

Protecting Constitutional Rights in Family Court Proceedings

Understanding 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 that provides that a husband can claim maintenance from his wife.

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.
- 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
- This is called the 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 to address 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 in family law

- 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

Addressing discrimination in family law by substantive equality

Nuanced interpretation of substantive 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)
- Presumption in favour of marriage (Shobha Hymavathi Devi vs Setti Gangadhara Swamy (2005 2 SCC 244)

Nuanced judgments addressing equality

- 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

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.

Certain crucial issues

- Each system of law has a different prohibition on consanguinity marriages.
- 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
- Customary law/ plural legal systems/ community processes such as panchyats etc

Understanding evidence

- The nuanced judgements of the higher courts offer tools in the appreciation of evidence in such cases to understand the applicability of equality in marriages.
- Understanding the negative impact of stereotyping and gender bias which may get reflected in cross examination- such as questions relating to how a “ Hindu “ wife should behave, if a woman is accused of consuming alcohol etc

- 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.