

Family Court Functioning ;  
Constitutional Mandate  
The Constitutional and Legislative  
Mandate

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# Critical issues

- Challenges in boxing emotions in the framework of law
- Understanding a rights based approach
- Creative interpretation of evidence to reconcile them with a wider objective of gender justice.

# Constitutional Equality and equality in family law

Article 14-The State shall not deny any person equality before the law or equal protection before the law.

Article 15- The State shall not discriminate against any citizen on grounds of only of religion, race, caste, sex, place of birth or any of them.

(5) Nothing in this article shall prevent the state from making any special provisions for women and children

# Formal Equality

A plain reading of Article 14

- Traditional approach of “treating likes alike” ignoring gender differences
- Focus on “equal treatment” rather than on equality of outcomes.
- Law is expected to be gender neutral and rules of a “single standard.”
- Does not take into account biological and gender differences
- an additional burden on women when in fact the social and economic reality of women is not similar to that of men

# Examples of Formal Equality

- Section 24 and 25 of the Hindu Marriage Act under which both husband and wife can claim maintenance and alimony from each other.

# Protectionist Equality

- recognizes differences of gender but reinforces them by sanctioning different treatment
- But relies on social assumptions as a standard for the roles and capacities attached to men and women.

# Examples of Protectionist Equality

- The concept of protective custody of women victims/survivors where women are detained as they are seen to require protection, but the perpetrators are often on bail, earlier provisions of Factories Act that prohibited women from night shifts etc, challenges to the shop and establishment Act relating to working hours etc.
- Such approach often falls on the assumption of weakness and subordination on the basis of sex rather than addressing the external, structural or systemic causes of the subordination of women.

# Substantive Equality

- Article 15
- corrective approach that recognizes that women were historically disadvantaged and corrective measures ought to be taken in order to address this discrimination.
- focuses on diversity, difference, disadvantage and discrimination.

# Substantive Equality

- Its principal concern is to ensure that the law corrects the imbalance and impacts on the outcome by assuring equal opportunities, access and benefits for women.
- In doing so it seeks a paradigm shift from “equal treatment” to “equality of outcomes.”
- Ex. DV Act that benefits women who have been in long relationships under the assumption that they were married, addresses violence independent of the institution of marriage. (Protection of women from sexual harassment Act)

# Support systems in Substantive Equality

- The DV Act provides for a comprehensive support system that is to be provided by the state to address domestic violence such as provision of service providers, shelter homes etc. That is to address the structural problems associated with the issue and not to just look at it as a private wrong.

# Understanding Discrimination

- DE JURE DISCRIMINATION

Indicates formal or legal position of women and includes discriminatory law.

## DE FACTO DISCRIMINATION

Informal practices that are not sanctioned by law but regulate women's freedoms

# Discriminatory provisions of cruelty dejure discrimination

- Under the Hindu Marriage Act and the Special Marriage Act divorce can be obtained if the spouse has treated the petitioner with cruelty.
- Under the Indian Divorce Act, Section 10 (x) “ the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.”

- Parsi Marriage and Divorce Act
- Section 32 dd- The defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the court improper to compel the plaintiff to live with the defendant.

# Understanding family law through the prism of equality and non discrimination

- Marriage laws in India is based on the fault finding approach and adversarial in nature.
- The spouse has to prove a matrimonial wrong
- Parties have to therefore keep reliving their conflict in courts
- While the Family Courts Act has done away with strict rules of evidence, the practice is still to go through a process of trial with all its inherent problems .

- Islamic law is based on the “irretrievable breakdown of marriages” where there is no requirement of proving a matrimonial wrong, but the practice in India is arbitrary and discriminatory.
- The woman also has to seek reliefs by filing multiple proceedings under different laws if she wants divorce, custody or maintenance.

- Each system of law has a different prohibition on consanguinity marriages. And within Hindu Law there is a difference in this regard with reference to customary practices
- The issue of domicile under the Indian Divorce Act that requires the respondent to be in India at the time of filing proceedings is extremely problematic

# Right to choice

- Section 5 and 7 of the Special Marriage Act.
- Requirement of notice and objection
- Objection only if it violates section 4 of the Act.

Misuse of the provision by Protests for the marriage by persons unconnected with the parties.

- Goes against the spirit of the law.

# Right to choice

- Whether to marry or not marry, or have a relationship. Observations on the acceptance of premarital sex- S Khushboo Vs Kanniammal ( 2010) 5 SCC 600

# The right to Privacy

- The provisions of incamera proceedings
- Issues of pleadings, examples of cases on defamation on the basis of pleadings

# X Vs Z Right to Privacy Delhi High Court

- Where a party in a case seeks to rely upon a document which in his or her assessment or the assessment of the party's lawyer is of a sensitive nature, viz., which contains details of a personal or private nature concerning a party or a person or their conduct, which when disclosed is likely to affect the right to privacy, or cause embarrassment, then such party and/or the lawyer of such party will first apply to the Court seeking leave to produce such document in a sealed cover.

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- Till such time that leave is granted the contents of the said document shall not be extracted in the pleadings or a copy of the whole or part thereof enclosed with the petition. For this purpose a document would include any writing, private letters, notings, photographs, and documents in electronic form including video clips, text messages, chat details, emails, printed copies thereof, CCTV footage etc. footage etc.

- Where a party applies or it comes to the knowledge of its own matters of a person, which when disclosed is likely to affect the right to privacy, or cause embarrassment, the Family Court will pass appropriate orders concerning the said document including providing copies thereof to the parties, preserving the originals or copies as the case may be in a sealed cover, de-sealing for being produced during Court proceedings and re-sealing after the purpose for which they are directed to be produced is over.

- The Family Court will also bind down by specific directions, the parties and their respective lawyers, and the Court staff regarding the making of copies, use, preservation and dissemination of such document with a view to maintaining its confidentiality.

- The Family Court can also pass necessary directions to specify the conditions upon which access would be permitted to such document by third parties.
- The directions are in the nature of broad guidelines and can be suitably modified and adapted/applied to a given situation by the Family Court. The Family Court will, however, at all times keep in view the requirements of protecting the rights to privacy and dignity of the parties and persons.

# Nuanced interpretation of law in judgments

Strict proof of marriage not required

- Chanmuniya vs Virendra Kumar Singh JT 2010 11 SC 132
- Presumption of marriage in live in relationships subject to proof ( Madan Mohan Singh vs Rajanikant. ( AIR 2010 SC 2933) a long relationship cannot be termed as “walk in and walk out” relationship presumption of marriage under section 114 of the Evidence Act
- Presumption in favour of marriage ( Shobha Hymavathi Devi vs Setti Gangadhara Swamy ( 2005 2 SCC 244)

- Maintenance-

Earning wife entitled to maintenance

Minakshi Gaur vs Chitranjan Gaur AIR 2009 SC 1377

Permanent alimony to take into consideration social status, conduct of parties, way of living of spouse and ancillary aspects. Amount already paid as interim maintenance to be ignored Vishwanath Agrawal vs Sarla Agarwal 2012(7) SCC 288

- Understanding “cruelty” in marriage relief  
Samar Ghosh vs Jayanthi Ghosh AIR 2007 SC  
A Jayachandra Vs Aneel Kaur AIR 2005 SC 534  
Mayadeve Vs Jadish Prasad AIR 2007 Sc 1426

Principles governing Talaq

Shamim Ara vs State of U.P 2002 SC

# Custody- The rights of the child

Emphasis on positive test for custody- Question is not whether the father is unfit to have the child a positive test whether such a custody will be for the welfare of the child. Nil Rattan Kundu vs Abhijit Kundu AIR 2009 SC (Supp) 732

Custody of one parent should not insulate the child from the other parental touch and influence. Ruchi Majoo Vs Sanjeev Majoo AIR 2011 SC 1952

# Custody and order of foreign judgments

- Dr V Ravi Chandran vs Union of India 2009 14 SCALE 27
- 2015 Surya Vadanana Vs State of Tamil Nadu

- SEPERATE PROCEDURE
- VIDEO CONFERENCING, RECORDING OF EVIDENCE, REJECTION OF E MAILS, NON COMPLIANCE OF EVIDENCE ACT
- CONSTITUTIONAL MANDATE- TRIAL