Gender Equality: Constitutional Challenges and Competing Discourses

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In this essay I address the issue of equality in the context of postcolonial India and some of the structural and normative obstacles encountered by women when bringing constitutional challenges in the bid for greater equality. These challenges cannot be measured in terms of whether women in the postcolonial world are better off or worse off. Such evaluative judgments tend to reinforce an "us and them" binary, where the situation of women in the west are regarded as the civilizational and cultural standard to be achieved. Such a position obscures the ways in which the history of the colonial encounter has partly produced this binary that continues to inform the contemporary responses to gender in the postcolonial world, as well as the ways in which global economic structures and neo-liberal models are implicated in producing and reinforcing some of the gender stereotypes that we are witnessing in the workplace both here and there.

I examine efforts at using law, and particularly, constitutional equality rights to challenge laws that discriminate on the basis of sex in India. I examine some of the efforts to use fundamental rights to equality as guaranteed by Articles 14, 15 and 16 of the Constitution to challenge legal rules and provisions that are alleged to discriminate against women. The effort is to reveal the extent to which judicial approaches to equality, sex discrimination, and gender difference have limited the role that constitutional rights have played in the promotion of women's substantive equality.

In the first part of this paper, I review the competing approaches to equality, and to gender difference. I argue that the judicial approach has been overwhelmingly influenced by a formal approach to equality, and a protectionist approach to gender difference. The formal approach, in which equality is equated with sameness, and the protectionist approach to gender difference, in which women are understood as weak and in need of

protection have operated to limit the efficacy of these constitutional challenges.

In the second part of this paper I draw attention to how familial ideology has informed the judiciary's approach to gender difference, and the ways in which the governing norms that privilege women's familial roles have operated to limit the attempts to use constitutional equality rights to challenge laws that discriminate against women. In particular, I argue that the discourses through which women are seen as mothers and wives with particular social roles and responsibilities are important in constituting women as "different." Treating women differently in law is not seen as discrimination but as protecting and promoting women's natural roles in the family.

I provide a few examples to illustrate how fundamental rights challenges have often operated to reinscribe the very familial and legal discourses that have constituted women as different, and as subordinate, looking at the issues of domestic violence, maintenance, sexual expression and sexual harassment. The analysis is not intended as a comprehensive review of gender equality in Indian constitutional law, but illustrative of the normative and structural constraints that are encountered in legal discourse when addressing gender equality.

My focus is to examine how equality discourses have operated with dominant familial discourses at times to preclude effective constitutional challenges on the basis of sex discrimination (Kapur and Cossman, 1996; Agnes, 2000; Jaisingh, 2000). It is not the only factor nor even the most important factor in these decisions, but simply that it is *a* factor that needs to be taken into account. In other words, in evaluating the potential for equality rights strategies to challenge rules, regulations, and practices that discriminate against women, familial ideology needs to be considered.

I. Formal versus Substantive Equality

Equality rights are formally guaranteed in Articles 14, 15 and 16 of the Indian Constitution.[1] But the

[1] Article 14 Equality before law The State shall not deny to any person equality before the law or the equal protection

Constitution tells us very little about the specific content of equality rights. The general principle of equality and non-discrimination is nowhere defined in the Constitution. I briefly discuss two different approaches to equality through which the constitutional guarantees can be understood: a formal approach to equality, and a substantive approach to equality (Williams, 2013, 56-60). While the formal approach to equality has been dominant within Indian constitutional law, fragments of the substantive approach have from time to time been identifiable. I discuss this briefly and will then examine the question of the relevance of gender difference within these models of equality.

In the formal approach, equality is seen to require equal treatment - all those who are the same must be treated the same. It is based on treating likes alike. The constitutional expression of this approach to equality in American and subsequently Indian equal protection doctrine is in terms of the similarly situated test - that is - the requirement that "those [who are] similarly situated be treated similarly" (Tussman and TenBroek, 1948). Only individuals who are the same are entitled to be treated equally – that is - "[a]ll persons

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of the laws within the territory of India.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth(15(1)). However, Article 15(3) provides that "Nothing in this article shall prevent the State from making any special provision for women and children." *See http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(6).pdf*

Article 16 provides for equality of opportunity in matters of public employment(16(1)). However, Article 16(3) provides that "Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. *See* *http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(6).pdf* .

are to be treated alike, except where circumstances require different treatment" (Reddy, 1982, 58; Singh, 1976). If the individuals or groups in question are seen as different, then no further analysis is required even if the differences among them are the product of historic or systemic discrimination; difference justifies the differential treatment. As Dwivedi (1990, 11) states, "among equals law should be equal and equally administered". This initial definitional step can preclude any further equality analysis. If the individuals or groups in question are seen as different, then no further analysis is required; difference justifies the differential treatment. As Brodsky and Day (1990, 158) have argued in the context of equality under the Canadian Charter, "The way the court defines a class, or its willingness to recognize a class, can make the difference between winning and losing. The Court can justify making a comparison between classes or refusing to make a comparison by the way they define the class, or whether they recognize it at all". (See also Majury, 2002). Accordingly, when groups are not similarly situated, then they do not qualify for equality even if the differences among them are the product of historic or systemic discrimination. In exploring the problematic connection between equality and sameness, Minow (1985, 207) has observed: "The problem with this concept of equality is that it makes the recognition of difference a threat to the premise behind equality. If to be equal you must be the same, then to be different is to be unequal"..

In contrast, the focus of a substantive equality approach is not simply with the equal treatment of the law, but rather with the actual impact of the law. "Such inequality results from provisions which though seemingly neutral in their application (and therefore conforming to notions of formal equality) in reality result in discrimination. Certain provisions have the effect of discriminating between men and women because in practice they only affect women" (Maloney, 1988, 301). It seeks to eliminate substantive inequality of disadvantaged groups in society. The objective of substantive equality is the elimination of the substantive inequality of disadvantaged groups in society (Singh 1976). Parmanand Singh describes this approach as one of equality in fact or compensatory discrimination. The focus of the analysis is not with sameness or

difference, but rather with disadvantage. The central inquiry of this approach is whether the rule or practice in question contributes to the subordination of the disadvantaged group. Within this approach, discrimination consists of treatment that disadvantages or further oppresses a group that has historically experienced institutional and systemic oppression.

The shift in focus from sameness and difference to disadvantage significantly broadens equality analysis. For example, within a formal equality model, the difference between persons with physical disabilities and persons without disabilities could preclude an equality challenge. Because disabled persons are different, they do not have to be treated equally. Within a substantive equality model, however, the focus is not on whether disabled persons are different, but rather, on whether their treatment in law contributes to their historic and systemic disadvantage. Differences do not preclude an entitlement to equality, but rather, are embraced within the concept of equality. Within this model of equality, differential treatment may be required "not to perpetuate the existing inequalities, but to achieve and maintain a real state of effective equality" (Gupta, 1969, 76). Thus, the failure of a rule or practice to take into account the particular needs of disabled persons, and thus perpetuate the historic disadvantage this group, would constitute discrimination, and violate their equality rights.

II Formal Equality in Indian Constitutional Law

Indian constitutional law has been overwhelmingly informed by a formal approach to equality. Article 14 guarantees equality before the law and equal protection under the law. The Supreme Court of India has held that the equality guarantees do not require that the law treat all individuals the same, but rather, that any classifications made between individuals be reasonable. According to the Supreme Court, the classification must meet two conditions in order to be found reasonable.

> (i)...the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group (ii)...that differentia must have a rational relating to the object sought to be achieved by the statute in

question. (Budhan Choudhry v State of Bihar, AIR 1955 SC 191, Judgement on Constitutional Validity, 2 December 1954 (India))

According to the doctrine of reasonable classification, only those individuals who are similarly situated must be treated the same in law (R.K. Dalmia v Justice S.R. Tendolkar, Judgment on Constitutional Validity, AIR 1958 SC 538, 28 March 1958 (India)).[2] Within this doctrine, equality does not require that all individuals are treated the same, but only those individuals who are the same. Equality is thus equated with sameness - and sameness is the prerequisite for equality.

This formal approach to equality spills over into the judicial approaches to Articles 15 and 16 of the Constitution and the particular doctrinal tests that have been developed in relation to these rights to non-discrimination. Article 15 prohibits discrimination on the ground of religion, race, caste, sex, and place of birth. Article 15(3) allows the State to make special provisions for women. Article 15(3) has largely been interpreted as an exception to the principle of non-discrimination guaranteed by Article 15(1) or what has been described as "positive discrimination" (Reddy, 2000, 2). Special treatment is an exception to equality, rather than as a necessary dimension of it. In contrast, in the substantive equality approach, Article 15(3) has been interpreted as part of the equality provisions as a whole, so that the differential treatment authorized by this article is not an exception to, but a part of, equality. This approach was endorsed in Motiram More Dattatraya v State of Bombay, (Judgement on Constitutional Validity, AIR 1953 Bom 311, p. 314, 18 November, 1952 (India)), wherein the Bombay High Court stated

2. The Supreme Court has also emphasized another dimension of Article 14 as a guarantee against arbitrariness. See Ajay Hasia v Khalid Mujib, Judgement on Constitutional Validity, AIR 1981 SC 487, p.499, 13 November 1980 (India) and E.P.Royapappa v State of Tamil Nadu, Judgement on Constitutional Validity, AIR 1974 SC 555, p. 583, 23 November, 1973 (India). See also Maneka Gandhi v Union of India, Judgement on Constitutional Validity ,AIR 1978 SC 597, p. 624, 25 January 1978 (India). While many commentators have argued that this doctrine constitutes a significant shift in judicial approach to Article 14, the underlying understanding of equality has not been significantly altered, in so far as this approach has incorporated the doctrine of classification.

> The proper way to construe Article 15(3) in our opinion is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1).[3]

This second approach goes some distance towards a substantive model of equality, in so far as difference and special treatment do not preclude equality, but rather are embraced within it.

This modest shift towards substantial equality in the Dattatraya case is limited however, by the extent to which the principle of non-discrimination remains overwhelming influenced by formal equality. Discrimination has primarily been interpreted as any classification or distinction on the grounds prohibited by Article 15(1). Again, we can see the extent to which the approach is based on a formal model of equality, in which any distinction or differential treatment is seen as a violation of equality. Article 15(3) is thereby interpreted as authorizing the state to discriminate in favour of women. In Dattatraya, for example, the Court states: "The proper way to construe Article 15(3)...is that...discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1)." In contrast, a substantive approach to equality would interpret discrimination in terms of whether the treatment of a particular group of persons contributed to their historic and systemic subordination, or to overcoming this subordination. Again, the emphasis of substantive equality is not on sameness or difference, but on disadvantage.

Some inroads have been made towards a substantive model of equality, most notably in relation to the equality of opportunity guarantees in relation to employment and the provision for reservations contained in Article 16 (Sankaran, 2007). In State of Kerala v N.M. Thomas (Judgement on Constitutional Validity, AIR 1976 SC 490, 19 September 1975 (India)), the Supreme Court addressed the question of the

3. See also Ram Chandra Mahton v State of Bihar, Judgement on Constitutional Validity, AIR 1966 Pat 214, 12 October, 1965 (India)

appropriate relationship between Articles 16(1) and 16(4). The Court held that Article 16(4) was not an exception to Article 16(1), and held that Articles 15 and 16 must be seen as facets of Article 14. Further, in Thomas, the Supreme Court began to articulate a substantive model of equality (Gallanter, 1982). The clearest statement of this doctrinal shift is found in the judgment of Mathew, J. , who noted that the formal approach to equality requires criteria by which differences, and thus differential treatment, can be justified. He observed that "[t]he real difficulty arises in finding out what constitutes a relevant difference." (*Ibid.*) Mathew J. goes on to state, "Though complete identity of equality of opportunity is impossible in this world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1) (Thomas, para. 82).

In Indra Sawhey v Union of India (Judgement on Constitutional Validity, AIR 1993 SC 477, 16 November 1992 (India)), the Supreme Court again emphasized that equality of opportunity may require treating persons differently in order to treat them equally. Although the continued use of the language of formal equality - of the similarly situated test, and of classification - in some ways limits the development in the majority decision, the minority decision of Sawant J went considerably further in articulating a more substantive vision of equality. According to Sawant J., equality "is a positive right, and the State is under an obligation to undertake measures to make it real and effectual:...To enable all to compete with each other on an equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged " (Indra Sawhney, paras 396, 397). [4]

[4] *See also* Subhash Chandra v Delhi Subordinate Services Selection Board, Judgement on Constitutional Validity (2009) 15 SCC 458, p.493, para 79,, 4 August 2009 (India), where the Court has stated that, "The law relating to affirmative action and protective discrimination ... invoking clause (4) of Article 16 of the Constitution of India is reflected by constitutionalism...). Similarly in Union of India v Rakesh Kumar, Judgement on Constitutional Validity, (2010) 4 SCC 50,, p 72, para 87, 12 January 2010 (India), the Supreme Court has reiterated that "It is a well-accepted premise in our legal system that ideas such as "substantive equality" and "distributive justice" are at the heart of our understanding of the guarantee of "equal protection before the law". The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres"

Some courts have recognized the doctrinal shift in Thomas.[5] In Roop Chand Adlakha v Delhi Development Authority, Judgement on Constitutional Validity, AIR 1989 SC 307, p. 312, 26 September 1988 (India), the Court was critical of the doctrine of classification within formal equality, observing that the process of classification could obscure the question of inequality. The Supreme Court held that ".....to justify classification cannot rest on merely differentials which may, by themselves by rational or logical, but depends on whether the differences are relevant to the goals to be reached by the law which seeks to classify"

Similarly, in Marri Chandra Skekhar Rao v Dean, Seth G.S.M. College and Others, Judgement on Interpretation, (1990) 3 SCC 130, p.138, 2 May 1990(India), where the Supreme Court recognized that disadvantaged persons may have to be treated differently in order to be treated equally. "Those who are unequal, in fact, cannot be treated by identical standards; that may be equality in law but it would certainly not be real equality...The State must, therefore, resort to compensatory State action for the purpose of making people who are formally unequal in their wealth, education or social environment, equal in specified areas"

Notwithstanding the important developments in the Supreme Court jurisprudence of equality as including compensatory state action for historically and socially disadvantaged groups, formal equality continues to dominate much judicial thinking on constitutional equality rights. As I demonstrate in subsequent sections, the courts' approach to equality has been and remains overwhelmingly formal, with its focus on sameness and equal treatment.

III. Equality and Gender Difference:

The debate over the meaning of equality is further complicated in the context of women, and gender

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5. See Jagdish Rai v State of Haryana, Judgement on Constitutional Validity, AIR 1977 P&H 56, p. 61, 17 September 1976 (India), in which Thomas is interpreted as having "introduced a new dynamic and a new dimension into the concept of...equality of opportunity " . (See also Singh, 1976, p. 304-319; Galanter, 1989)

equality (Kaufman, 2006). The prevailing conception of equality as sameness has led to a focus on the relevance of gender difference. If women and men are different, then how can they be treated equally? But if they are treated differently, then what becomes of the principle of non-discrimination on the basis of sex? Do the constitutional guarantees require that women and men be treated the same?

Three very different approaches to the question of gender difference have been developed: protectionist, sameness, and compensatory. In the first approach, women are understood as different from men - more specifically, as weaker, subordinate, and in need of protection. In this approach, any legislation or practices that treats women differently than men can be justified on the basis that women and men are different, and that women need to be protected. Any differential treatment of women is virtually deemed to be intended to protect and thus benefit women. This approach tends to essentialise difference - that is to say - to take the existence of gender difference as the natural and inevitable. There is no interrogation of the basis of the difference, nor consideration of the impact of the differential treatment on women. In the name of protecting women, this approach often serves to reinforce their subordinate status.

The second approach is an equal treatment or sameness approach. In this approach, women are understood as the same as men - that is to say - for the purposes of law - they are the same, and must be treated the same. In this approach, any legislation or practice that treats women differently than men is seen to violate the equality guarantees. This sameness approach has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude any analysis of the potentially disparate impact of gender neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equally. Any recognition of gender difference in the past has been perceived as a tool for justifying discrimination against women.

In the third approach, women are understood as a historically disadvantaged group, and as such, in need of compensatory or corrective treatment. Within this approach, gender difference is often seen as

relevant, and as requiring recognition in law. It is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. In this approach, rules or practices that treat women differently from men can be upheld, if such rules or practices are designed to improve the position of women. If, however, the legislation or practice is based on a stereotype or assumption that women are different, weaker or in need of protection, it would not be upheld.

Proponents of this compensatory approach attempt to illustrate how the ostensibly gender neutral rules of the formal equality approach are not gender neutral at all - but rather, based on male standards and values. In such a model, women will only qualify for equality to the extent that they can conform to these male values and standards. Thus, the compensatory approach argues that gender differences must be taken into account in order to produce substantive equality for women.

The judicial approach to sex discrimination in India is overwhelmingly influenced by a formal approach to equality, and often, a protectionist approach to gender difference that has operated to preclude any entitlement to equality. And this problematic approach to gender is often informed by familial ideology, and an understanding of women's gender difference in terms of the sexual division of labour within the family. At the same time, it is important to recognize that the judicial approaches to equality and gender difference are neither homogeneous, nor static but a site of contest, in which the different visions of equality and gender difference compete.

IV Gender Equality in Judicial decisions

In this section I discuss specific cases to illustrate how gender equality plays out in judicial discourse.

a. Domestic Violence

The Protection of Women against Domestic Violence Act of 2005 (PWDVA), is one of the most progressive laws enacted in favour of women's rights in recent times. But it has also encountered a barrage of legal challenges. In 2008 a case was brought before the Delhi high court, to challenge the PWDVA as being

ultra vires the Constitution on the grounds that it accords protection only to women and not to men (Aruna Parmod Shah v Union of India (2008) 102 DRJ 543 (Delhi, India). The Writ Petition was filed by the mother-in-law for quashing of the proceedings initiated against her under the PWDVA in a lower court. The Delhi High Court upheld the Act stating that:

> ...that the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against exploitation of women (para 4).

The Court held that classifying women as a class in need of protection under this Act was not unconstitutional. While cases of men being subjected to domestic violence did occur, these cases were very few in number and did not call for the same protection under the Act.

The petitioner further challenged the Act on the grounds that it provided equal rights to those couples who were married and to those in a live-in relationship, even though the two were not alike. The Court held that just like the "abjectly dismal" (para 4) lot of the married woman, women in live-in relationships were in need of protection as such relationships were "invariably initiated and perpetuated by the male" (para 5) and the "social stigma always sticks to the women and not to the men" (para 5) in such relationships.

While the court wdid not strike down this very progressive legislation, we still have to question the reasoning on which this holding is based. The case operates within the framework of formal equality- men and women are not treated the same way under this Act as they are perceived differently whether in a marriage or in a live in relationship. While no stigma attaches to a man who is a part of a relationship in the nature of marriage, the woman who enters such a relationship is often stigmatized. The Court constructs the woman as a hapless participant in the live in relationship "perpetuated" by a man and thus in need for protection.

Familial ideology operates to portray the wife as someone who is dependent and in need of support when she is abused. A similar logic is extended into the non-marital relationship, where women are again

viewed as entering into such relationships through coercion rather than choice and rendered even more vulnerable because of the stigma attached to such relationships, especially if it does not result in marriage. The case provides an example of reinforcing gender stereotypes in familial relationships while also protecting the legislation, which in contrast is based on rights to bodily integrity and sexual autonomy. It is an important example of how we need to take a step back and examine what has been lost when we experience a victory in the court room as well as what has been won when we experience a defeat.

b. Maintenance

Constitutional challenges have been directed to the maintenance provisions of several family law statutes. The Criminal Procedure Code contains provisions that direct a man to provide alimony to a woman who is divorced or separated. The provision was challenged as violating Article 15 that prohibits discrimination on the basis of sex. In the case of Purnananda Banerjee v Swapna Banerjee and Anr, Judgement on Constitutional Validity, AIR 1981 Cal 123, 10 December, 1980 (India), the wife had filed for divorce on the grounds of cruelty and also filed an application for alimony *pendete lite* under Section 36 of the Special Marriage Act. The husband opposed the application and challenged the constitutional validity of the section., The High Court of Calcutta upheld the maintenance law on the grounds that it did not discriminate only on the basis of sex, but rather provided maintenance where the wife had no independent income sufficient for her support. (Para 9). The Court further held that even if the provision under challenge did discriminate on the basis of sex alone, it would be protected by Article 15(3) that enables the State to make special provisions for women. (Para 9)

The Court approached the question of the constitutionality of the law from the perspective of formal equality. Article 15 is seen as prohibiting any classification based on sex - or more specifically, any classification based "only on the ground of sex." In order to uphold the section the Court had to find that the section did not discriminate only on the ground of sex, but on other grounds as well. In the Court's view, the

classification was based not only on sex, but on a wife's need for economic support where she had no independent means of support. Women's economic dependency within the family is thereby separated from sex, for the specific purpose of upholding legislation intended to address this economic dependency.

The case is an interesting example of the judicial gymnastics made necessary by the formal model of equality. The technical approach of "only on the ground of sex" is used to uphold legislation that would otherwise be seen to violate Article 15, by drawing artificial distinctions between sex, and socially constructed gender differences, or in the words of other courts who have been critical of this approach, between "sex and what sex implies." The formal understanding of equality, within which any classification on the basis of sex is seen to constitute discrimination, requires that economic dependency be seen as something other than a difference based on sex, if the provision is to be upheld.

By way of contrast, a substantive model of equality would similarly allow the Court to uphold such legislation, without "severing sex from what it implies." It would direct attention to whether the rule in question contributes to the disadvantage of women, and a compensatory approach to gender, would allow a recognition that women may need to be treated differently to compensate for past disadvantage. Within such an approach, the maintenance provision could be upheld on the ground that it takes gender difference into account to compensate for past disadvantage. The reality of women's economic dependence, resulting from the sexual division of labour within the family, could be seen to require provisions that recognize and compensate women for this dependence. In Krishna Murthy v P.S. Umadevi, Judgement on Constitutional Validity, AIR 1987 AP 237, 12 June 1986 (India), section 24 of the *Hindu Marriage Act* was challenged as violating Article 14, on the basis that a spouse's liability for alimony was vague, particularly as compared to the *Indian Divorce Act*, where a husband's liability for alimony was expressly limited to a maximum of 1/5 of his income. In a brief decision, the High Court rejected the challenge, and held that there was no invidious discrimination or undue disability to the wife or the husband.

The case is also illustrative of the often contradictory nature of familial ideology. The way in which the Court casually draws a distinction between sex and women's financial needs rests, at least partially, on the naturalization of women's economic dependency within the family. Economic dependency is not seen as a socially constructed gender difference, but simply, as a natural and inevitable consequence of family life for many women. It is, at least in part, the way in which this assumption operates at the level of common sense that allows the Court to hold that the maintenance provision is not a classification on the basis of sex only, and in turn, to uphold the section from constitutional challenge. This result, which both draws upon and reinforces familial ideology, is at the same time an important victory both for the individual woman in the Calcutta case, who was awarded maintenance, and for all women who may otherwise qualify for maintenance under the specific legal provision that was challenged. The case thus illustrates the extent to which familial ideology does not necessarily always work against women's immediate interests. Rather, in effectively blocking the equality challenge to a provision intended to address women's socio-economic inequality, familial ideology can be seen to have protected these interests.

A rather different constitutional challenge was brought to the maintenance provision in the Kerala High Court (K. Shanmukhan v G. Sarojini, Judgement on Constitutional Validity, (1981) Crim. L.J. 830, 20 November 1980 (India).. The case involved a challenge to a provision that entitles a divorced woman to maintenance while a married woman is not entitled to maintenance if she refuses to live with her husband without sufficient reason, lives in adultery or lives separately by mutual consent. The marriage of the parties was dissolved and a maintenance order granted for the child. None of the parties contested the legality of the divorce. The Magistrate however did not grant maintenance to the divorcee-wife as she was living separately by mutual consent, and compensation under the Travancore Ezhava Act was promised to her at the time of divorce. The Court adopted the reasonable classification test, and held that the classification was based on intelligible differentia. In the Court's view, divorced women and married women were differently situated.

The conditions stipulated in the impugned law could only apply to married women; they were, by their very nature inapplicable to divorced women. Similarly, the Court observed that divorced women were disentitled to maintenance in situations that do not apply to married women, such as, when divorced women remarry. The Court adopted a formal approach to equality, according to which the difference between married and divorced women is seen to defeat the challenge. But there is no interrogation of whether the legal treatment disadvantages married women.

The approach to difference is essentialist: in the Court's view, the differences between married women and divorced women are seen as natural, as part of the nature of the institution of marriage. The deeper question of why married and divorced women are different remains unexamined. There is no consideration of the extent to which these differences are a product of the legal regulation of marriage -that is - married women and divorced women are different because the law treats them differently. Rather than considering the question of economic dependence and economic need, a criteria according to which married and divorced women may be similarly situated, the Court justifies the differential entitlement of maintenance on the basis of what it considers to be accepted differences. The case illustrates how virtually any difference, including those differences created solely through law can be found to be intelligible criteria, and thereby satisfy the reasonable classification test of the formal equality approach.

Nor is there any consideration as to why the law has seen fit to treat these women differently. In examining the assumptions that underlie the law, it is important to recognize that the law does not distinguish between divorced women and all married women, but rather, only those married women who refuse to live with their husbands without sufficient reason, who live in adultery, or who live separately through mutual consent. The categories of married women who are disentitled from maintenance are those who have chosen not to live with their husbands. The question which is nowhere addressed in the decision is why women who choose not to live with their husbands should be any less entitled to maintenance than divorced women (many

of whom no doubt also choose not to live with their husbands). The answer lies in the assumptions about women's roles and responsibilities in marriage. The institution of marriage is seen to involve, first and foremost, the obligation of the wife to live with her husband. The status of being married precludes the idea that a woman can choose to not live with her husband.

These assumptions about the nature of marriage and about women's roles within marriage remain uninterrogated. According to the formal model of equality, the Court is able to simply point to what it understands to be significant differences. The mere existence of these differences precludes any further analysis of the source of these differences. As with so many of the cases involving challenges to family laws, women's discursively constituted roles as wives and mothers are accepted as natural, without any further consideration of the inequalities that these roles have produced, nor of the unequal social relations that have produced these roles. Again and again, the formal model of equality and familial ideology which constructs women as naturally wives and mothers preempt any substantive interrogation of inequality and disadvantage. At the same time, within the context of maintenance laws, familial ideology has largely operated to uphold these laws from equality rights challenges by men who have sought to escape from their legal obligations to support their wives.

c. Sexual Expression and Sexual Harassment

Indian Courts have taken a very conservative view of sexual expression and have constructed the woman as a helpless passive victim of the male aggressor and in coming to this conclusion about the sexuality of women have failed to distinguish between a case of sexual harassment, rape and positive sexual expression. While there have been a handful of cases that have acknowledged the sexual agency of women, most of the cases have understood the sexual lives of women as the centre of their dignity in society. In the case of A and B v State Thr. N.C.T. of Delhi and Anr, Judgement on Quashing of FIR, 2010 Cri LJ 669, 25 May 2009 (India), a criminal case was registered against a married couple for "sitting in an objectionable position near a

Metro pillar and were kissing each other" under the obscenity provisions and resulting in a situation where "passersby were feeling bad" (para 9). The Delhi High Court held that "it is inconceivable how, even if one were to take what is stated in the FIR to be true, the expression of love by a young married couple, in the manner indicated in the FIR, would attract the offence of *obscenity* and trigger the coercive process of the law" (para 3). It is important to note that this judgment though prima facie looks very progressive, is severely limited in scope by the explicit mention of the married couple who are engaging in the expression of love.

The recognition of sexual agency within a marital context stands in contrast to the way in which sexual subjectivity is treated in the context of sexual harassment in the workplace. In 1997 the Supreme Court in the case of Vishaka v. State of Rajasthan, Judgement on Enforcement of Fundamental Rights, ([1997] AIR 3011 (SC),13 August 1997 (India), recognized the problem of sexual harassment at the workplace and accepted that the failure to check this amounted to the violation of the equality rights of the woman. The petition was filed when a state government employee who worked as a part of the Women Development Programme was brutally raped by a group of landlords in a village in Rajasthan. The Rajasthan High Court acquitted the rapists, which led to protests and the subsequent\filing of the petition by Vishaka, an organization working for women's rights. The Supreme Court formulated guidelines to address sexual harassment at the workplace and defined sexual harassment as an unwelcome sexual conduct which disadvantages a woman in recruitment/promotion or creates a hostile work environment. However, in the Indian Courts the second requirement of hostile work environment has gradually been diluted and the focus has been on first leg that is sexual conduct.

In the first case decided after Vishaka, (Apparel Export Promotion Council v. A K Chopra, Judgement on Enforcement of Fundamental Rights, AIR 1999 SC 625, 20 January 1999 (India)), the complainant sued the chairman of the company who had tried to molest her several times. In this case, the definition of what constitutes sexual harassment was expanded in these words:

> Any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. (para 25).

The court held that the woman had been subject to sexual harassment even though it is never specified what exactly happened. And the conduct was regarded as unwelcome because in the courts view she was unmarried and hence not familiar with or knowledgeable about matters of sex. Implicit in this holding is that the dress and past sexual conduct of the complainant may be used to assess whether the conduct was in fact unwelcome. Such an understanding renders only some kind of women worthy of protection under the legal regime, possibly excluding the bar dancer, the waitress and the sex worker.

Additionally, the court read into the definition of sexual harassment conduct the term "outraging the modesty" of a woman, a 19th century expression that had been included in the Penal Code drafted by the Victorian colonial ruler and continues to be in operation today. In the process, the court emphasized the first leg of the definition of sexual harassment that is sexual conduct, while simultaneously diluting the second leg of the test formulated by Vishaka which requires that the alleged sexual harassment creates a hostile work environment or prejudices the woman either in recruitment or promotion. The recent enactment of the Prevention of Sexual Harassment at the Workplace Act which has yet to brought into force, contains some of these very same limitations.

Thus what is once again a progressive law, can be use to reproduce governing sexual and gender norms, and continue to view the issue of equality through a protectionist approach. The impact of course is to at one level recognize that the problem of sexual harassment in the workplace does exist, but through reasoning that does not subvert or disrupt sexual or gender stereotypes.

V - Conclusion

Indian sex discrimination case law has been informed by a formal approach to equality, within which

almost any differences can justify the differential treatment of women in law. Sometimes this approach has the effect of upholding legislative provisions designed to benefit women. But, often times, this approach has the effect of upholding legislative provisions that have disadvantaged women. The formal approach to equality, coupled with a protectionist approach to gender difference, preempts any consideration of disadvantage: women are just different. I have further examined the way in which familial ideology interacts with this dominant discourse of equality and undermines any consideration of substantive inequality. Familial ideology constitutes women as wives and mothers reinforcing the construction of gender difference. The woman is different, and thus, is precluded from any entitlement to be treated the same. Familial ideology thereby operates to immunize laws that treat women differently then men from constitutional challenge.

As I have argued, however, the impact of this familial ideology on women in the context of equality rights challenges is contradictory. In many cases where men have sought to have legislation that is intended to promote women's interests struck down as discriminatory, familial ideology has operated to defeat the challenge. The understanding of women as wives and mothers, as naturally different from men, lead the courts to conclude that women need not be treated the same as men, and that legislation that treats women differently is not unconstitutional. Maintenance laws, for example, are thus upheld on the ground that women are different, and in need of protection. Paradoxically, within a formal approach to equality, this understanding of women as different has had the effect of upholding laws that promote women's substantive equality.

In contrast to formal equality, there is a second substantive model of equality, in which the central question is whether the impugned legislation contributes to the subordination of the disadvantaged group, or to overcoming that subordination. I suggest that substantive equality analysis might alter both the reasoning and results of the cases, by directing attention to the question of disadvantage. Such an approach to equality does not, in and of itself, answer the question of the relevance of gender difference. Rather, this substantive

approach simply directs the interrogation to whether gender difference needs to be taken into account in furtherance of the substantive equality of women. This approach opens space within which the difficult question of gender difference can be examined. By directing attention to this question of disadvantage, this approach creates space for an analysis of the relationship between difference and disadvantage. In this way, difference is not assumed to be natural, nor assumed to be relevant. Rather, difference must itself become part of the analysis, rather than a justification for not pursuing an equality analysis. Substantive equality redirects our attention to disadvantage, and to a critical interrogation of the dilemmas of difference; to the ways in which difference has been socially constructed, to the ways in which difference has very real material implications in individual's lives, and to the ways in which judicial approaches cannot simply proclaim on the relevance or irrelevance of difference, but rather, must begin to deconstruct the assumptions that are deeply embedded in the way we see the world.

The relationship between the discourses of equality and familialism will not be automatically resolved by a shift to a substantive model of equality. Familial ideology can still operate to blind courts to the socially constructed nature of women's roles as wives and mothers in the family. The substantive approach to equality simply opens the space within which this familial ideology, and the way in which these discourses constitute women as naturally different, can be further scrutinised and deconstructed. By redirecting our attention to disadvantage instead of difference, this approach may facilitate an analysis of the ways in which women's position in the family has contributed to their social, economic and political inequality. It does not in any way guarantee that the ideological grip of the family will be loosened. But, it might take us a few steps further in the project of destabilising assumptions about gender difference. A substantive approach to equality may provide feminists engaged with law with a way to make more complex legal arguments.

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