

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. Section 497 IPC is an example since the women were not punished
- Old provisions of factories act

# 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)



# Substantive Equality

- Joseph shine vs union of India- 497 IPC is violative of substantive equality- Justice Chandrachud

# ARUN KUMAR AGARWAL VS NATIONAL INSURANCE CO LTD 2010 9 SCC 218 .

- Work is very vital to the system of gender reconstruction in societies and in this context masculine
- and feminine work is clearly demarcated.
- Women are generally engaged in home making, bringing up children and also in production of
- goods and services which are not sold in the market but are consumed at the household level. Thus, the work of women mostly goes unrecognized and they are never valued.

- Women make significant contribution at various levels including agricultural production by sowing, harvesting, transplanting and also tending cattles and by cooking and delivering the food to those
- persons who are on the field during the agriculture season.

# Understanding discrimination in family law

- 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.”

- 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

- Discrimination in age- a major factor in maintenance

# 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



# 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  
maintenance for a divorced muslim wife under  
section 125 crpc continues post Iddat period  
*Shabana Bano vs Imran Khan* 2010 1SCC pg 666

# 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