

Reconciling the Constitutional Gender Equality Rights and the Gender Discriminatory Custom in Indian Courts

Sandeep Kindo*

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This essay assesses aspects of Indian courts' interpretation of the relationship between the Constitution's gender equality principles and gender discriminatory custom as practiced in local communities. Specifically, this essay aims to evaluate the extent to which the court opinions employ legal, structural, and substantive considerations for determining the constitutionality questions of the gender discriminatory custom. This essay first gives a brief overview of the Constitutional recognition of customary law and the relationship between gender equality rights and customary laws. Next, the paper assesses how courts reconcile constitutional equality and gender discrimination in custom practices.

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* Professor of Law, O.P. Jindal Global University, India

I. Constitutional Recognition of Custom

The Constitution of India recognizes customary norms. Specifically, Article 13 identifies “[a]ll laws in force in the territory of India immediately before the commencement of this Constitution,” and the term “laws” here include “custom or usage” or the customary norms (cl. 1 and cl. 3, sub-cl. a). Article 13, in its recognition, however, also requires a condition stating that “in so far as they [laws, including custom] are inconsistent with the provisions of this Part [III], shall, to the extent of such inconsistency, be void” (cl. 1). The Constitution does not recognize those propositions of law and custom that conflict with fundamental rights guarantees such as the “right to equality” stated in Part III of the Constitution (arts. 12-35). These provisions, thus, reaffirm the basic scheme of the Constitution, which, while honors customary norms, offers “primacy to fundamental rights” in the event of a conflict between the two.

Various Supreme Court cases asserting the rule of how fundamental rights principles repudiate custom in situations of inconsistencies between the two. For example, the 1965 case of *Sant Ram and Ors. v. Labh Singh and Ors*¹⁾ involved the sale of immovable property, but the defendant who owned the adjacent house had protested the sale on account of the custom of pre-emption practiced in his town. The custom of pre-emption allowed the owners of an adjoining property the right to the preferential buyer in the event of the sale of immovable property. Therefore, the Court had to resolve whether the custom of pre-emption was like ‘law’ and affected by fundamental rights of the Constitution of India, precisely, the fundamental rights Article 19 that disallowed any “unreasonable restrictions on the right to acquire, hold and to dispose of property” (cl. 1, sub-cl. f [now repealed] and cl. 5). In quoting Article 13, which annuls laws inconsistent with fundamental rights and allows the term “law” to include custom, the Court, in *Sant*, wrote that the custom too, like ‘law,’ was affected by fundamental rights as Article 19. That is, fundamental rights veto customary norms to the extent of inconsistencies between the two.

In another example, *Bhau Ram v. B. Baijnath Singh and Others*²⁾ restates the relationship

1) Supreme Court of India. *Sant Ram and Ors. v. Labh Singh and Ors.* 15 Apr. 1964, indiankanoon.org/doc/1792958/.

2) Supreme Court of India. *Bhau Ram v. B. Baijnath Singh and Others.* 16 Mar. 1961, indiankanoon.org/doc/250624/.

between statutory law and fundamental rights. Unlike *Sant, in Bhau*, the custom of pre-emption was provided in the statute-laws in the States of Madhya Pradesh, Delhi, and Maharashtra. These statutes stipulated pre-empting sale of immovable property to both co-sharers or partners, as well as anyone who owned the adjoining property. While the appellants were the purchasers of the immovable properties, the defendants claimed pre-emption based on vicinage. The Court, in *Bhau*, observed that because the pre-emption clause also prevented “strangers, i.e., people belonging to a different religion, race or caste, from acquiring property,” it was unreasonable and inconsistent with fundamental rights-like, Article 15, prohibiting discrimination based on “religion, race, caste, sex, [or] place of birth,” and Article 19 (cl. 5), disallowing such unreasonable restrictions of no public interest. That is, laws that are inconsistent with fundamental rights are invalid.

While the Indian Constitution offers recognition to local custom, it invalidates customary usages that violate Constitutional fundamental rights. The discussion on the Indian Constitution and its interpretation in court cases, thus, illustrates the constitutional recognition of custom and the relationship between the constitutional fundamental rights and the local customary laws. In the following section, the essay reviews a few court cases and assesses how to reconcile constitutional equality and gender discrimination in custom practices.

II. Constitutional Gender Equality: Application and Reconciliation

The significance and the effect of applying the Constitutional equality principles to gender discrimination questions are found in the court opinion of Rajasthan High Court in *Jani Bai v. State of Rajasthan and Ors.*³⁾ In *Jani*, the statute, the Rajasthan Colonisation Act, 1954, allowed Rajasthan to frame rules to grant land to landless persons in a colony or settlement. The following Rajasthan rules thus framed, however, were controversial. While it allowed the permanent allotment of land to persons who earlier held a temporary land lease for cultivation, the rules also stipulated granting the allotted-persons’ surplus land to their “adult sons.” In effect, the regulations excluded adult daughters from the land allotments, and the

3) Rajasthan High Court. *Jani Bai v. State Of Rajasthan and Ors.* 21 Nov. 1988, indiankanoon.org/doc/54591/.

Rajasthan High Court had to determine the validity of such gendered rules.

Jani interpreted the gender contexts of the Rajasthan rules and also with the Constitutional prevention of gender discrimination and equality principles. Firstly, in rejecting the respondent's claim that the daughters moved into their husbands' home after marriage and the discriminatory rules prevented "fragmentation of the holding [land]," the Court wrote that the "compactness of holding" was not a "factor" in the "context" of Rajasthan's statute and rules. In fact, as *Jani* stated, in allowing the allotment of the father's surplus land only to his son, or sons "as co-tenants and not as joint-tenants," the rules, in contrast to the "fragmentation" and "compactness" claims, already construed each son as "distinct units" and independent of the father. In Rajasthan rules, thus, the Court found no "context" or "object" for "any rational basis to permit classification on...the ground of sex." Secondly, for *Jani*, such rules, in the absence of "rational...classification" between sons and daughters, violated Article 15 of the Constitution of India that prohibits gender discrimination. Still, the concern that any decision invoking Article 15 to invalidating the discriminatory rules, while it stalled land allotment to sons, offered no advantage to daughters either, dissuaded the Court from such invalidating decision, favoring a somewhat reconciliation of rules themselves instead (pars. 15-16).

The Court, in *Jani*, also referred to the Constitutional Article 14, ensuring equality, in part, also as an additional justification in support of reconciling the Rajasthan rules. The Court viewed the State's land allotment as inconsistent with the equality principles in Article 14 of the Indian Constitution. Since the term 'surplus land,' which in the Rajasthan rules referred to the lands that remained unassigned after the completion of the allotment of lands to the temporary lease-holders, belonged to the Government of Rajasthan, the Court wrote that the "distribution of State largesse cannot be made in violation of right to equality." Thus, the Court argued that while the concept of equality in Article 14 prevented discrimination in the State's land allotment, the idea also justified the Court's overall efforts in reconciling the discriminatory rules to achieve gender parity (par 20).

In reconciling the discriminatory rules, the Court, in *Jani*, invoked the Rajasthan General Clauses Act of 1955, which was created to assist with interpreting the State's laws. Notably, Section 14 of the Act, which stated that "unless a different intention appears the words

importing masculine gender shall be taken to include the females.” Since the “context” and “object” of the Rajasthan rules offered no reasonable basis for classification on sex, the Court found no valid “different intention” to avoid the “ordinary rule” of interpretation in Section 14. Accordingly, the court opinion, in *Jani*, stated that “[w]e accordingly hold that the word ‘son’ importing masculine gender used in Rules...shall be read...[to] include females...and similarly the words ‘his/he’ shall include ‘her/she’.” Further, as the Court observed, “[u]nless the above construction is made, Rule[s] would be rendered invalid which consequence is to be avoided for obvious reasons. The construction made by us will result in upholding these provisions as valid and this is sufficient reason for making this construction.” Thus, in employing the interpretative provision of Section 14 of the Rajasthan General Clauses Act of treating alike the words implying masculine and feminine genders, the Court reconciled discrimination between sons and daughters and also prevented the Constitutional invalidation of the rules (par. 21).

Another method of reconciling the gender discrimination questions involves employing the concept of justice, equity, and good conscience. The opinions of the Supreme Court, such as *Maneka Gandhi v. Union of India*⁴⁾ and *Harbans Singh Etc. v. Guran Ditta Singh Etc.*,⁵⁾ offer examples for invoking the justice concepts. The former case dealt with the question of the constitutional soundness of a State action in virtue of a statute. As ascertained from the published court opinion in *Maneka*, the case involved the seizure of the petitioner’s passport, with no opportunity of prior hearing, by the Delhi passport authority on public interest grounds under the Passports Act of 1967. Section 10 of the statute allowed State to “impound...or revoke a passport” whenever the “passport authority deems it necessary...in the interests of the general public” (sec. 10, cl. 3). That is, while the Act merely allowed impounding the passport, it lacked any explicit provision of offering “reasonable opportunity” of prior hearing to the petitioner. Accordingly, the petitioner argued that, in denying her the opportunity of hearing before confiscating her passport, the State had violated the petitioner’s constitutional fundamental rights, including “personal liberty” and “equality before law” and (arts. 21 and

4) Supreme Court of India. *Maneka Gandhi v. Union Of India*. 25 Jan. 1978. *Indian Kanoon*, indiankanoon.org/doc/1766147/.

5) Supreme Court of India. *Harbans Singh Etc. v. Guran Ditta Singh Etc.* 20 Feb. 1991. *Indian Kanoon*, indiankanoon.org/doc/511537/.

14). The petitioner, thus, sought from the Court to determine the constitutional validity of the State-action and the controversial provision of Section 10 in the Passports Act that was silent on the issue of the prior hearing.

The Court, in *Maneka*, had two options: to either declare the contentious statutory provision as unconstitutional or offer a “reasonable opportunity” construct and interpretation to the provision. The Court considered the statutory provision of the Passport Act jointly with Article 21, disallowing deprivation of one’s “life or personal liberty except according to procedure established by law,” and Article 14, providing “equality before law” (Indian Constitution). In considering the constitutional validity under Article 21, the Court examined the “direct and inevitable effect” of State-action of seizing the petitioner’s passport and determined that the State-action amounted to denying the petitioner her “right to go abroad”—a violation of her “personal liberty.” That is, because the Passport Act, in virtue of the State-action, deprived the petitioner of her fundamental right of “personal liberty,” the Court had the option to declare Section 10 of the Passport Act as unconstitutional, and, thus, invalid.

The Court, however, focused on the “equality before law” principle in Article 14. The Court also wrote that “equality” includes “reasonableness” of legal procedures to satisfy the principles of “Natural Justice···be right and just and fair and not arbitrary, fanciful or oppressive.” Because, in its provision on passport confiscation, the Passport statute was silent about any prior hearing opportunity question, the Court interpreted Section 10 of the statute to include the “pervasive” principles of “Natural Justice” stating that “even when statute is silent[,] the law···make an implication and apply the principle.” In other words, in interpreting the controversial statutory provision, the Court used its “Natural Justice” argument and offered the construct of “reasonable opportunity” of prior hearing in Section 10. The Court, thus, instead of declaring the entire provision of Section 10 as unconstitutional and void on account of the “personal liberty” question, maintained the provision’s constitutional validity through “equality” in Article 14 by emphasizing that the principles of “Natural Justice” of “right, just, and fair[ness]” were implicit and intrinsic to Section 10.

The second case of *Harbans Singh Etc. v. Guran Ditta Singh Etc.*⁶⁾ involved the specific

6) Supreme Court of India. *Harbans Singh Etc. v. Guran Ditta Singh Etc.* 20 Feb. 1991. *Indian Kanoon*, indiankanoon.org/doc/511537/.

issues of limitation statute in suits of mortgage of property. In this case, the defendant's predecessor had executed the mortgage by hypothecating his agricultural lands to the mortgagees, the appellants. Later, he entered into a compromise with the appellants on the mortgage payment and obtained a compromise-decree from the local revenue officer, the Collector. However, when the defendant's predecessor defaulted on the payment, the Collector dismissed his application seeking redemption or repossession of mortgage lands. After the mortgagor's death, his heirs, the defendants in *Harbans*, filed suits of redemption in the district's civil Court. However, since the lawsuits were filed beyond one year from the date when the Collector had dismissed the predecessor's application, the appellants claimed that the suits in the civil Court were barred by limitation under the Redemption of Mortgages (Punjab) Act 2 of 1913 and the Limitation Act of 1903. Section 12 of the former and Article 14 of the latter allowed the filing of redemptions suits within one year. The Court, thus, had to determine if limitation barred the redemptions suits.

In *Harbans*, the Court uniquely derived its redemption construct. The Court stated that the respondent's redemption petition was not barred by limitation as the Collector's Court earlier had dismissed the predecessor's redemption application for defaulting in payment. Still, the redemption right itself was not dismissed. Further, in its determination, the Court cited Section 60 of the Transfer of Property Act, 1882, providing the mortgagors the right of redemption of their mortgage property. Although the Act did not apply to the State of Punjab at that time, the Court wrote that the principles implicitly embodying the redemption right in Section 60, i.e., principles of "Justice, Equity, and Good Conscience," were still applicable. That is, the redemption right provided in the inapplicable statute was still made applicable in virtue of the substantive natural justice principles arguments.

Maneka and *Harbans* highlight two interpretive aspects. First, as stated in *Maneka*, in determining whether a statutory provision violates one's constitutional-fundamental rights, the Court must also examine the "direct and inevitable effect" of the State-action in virtue of the statutory provision. Here, if the "effect" of the State-action is found to breach any fundamental right, then the relevant statutory provision enabling such action, too, is constitutionally incongruent. Second, as *Maneka* offered, the constitutional provision "equality before law" in Article 14 includes the substantive moral principles of "reasonableness" and

“non-arbitrariness.” This relationship between the Constitution and moral principles allows constructive interpretation, by expanding or “reading down” the statutory provision in question, in ways that conform with moral principles of “reasonableness” and “non-arbitrariness,” or the natural justice principles comprising “justice, equity and good conscience.” Such “reading down” constructive interpretation is offered both in *Maneka* as well as *Harbans*.

III. Conclusion

This essay has examined the constitutional recognition of customary laws and courts’ interpretation of the relationship between the Constitution’s gender equality principles and the regional custom usages. The research has shown that it is possible to use structural and divergent substantive considerations for determining the Constitutional gender equality questions in customary law disputes. Courts may employ two inventive methods to address constitutional equality and gender discrimination in custom practices. It is possible to reconcile the impasse by invoking the General Clauses Act and amending the gender discriminatory provisions of a statute in question. Accordingly, in *Jani* above, the court interprets masculine and feminine genders comparably.

Moreover, courts may employ the natural justice principles of justice, equity, and good conscience to the gender discriminatory clauses. Through this “reading down” constructive interpretation, courts can alter the discriminatory provisions as seen in *Maneka* and *Harbans*. In providing a gender-neutral construction to the clauses, courts can maintain the statutory clauses’ constitutional validity in the amended form. That is, instead of voiding the controversial clauses for reasons of violating constitutional equality, the courts can amend such clauses. The substantive considerations of gender equality primarily drive this method of amending statutory provisions.

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[Abstract]

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Sandeep Kindo*

This essay reviews and assesses aspects of the Indian courts' interpretation of the relationship between the Constitution's gender equality principles and gendered local customary laws. It studies the court opinion's legal, structural, and substantive considerations for determining the constitutionality questions of the discriminatory customary law. The paper evaluates how courts appear to reconcile the Constitution and custom impasse on the gender equality question. It argues that courts tend to use imaginative ways to respond to the gender equality impasse. One way is to invoke interpretive statutes such as the General Clauses Act and modify the gender discriminatory clauses of any regulation in question. In another method, courts tend to utilize the natural justice principles of justice, equity, and good conscience to the gender discriminatory clauses. Here, the courts offer gender-neutral construction to the disputed statutory clauses through a "reading down" constructive interpretation. Driven by substantive considerations, the courts, thus, modify gender-discriminatory statutory clauses and avoid striking down the clauses of the statute altogether.

[Key Words] Indian, Constitutional Gender Equality Rights, Gender Discriminatory Custom, Gender, Indian Courts

* Professor of Law, O.P. Jindal Global Law School, India