon'ble Court may deem fit and proper in facts of the case and allow the cost to petitioner.

31.08.2020 **(ASHWANI KUMAR DUBEY)**

NEW DELHI **ADVOCATE FOR PETITIONER**