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ON WOMEN, EQUALITY AND THE CONSTITUTION: THROUGH THE LOOKING GLASS OF FEMINISM

Ratna Kapur* and Brenda Cossman**

ABSTRACT

This article explores the approaches that have been adopted by the Supreme Court and High Courts in constitutional cases on sex discrimination. It begins by reviewing and evaluating two competing models of equality—formal versus substantive equality. The authors illustrate the extent to which Indian constitutional law is informed by a formal model of equality, and how attempts at moving towards a more substantive understanding have been thwarted by the deeply embedded assumptions regarding equality as formal equality. They examine three competing approaches to the question of the relevance of gender difference: protectionist, sameness, and corrective. Finally, they contextualise the Supreme Court and High Court case law on gender discrimination within these debates.

1. INTRODUCTION

Formal equality for women is explicitly enshrined within Indian law. Notwithstanding formal guarantees of equality, Indian women's lives continue to be characterised by pervasive discrimination and substantive inequality. By examining the judicial interpretations of Indian constitutional law, this paper will illustrate how the legal system itself contributes to the gap between the formal guarantees of gender equality and the substantive inequality that plagues women's lives. We will argue that with some notable exceptions, the judicial approach to the equality guarantees of the Constitution is informed by a problematic approach to both equality, and gender difference.

The article begins by reviewing and evaluating two competing models of equality—formal versus substantive equality. We will attempt to briefly

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illustrate the extent to which Indian constitutional law is informed by a formal model of equality, and how attempts at moving towards a more substantive understanding have been thwarted by the deeply embedded assumptions regarding equality as formal equality. The paper will subsequently examine three competing approaches to the question of the relevance of gender difference: protectionist, sameness, and corrective. We then attempt to contextualise the Supreme Court and High Court case law on gender discrimination within these debates.

II. **Formal versus Substantive Equality**

The understanding of equality that has dominated Western thought since the time of Aristotle has been one of formal equality. Equality has been interpreted as ‘treating likes alike’, its constitutional expression in American and subsequently Indian equal protection doctrine, as the requirement that ‘those [who are] similarly situated be treated similarly’. 1 Within this prevailing conception, equality is equated with sameness. Indeed, sameness is the entitling criteria for equality. Only if you are the same are you entitled to be treated equally. Further, within this equal treatment approach any difference in treatment as between similarly situated individuals, constitutes discrimination. 2 In other words, if you are the same, then you should not be treated differently.

The similarly situated test requires that the Court begin by defining the relevant groups or classes for comparison. In contrast a substantive model of equality begins with the recognition that equality sometimes requires that individuals be treated differently. This approach is extremely critical of the formal model of equality, and its emphasis is on sameness. Martha Minow, in exploring the problematic connection between equality and sameness 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. 3

1 Joseph Tussman and Jacobus Tenbroek, ‘The Equal Protection of the Laws’ (1949) 37 Calif L Rev 341; see also Haragopal Reddy, ‘Equality Doctrine and the Indian Constitution’ (1982) 45 Andhra Law Times 57, 58 [‘All persons are to be treated alike, except where circumstances require different treatment’].

2 As Parmaman Singh notes in Singh, ‘Equal Opportunity and Compensatory Discrimination: Constitutional Policy and Judicial Control’ (1976) 18(2) Journal of The Indian Law Institute 300, 301 [‘...legal equality requires the absence of any discrimination in the words of the law’]; see also, KC Dwivedi, ‘Right to Equality and the Supreme Court (1990) 11, who defines equality as signifying ‘that among equals law should be equal and equally administered’.

This initial definitional step can effectively preclude any further equality analysis. If the Court defines the classes as different, then no further analysis is required; difference justifies the differential treatment. 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.

The focus of a substantive equality approach is not simply on equal treatment under the law, but rather on the actual impact of the law. The explicit objective of a model of substantive equality is the elimination of the substantive inequality of disadvantaged groups in society. As Parmanand Singh notes, it ‘takes into account inequalities of social, economic and educational background of the people and seeks the elimination of existing inequalities by positive measures’. The focus of the analysis is not with sameness or difference, but rather with disadvantage. Substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society.

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4 Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights For Women: One Step Forward Or Two Steps Back, (1989) 153 ['The way the 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 at 155, ['Just as the way the Court defines a class can determine the outcome, so can the way the Court compares or fails to compare the classes it has identified. Sometimes the courts simply fail to make a comparison; and sometimes comparisons are tautological because the courts compare classes only within the terms already set out in the law. ']

5 The problems with the formal approach to equality, and with the similarly situated test have been widely recognised and criticised. For example, the Supreme Court of Canada in Andrews v the Law Society of Upper Canada [1989] 1 SCR 43, held: ‘The test as stated is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremburg laws of Adolf Hitler. Similar treatment was contemplated for all Jews.’ In A Laxamana Murthy v State of AP, A 1980 A.P. 293, 298 the High Court similarly observed: ‘Hitler’s classification of all Jews into a separate category for the purposes of butchering them and Naxalites classification of all landlords into a separate category for purposes of exterminating them cannot therefore be faulted on this theory of equal protection clause’.

6 As Maureen Maloney has written in Maloney, ‘An Analysis of Direct Taxes in India: A Feminist Perspective’ (1988) 30(4) Journal of the Indian Law Institute 397: ‘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.

7 cf Parmanand Singh (n 2) 301. He describes this approach as one of equality in fact, or compensatory discrimination.

8 Kathy Lahey, ‘Feminist Theories of (In) Equality’, in S Martin and K Mahoney (eds) Equality and Judicial Neutrality (1987) 71 argues that courts must adopt an approach which considers the effect of the rule or practice being challenged, to determine whether it contributes to the actual inequality of women, and whether changing the rule will actually produce an improvement in the specific material conditions of the women affected. See also Colleen Sheppard, ‘Equality, Ideology and Oppression: Women and the Canadian Charter’, Charter Watch: Reflections On Equality (1986) who argues that the central question to be asked is whether the rule or practice in question contributes to the social inequality of women.
contributes to the subordination of the disadvantaged group. Accordingly, 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 the equality analysis. Within a formal equality model, the difference between, for example, able bodied and less able bodied persons could preclude an equality challenge. According to this model, 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 disadvantage. Indeed, differences are not seen to 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.’ As such, the failure of a rule or practice to take into account the particular needs of disabled persons, and thus perpetuate the historic disadvantage of this group, would constitute discrimination, and violate their equality rights.

III. JUDICIAL APPROACHES TO EQUALITY RIGHTS IN INDIA

The following section will briefly review the judicial approaches to the equality rights guaranteed by Articles 14, 15 and 16 of the Indian Constitution. It will attempt to illustrate the extent to which the constitutional doctrine is informed by a formal model of equality, in which equality is equated with sameness. While some inroads have been made towards a substantive model of equality in recent case law, the continuing hold of the formal model of equality over the judiciary's approach has operated to profoundly limit even these more progressive approaches to the equality guarantees.

A. Article 14

Article 14 of the Constitution guarantees equality before the law and equal protection under the law. It has been interpreted as a prohibition against unreasonable classification. The equality guarantee does not require that the law treat all individuals exactly the same. Rather, it allows the State to make classifications. However, this power of classification must be exercised on
The Supreme Court has expressly adopted a similarly situated approach to equality rights under Article 14. Accordingly, the first step in determining whether Article 14 has been violated is a consideration of whether the persons between whom discrimination is alleged fall within the same class. If the persons are not deemed to be similarly circumstanced, then no further consideration is required.

The principles adopted by the Court are premised on a formal model of equality. The focus of the analysis is on the question of sameness—on determining whether the persons among whom the denial of equality is alleged are the same, or whether the classification is based on reasonable differences. In this approach, there is no interrogation of substantive inequalities—of such social and economic disadvantages that may have produced differences between persons.

More recently, the Supreme Court has emphasised a ‘new dimension’ of Article 14, namely ‘that it embodies a guarantee against arbitrariness’. While the new doctrine has been harshly criticised as a significant shift away from the reasonable classification approach by some commentators, there has been little if any significant change in the underlying understanding of equality. The new judicial reasoning has incorporated the doctrine of

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10 Article 14 provides: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The Supreme Court has held that two conditions must be met to pass this test of reasonable classification: [*'(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 relation to the object sought to be achieved by the statute in question’*]: Budhan Chaudhry v State of Bihar, (1955) A SC 191; State of W.B. v Anwar Ali (1952) SCR 340; R.K. Dalmia v Justice S.R. Tendolkar, (1958) A SC 538. See also HM Seervai, Constitutional Law of India (3rd edn 1988) 292-293; DD Basu, Constitutional Law of India (10th edn 1988) 32.

11 ‘The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another, if as regards the subject matter of the legislation, their position is substantially the same’. cf Dalmia, ibid 539. See also U.P. Electric Co. v State of U.P. (1970) A SC 21.

12 See, for example, DD Basu (n 10) 32: ‘When a law is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation’.

13 Ajay Hasia v Khalid Mujib (1981) 1 SCC 487, 499; E.P. Royappapa v State of Tamil Nadu (1974) AIR 555, 583; Ramana Dayaram Shetty v LAAI, (1979) A SC 1628, 1643. See also Maneka Gandhi v Union of India (1978) AIR 597, 624, where the Court held: ‘Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment’.

14 cf HM Seervai (n 10) 272-279, para 16.
classification into its folds and thus continues to be premised on a formal model of equality.\textsuperscript{15}

\textbf{B. Article 15}

Article 15 prohibits discrimination on the ground of religion, race, caste, sex, and place of birth. In reviewing the judicial interpretation of Article 15, we will attempt to identify some of the doctrinal techniques used by the Courts and locate these techniques within the broader context of the competing models of equality.

(i) Discrimination

A number of debates have arisen in the case law regarding the meaning of discrimination within Article 15.\textsuperscript{16} At a general level, this concerns the context of the judicial interpretations of the treatment authorised by Article 15(3). This article, which allows the State to make special provisions for women, has been interpreted as authorising the State to discriminate in favour of women. However, a further question is whether article 15(3) authorises discrimination against women. In \textit{Mahadeb Jiew v RB Sen},\textsuperscript{17} the Calcutta High Court held that Article 15(3) could not be used to authorise discrimination against women but rather, from the language used in the Article, it was clear that the intention of the framers of the Constitution was to protect the interests of women and children.\textsuperscript{18} Article 15(3) has thus been limited to upholding legislation that benefits women; not extended to

\begin{footnotesize}
\begin{enumerate}
\item cf HM Seervai (n 10) 408: ‘The doctrine of classification ... is ... a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting a denial of equality. If the classification is not reasonable ... the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.’
\item Article 15 provides:-
(1) The State shall not discriminate against any citizen on grounds only of religion, race, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –
(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
\item According to the Court, Article 15(3) did not use the language ‘discriminate against’ but rather use ‘special provisions for’. In \textit{Dattatraya Motiram More v State of Bombay} (1953) A Bom. 311, at para 7, the Court held that the effect of the joint operation of Article 15(1) and 15(3) was that the State could discriminate in favour of women against men, but could not discriminate in favour of men against women. See also \textit{Shahdad v Mohd Abdullah} (1967) A 1 & K. 120, \textit{Mt. Choki v State} (1957) A Raj. 10. Seervai (n 10) 410 is in agreement with this approach, noting at 410 that ‘... it effectuates both the general policy underlying Art. 15(1) and the necessity of making an exception in favour of women and children, whose position requires special protection’.
\end{enumerate}
\end{footnotesize}
authorising discrimination against women. This interpretation is useful, as far as it goes. At the level of application, when the Courts must interpret whether legislation benefits or discriminates against women, the doctrine provides little guidance. The absence of a substantive approach to equality that attempts to contextualise the legal regulation of women within gender oppression allows the courts to classify laws as ‘protection’. There is little consideration of whether the laws actually benefit women or of the appropriateness of the underlying rationale for the ostensibly protectionist legislation.\footnote{This approach was also followed in Anjali Roy v. State (1952) A Cal. 825.}

This question of the treatment authorised by Article 15(3) is related to a deeper question of the meaning of discrimination within Article 15 more generally. Two approaches to the meaning of discrimination can be identified in the case law. In the first approach, discrimination means any classification or distinction on the prohibited grounds. It is based on a formal understanding of equality as sameness, and thus, of discrimination as any distinction as between similar individuals on the prohibited grounds. This formal approach to discrimination is evident in the court’s use of the terms ‘preferential’ or ‘compensatory’ discrimination. The courts speak of discrimination in favour of women—a term that only makes sense if discrimination is taken to mean any classification or distinction.\footnote{In Dattatraya Motiram More (n 18) 314, para 7, 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 the second approach, discrimination means an adverse distinction on the prohibited grounds, that is, distinctions that disadvantage. It is based on a more substantive understanding of equality, concerned not simply with treatment that differentiates, but rather, with treatment that disadvantages. This approach to discrimination was suggested in Anjali Roy, wherein the Court held:

\begin{quote}
All differentiation is not discrimination but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural differences between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristics or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiations made as a justifying reason.
\end{quote}\footnote{cf Anjali Roy (n 19) para 16. This substantive approach to discrimination was also hinted at in Kathi Ranning Rawal v Saurashtra (1952) A SC 123, 125 wherein Sastri, CJ states: ‘Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context.’}
The Court's approach goes some way toward substantive equality, in so far as it directs attention to whether the distinctions drawn by the legislation are invidious. However, this shift is limited by the Court's understanding of difference as effectively precluding equality. Within this framework of formal equality, invidious distinctions would only be those distinctions not based on real differences. The Court's approach thereby remains overly influenced by a formal model of equality.  

(ii) Relationship between Articles 15(1) and 15(3)

A major issue that has arisen with regard to Article 15 is the relationship of clauses (1) and (2) with clauses (3) and (4). Two approaches to this relationship have emerged in judicial decision-making. We will refer to them as the 'exception approach' and the 'holistic approach'. In the first approach, Articles 15(3) and 15(4) are interpreted as exceptions to the general equality guarantees. A classic statement of this 'exception approach' is found in Anjali Roy v State of W.B., in which the Calcutta High Court held that Article 15(3):

...is obviously an exception to clause (1) and (2) and since its effect is to authorise what the Article otherwise forbids, its meaning seems to be that notwithstanding that clause (1) and (2) forbid discrimination against any citizen on the grounds of sex, the State may discriminate against males by making a special provision in favour of females.

The 'exception approach' has been overwhelmingly supported by the commentators. In the second approach, Article 15 is seen as a whole, and therefore Article 15(3) and 15(4) are used to interpret the equality provisions.

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22 There is no symmetry between the formal approaches to discrimination and to the relationship between the articles discussed in the following section; nor between the more substantive approaches to discrimination and to the relationship between the articles. The difference between these understandings of discrimination and of the relationship between the articles remain unarticulated, and the relationship to the broader models of equality is obscured in both the case law and the commentaries. For example, in Dattatraya Motiram More (n 18), the Court adopted the formal approach to discrimination, yet was also shown to have adopted the more substantive approach to the relationship between the Articles. Conversely, in Anjali Roy (n 19) the Court adopted a more substantive approach to discrimination, but the formal approach to the relationship between the Articles. This apparent inconsistency is also evident in the commentaries.

23 cf Anjali Roy (n 19) 830-831.

24 HM Seervai (n 10) 396 for example, argues that Articles 15(3) and 15(4) must be seen as exceptions to the general guarantees of equality. ['Article 15(1) prohibits discrimination only on the ground of sex; therefore a discrimination in favour of women would necessarily discriminate against men only on the ground of sex and would be void. The discretionary power in Art. 15(3) relaxes this prohibition in favour of women by expressly authorising such discrimination by way of an exception']. See also HM Seervai, Supplement to the Third Edition (1988) 241. Jain and Basu both argue that Articles 15(3) and 15(4) are exceptions to Articles 15(1) and (2). DD Basu (n 10) 67 argues, for example: 'Being an exception, clause (4) cannot be so extended as in effect to destroy the guarantee in cl(l).... See also, MP Jain, Indian Constitutional Law (3rd edn 1978) 430.
more generally. This ‘holistic approach’ was endorsed in Dattatraya, wherein the Bombay High Court held:

...Article 15(3) is obviously a proviso to Article 15(1) and proper effect must be given to that proviso ... 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). 25

The ‘holistic approach’ appears to have been given more general expression by several High Courts, and the Supreme Court. 26 These two competing approaches to the relationship between the clauses of Article 15 roughly correspond to the two competing models of equality. In the first, ‘exception approach’ equality is equated with sameness. Any deviation from identical treatment as contemplated by Article 15(3) and 15(4) must then be considered an exception to equality. In the second, ‘holistic approach’, equality is understood as sometimes requiring that individuals be treated differently. Therefore, the special treatment contemplated by Article 15(3) and 15(4) need not be seen as an exception, but as a fundamental part of equality. 27 This approach goes some way toward a substantive model, in so far as difference need not preclude equality, but rather, is embraced within it. This approach, however, stops considerably short of recognising equality as essentially a question of disadvantage. The shift toward substantive equality is further limited by the extent to which the Court remains overly influenced by a formal model of equality. For example, while the Court in Dattatraya

25 cf Dattatraya Motiram More (n 18) 314. See also Ram Chandra Mahton v State of Bihar (1966) A Pat. 214. Basu (n 10) 68 is extremely critical of this approach. With regard to the decision in Dattatraya Motiram More he writes: ...such discrimination in favour of women would be justifiable only if clause (3) could be regarded as a complete exception to clause (1) of Article 15. The use of the word ‘women’ in juxtaposition to children in (3)(d) suggests that the special provision referred to in it must be related to such disabilities which are peculiar to women and children.

26 An early indication of the Supreme Court’s preference for it is evident in Abdul Aziz v Bombay (1954) A SC 321. In rejecting the argument that Article 15(3) should be restricted to provisions that benefit women, the Court stated that ‘Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights.’ More recently, the Supreme Court has held that Articles 14, 15 and 16 constitute a single code. See Kerala v N. M. Thomas (1976) I SCR 906; Shamsher Singh v State (1970) AP & H 372.

27 Such an approach has been advocated by Marc Galanter, in relation to the provisions of both Article 15 and 16. ‘Article 15(4) and 16(4) are undoubtedly exceptions to the constitutional prohibition of State employment of the otherwise forbidden criteria of caste, religion and so forth. But it does not follow that they are exceptions to the policy of equal treatment mandated by Articles 14, 15 and 16. In respect to the general policy of equality they represent an empowerment of the State to pursue substantive equality in respect to the disparities between the backward classes and others’ . Marc Galanter, ‘Symbolic Activism: A Judicial Encounter with the Contours of India’s Compensatory Discrimination Policy’ (1989) Law and Society in Modern India 112 (1989).
adopted this more substantive understanding of the relationship between the articles, it also adopted an approach to discrimination based on a formal model of equality.\footnote{For example, HM Seervai (n 10) 404, an advocate of the formal equality approach to the relationship between the Articles, adopts a more substantive definition of discrimination. He notes that the definition of discrimination in the Oxford dictionary is ‘to make an adverse distinction with regard to; to distinguish unfavourably from others’. This apparent inconsistency, however, in Seervai’s analysis is remedied, in so far as, in his view any preferential treatment of one group can be seen as adverse treatment of another group. Thus, virtually any distinction can be understood as adverse distinction. His concept of discrimination can thereby be seen as premised on a formal model of equality in which equality is equated with sameness, and discrimination with any difference in treatment as between those who are the same.}

(iii) *On the Grounds Only of Sex*

Article 15(1) prohibits discrimination ‘...on the grounds only of religion, race, caste, sex, place of birth or any of them.’ It has been interpreted as requiring discrimination ‘only’ on the prohibited grounds. As the Court noted in *Anjali Roy v State of W.B.*:

[T]he discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.\footnote{cf *Anjali Roy* (n 19) 829 para 16. See also *Purnananda Banerjee v Swapna Banerjee* (1981) A 1981 Cal 123; cf *Shahdad v Mohd Abdullah* (n 18).}

According to this interpretation, if discrimination is found to exist on grounds other than those enumerated, then there is no violation of Article 15(1). Even discrimination on the basis of sex, coupled with discrimination on other non-enumerated grounds, would not constitute a violation.\footnote{The Court in *Dattatraya Motiram More* (n 18) 313 para 7, similarly held: ‘It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 15(1). If there is a discrimination in favour of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are of a particular sex’.}

The focus on ‘the grounds only of sex’ has been used primarily to uphold legislation that provides preferential treatment for women. In attempting to uphold this legislation the courts have searched for some other ground on which the legislative distinction is based. In their search, the Courts have caste their net widely. They have found, for example, that distinctions based also on the ‘backward’ social position of women, on the financial need of wives for support, and on public morality constitute grounds other than those
stated in Article 15(1). This process by which the courts are attempting to uphold legislation that gives preferential treatment to women is somewhat misdirected. Both the backward social position of women, and the financial need of wives for support are products of the social, economic and political inequality of women. Legislation designed to promote women's position and/or provide for the financial needs of economically dependent women should not be seen as discrimination against women. But the reason is not because these distinctions are broader than the ground of sex. Rather, it is precisely because these provisions are based on ameliorating the conditions that women have suffered on the ground of sex. Sex is a category which has traditionally denoted disadvantage—it has been used as a ground for discrimination and has resulted in women being 'more backward' than men. Yet, the Court attempts to distinguish the ground of sex from other factors, rather than seeing the fundamental relationship between them.

The intention of the Courts in their inquiry into 'on the ground only of sex' is laudable. They can in some respects be seen to be pursuing a more substantive vision of equality—that is, one which is concerned with promoting the social, economic and political equality of women. As such, the courts do not strike down legislation designed to benefit women by calling it discrimination on the basis of sex. However, their focus on the technical meaning of 'only on the ground of sex' obscures this normative vision of equality. Indeed, the construction of this issue as a narrow and mechanical question of interpretation is motivated by the prevailing understanding of equality as formal equality. The deeply rooted belief that any special treatment constitutes an exception to equality leads the Court to attempt to avoid the issue (Article 15 (3) notwithstanding) by constructing the discrimination as not only on the basis of sex. Moreover, this narrow focus on 'the grounds only' of sex is potentially dangerous. Without an inquiry into disadvantage and substantive inequalities, a search for other grounds could even be used to uphold legislation that disadvantages women. For example, legislation prohibiting women from voting could be found to be based not only on sex, but also on the 'backward social position' of women.

31 In Girdhar Gopal v State of M.B. (1953) A MB. 147, the Court adopted this approach to uphold the constitutionality of section 354 of the Indian Penal Code the offence of outraging the modesty of women. The Court held at para 5: 'If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of property, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Art. 15(1). It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under s. 354 not merely because women are women, but because of the factors enumerated ...'.
The Delhi High Court, in *Walter Alfred Baid v Union of India*, although dealing primarily with a challenge under Article 16(2), recognised some of the problems implicit in this approach to 'only on the grounds of sex'. The Court observed:

[I]t is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex 'alone' because it is based on 'other considerations' even though these other considerations have their genesis in the sex itself. It virtually amounts to saying that woman was being discriminated against...not because she belonged to a particular sex but because of what the sex implied...

The Court concluded:

Sex and what it implies can not be severed. Considerations which have their genesis in sex and arise out of it would not save such a discrimination. What could save such a discrimination is any ground or reason independently of sex such as socio-economic conditions, marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc.

The approach in *W.A. Baid* recognised the connection between sex and the social implications of sex, and thus criticised the narrow doctrinal approach to 'only on the ground of sex'. However, the approach is not unproblematic. The decision is rooted firmly within a formal model of equality, and the result of the case was to strike down a recruitment rule that had been advantageous for women.

While the debates within the Article 15 case law reveal a tension between a formal and substantive vision of equality, these underlying normative differences remain unarticulated, and the case law remains overly determined by a formal model of equality. Rather than weaving the various substantive equality threads together, the threads are left to unravel.

c. Article 16
A similar tension between formal and substantive equality is apparent in Article 16, which guarantees equality of opportunity and prohibits

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33 Ibid 306 para 10.
34 Ibid 308 para 10.
discrimination in matters of employment. A formal interpretation of equality of opportunity pervaded the early case law. For example, in *All India S.M. and A.S.M.'s Assn. v Gen. Manager Central Railway*, the Supreme Court held that equality of opportunity in matters of promotion guaranteed by Article 16(1) must be interpreted to mean equality among members of the same class of employees, and not equality among members of different classes. The similarly situated test, with its emphasis on sameness as the basic entitlement to equality, thus infused the court's understanding of equality of opportunity and reinforced the formal model of equality.

Notwithstanding this formal equality approach, a tension has emerged within the court's approach to equality of opportunity. For example, a similar controversy has arisen over the appropriate relationship between the clauses of article 16. Within the formal approach to equality of opportunity, the special provisions authorised by 16(4) for 'backward classes' are seen as exceptions to the general equality of opportunity guarantees under Articles 16(1) and 16(2). The commentators again advocate the formal approach. Within the second, more substantive approach to equality of opportunity, the

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35 Article 16 provides:-(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.
(3) 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.
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination


37 It should be emphasised that the critique is directed at the judicial approach to equality, and not necessarily at the particular outcome of the cases. The All India SM and ASM's Assn case could have been decided by reference to a more substantive understanding of equality, and equality of opportunity. The differential treatment in the case, namely that between road-side station masters and guards, was not discrimination, that is, it was not treatment based on personal or group characteristics and/or historical disadvantage. The ruling of the Supreme Court can be supported, without endorsing the particular model of equality that informed the Court's reasoning.

38 DD Basu (n 10) 71 argues, for example: 'Clause (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment, under the State. Clauses (3) - (5), however, lay down several exceptions to the above rule of equal opportunity.'
special provisions are seen to be used in interpreting the general guarantees. This approach has been adopted in the case law. Some High Courts have gone so far as to say that Articles 14, 15 and 16 constitute a single code.

The Supreme Court has addressed this debate. In *Kerala v N.M. Thomas*, the Supreme Court held that Article 16(4) was not an exception to Article 16(1), and further held that Articles 15 and 16 are facets of Article 14. Indeed, in Thomas, the Supreme Court began to articulate a substantive model of equality. The clearest statement of this doctrinal shift is found in the judgment of Mathew, J. which explicitly rejects the formal model of equality and argues that equality of opportunity will require more than equality in law or formal equality.

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).

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39 Marc Galanter has described the formal approach to equality of opportunity as one in which: 'Equality is visualised as identical opportunities to compete for existing values among those differently endowed, regardless of structural determinants of the chances of success or of the consequences for the distribution of values'. Marc Galanter (n 27) 262. Within this view, preferential treatment, or 'compensatory discrimination' is seen as an exception to equality; it 'is accepted as a marginal adjustment to be made where the results of complete equality are unacceptable'. He contrasts this approach with a second, more substantive approach to equality, in which the present is seen as a 'transition' from past inequality to a desired future of substantive equality; the purposes of compensatory discrimination is to promote equalization by offsetting historically accumulated inequalities. Thus compensatory discrimination does not detract from equality in the interests of present fairness; rather, it is seen as a requisite to the fulfilment of the nation’s long run goal of substantive redistribution and equalization.

40 See *Shamsher Singh Hukam Singh v Punjab* (1970) A P & H. 372. For example, in Shamsher Singh, the Court held: 'Article 14, 15 and 16, being the constituents of a single code of Constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Article 16(2).'

41 AIR 1976 SC 490.

42 For a detailed discussion of the doctrinal shift in Thomas, see Marc Galanter (n 27) 265-278.

43 Justice Mathews argues that formal equality is achieved by treating all persons equally: '[ Each man to count for one and no one to count for more than one. But men are not equal in all respects ...]. We, therefore have to resort to some sort of proportionate equality in many spheres to achieve justice.' *Kerala v NM Thomas* (n 41) 513 para 78. He continues: '[The principle of proportional equality is attained only when equals are treated equally and unequals unequally. This would raise the baffling question: Equals and unequals in what?] Mathew, J. notes the formal approach to equality requires criteria by which differences, and thus differential treatment can be justified, and observes that '[the real difficulty arises in finding out what constitutes a relevant difference.]

44 'Equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities, but on the existence of abilities.' Ibid 515 para 90. A similar shift is evident in Krishna Iyer J.'s decision, who refers, for example, to the need to bring the weaker sections of society '[to a real, not formal equality]' 1. Ibid 529 para 142 He concludes: '[...that the genius of Articles 14 to 16 consist not in literal equality but in progressive elimination of pronounced inequality.]' Ibid 537 para 167.

45 Ibid 514 para 82. At 515 para 89, he writes '...if we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social educational and economic environment.'
In *Thomas*, the Supreme Court began to articulate a substantive model of equality. While some courts have recognised the doctrinal shift in *Thomas*, other courts and commentators have argued strenuously against it. Not surprisingly, the *Thomas* case has been most severely criticised by those commentators who remain firmly committed to equality as formal equality. Their criticisms, however, are rarely articulated in such terms, but rather, remain focussed on the narrow, doctrinal aspects of the case. Indeed, the failure of the Court to go far enough in articulating its substantive model of equality can be seen to have contributed to this critical reaction.

The Supreme Court has continued to approach Article 16 in a manner that is critical of formal equality, and appears to be more informed by a substantive approach. In *Roop Chand Adlakha and others v Delhi Development Authority*, the Court was critical of the doctrine of classification within formal equality, observing that the process of classification could obscure the question of inequality. More recently, in *Marti Chandra Shekhar Rao v Dean, Seth G.S.M.*, the Supreme Court recognised 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.\textsuperscript{52}

Notwithstanding the critics of this substantive approach, it is important to recognise that the choice between formal and substantive equality is not simply a choice of the correct interpretative techniques. It is a normative choice of the appropriate model of equality informing the constitutional guarantees. Any attempt at framing the issue as exclusively one of mechanical techniques simply masks these difficult normative choices facing the judiciary.

It is, moreover, a normative choice between questions of sameness and difference, or questions of disadvantage. Instead of comparing the relative sameness and/or difference, a shift to a substantive model of equality would require the Court's commitment to explore the question of disadvantage in equality challenges, that is, to interrogate whether the differential treatment reinforces the inequality of historically and systemically disadvantaged groups.

IV. Judicial Approaches to Sex Discrimination

A. Introduction: The Relevance of Gender

The case law dealing with sex discrimination reflects the more general judicial approaches to the interpretation of equality rights. The same tension between formal and substantive equality is apparent, a tension which remains largely unarticulated in the case law. The sex discrimination case law remains overly determined by a formal model of equality. While some inroads to a substantive model of equality are evident, the judicial approaches remain limited by their formal equality discourse. But the case law dealing with sex discrimination raises some issues of its own. The prevailing conception of equality as sameness has led to a focus on the relevance of gender difference. Three approaches are apparent: protectionist, sameness and corrective. The following discussion will first briefly review and evaluate these three approaches to gender difference. It will attempt to reveal the extent to which these judicial approaches are overwhelmingly informed not only by a formal approach to equality, but moreover, by a deeply problematic approach to gender difference.

\textsuperscript{52} Ibid 138.
The first, and most common approach is a protectionist approach in which women are constructed as weak and subordinate, and are thus in need of protection. In this approach, the Court's understanding of women's differences is asserted as justification for differential treatment. While in some circumstances this differential treatment is preferential treatment, more often than not the differences are seen as sufficient justification in and of themselves for differential treatment. This approach tends to essentialise difference—that is to say, to take the existence of difference as the natural and inevitable point of departure. There is virtually no interrogation of the basis of the difference, nor any substantive consideration of the impact of the differential treatment on women. Rather, women's differences are seen to justify differential treatment, and any differential treatment is virtually deemed to be preferential treatment. 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 which women are constructed as the same as men, and thus, ought to be treated exactly the same as men in law. This sameness approach is invoked in a number of different contexts. It 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.

Some feminist approaches endorse this conception of equality according to which gender difference ought to be irrelevant, and women ought to be treated exactly the same as men. In this approach, any recognition of gender difference in the past has simply been a justification for discriminating against women. Advocates of this approach for example, argue that special treatment has historically been a double-edged sword for women, that is, under the guise of protection, it has been used to discriminate against women. Any admission of differences between women and men, and any attempt to accommodate those differences is seen to provide a justification

53 This approach is exemplified by S Jahwari, 'Women and Constitutional Safeguards in India', (1979) 40 Andhra Law Times Journal 11, who writes: 'The true meaning of the principle of equality between men and women is that certain natural differences between men and women is to be treated as normally irrelevant in law, and that consequently is not to be treated as constituting in itself a sufficient justification for unequal treatment'.

for continued unequal and discriminatory treatment. For example, the use of gender difference in the past in prohibiting women to vote, to be elected to government, to be admitted to the legal profession, and other such participation in the economic, political and cultural dimensions of society.

The third, and most promising approach is a corrective approach, in which women are seen to require special treatment as a result of past discrimination. Within this approach, gender difference is often seen as relevant, and as requiring recognition in law. Under this approach, it is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. Proponents of this approach attempt to illustrate how the ostensibly gender neutral rules of formal equality are not gender neutral at all, but rather, based on male standards and values. As Naudine Taub has argued ‘rules formulated in a male-oriented society reflect male needs, male concerns and male experience.’

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 corrective approach argues that gender differences must be taken into account in order to produce substantive equality for women.

There are some important similarities between the protectionist approach and the corrective approach. Most significantly, both of these approaches conclude that gender difference can be relevant and therefore must be recognised in law. However, there are important distinctions between these approaches. Most notably, the protectionist approach is more likely to accept both gender differences and special protection as natural or essential. The corrective approach, on the other hand, is more likely to consider the basis of the difference, and the impact of recognition versus non-recognition of the difference, on the lives of women. Gender difference is not essentialised, but rather, its relevance is seen in the context of past disadvantage. It other words, gender difference needs to be recognised because of the extent to which it has historically been the basis of disadvantage and discrimination.

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55 See generally Williams, ‘The Crisis in Equality’ (n 54).
56 For example, in Bradwell v Illinois (1872) 16 Wall. 130 490, the refusal to admit a woman to the legal profession was upheld by the United States Supreme Court, on the basis of women’s differences.
58 N Taub, ‘Book Review’ (1980) 80 Columbia Law Review 1686, 1694. As Gwen Brodsky and Shelagh Day (n 4) 149 further note: ‘The extreme and persistent economic and social inequality of women, which is the result of society’s bias and oppression, is obscured by a definition of equality that focuses only on differences in the form of law. Women are poorer than men, they work in ill-paid female ghettos, they are the primary care givers for their children and parents, and they are overwhelmingly, the victims of rape and battery. Simple gender neutrality in law based on male standards does not address those major inequalities.’
These approaches to gender difference are often seen to roughly correspond to the formal and substantive approaches to equality. Both the protectionist and the sameness approach to gender can be seen to be based on a formal model of equality, whereas the corrective approach to gender is based on a substantive model of equality. It is important, however, that these debates not be collapsed. The adoption of a substantive approach to equality does not automatically resolve the question of the relevance of gender difference. That is, a substantive approach does not necessarily correspond to a corrective approach to gender. Rather, it might in a particular context determine that treating women differently would further contribute to their disadvantage, and thus conclude that women ought to be treated the same. A substantive approach to equality, while opening the space for gender difference to be recognised, does not eradicate the need to make choices regarding when and how difference ought to be recognised.

The basic inquiry of the substantive approach is whether the impugned provision contributes to or reinforces the subordination of women. In some contexts, this substantive approach will require a sameness approach, whereas in other contexts it will require a corrective approach. For example, in relation to basic civil and political rights such as the right to vote and the right to own land, gender would be considered irrelevant in the pursuit of equality, and any recognition of gender would likely only contribute to, or reinforce, the subordination of women. In relation to employment rights, however, a substantive approach may require a recognition of women's reproductive differences in so far as the pursuit of equality will require that women are provided with maternity leave and benefits.

B. Employment

Sex discrimination challenges in the employment law context can be divided into two sets of cases. In the first set, women have challenged rules, regulations and practices that restrict or prohibit women's employment. In a second, and smaller set of cases, rules, regulations and practices that treat women preferentially have been challenged on the basis that they restrict or prohibit men's employment.

(i) Restrictions on Women's Employment

Many of the rules, regulations and practices that impose restrictions on women's employment have been found to violate the equality guarantees. However, the decisions in this area are not entirely unproblematic. Firstly, some of the rules and practices which restrict women's employment have been
upheld. Secondly, the approach to equality and gender difference informing these decisions are often problematic. The courts have overwhelmingly adopted a formal approach to equality. The approach to gender difference, however, is divided. Many judges have adopted a protectionist approach, while others have adopted a sameness approach.

In Raghuban Saudagar Singh v State of Punjab, a government order directing that women were ineligible or appointments to all positions in men’s jails with the exception of the position of clerks and matrons, was challenged as discrimination on the basis of sex. The Court held that the order did not constitute discrimination only on the ground of sex.

It needs no great imagination to visualise the awkward and even the hazardous position of a woman acting as a warden or other jail official who has to personally ensure and maintain discipline over habitual male criminals.

The Court concluded:

[W]here disparities of either-sex patently add to or detract from, the capacity and suitability to hold a particular post or posts, then the State would be entitled to take this factor into consideration in conjuncture with others.

The Court upheld the restriction on women’s employment.

In the Raghuban case the Court adopts a formal approach to equality, within which the perceived differences between women and men justify the differential treatment, and in effect, preclude women’s entitlement to equality. Moreover, the Court adopts a protectionist approach to gender difference. The Court emphasised the differences in physical strength between women and men. While a certain level of physical strength may indeed be a necessary occupational qualification, the Court did not interrogate whether the gender-based classification was the most reasonable means of meeting this qualification. Instead of banning an entire

59 AIR 1972 P. & H. 117.
60 The petitioner was a Deputy Superintendent of a women’s jail. As a result of the government order, she was denied promotion.
61 Raghuban Saudagar Singh (n 59) 121 para 17.
62 In further support of this assertion of the fundamental physical differences between the sexes, the Court quoted from a 1907 United States Supreme Court decision, Curt Muller v State of Oregon (1907) 208 U.S. 412. ‘The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength...This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her’.
class of candidates, a more reasonable classification might have been based on ensuring that individual candidates meet the required level of physical strength. The Court, however, did not consider the reasonableness of the classification. Rather, physical difference in strength was put forward as natural gender difference and as applying to all women and all men. Indeed, the Court seemed to be concerned with differences beyond mere physical strength. Without exploring the nature of these differences, the Court concludes that these ‘patent disparities’ would make it awkward, unsuitable, and indeed, immoral for women to be employed as jail officials. Underlying the decision appears to be a concern with protecting women, as the weaker sex, from male prisoners.

In the recent case of *Omana Oomen v FACT Ltd*, female apprentice trainees were denied the opportunity to write an internal examination on the basis of restrictions imposed on the working hours of women by S.66 of the Factories Act. The petitioners contended that they could have been accommodated in the day shift in which there were several male technicians and that women technicians had been absorbed in other divisions of the company. The Court held that the restriction was based entirely on the basis of sex, and thus violated Articles 14 and 15. Many constitutional challenges have been directed to employment rules that specifically restrict the employment of married women. In *Bombay Labour Union v International Franchise* a rule requiring an unmarried woman to give up her position when she married was challenged. The rule only applied to a particular department of the company. The justification put forward by the company for this rule was the need to work in teams, that attendance must be regular and that there is greater absenteeism among married women. The Supreme Court held that there was no evidence that married women were more likely to be absent than unmarried women.

If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also ... The only difference in the matter of absenteeism that we can see between married women ... and unmarried women ... is in the matter of maternity leave which is an extra facility available to married women. To this extent only, married women are more likely to be absent than unmarried women and widows. But such absence can in our opinion be easily provided

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63  AIR 1991 Ker. 129.
64  1966 AIR 942, 1966 SCR (2) 477.
for by having a few extra women as leave reserve and can thus hardly
be a ground for such a drastic rule ...

The Court struck down the restriction on women's employment.

In C.B. Muthamma v Union of India and Others, the petitioner, a successful
candidate in the Indian Foreign Service, was refused appointment because
she was married. The rules of the Indian Foreign Service, prohibiting the
appointment of married women, and requiring that unmarried women in the
employment of the Foreign Service obtain permission before marrying, were
challenged. The Supreme Court held:

If a woman member shall obtain the permission of government before
she marries, the same risk is run by government if a male member
contracts a marriage. If the family and domestic commitments of a
woman member of the Service is unlikely to come in the way of efficient
discharge of duties, a similar situation may well arise in the case of
a male member. In these days of nuclear families, intercontinental
marriages and unconventional behaviour, one fails to understand the
naked bias against the gentler of the species.

The Court held that although the rule is discriminatory, the application
should be dismissed in light of the subsequent promotion of the petitioner.
However, the Court concluded by strongly urging the Government to
'overhaul all Service Rules to remove the stain of sex discrimination.'

The Court adopted a formal approach to equality, and a sameness approach
to gender. For the purposes of employment in the Foreign Service, women
and men are to be considered the same. According to the Court, women and
men must both balance the demands of work and family. Women and men
must therefore be treated the same in law. However, the Court is cautious
in its adoption of this sameness approach, and in fact, goes on to limit its
applicability:

We do not mean to universalise or dogmatise that men and women are
equal in all occupations and all situations and do not exclude the need
to pragmatise where the requirements of particular employment,
the sensitivities of sex or the peculiarity of societal sectors or the
handicaps of either sex may compel selectivity.

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65 Ibid 944 para 3.
66 1979 AIR 1868.
67 Ibid 1870 para 5.
68 Ibid 1870 para 9.
69 Ibid 1870 para 7.
The sameness approach is thus expressly limited to the particular circumstances of the particular case. The Court leaves open the possibility of adopting an approach which recognises differences. Indeed, the discourse of the decision suggests an underlying protectionism. The references to women as 'the gentler of the species', suggests that the Court does see women as different, as weaker, and as in need of protection. Indeed, the recurring references to women as 'the weaker' and 'the gentler' sex reinforces images of women as weak, and in need of protection.\(^{70}\)

In *Air India v Nergesh Meerza*\(^{71}\) air hostesses challenged the discriminatory employment conditions for air hostesses and stewards. The Supreme Court upheld a contractual condition permitting the termination of an air hostess's services on her marriage within the first four years, but invalidated a condition that terminated her services on her first pregnancy. The Supreme Court began with a review of the basic principles of reasonable classification under Article 14,\(^{72}\) and set out the criteria for determining the distinct classes.\(^{73}\) Based on this test, the Court concluded that Air Hostesses constituted a separate class of Air India employees. The Court considered the list of circumstances, noting the differences in recruitment, terms and conditions of service, the promotional avenues, and other 'special attributes' between Air Hostess (AHs) and Assistant Flight Pursers (AFPs), and concluded that AHs were distinct from the class of AFPs.

The Court then considered the challenge to the restriction on marriage. The restriction was upheld on the grounds that it fostered the State family planning programme, that women would be more mature to handle and make a marriage work successfully if forced to wait four years, as well as on the grounds of the financial hardship the corporation would incur should

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\(^{70}\) While the Court's references to misogynous and masculinist culture suggest that women's differences are the product of these oppressive relations, (the Court writes, for example, 'This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against mens thraldom.' Ibid para 3.) These references are at least in part undermined by references which suggest that women are naturally and essentially weak.

\(^{71}\) 1981 AIR 1829.

\(^{72}\) In reviewing the doctrine of reasonable classification, the Court adopts the standard formulation of equality as sameness, according to which likes must be treated alike. The Court writes, for example ['(3) Article 14 certainly applies where equals are treated differently without any reasonable bias. (4) Where equals and unequals are treated differently, Article 14 would have no application' ]. Ibid 1842 para 37.

\(^{73}\) These criteria include, '(a) the nature, the mode and the manner of recruitment of a particular category (b) the classifications of the particular category (c) the terms and conditions of service of the members of the category (d) the nature and character of the posts and promotional avenues (e) the special attributes that the particular category possess which are not to be found in other classes and the like.' Ibid.
the bar to marriage be removed.\textsuperscript{74} The Court concluded that the treatment of the ‘fair sex’ in this regulation is neither arbitrary nor unreasonable, and thus does not violate Article 14.

The Court subsequently examined the regulation requiring AHs to retire upon their first pregnancy. According to the Court, the dismissal of a pregnant AH ‘[a]mounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature.’

It seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood—the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values.\textsuperscript{75}

The Court concluded that the pregnancy restriction was unreasonable and arbitrary, and thus in violation of Article 14.\textsuperscript{76}

The Air India case illustrates the problems with a formal approach to equality, as well as with an approach to gender equality informed by the narrow sameness/difference debate. Firstly, the formal approach to equality, and its similarly situated test is used to preclude any analysis of substantive inequality between male and female employees. The Court uses the very discrimination between these two groups of employees to distinguish between them—that is, the practice of institutional discrimination against AHs is used in the very definition of classes. As a result of the history of discriminatory treatment between a group of female and male employees, the Court was able to conclude that the classes are distinct, and that no

\textsuperscript{74} The Court held: ‘Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on an ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan’. ibid 1850 para 78.

\textsuperscript{75} ibid 1850 para 80.

\textsuperscript{76} In a more recent case against Air India, Lena Khan v Union of India (1987) AIR 1515, the regulations which required air hostesses employed in India to retire at age 35, with extension to age 45, but which allowed air hostesses employed outside India to continue employment beyond age 45, was challenged as violative of Articles 14 and 15. The Supreme Court held that such discrimination should not be allowed merely because it complies with local law abroad. However, in light of Air India’s submissions that it would phase out air hostesses recruited outside of India at age 45, the Court concluded that no intervention was required at this time.
comparison needs to be made between them for the purposes of Article 14. For example, rather than considering the problematic nature of the distinctions between the recruitment requirements for the AHs and AFPs, the Court uses the difference requirements regarding marital status as between AHs and AFPs as a factor in concluding that these employees are different. The circularity of the approach is evident—past institutional discrimination (AHs/women must be unmarried; AFPs/men need not be) is thereby used to preclude any analysis of institutional discrimination (AHs/ women and AFPs/men are distinct classes).

Secondly, while some have looked favourably on the decision, the Court's approach to gender difference is quite problematic. In recognising differences in the context of marriage, the approach adopted by the Court was protectionist—women need to be treated differently to protect them. In recognising difference in the context of pregnancy and maternity, the approach adopted by the Court was also protectionist and essentialist. Pregnancy and maternity were not simply seen as a biological difference which, in the interest of treating women equally, must be recognised. Rather, in the Court's view, it was a also difference in the roles of women and men, according to which women are not only responsible for child bearing, but also for child rearing. In this view, women's role as mothers is seen as natural and a product of biology, rather than product of the sexual division of labour. The approach adopted by the Court was based upon, and served to reinforce, the ideology of motherhood that has been constructed around these physical differences. Notwithstanding the fact that the Court struck down the pregnancy restriction on women's employment, its understanding of women as different precluded an analysis of the sexist ideologies that continue to inform systemic gender discrimination.

In Maya Devi v State of Maharashtra, a requirement that married women obtain their husbands consent before applying for public employment was challenged as violating Articles 14, 15 and 16. The Supreme Court held:

This is a matter purely personal between husband and wife. It is unthinkable that in social conditions presently prevalent a husband

78 Indeed, even the physical difference that is being recognised is one loaded with social meaning - pregnancy is simply a biological difference, but it is seen as 'a natural consequence of married life'. For example in reviewing the American case law on sex discrimination and pregnancy, the court made the following observation : '...pregnancy ...is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot-but be held to be extremely arbitrary'. Air India v Nergesh Meerza (n 71) 1852 para 88.
79 1986 1 SCR 743.
can prevent a wife from being independent economically just for his whim or caprice.\textsuperscript{80}

The Court emphasised the importance of economic independence for women, and the importance of not creating conditions that discourage such independence. The consent requirement was held to be unconstitutional. In this case, the Court was of the view that consent requirements were an anachronistic obstacle to women's equality. In order to achieve economic independence women must not, at least in this regard, be treated differently than men. The decision might be seen to reflect a formal model of equality, and a sameness approach to gender difference which requires that women and men be treated the same. However, the decision also supports a more substantive approach to equality—that is, a recognition that the consent requirement contributed to the subordination of women. The case exemplifies how a substantive approach to equality may still require a choice to be made about the relevance of gender. In this case, an inquiry into whether the rule contributed to or reinforced women's subordination revealed that in this particular context, gender ought to be irrelevant, and thus, a sameness approach was appropriate.

\textit{(ii) Preferential Treatment}

Several cases have involved challenges to employment rules, regulations and practices that treat women preferentially, on the basis that such preferential treatment discriminates against men. The results of these cases have been mixed. In those cases where the employment rules have been upheld, the Court has adopted a more substantive approach which recognises that equality may require differential treatment. For example, in \textit{Shamsher Singh v State}\textsuperscript{81} the employment practices of the State educational system were challenged as violating Article 16(2). The educational system had two branches, one run exclusively by women, the other, exclusively by men. In the women's branch, Assistant District Inspectors were granted a special pay increase. The educational department was subsequently reorganised, and as a result both male and female Assistant District Inspectors were designated as Block Education Officers. Both the women and men were performing identical duties. The male petitioner challenged the pay increase as sex discrimination, and as violative of Article 16(2). The question referred to the Full Bench of the High Court was whether Article 15(3) could be invoked to interpret article 16(2). In response, the Court held that Articles 14, 15 and 16 constitute a single code, and that Article 15(3) could thereby be invoked to

\textsuperscript{80} Ibid 745.
\textsuperscript{81} cf n 26.
determine the scope of Article 16(2). The petition was dismissed and the pay increase upheld.

In those cases where employment rules have been struck down, the Court has adopted a formal approach to equality, and a sameness approach to gender difference. For example, in *Walter Alfred Baid v Union of India*, a recruitment rule in a school of nursing, a predominantly female institution, which made male candidates ineligible for the position of senior nurse tutor, was struck down as violating Article 16(2). The Court held that Article 16(2) did not permit a classification on the basis of sex.

Article 16(2) incorporates a concept of absolute equality between the sexes in matters of employment which is underscored by the absence of any saving in the other clauses in relation to sex.

The Court thereby adopted a formal approach to equality, according to which women and men are to be treated the same for purposes of employment. This sameness approach does not allow for any difference in treatment on the basis of sex—including a difference in treatment which may advantage women.

With regard to the relevance of gender difference, the Court further stated that although 'it is true that there are patent physical disparities between the two sexes', such differences could not justify differential treatment without violating Article 16(2):

> It is too late, therefore, for anyone to suggest that there is an area of human activity for which women as a class are ineligible or any work for which all women are unfit.

While recognising certain physical differences as natural, the Court adopted a sameness approach to gender difference, that is, for the purpose of the law, any such gender difference should be irrelevant.

In concluding that the classification in question was one based on sex, the Court rejected the distinction 'between sex and what it implied'. This

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82 Ibid 376 para 19.
83 cf n 32.
84 Ibid 306 para 10.
85 Ibid 307 para 10.
86 'Considerations which have their genesis in sex and arise out of it would not be saved by such a discrimination. What could save such a discrimination is any ground or reason independently of sex such as socio-economic conditions, marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc'. Ibid 308 para 10.
rejection of the narrow interpretation of ‘only on the ground of sex’ opened the possibility of recognising the extent to which gender differences are socially constructed and bringing these social dimensions of difference within the folds of the equality guarantees of the Constitution. In the context of a substantive model of equality, this approach would allow the Courts to address the broad range of socially constructed inequalities that women suffer—from economic dependency to educational disadvantage. However, in the W.A. Baid case, this understanding of gender difference was coupled with a sameness approach, whereby any difference, whether natural or otherwise, ought to be irrelevant for the purposes of the law. As a result of the formal approach to equality, and sameness approach to gender difference, the Court found that the gender specific recruitment rule violated Article 16(2). The effect of this approach was to preclude any analysis of the purpose of the differential in treatment, and thus, any consideration of whether the differential in treatment was intended to advantage or disadvantage women. Further, the particular examples used by the Court to distinguish between those factors implied by sex, and those factors which are not, were also problematic. Socioeconomic conditions, marital status, health and education are all factors that may be relevant to sex, if measured in terms of the substantive inequality of women, and in respect of which a corrective approach to gender difference may thus be required.

C. Civil and Political Rights
The constitutional challenges to legislation dealing with civil and political rights can be divided into three sets of cases. In the first set, women have challenged legislation that restricts their rights to own land. In the second set of cases, legislation that provides reservations for women have been challenged as discriminatory. These reservations have been upheld. A third set of cases raises some of the problems in the classification of legislation as preferential.

(i) Restrictions on Land Ownership
In Pritam Kaur v State of Pepsu, Section 5(2)(a) of the Pepsu Court of Wards Act was challenged as in violation of Article 15(1). Section 5(2) authorised the government to make an order directing that property of a landholder be placed under the supervision of the Court of Wards, if the landholder was incapable of managing his affairs. Section 5(2)(a) authorised such an order

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87 Ibid.
if a landholder' by reason of being a female' was incapable of managing the property. The Court noted:

To be a woman is an additional reason on the basis of which the Government can deprive her of the management of her estate. In other words, if a man mismanages his estate, that mismanagement will not render his estate liable to be taken over by the Court of Wards unless his case falls under anyone of clauses (b), (c) and (d) of section 5(2) of the Act. Whereas in the case of a woman it can be so taken merely for the reason that she is a woman.\(^\text{89}\)

The Court concluded that section 5(2) of the Act discriminated on the basis of sex, and thus violated Article 15. However, two subsequent cases dealing with restrictions on women's land ownership have been upheld. In Sucha Singh Bajwa \& Sadhu Singh Bajwa v The State of Punjab,\(^\text{90}\) section 5 of the Punjab Land Reforms Act was challenged as violating Article 15 on the grounds that it allowed the holder or owner of the land to select the separate permissible area in respect of adult sons, but not adult daughters. The High Court held:

The subject of the legislation is the person owning or holding land, and not his or her children ...\[Since\] every person described in section 5 whether male or female is allowed the same permissible area and there is no discrimination qua one land owner and the other on the ground of sex ...\(^\text{91}\)

The Court further held that the distinction was not made on the ground of sex alone, but rather 'also for reason that a daughter has to go to another family after her marriage in due course.'\(^\text{92}\) The Court upheld the restriction.

The decision highlights the ways in which classification and comparison can be manipulated within a formal equality approach. The Court defines the relevant comparison as one between the landholders. Accordingly, since there is no discrimination between male and female landholders, the provision is not seen to discriminate on the basis of sex. While the discrimination as between sons and daughters on the face of the legislation might be seen to offend even a formal approach to equality, the Court evades this question by simply defining this comparison between potential recipients as irrelevant.

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89 Ibid 16 para 17.
90 AIR 1974 P.& H. 162.
92 Ibid.
Further, the Court’s approach to gender is also problematic. In support of its decision, the Court resorts to the doctrine of ‘only on the grounds of sex’ and argues that there are other factors not based on sex that justify the differential treatment of a daughter, such as the fact that daughters go to another family after marriage. The reasoning exemplifies the problematic distinction between sex and what it implies, that is, the failure to explore the connections between such customary practices and the social construction of gender. The practice of daughters leaving their natural families on marriage is a product of the social organisation of gender, and the roles that women are expected to assume. The practice is, in other words, one that is implied by sex. By focussing narrowly on sex, the Court fails to see the necessary connection between sex and what sex implies. Stereotypes of women are used as justification for differential treatment, without any real analysis of disadvantage, nor any attempt to explore the extent to which these stereotypical roles of women have served to reinforce women’s inequality.

In Nalini Ranjan Singh and others v The State, Section 2 (ee) of the Bihar Land Reforms Act was challenged as violating Article 15. The definition of family in the section did not include an adult daughter, for the purposes of claiming a separate unit of land, and was thus alleged to discriminate as between adult daughters and adult sons. On the basis of principles of Hindu personal law, the Court held that daughters are not members of the coparcenary.

Although a daughter can be a member of a joint Hindu Undivided Family, she cannot be given a status as a coparcener in a coparcenary, even after the commencement of the Constitution ...There are various factors which sanction that while a son may be a member of a coparcenary, a daughter may not. As a necessary corollary it follows that the very same reasons which justify the discrimination between a son and a daughter in a coparcenary apply with force to any attack on the validity of the impugned legislation as being violative of Article 15(1). The Court thus upheld the restriction.

(ii) Reservations
The cases dealing with constitutional challenges to reservations for women in political institutions have been upheld. In Dattatraya Motiram More v

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93 AIR 1977 Pat. 171.
94 Ibid 179 para 8-A.
Bombay, s. 10(1)(c) of the Bombay Municipal Boroughs 1925 Act for the reservation of seats for women was challenged as violating Articles 14, 15 and 16. With regard to Article 15, the Court adopted the approach that Article 15(3) must be interpreted as a proviso to Article 15(1), and that Article 15(1) prohibited discrimination 'only on the ground of sex', and that Articles 15(1) and 15(3) together allowed the State to discriminate in favour of women against men, but not to discriminate in favour of men against women. The Court held that the reservations did not constitute a classification only on the ground of sex, but rather, was the result of 'other considerations besides the fact that the persons belonging to that class are of a particular sex'.

There is force in the Advocate General's argument that if Government have discrimination in favour of women in reserving seats for them, it is not only on the ground that they are women, but there are various other factors that come into play. It is said that even today women are more backward than men. It is the duty of the State to raise the position of women to that of men.

The decision can be seen to be informed by a substantive model of equality and a corrective approach to gender, in so far as the Court recognises that the social and historic inequality of women must be recognised in order to overcome this inequality. However, some aspects of the decision limit this progressive approach. For example, the substantive understanding of equality remains limited by the discourse of formal equality apparent in the narrow technical reading of Article 15(1), and of 'only', as well as the use of the term discrimination to imply any difference in treatment. Similarly, the understanding of difference is problematic in so far as the Court separates sex from what sex implies the recognition of the social inequality of women is not seen as based on sex. This distinction reinforces an understanding of sex difference as natural and biological.

In K.R. Gopinath Nair v The Senior Inspector cum Special Sale Officer of Cooperative Societies and Others, the Kerala High Court held that section 28 A of the Kerala Cooperative Societies Act which provided for the reservation of a seat in the committee of every cooperative society did not violate Articles 14 and 15. The Court held that the provision of special measures for women and children has been recognised in Article 15, as well

95 cf Mahadeb Jiew v RB Sen (n 17).
96 Ibid 313 para 7.
97 Ibid.
98 AIR 1987 Ker. 167.
as being one of the proclaimed directive principles of State policy in Article 38. The Court stated:

Even on a global view, women still suffer the pangs of inequality, though women constitute about 50% of the population, effective participation in the political administration is, to them, still a teasing illusion.\(^9\)

The Court then concludes that

...s 28A is a small step in the correct and progressive direction in offsetting the ill effects of age old handicaps of women.\(^{100}\)

The decision can be seen to be based on a substantive approach to equality, in which the Court examines whether the provision in question contributes to women’s subordination. The Court’s inquiry reveals that the provision, which treats women differently, is specifically intended to eradicate historic discrimination against women, and thus, that a substantive approach to equality in this context requires a corrective approach to gender difference.

(iii) Civil Procedure:

In *Mahadeb Jiew v Dr. RB. Sen*,\(^101\) a provision of the Civil Procedure Code, which gave the courts discretion to order security for costs where the plaintiff is a woman, and does not possess sufficient immoveable property in India, was challenged as discrimination on the basis of sex. The Court held that the discrimination was not on the basis of sex alone, but rather, also involved property considerations.

Possession of sufficient immoveable property in India is not a consideration bearing on sex at all ...The basic criterion is ...that the person who is ordered to secure for costs is one who has not sufficient property out of which to pay the successful litigant’s costs.\(^{102}\)

The Court thus upheld the provision. The Court was unmoved by the fact that men without sufficient immoveable property in India were not required to provide security for costs. It simply insisted that the discrimination could not be said to be on the basis of sex alone, but on the combined grounds of sex and property.

\(^{99}\) Ibid 168 para 8.

\(^{100}\) Ibid 169 para 13.

\(^{101}\) cf *Mahadeb Jiew v RB Sen* (n 17).

\(^{102}\) Ibid 568 para 29.
The case exemplifies the problematic and indeed dangerous potential of the ‘only on the ground of sex’ approach, whereby virtually any factor or characteristic can be added to the sex discrimination and thereby make the discrimination not only on the ground of sex. Moreover, the failure to inquire into the question of the social and economic disadvantage of women precludes any consideration of assumptions informing this rule. The distinction between women and men without sufficient immoveable property can be seen to be based on the underlying assumption that women do not have any source of income—they do not work outside of the home—and therefore, will not be able to pay for costs. Men, on the other hand, are assumed to work outside the home, and thus, presumed to be able to pay for costs. The sexual division of labour has operated to make many women economically dependent. However, the classification is too broad. Some women may well work outside the home; men may be unemployed. The ‘only on the grounds of sex’ test, fails to reveal and interrogate the validity these underlying assumptions. While the objective of the provision is legitimate—that is, ensuring that plaintiffs have sufficient means to pay costs—this objective is not well served by criteria on the basis of sex.

In Shahdad v Mobd Abdullah103 the provisions of the Civil Procedure Code, which state that service of a summons must be made on a male member of the family, were challenged as violating Article 15. In rejecting the challenge, the Court held:

... we have to analyse the background in which this rule was enacted. The functions of females in Indian society is that of housewives. Until very recently it was in exceptional cases that ladies took part in any other activity than those of housewives. Females were mostly illiterate and some of them Parda Nashin. Therefore in enacting this rule, the legislature had in view the special conditions of the Indian society and therefore enjoined service only upon male members and did not regard service on females as sufficient.104

The Court noted that Article 15(3) is intended ‘to cover any provision specially made for women’ and that the provision:

...does not give them any disadvantageous position but rather exonerates them from the responsibility of fastening notice of service as service of the other members of the family.105

103 cf n 18.
104 ibid 127 para 32.
105 ibid 127 para 33.
After noting other provisions which ‘confer special privileges upon a protection to women’ which have been upheld by the courts, the Court concluded that the service provisions of the Civil Procedure Code did not constitute discrimination on the basis of sex.106

The decision is based on a formal approach to equality, in which any difference can be used to justify differential treatment, and a protectionist approach to gender, in which women are seen as different and as in need of protection. The Court seized upon women as housewives as a difference which justified the differential treatment of women and men in law. The approach did not challenge the stereotype of women as housewives; it did not examine the extent to which these stereotypes of women have served to reinforce women’s inequality—nor the extent to which the underlying sexual division of labour has produced such inequality. Rather, the difference is taken as natural. The decision exemplifies the way in which the recognition of gender difference under the guise of protection can perpetuate women’s subordination. The recognition of the difference in the sexual division of labour serves only to reinforce the negative stereotypes of women as housewives.

Moreover, in the Court’s protectionist view, the fact that women are not subject to service is seen as preferential rather than restrictive treatment for women. The protectionist approach blinds the Court to the fact that such a differential in treatment accords women less than equal rights and responsibilities, and thus renders them less than equal members of the family. From the perspective of substantive equality, the legislation could be seen to disadvantage women. However, even within a substantive approach to equality and a corrective approach to gender, it might be necessary to recognise gender difference in this case. It could be argued that the continuing sexual division of labour and the resulting inequalities of women within the family are such that women ought not be burdened with equal responsibilities until such time as they have equal rights. This was not, however, the approach in Shahdad, where the Court merely seized upon a perceived difference, and justified differentiation of treatment.107

106 The Court referred to the decisions regarding the provisions adultery under section 497 of the Indian Penal Code, A 1953 B 147 and the maintenance provisions under Section 488 of the Civil Procedure Code, A 1952 Mad 529: ‘These authorities therefore lend support to the view that in enacting 0.5 r. 15 there is no discrimination between a woman and a man simply on the ground of his or her sex on receiving a notice on behalf of some other member of the family’.

107 In Smt Savitri Aggarwal v K.K. Bose (1972) AIR All. 305, an order granting a hotel a bar licence for the sale of foreign liquor was challenged as violating Article 15. The District Excise Officer had granted the license on the basis of sex, observing that certain applications ‘deserve sympathetic consideration as they are ladies’. The Allahabad High Court held that such a preference in the granting of licenses did not constitute a special provision for women pursuant to Article 15(3). ‘What Article 15(3) contemplates is the making of special provision for women as a class and not the making of provisions for an individual women.’ The Court allowed the petition, and quashed the order granting the licence.
D. Criminal Law

Constitutional challenges have been brought to the adultery, maintenance, prostitution and bail provisions of the criminal law. Unlike the employment cases, these sex discrimination cases have been largely unsuccessful. The Courts have primarily adopted a formal approach to equality and a protectionist approach to gender difference.

(i) Adultery

The Supreme Court has considered several challenges to section 497 of the Indian Penal Code, which makes only adultery committed by a man an offence, and section 198 of the Code of Criminal Procedure, which allows only the husband of the ‘adulteress’ to prosecute the men with whom she committed adultery, but does not allow the wife of that man to prosecute him. In Abdul Aziz v Bombay, the accused, charged with committing adultery under s.497, challenged the section as discriminating on the basis of sex, and in violation of Articles 14 and 15. The High Court concluded that the difference of treatment was not based on sex but rather, on the social position of women in India. On appeal, the Supreme Court held that any challenge under Article 15(1) was met by Article 15(3). The Court rejected the argument that Article 15(3) ‘should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes’. The Court held

Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children.

The Court thus upheld the adultery provisions as beneficial to women.

The Court adopted the ‘holistic approach’ to Article 15, and thereby seemed to endorse the view that equality may require that disadvantaged groups be treated differently, and in fact, preferentially. However, the Court’s understanding of discrimination—that is, of any distinction on the prohibited grounds—is suggestive of a more formal approach to equality. Notwithstanding the Court’s statement that the Articles should be read together, it seems to understand the preferential treatment allowed by Article 15(3) as an exception to equality. Moreover, it is not clear whether the

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108 cf n 26.
109 ibid 322 para 5.
adultery laws do in fact treat women preferentially. On one level, there is an obvious benefit to not being subject to criminal prosecution. Yet, at another level, the adultery laws are based on problematic assumptions about women, about women's sexuality and about the relationships between women and men. Women are seen as the passive victims of aggressive male sexuality, incapable of agency in sexual relations, and needy of protection. Within this understanding, adultery is seen as the fault of the man; a woman is simply his hapless victim; and not to be blamed. The failure to interrogate the adultery provisions at a deeper level leaves these assumptions in place, and the adultery provisions continue to reinforce underlying social inequalities. The Court's approach, wherein any differential in treatment can be seen to be beneficial, and any benefit can be seen to fall within Article 15(3), thus fails to adequately consider the questions of inequality and subordination.

In *Sowmithri Vishnu v Union of India*, Section 497 of the Indian Penal Code was challenged as unconstitutional by a woman whose husband had prosecuted her lover for adultery. She argued that the section was discriminatory because the husband had a right to prosecute the adulterer. The wife, on the other hand, had no right to prosecute either her adulterous husband or the woman with whom the husband had committed adultery. In addition, she argued that the section did not take into account situations where the husband had sexual relations with an unmarried woman. In dismissing the petition, the Court held that confining the definition of adultery to men was not discriminatory as 'It is commonly accepted that it is the man who is the seducer and not the woman.'

Again, in the Court's view, a wife who is involved in an adulterous relationship is the victim rather than the author of the crime. The offence is committed against the sanctity of the matrimonial home and it is the man who defiles that sanctity.

The Court's decision was firmly located within a formal equality approach. The challenge was not allowed on the grounds that in the context of adultery, women and men are different. Further, the Court clearly articulated its protectionist approach to gender difference. The man was regarded as the seducer and the author of the crime. The approach essentialises women as

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111 AIR (1985) 1618.
112 Ibid 1620 para 6.
113 Ibid 1620 para 7.
passive, as incapable of agency in sexual relations, and as victims. Moreover, in the Court's view, these differences were seen as natural.116

Yet, even within this view, it is not clear why the wife of the adulterer cannot prosecute him. This question is more directly addressed by the Court in Revathi v Union of India,115 section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure were again upheld. According to the Court, these provisions:

...go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit and the community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses...116

The fact that the wife of the adulterer is expressly prohibited from prosecuting her husband is the only exception to the general rule that anyone can set the criminal law in motion. This exception is based on a particular understanding of the nature of the harm caused by adultery. Adultery is seen as a violation of a husband's property rights over his wife; more specifically, of his wife's sexuality. It is not a violation of a wife's rights since she is not seen as having the same claim to her husband. Thus, it is only the husband who can prosecute an adulterer since he is the only one who is seen to have suffered a harm. This basic difference in the understanding of adultery, a difference that is seen as natural, is used to justify the differential treatment, and thereby uphold the law. The underlying sexist assumptions, again, remain uninterrogated.

(ii) Maintenance
Several challenges have been made to s.488 of the Code of Criminal Procedure which requires men to pay maintenance in favour of their wives, but imposes no corresponding duty on women to maintain their husbands. In Thamsi Goundan v Kanni Ammal,117 this provision was challenged as violating Article

114 In upholding the adultery provisions, the Court further held that the underinclusive definition was not discriminatory. This holding reinforces the courts position on relations between married men and unmarried women, who are often prostitute women. Prostitute women are different from all other women and thus entitled to less legal rights or protection than all other women. Such women belie the patriarchal construction of female sexuality as passive. Their agency is considered a threat to the family and the matrimonial relationship and therefore, the law operates primarily against them.
116 Ibid 838 para 5.
14. The Court, in adopting the reasonable classification approach, held that the classification was based on the difference between men and women.

Women as a whole suffer from several disabilities from which men do not suffer. They have no right at least under Hindu law to participate along with their brothers in the inheritance to the property of their parents. Instances can be multiplied without number to show how women have not equal rights with men. That as a class they are weaker than men cannot also be disputed. In fact they are even called by the appellation ‘Weaker Sex’. The very provision in clause 3 of Article 15, that special provision may be made for women, suggests the existence of disparity.

The Court held that section 488 ‘applies to all women in similar circumstances’, that is, to all women deserted by their husbands, and that ‘legislation in favour of this class of people’ is not arbitrary.

The Court adopted a formal approach to equality regarding Article 14, according to which only those who are similarly situated are to be treated the same. Women, and more specifically, wives deserted by their husbands, are not the same as men, and therefore need not be treated the same. Moreover, Article 15(3) allows for special treatment of this class of women. The Court’s approach to gender is thus one of emphasising the difference. The Court recognised that there has been historical discrimination against women insofar as they have been denied property rights. Yet it proceeded to treat the difference between men and women as natural, and in so doing, adopted a protectionist approach. The Court explicitly stated women are weaker than men and thus, in need of protection. There is no further interrogation of the deeper relationships of oppression that create these inequalities, such as the sexual division of labour which renders women economically dependent on men.

In *K. Shanmukhan v G. Sarojini* section 124 (1) (b) of the Criminal Procedure Code was challenged as being in violation of Article 14 by discriminating

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118 Ibid 530, para 3.
119 Ibid.
120 In *Gupteshwar Pandey v Smt. Ram Peari Devi* (1971) AIR Pat. 181, the Court again held that s.488 was a special provision designed for the benefit or protection of women or children whose husbands or fathers failed to maintain them in spite of sufficient means, and thus within the scope of Article 15(3). The Court again adopts a formal approach to equality, within which Article 15(3) is understood as an exception to equality, and a protectionist approach to gender difference, according to which s.488 is justified on the basis that women are the weaker sex, and in need of special protection.
121 1981 Cr.L.J. 830 (Ker.).
between divorcees and wives whose marriages were subsisting. The provision 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 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 legislation 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 which do not apply to married women, such as, when divorced women remarry. The Court adopted a formal approach to equality, according to which the differences between married and divorced women were deemed to be sufficient to defeat the challenge. There is no interrogation of whether the legal treatment disadvantages wives.

Further, the approach to difference is essentialist—that is, in the Court’s view, the differences between married women and divorced women were seen as natural, as part of the nature of the institution of marriage. There was no consideration of the extent to which these differences are in fact a product of the legal regulation of marriage—it 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 justified the differential entitlement of maintenance on the basis of the 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.

The constitutionality of section 125 of the Criminal Procedure Code has been considered in a number of cases. These cases have involved applications for maintenance under section 125, and although the Courts have referred to the equality provisions, the cases are not strictly speaking, constitutional challenges. In Mustt. Sahida Begum v Md. Mofizul Haque,122 the Court held that if the personal law was held to be final, with the conclusion that a divorced woman cannot claim any further maintenance beyond the period

122 1986 Cr. LJ. 102 (Ori.).
of iddat, a discrimination would occur between the divorced Muslim woman and divorced women belonging to other religions or castes. The court rejected the challenge.

The court can be seen to have based its decision on a substantive approach to equality in so far as it considered how the difference in this instance disadvantages. Religion cannot be a basis for reasonable classification. The court upheld the premise on which maintenance was granted, which is economic necessity. It clearly states that the relevant criteria must be economic necessity, and that the section is meant to protect the distresses of all wives, including divorced women, irrespective of religion or castes, for their future life until remarriage. At the same time the Court does not outline the reasons for women’s economic dependence. It is stated as a fact, and the implicit assumption is that it is a natural and unalterable condition of women.123

(iii) Prostitution

Several challenges have been made to the provisions of the Suppression of Immoral Traffic (prevention) in Women and Children Act (PITA). Two early cases involved challenges to section 20 of PITA. Section 20 permits the removal of prostitutes from any area in the interests of the general public. The magistrate is further empowered to prohibit the prostitute woman from re-entering the place from which she has been removed. In Smt. Shama Bai v State of Uttar Pradesh,124 section 20 was challenged by a prostitute woman. She argued that prostitution was her hereditary trade, that it was the only means of her livelihood and that members of her family were economically dependent on her. The writ was filed primarily to prevent her landlord from using the provisions of PITA for evicting her from the premises. The Court held that the unfettered discretion conferred on the magistrate to remove

123 In Balan Nair v Bhavani Aroma Valsalamma (1987) AI Ker. 110. In obiter, on section 125 of the Criminal Procedure Code:

Though s. 125 benefits a distressed father also, main thrust of the provision is to assist women and children in distress. That is fully consistent with Article 15(3) of the Constitution which states that the prohibition contained in the Article shall not prevent the State from making any special provision for women and children. The provision is a measure of social justice and specially enacted to protect women and children.

The Court held that the provision was consistent with Article 15(3) and could benefit a distressed father although the main thrust was to assist women and children in distress. The Court cited a Supreme Court decision, Ramesh Chander v Veena Kaushal, where it stated that ‘the brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance.’ The Court relied on social justice as an interpretive tool for constitutional provisions. The case does not elaborate beyond stating that ‘men and women equally, have the right to an adequate means to livelihood’ and that Article 15 (3) enables the State to make special provisions for women and children.

124 AIR (1959) All. 57.
any woman believed to be a prostitute from his jurisdiction by section 20 violated Article 14. The Court held that prostitute women were subject to a punitive form of surveillance to which other women were not, and that this differential treatment constituted discrimination between persons who were similarly situated.125

In The State of Uttar Pradesh v Kaushaliya,126 section 20 was again challenged as violating Article 14. The Supreme Court, in adopting the reasonable classification approach, held that the difference between prostitute women and non-prostitute women was a reasonable classification. Further, the Court ruled that there were real differences between a prostitute woman who does not demand in the public's interest any restrictions on her movements, and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deportation. The object of PITA was not only to suppress immoral traffic in women and girls, but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions.127

The decision in Kaushaliya is based on a formal model of equality. The differences between prostitute and non-prostitute women, and the differences between prostitutes in busy localities and prostitutes working discretely, were seen to justify the differential treatment. The effect was to preclude an entitlement to equality for those women who fell into the 'problematic' classification: prostitute women working in busy area. There was no interrogation of the basis for the ostensible differences. Rather, prostitute women were simply deemed different from other women because of their inherent immorality. The approach not only stigmatises prostitute women by justifying the criminalisation of their work, but also uses moral considerations to distinguish them from all other women. Prostitute women thus become inherently bad and immoral, and need to be controlled by harsh penal provisions.

Several constitutional challenges to PITA have been made by brothel owners. The Courts have rejected these challenges, holding that brothel

125 The decision was progressive in many important respects. Most significantly, the Court was prepared to consider the work of prostitute women as a trade rather than a crime. It recognized that women entered the profession because of social and economic hardship, rather than immorality.

126 AIR (1964) S.C, 416; The High Court had held that the delegation of power was unguided and unfettered; and that women who were similarly situated—that is prostitute women, were being treated differently. It thus struck down the provision.

127 Begum v State (1963) AIR Born. 17 (relied on).
owners should not be allowed to take advantage of the Act. These cases also adopted a formal approach to equality, and a difference approach to prostitute women. In Sayed Abdul Khair, the Court held that the provisions of PITA were a reasonable classification since young women all over the world were special victims of the vice market. In Moainuddin, the Court held that women and girls who solicit for prostitution were different from other women. While Sayed Abdul Khair was based on the need to protect women, in Moainuddin, the Court seemed more concerned with issues of morality. The differentiation is based on assumptions that these women are essentially bad. This differentiation disqualifies them from equality and perpetuates their situation and status as ‘bad women’.

(iv) Bail
Several challenges have been directed to section 497(1) of the Criminal Procedure Code which allows the Court to grant bail in non-bailable cases when: the accused is under 16 years of age; a woman; sick; or infirm. In Nirmal Kumar Banerjee v The State the Calcutta High Court held that the constitutional validity of the provision had to be determined against Article 14, a general provision, read together with Article 15(3), a provision where the State was empowered to allow special treatment for women and children. The provision was held to constitute a reasonable classification, as a female, or a person below 16 years of age, or an infirm person, were not likely to interfere with the investigation or to delay the trial by abscondence or interference.

While the Court adopts a ‘holistic approach’ to the equality provisions, it continues to interpret discrimination in a way that means any distinction, rather than distinctions that disadvantage within the broader meaning of equality. In so doing, the Court’s understanding can be seen to be firmly located within a formal model of equality. It upholds the provision by adopting a protectionist position whereby women are to be treated in the same way as a person under 16 or someone with an infirmity. Women are

128 In Sayed Abdul Khair v Babubhai, Jamalbhai and Another (1974) Cr.LJ. 1337 (Born.), the accused, a brothel keeper, challenged section 15(4) and 16(1) of the Act as violating Article 14, on the basis that the sections discriminated between girls and women. The provisions empower a special police officer to enter any premises to remove any girl under the age of 21 years if she is carrying on or being made to carry on or attempts are being made to make her carry on any prostitution. In Moainuddin v State (1986) Cr.L.J. 1397 (A.P.) Section 8 of the Immoral Traffic (Prevention) Act, that punishes women or girls soliciting for the purposes of prostitution, was challenged by a brothel keeper as violating Article 14.

129 cf Sayed Abdul Khair (n 128) 1349 para 14.
130 Ibid 1398 para 4.
131 1972 Cr. L.J. 1582 (Cal.).
seen as weak, as incapable of exercising basic rights in the same way as children and the infirm, and thereby in need of protection.

Similarly, in *Mt. Choki v State of Rajasthan*, the Court held that section 497(1) of the Criminal Procedure Code, in providing for special provisions in favour of women and children, was within the scope of Article 15(3). The decision was based on the reasoning that, for the purposes of bail, women and children are different from men. The assumption informing the decision is that women are caretakers of the home and thus need to be accommodated so that the home does not suffer. The reasoning is thus based on an protectionist understanding of gender and of women's roles in the home. There is no inquiry into the institutional and structural discriminations that are responsible for keeping women in the home and in the role of primary care givers.

**E. Education**

The case law in this area has involved challenges to the admission practices of educational institutions. In one set of cases, female students have been denied or restricted access to particular schools and colleges. This restricted access has been challenged as discrimination on the basis of sex, and thus, in violation of Article 15. The Courts have generally upheld the restrictions. The grounds have been varied, but the approaches have predominantly been narrow and technical, focusing for example on the meaning of discrimination and/or the significance of 'only on the basis of sex'. The Courts have generally been unwilling to find such admission practices to be discrimination on the basis of sex. In considering these restrictions under Article 15(3), the courts have emphasised the objective of the practices, namely, the attempt to promote schools and colleges specifically for women. The admission practices are thereby seen as preferential treatment as authorised by Article 15(3). While the result could be supported by a substantive model of equality, the discourse of the decisions remain informed by a model of formal equality.

In *Anjali Roy v State of W.B.*, an order of the Director of Public Institution directing that no more women students be admitted to College A, but only to College B was challenged as violating Article 15. The High Court held that there was no discrimination within the meaning of Article 15(1) and upheld the restricted access. The Court adopted the technical approach of 'only on the ground of sex', and concluded that no 'discrimination was

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132 AIR (1975) Raj. 10.
133 cf *Anjali Roy* (n 19).
made against the appellant only on the ground that she was a woman’. The refusal to admit the appellant was, according to the Court, not only on the ground of sex but ‘due to the introduction of a comprehensive schedule for the provision of education facilities to both male and female students’.

The cardinal fact is that she was not refused admission merely because she was a woman, but because under a scheme of better organization of both male and female students at Hooghly, which covered development of the Women’s College as a step towards the advancement of female education...

The holding is consistent with a corrective approach to gender difference and a substantive model of equality – that is – women’s difference must be recognised to overcome historic disadvantage. Yet the decision of the Court was firmly located within a formal model of equality. While recognising that discrimination involves invidious distinctions, the Court adopted the formal equality approach to the relationship between Articles 15(1) and 15(3), and as such, could hold that special provisions for women were legitimate, although they allowed invidious discrimination against men. The Court did not consider invidious discrimination within the broader context of substantive inequalities, but only within a formal equality context, such that invidious discrimination can be directed equally at men as at women. The only difference is that Article 15(3) permits the former, and not the latter.

The Court subsequently noted the exclusion of sex from Article 29(2) which deals specifically with admission to educational institutions:

The framers of the constitution may have thought that because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only, and vice versa would not be hostile or unreasonable discrimination.

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134 Ibid 830 para 17.
135 Ibid.
136 Ibid.
137 Ibid 831 para 20.
138 Article 29 of the Constitution provides:-

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State of receiving aid out of State funds on grounds only of religion, race, caste language or any of them.

139 Supra note 19 at 831 para 22.
This passing reference to ‘physical and mental differences between men and women’ is significant. While the Court does not specifically endorse this explicit statement of natural and essential gender differences, the failure to interrogate the assumptions suggests that it is not seen as controversial—and in fact, reinforces this view of essential differences.140

In University of Madras v Shanta Bai,141 an order directing that women students not be admitted to affiliated colleges without receiving special permission was challenged as violating Article 15. The Court held that the university was not part of the State within the meaning of Article 12, and is therefore not subject to the prohibitions of Article 15.142 However, the Court then considered the relationship between Article 15 and Article 29(2) of the Constitution,143 and held:

[T]he true scope of Article 15(3) is that notwithstanding Article 15(1), it will be lawful for the State to establish educational institutions solely for women and that the exclusion of men students from such institutions would not contravene Article 15(1). The combined effect of both Articles 15(3) and 29(2) is that while men students have no right of admission to women's colleges, the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges.144

The Court further discussed the reasons underlying these admission policies, namely, the insufficient number of women's colleges to accommodate the demand. In a later set of cases, the allotment of seats for female students within educational institutions has been the subject of constitutional challenges. In Balaji v State of Mysore,145 for example, the Supreme Court held that Article 15(4) could not be interpreted so as to render 15(1) nugatory, and therefore, that reservations could not exceed 50%. An issue that has subsequently arisen is whether the allotment of seats for women constitutes a reservation within the meaning of 15(4), and thus, whether the allotment of these seats are to be considered in calculating the permissible 50%. The judicial approach to the issue has been divided. Sometimes this

140 Ibid. But the Court declined to rule on the relationship between Articles 29(2) and 15.
142 Educational institutions will fall within the scope of Article 15 only if they are state maintained; the University of Madras is state-aided, but not state maintained.
143 cf University of Madras v Shanta Bai (n 141) 70 para 9: ‘...the omission of “sex” in Article 29(2) would appear to be a deliberate departure from the language of Article 15(1) and its object must have been to leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women’.
144 Ibid.
145 AIR (1963) SC 649.
allotment of seats for women has been held to be a reservation.\footnote{146} Other times the allotment has been designated as an ‘indication of source’, and not a reservation.\footnote{147}

F. Family Law

Constitutional challenges to family laws on the ground of sex discrimination have met with very mixed results.\footnote{148} In some cases, the Courts have held that laws which treat women differently than men are discriminatory and thus, in violation of the equality guarantees. Indeed, some cases recognise that the discriminatory treatment is based on sexist attitudes and practices which reinforce women’s subordination. The approach adopted by those courts is one of formal equality and sameness—women and men are the same, and thus ought to be treated the same in law. However, other cases have rejected the challenges to family laws. These cases, though also adopting a formal model of equality, emphasise the differences between women and men, and thus, preclude interrogation of substantive inequalities.

(i) Divorce

Section 10 of the Divorce Act (1869) which provides that a husband may petition for divorce on the basis of his wife’s adultery alone, but that a wife may only petition for divorce on the basis of her husband’s adultery coupled with desertion, cruelty, rape, incest or bigamy, has been challenged.

\footnote{146} In \textit{Subhash Chandra v State} (1973) AIR All 295 the Court held that the allotment of seats for women in medical school was a reservation, and thus, to be taken into account in calculating the total reservation of seats. The Court held: ‘Sub-articles (3) and (4) of Article 15 classify women and children, socially... as distinct groups. If the State Government makes reservations for these groups it cannot be said that classification is not based on rational differentia. The objective of these reservations in favour of various categories of candidates is obviously to make special provision for their advancement’. The Court thus concluded that such reservations were within the scope of Article 15(3), and did not offend Article 15(1).

\footnote{147} In \textit{Sukhvinder Kaur v State} (1974) AIP 35, the High Court refused to treat the allotment of seats for women, as well as those allotted for other diverse categories which did not come within the definition of backward classes as ‘reservation’. In \textit{Padmaraj Samarendra v State of Bihar and another} (1979) AIR Pat. 266, the Court held that the allotment of seats for female students was not a reservation in the strict sense. Reservations involve the allotment of seats ‘for the reason that the persons for whom the seats are earmarked should be educationally, socially or culturally backward and require protection’. In this case, according to the Court, the allotment of seats for women was not for this reason, but rather, based on the state’s need for more female doctors in government hospitals. Thus, the Court held that the allotment was not a reservation, but an allotment of source. The Court further held that since the reason for the allotment was the state need for female doctors, the allotment was not ‘only on the grounds of sex’, and thus, did not violate Article 15 (1).

\footnote{148} Challenges to social reform in personal law, on the basis of violating equality rights under Art. 14 and 15 have generally been dismissed by the Courts. See, for example, \textit{Gogireddy Sambireddy v Gogireddy Jayaremma and another} (1972) AIR AP 156. As Seervai notes, it has generally been held that ‘...the State is entitled to proceed by stages and to consider whether any particular community governed by the personal law is ripe enough for reform to proceed’. HM Seervai (n 10) 403. The focus of the subsequent discussion is thus on constitutional challenges specifically dealing with allegations of sex discrimination within particular personal laws, not as between different personal laws.
as violating Articles 14 and 15. In an early case, *Dwaraka Bai v Professor N. Mathews*,\(^{149}\) the Court held that section 10 was based on differences in adultery committed by women and men, and thus constituted a sensible classification.

A husband commits an adultery somewhere but he does not bear a child as a result of such adultery, and make it the legitimate child of his wife's to be maintained by the wife. He cannot bear a child nor is his wife bound to maintain the child. But if the wife commits adultery, she may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under s. 488 ...\(^{150}\)

According to the Court, these differences justified the different grounds for divorce, and Section 10 was upheld.

More recently, in *Swapna Ghosh v Sadananda Ghosh*,\(^{151}\) section 10 was again challenged. After reviewing the justification for this provision, namely that a husband would not bear a child to be maintained by his wife, but a wife might bear a child to be maintained by her husband,\(^{152}\) the Court held:

I would like to think that even assuming that the liability to conceive as a result of adulterous inter-course may otherwise be a reasonable ground for classification between a husband and a wife permissible under Article 14, since a wife conceives and the husband does not only because of the peculiarities of their respective sex, any discrimination on such ground would be a discrimination on the ground of sex alone against the mandatory prohibition of Article 15.\(^{153}\)

The Court, however, concluded that the case could be decided without a determination of these issues:

My only endeavour is to draw the attention of our concerned legislature to these anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the

\(^{149}\) AIR (1953) Mad. 792.

\(^{150}\) Id, at 800 para 30.


\(^{152}\) The Court noted that the only defence for this provision was that stated in *Dwarka Bai v Mathews* (n 149) para 3, namely, where the Court held that since the husband even by committing adultery 'does not bear a child as a result and make it a child of his wife to be maintained by the wife', the wife by committing adultery 'may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child and will be liable to maintain that child under Section 488, Criminal Procedure Code...'.

\(^{153}\) *Swapna Ghosh v Sadananda Ghosh* (n 151) 3 para 3.
ground of Religion or Sex and also to Article 44 staring at our face for four decades with its solemn directive to frame a UCC. 154

On the facts, the Court confirmed the divorce decree in favour of the wife on the grounds of the husband's adultery, cruelty and desertion. 155

While the decisions reached in these two challenges to s. 10 of the Divorce Act were different, the reasoning informing the decisions is similar in many important respects. Firstly, both decisions are located within a formal model of equality. In Dwaraka Bai, women and men were seen as different, and therefore as not qualifying for equal treatment. In Ghosh, the Court similarly accepted that the differences between women and men might be the basis for a reasonable classification for the purposes of Article 14. However, the decision in Ghosh turned on the Court's approach to Article 15. The Court adopted the 'only on the ground of sex' approach to Article 15(1), and that any differential treatment on the basis of the reproductive differences between women and men would constitute discrimination 'only on the ground of sex'. In the Court's view, sex was an absolutely prohibited ground for classification, and thus, section 10 of the Divorce Act which did not treat women and men the same, was in violation of Article 15(1). Further, the two decisions adopt very similar approaches to gender difference. In Dwaraka Bai, the differences between women and men justified the different grounds for divorce. In Ghosh, the differences between women and men did not justify the different grounds for divorce. Notwithstanding these differences, women and men had to be treated the same. Yet, both decisions focus on the same biological differences of reproduction. Both decisions view these differences as natural and as the only possible justification for the differential treatment. Both decisions collapse the biological differences of reproduction with the gender differences that have been socially constructed—differences that have also come to be viewed as natural and inevitable. The decisions are informed by the same understanding of difference—the only distinction between them being the legal significance of this difference. The two decisions, although different in their result, can be seen as located within the same discourse of formal equality and a very similar discourse of gender difference.

154 Ibid 3 para 4.
155 Ibid 5 para 9. More specifically, the divorce decree was confirmed 'on the ground that the husband-respondent is guilty of adultery coupled with such cruelty as without adultery would have justified a decree of judicial separation and also of adultery coupled with desertion without reasonable excuse for two years and more'.
(ii) **Restitution of Conjugal Rights**

Section 9 of the Hindu Marriage Act, which provides for the remedy of restitution of conjugal rights, has repeatedly been challenged as violating Article 14. In *Sareetha v Venkata Subbaiah*, the Court held that section 9 did not meet the traditional classification test, and was thus unconstitutional. The Court noted that Section 9 did not discriminate between husband and wife on its face, in so far as ‘the remedy of restitution of conjugal rights’ is ‘equally available to both wife and husband’, and it thus ‘apparently satisfies the equality test’. Notwithstanding this formal equality, the Court then turned its attention to the operation of the remedy.

In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife .... The reason for this mainly lies in the fact of the differences between the men and the women. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievably whereas the husband’s can remain almost as it was before. This is so because it is the wife who has to beget and bear a child. This is practical, but the inevitable consequence of the enforcement of this remedy cripples the wife’s future plans of life and prevents her from using this self destructive remedy. Thus the use of the remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband...

The Court thus held:

> As a result, this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife and husband who are inherently unequal as equals, section 9 of the Act offends the rule of equal protection of the law. For that reason the formal equality that Section 9 of the Act ensures cannot be accepted as constitutional.

The Court in *Sareetha* concluded that notwithstanding the gender neutrality of the provisions regarding the restitution of conjugal rights, the law had a

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156 See also *Swaraj Garg v K.M. Garg* (1978) AIR Del. 296, in considering the interpretation of s. 9, wherein the Court held that any law that gave husbands the exclusive right to decide the place of the matrimonial home without considering the merits of the wife’s claim would violate Article 14.
158 Ibid 373 para 38.
159 Ibid.
160 Ibid.
disparate impact on women. The law is used primarily by husbands against their wives; not by wives against their husbands. Accordingly, the Court concluded that the law operated 'as an engine of oppression' against women. The Court thus moved beyond a formal equality approach to consider the substantive inequalities which are produced by the operation of the law.

The approach in Sareetha, however, is not entirely unproblematic. Firstly, while the Court seems on the one hand to expressly reject formal equality as inadequate, the language of the decision on the other hand retains this understanding of equality. For example, the Court specifically concludes that women and men are unequals, and therefore ought not be treated the same. The conclusion is cast in the language of formal equality rather than moving beyond it. Moreover, the decision is problematic in its approach to difference. In the Court's view, the inequalities produced by the law are a result of the differences between women and men. The Court focuses on the biological differences of reproduction, and, presents the differences between women and men as natural and inevitable. Yet, there is much more at stake than biological differences. The oppression to which the Court refers is not merely the product of biological difference. It is a product of the sexual division of labour in general, and the social relations of child rearing in particular, which have been constructed around these biological differences, whereby women have been allocated the responsibility for child care.

While women's role in child rearing is often seen as a natural consequence of women's role in child bearing and thus, as biologically determined, biological differences are relevant only in terms of pregnancy and breast feeding. Beyond these early periods of infancy, women's responsibility for child care is a social, not a natural phenomenon. However, in Sareetha, these differences are collapsed, and women's role in child care is seen as a natural product of biological difference.

The approach of the Court to equality is commendable, in so far as it recognises the impact of child rearing on women. However, the approach to difference is somewhat problematic in so far as it reduces this difference to a natural one. The decision exemplifies some of the dilemmas presented by difference. If difference exists, and matters in the lives of individuals, then it must be recognised. Yet, in recognising difference, we risk reinforcing the underlying social inequalities that produce these differences. In the context of Sareetha, the dilemma is how to recognise the impact of child rearing on
women, without reinforcing the social inequalities that have produced this sexual division of labour.

In Harvinder Kaur v Harmander Singh Choudhry, section 9 of the Hindu Marriage Act was again challenged. However, in this case, the Delhi High Court rejected the challenge and declined to follow the case of Sareetha. The Court noted that while Sareetha was based on the assertion that 'a suit for restitution by the wife is rare', this was only true prior to the enactment of the Hindu Marriage Act. Since the Hindu Marriage Act was amended in 1964 allowing either party of the marriage to petition under section 13:

There is complete equality of the sexes here and equal protection of the laws.

The Court was only concerned with formal equality—that is, with whether women and men were treated as formal equals under the law. There is no consideration of the impact of the law, nor in turn, whether there is a disparate impact of the law on women.

In rejecting the challenge, the Court further held that the Constitution ought not to be applied to the family.

Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond.

In the Court’s view, the application of constitutional law would encourage litigation within the marital relationship—litigation which should be discouraged as far as possible.

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162 Ibid 75 para 44.
163 The Court further articulated its understanding of the family as private, and thus beyond the scope of the Constitution: ["In the home the consideration that really obtains is the natural love and affect which counts for so little in these cold Courts"] Ibid para 45. In support of its view, the Court cited the 1919 English case of Balfour v Balfour 2 KB 571 which in its view: "...illustrates that the house of everyone is to him his castle and fortress. The spouses can claim a kind of sacred protection behind the door of the family home which, generally speaking, the civil authority may not penetrate. The introduction of Constitutional Law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship and will be a fruitful source of dissension and quarrelling".
The reasoning in *Harvinder Kaur* is a classic statement of the understanding of the family as private and of the public/private distinction. The family is understood as private, and thus beyond the appropriate intervention of the law. This public/private distinction has been an important dimension of the legal reinforcement of women's subordination. Women have traditionally been confined to the private sphere of the family, as wives and mothers, sisters and daughters; and their access to the public sphere has been denied. The public/private distinction has been used to insulate from legal review the discrimination that women face within the private sphere of the family. Discriminatory practices, ranging from unequal inheritance rights, to sexual assault, to dowry death have been, and continue to be justified on the ground that they occur within the private sanctuary of the family, and thus beyond the scope of the law.

The constitutionality of section 9 of the Hindu Marriage Act was considered by the Supreme Court in *Saroj Rani v Sudarshan Kumar*. The Court held that restitution of conjugal rights did not violate Article 14, thus affirming the decision in *Harvinder Kaur* and overruling the decision in *Sareetha*. According to the Court:

> In India it must be borne in mind that conjugal rights ie the right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself.

In the Court's view, there were sufficient procedural safeguards to prevent section 9 'from being a tyranny', and that the decree was only intended where the disobedience was wilful. The Court further held that the decree for the restitution of conjugal rights 'serves a social purpose as an aid to the

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164 Madhu Kishwar, 'Some Aspects of Bondage: The Denial of Fundamental Rights to Women' (Jan-Feb 1983) Manushi 31, arguing that the family structure in India reinforces the subordination of women in a way that precludes women's access to fundamental rights. At 31-32, she writes: 'The feature which most distinguishes women's oppression is that the denial of their most basic rights takes place first and foremost within the family. This is done so effectively that the hand of the government or of any similar repressive agency is seldom visible in keeping women oppressed. That is why it is easy to dismiss such violations as private family affairs rather than as social and political issues. But if we examine closely how the family functions in keeping women subjected we can begin to see how an exploitative family structure receives crucial support from the government and the state through various laws and rules of behaviour which legitimate the authority of the male members over the lives of women members of the family'; See also: Nandita Haksar, Demystification of Law for Women(1986) 58; Nadine Taub and Elizabeth Schneider, Perspectives on Women's Subordination and the Role of Law in D Kairyns (ed) The Politics Of Law (1982); Frances Olsen, 'The Myth of State Intervention' (1985) 18 Mich L Rev 835; Judy Fudge, 'The Public/Private Distinction: The Possibilities of and the Limits to Further Feminist Struggles' (1987) 25 Osgoode Hall LJ 485.


166 Ibid 1562 para 15.
prevention of the break-up of marriage’, and thus concluded without any further equality analysis that it did not violate Article 14. While the Court implicitly adopts the approach to equality and gender of the Delhi High Court in *Harvinder Kaur*, it does not expressly state or develop its own views in this regard.167

(iii) Succession Laws
Several challenges have been made to the laws of succession. These challenges have overwhelmingly unsuccessful. In *Mukta Bai v Kamalaksha*168 hindu personal law which excluded illegitimate daughters from maintenance from the estate of their putative fathers was challenged as violating Article 14. In rejecting the challenge, the Court held:

The fact that the law makes no provision for the maintenance of an illegitimate daughter cannot be said to amount to discrimination against illegitimate daughters, such as would amount to violation of Article 14 of the Constitution.169

The reasoning in the decision is entirely conclusory. There is no consideration of Article 14 case law, nor any analysis of why the distinction did not amount to discrimination.

Challenges to the Hindu Succession Act, 1956, on the ground that it discriminated on the basis of sex, brought overwhelming by men have been rejected by the courts. For example, in *Kaur Singh v Jaggar Singh*170 Section 14, which provides a female Hindu with the right of absolute ownership over her property was challenged as discriminatory.171 While the Court acknowledged that the Hindu Succession Act did create an apparent anomaly in the powers of alienation of property, it held that the removal of such remained the prerogative of the legislature, not the courts. The Court

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167 It should be noted that the Supreme Court did not comment on the holding in Harvinder Kaur regarding the non-applicability of the Constitution to the legal regulation of the family. Further, more recent cases involving challenges to personal laws have not strictly followed Harvinder Kaur in so far as the non-applicability of the Constitution to the legal regulation of the family is concerned. For example, in *Krishna Murthy v P.S. Uma* (1987) A A.P. 237. *Swapna Gosh v Sadanada Gosh* (n 151) and *Lalitha Ubbayamkar and another v. Union of India and another* (1991) A Kar. 186; the courts were willing to consider constitutional challenges to the Hindu Marriage Act, The Divorce Act (1869), and the Hindu Adoptions and Maintenance Act, respectively. The ideology of privacy was not invoked, as in Harvinder Kaur, to preclude an analysis of the operation of the provisions relating to the legal regulation of the family.

168 AIR (1960) Mys. 182

169 Ibid 183 para 5.


171 The plaintiffs argued that the effect of section 14 was discrimination in the powers of alienation of property between women and men. While women had by virtue of section 14 absolute ownership and thus absolute rights of alienation, men who were still governed by the Punjab Customary Law were not free to dispose of ancestral immovable property by will.
held that ‘it may well be that in view of the inferior status enjoyed by the females, the Legislature thought fit to put the females on a higher pedestal’, which was within the purview of Article 15(3).\textsuperscript{172} It further held that women as a class were different from men as a class and the legislature had merely removed the disability attaching to women.

In \textit{Partap Singh v Union of India},\textsuperscript{173} section 14(1) was again challenged as violating Articles 14 and 15(1). The Court found that section 14(1) was enacted to address the problem faced by hindu women who were unable to claim absolute interest in properties inherited from their husbands, but rather, who could only enjoy these properties with the restrictions attached to widow’s estates under hindu law. As a special provision intended to benefit and protect women who have traditionally been discriminated against in terms of access to property, it was not open to hindu males to challenge the provision as hostile discrimination. Rather, the Court concluded that the provision was protected by Article 15(3), which in its view, ‘overrides clause 15(1)’.\textsuperscript{174} While the Court thus upheld the provision, the approach to equality and to gender on which it did so remains unclear. The decision could be informed by either a protective approach (women need special provisions to protect them) or a corrective approach (women have historically been discriminated against and require special provisions to correct). The Court’s reference to the traditional problems that women faced in property ownership is suggestive of the latter.

In \textit{Sonubhai Yeshwant Jabhar v Bala Govinda Yadav and Others}\textsuperscript{175} section 15(2) of the Hindu Succession Act was challenged as discriminating on the basis of sex, and thus being in violation of Articles 14 and 15. Section 15(2) (b) provides that the property inherited from a husband of a female Hindu dying intestate will devolve upon the heirs of the husband, whereas s. 8, dealing with the property of a male Hindu dying intestate does not make any such provision regarding property inherited from his wife. In rejecting the challenge, the Court held that the rules were enacted with the clear intention of ensuring the continuity of the property within the husband’s line. The assumption that property should be passed down through the male line is so deeply held that the Court does not question the gender bias of the assumption. The historic discrimination against women in inheritance has created a norm—that property passed through the male line—and it is against

\textsuperscript{172} Ibid 493 para 13.
\textsuperscript{173} AIR (1985) SC 1695.
\textsuperscript{174} Ibid 1697 para 6.
\textsuperscript{175} AIR (1983) Born. 156.
this norm which any challenges to the practice are measured, and ultimately rejected.

**iv) Maintenance**

Constitutional challenges have been directed to the maintenance provisions of several family law statutes. In *Puranananda Banerjee v Sm. Swapan Banerjee and Another*, 176 section 36 of the Special Marriage Act, which provides for a grant of alimony pendente lite to a wife was challenged as violating Article 15. In upholding the section, the Court held 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. The Court further held that even if section 36 did discriminate on the basis of sex alone, it would be protected by Article 15(3).

The Court has approached the question of the constitutionality of section 36 from the perspective of formal equality. In its effort to uphold the provision, the Court first adopted the technical approach of ‘only on the ground of sex’. Rather than viewing women’s economic dependency as a socially constructed gender difference, the Court severed sex from what sex socially implies. The formal model of equality is echoed in the Court’s understanding of discrimination—that is, as any distinction on the prohibited grounds—which is justified under Article 15(3).

The objective of the Court in this case is laudable—that is, it sought to uphold legislation specifically designed to address women’s economic dependency in the family. However, this objective could be better served by a substantive approach to equality, which directs attention to whether the rule in question contributes to the disadvantage of women, and a corrective approach to gender, which acknowledges that women may need to be treated differently to make up for past disadvantage. Within such an approach, the 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, requires that provisions exist to recognise and compensate women for this dependence.177

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177 In *Krishna Murthy v P.S. Umadevi* (1987) AIR A.P. 237, 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 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.
In this paper, we have attempted to provide a comprehensive review of the High Court and Supreme Court constitutional cases on sex discrimination. We have argued that this case law is primarily informed by a formal model of equality—that is, an understanding of equality as sameness, and a disqualification of those who are different from an entitlement to equality. We have tried to reveal the ways in which this understanding of equality has led to a focus on the relevance of gender difference. In one set of cases, the courts have held that women are different than men; that women are weaker and in need of protection. This difference is used to virtually disentitle women to any claim to equality. In upholding legislation, this approach cannot distinguish between differential treatment that disadvantages and differential treatment that advantages. It cannot, in other words, distinguish between legislation that further contributes to women's subordination, and legislation that attempts to correct or compensate for that subordination. Rather, any and all differential treatment can be justified on the basis that women are essentially and biologically different.

In the second set of cases, the courts have held that for the purposes of legislation, women and men are the same, and therefore must be treated the same in law. The sameness approach has been used to uphold legislation that treats women and men the same, and to strike down legislation that treats women differently. However, in striking down the legislation, this approach cannot distinguish as between differential treatment that disadvantages and differential treatment that advantages. Like the protectionist approach, there is no distinction between protectionist legislation that discriminates against women, and corrective legislation that attempts to compensate for past discrimination. In comparison to the protectionist approach, the sameness approach would strike down both protectionist and corrective legislation.

In contrast to formal equality, we have described a second substantive model of equality, and have attempted to reveal the limited extent to which this alternative vision of equality has informed judicial interpretations. In this model, equality is not a question of sameness and difference, but rather a question of disadvantage. Within a substantive model of equality the central question is whether the impugned legislation contributes to the subordination of the disadvantaged group, or to overcoming that subordination. This model of equality creates space for a third approach to gender difference, that is a corrective approach. This third, though very small set of cases recognises
that to correct or compensate for past discrimination, women may have to be treated differently.

By asking different questions, then, the substantive approach to equality can direct attention to, and distinguish between protective and corrective legislation, that is, rules that contribute to women’s subordination, and rules that contribute to overcoming that subordination. This model can be used to strike down protective legislation, and to uphold corrective legislation. Moreover, this model of equality still leaves room for a sameness approach—that is, by focusing on the relative advantage and disadvantages of women—the inquiry can lead to the conclusion that in a particular context, gender difference ought to be irrelevant, and women and men ought to be treated the same.