

# *Feminist constitutionalism: Mapping a discourse in contestation*

Shreya Atrey\*

*This article explores what we call feminist constitutionalism and what should be called feminist constitutionalism. It argues that feminist constitutionalism, properly understood, is a discourse in contestation and the competing substantive arguments that define such contestation. A study in feminist constitutionalism would revolve around unraveling this discourse rather than categorizing or labeling particular constitutional texts or judicial outcomes as feminist. The article thus interrogates the current impulse to brand a recent spate of good outcomes by the Supreme Court of India as conclusively feminist, against a long trajectory of gender jurisprudence which brings out a rich and complicated history which can neither be simply cast aside nor celebrated. The only way to make sense of the practice of feminist constitutionalism is thus to study the discourse itself. The article shows the kind of discourse analysis which may lend itself to feminist constitutionalism.*

## **1. Introduction**

No sooner had Justice D.Y. Chandrachud presided as the chief guest at a conference on feminist lawyering and feminist judging in October 2018 than he was asked whether he was a feminist judge. The question was no volley. It was in fact very timely. Just three weeks earlier, Justice Chandrachud and his bench at the Supreme Court of India had handed down three far-reaching decisions concerning women and sexual minorities: the first had decriminalized sodomy,<sup>1</sup> the second had decriminalized adultery,<sup>2</sup> and the third had lifted the ban on women of reproductive age from entering the famed Sabarimala temple.<sup>3</sup> The previous year, the Supreme Court had declared

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\* Associate Professor in International Human Rights Law, University of Oxford, Oxford, United Kingdom. Email: [shreya.atrey@conted.ox.ac.uk](mailto:shreya.atrey@conted.ox.ac.uk). I am grateful to Ruth Rubio-Marin, Mara Malagodi, Wen-Chen Chang, and Kelley Loper for providing extensive comments on earlier drafts of this article.

<sup>1</sup> Navtej Johar v. Union of India, AIR 2018 SC 4321.

<sup>2</sup> Joseph Shine v. Union of India (2018) SCC 1676.

<sup>3</sup> Indian Young Lawyers Association v. State of Kerala, 2019 11 SCC 1 [hereafter *Sabarimala*].

the right to privacy as a constitutional right.<sup>4</sup> The same year, it had also declared the Muslim practice of “triple talaq” to be unconstitutional.<sup>5</sup> The outcomes in these cases were patently women and sexual minorities friendly. So, the question whether one of the leading voices of the apex court was feminist was only licit.

This was his response. To enforce the Constitution, especially in a transformative sense, was feminist, because the Constitution itself was feminist. The implication was that enforcing a feminist constitution perforce made him a feminist judge. According to him, it was the Constitution itself, and in it, the trinity of dignity, equality, and liberty, that served as the guiding principles of constitutional adjudication. Faithfulness to the Constitution made some outcomes a *fait accompli*. Being a feminist or employing feminist reasoning or reaching a feminist outcome was thus nothing but enforcing the Constitution. The question then became not whether *he* was a feminist judge, but about recognizing the Constitution’s feminist mandate and asking whether *it* was enforced correctly.

The problem with the answer, or rather, the reframing of the original question, is that it assumes that the Constitution can itself be feminist; and that constitutional adjudication when properly enforcing a feminist constitution becomes feminist too. But no constitution has declared itself “feminist.” There is no checklist of constitutional provisions which is considered to cumulatively render a constitution feminist. Similarly, while outcomes can be feminist in a simple sense when women and sexual minorities win cases, feminism is not exhausted there. Neither constitutional text nor constitutional outcomes tell the full story of feminist constitutionalism. Embedded in their diverse discourses of contestation over meaning, both feminism and constitutionalism are about understanding the substantive reasoning people invoke in engaging the Constitution—whether as litigants or judges. In fact, given the diversity of feminist viewpoints, it is the continuing discourse of contestation around them that defines feminist constitutionalism. Ignoring this discourse and the substantive reasoning that stakes a claim to the normative meaning of feminism and constitutionalism ignores what feminist constitutionalism is and how it transpires.

This is what this article is about. It aims to exhume the discourse on feminist constitutionalism in light of the rich history of contestation around the rights of women and sexual minorities in India, and, consequently, the range of substantive reasoning invoked in contesting rights. In particular, it interrogates the competing conceptualizations offered in justifying the rights of women and sexual minorities as important in understanding feminist constitutionalism. In doing so, it traces the trajectory of feminist thought in the seventy-years-strong postcolonial jurisprudence. What emerges is a rather checkered record, cautioning us against dubbing the current moment in constitutionalism as manifestly feminist. This is the central argument of this article. It is established thus. The next section explains what is meant by feminist constitutionalism. It does so by excavating from the literature on feminist constitutionalism the muted aspect which has to do with the discourse of contestation

<sup>4</sup> Puttaswamy v. Union of India, 2017 (10) SCALE 1.

<sup>5</sup> Shayara Bano v. Union of India, 2017 SCC OnLine SC 963.

as much as its substantive content. Section 3 sets out the landscape in which this article is situated. It points to the history of the making of a liberal constitution in India (enacted in 1950) against the backdrop of the nationalist movement which in turn evolved with the women's movement as the backdrop. This had a clear influence on how the text of the Constitution was negotiated and in fact continues to operate, but cannot be taken to have rendered constitutionalism feminist because the practice surrounding giving normative meaning to constitutional text was and continues to be deeply diverse and contested. It takes two examples—of the Uniform Civil Code and women's reservation in Parliament—to show instead this wider discourse in feminist constitutionalism. Section 4 then considers the development of constitutional jurisprudence concerning women and sexual minorities. It traverses seventy years of India's postcolonial gender jurisprudence to carefully unravel the substantive judicial reasoning which has entailed many feminist perspectives at once, as well as the interaction or argumentation between these many perspectives which together make up the discourse on feminist constitutionalism. In showing this detailing which goes beyond texts, outcomes, and even consensus that defines the recent jurisprudence, the article hopes to lay down the template of *doing* feminist constitutionalism as opposed to declaring it *done*.

## 2. Feminist constitutionalism

Feminist constitutionalism here refers to the discourse in theorizing and practicing feminist reasoning within the broad field of constitutionalism. At its core, it engages feminist theory and praxis in the study of constitutionalism. It is the discourse that this engagement generates that is the focus of feminist constitutionalism in this article. The article is interested in unravelling how the discourse unfolds in terms of parsing through a wide range of feminist reasoning in constitutionalism.

The meanings of feminist constitutionalism offered in previous scholarship clearly emphasize both the substantive feminist reasoning and the discourse it generates in constitutionalism. But the emphasis is uneven, often focused more on the substance than the process of engaging feminist reasoning. The discourse analysis thus appears somewhat muted against substantive engagement. For instance, according to Beverley Baines and Ruth Rubio-Marín, two leading scholars in the field, “[f]eminist constitutionalism proposes to rethink constitutional law in a manner that addresses and reflects feminist thought and experience. Its focus on women brings a critical lens to bear on the ‘gender neutral’ approach traditionally and still generally favoured in analysing constitutional law.”<sup>6</sup> While they maintain an unambiguous substantive emphasis on “feminist thought and experience,” they also speak of the process of critical reflection. Elsewhere, Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana, too, define feminist constitutionalism as “the project of rethinking constitutional law in

<sup>6</sup> Beverley Baines & Ruth Rubio-Marín, *Feminist Constitutionalism in Canada*, in OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION 965, 966 (Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers eds., 2017).

a manner that addresses and reflects feminist thought and experience. . . [exploring] the relationship between constitutional law and feminism by examining, challenging, and redefining the very idea of constitutionalism from a feminist perspective.”<sup>7</sup> Again, one aspect of their framing, in addition to the substantive emphasis on the “feminist thought and experience,” is the emphasis on processes of “examining, challenging, and redefining” constitutionalism. This illuminates the process or mode in which feminist constitutionalism is taken up. The process appears argumentative and reasoned, with a critical stance towards constitutionalism, rather than being literal or abstract. In a similar vein, Jennifer Nedelsky frames feminist constitutionalism specifically in deliberative and dialogic terms, thus emphasizing the form of its engagement with constitutional structures and public power.<sup>8</sup> In Ruth Houghtoun and Aoife Donoghue’s recent work, they focus on feminist narratives in the context of global constitutionalism, as a form of “collective reflection and discussion” for “illuminat[ing] the interrelation between individuals within collectives to consider how to achieve ‘The People’ as a series of persons in dialogue, rather than a homogenous whole.”<sup>9</sup> Catharine MacKinnon, too, brings out this processual side of feminist constitutionalism in her strong words proclaiming that feminism in feminist constitutionalism is something to be *done*, not “a flag to be flown.”<sup>10</sup>

It is important to restate this with renewed emphasis because the focus of feminist constitutionalism has often been largely substantive. It is specifically concerned with the effect of constitutionalism on “women as women, meaning women as a sex in the gendered sense.”<sup>11</sup> At its heart is the concern for women’s inequality and the critical engagement with constitutionalism is framed around it.<sup>12</sup> As MacKinnon describes, “[f]eminist method adopts the point of view of women’s inequality to men... [by] [g]rasping women’s reality from the inside, developing its specificities, facing the intractability and pervasiveness of male power, relentlessly criticizing women’s condition as it identifies with all women. . . .”<sup>13</sup> The feminist tryst with constitutionalism in turn has been driven by the project to “constitutionalize women’s equality from scratch.”<sup>14</sup> This

<sup>7</sup> Beverley Baines, Daphne Barak-Erez, & Tsvi Kahana, *The Idea and Practice of Feminist Constitutionalism*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 1, 1 (Beverley Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012).

<sup>8</sup> Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES*, *supra* note 7, at 15; Jennifer Nedelsky, *Reconceiving Rights and Constitutionalism*, 7 J. HUM. RTS. 139 (2008).

<sup>9</sup> Ruth Houghton & Aoife O’Donoghue, “Ourworld”: A Feminist Approach to Global Constitutionalism, 9 *GLOBAL CONSTITUTIONALISM* 38 (2020).

<sup>10</sup> Catherine A. MacKinnon, *Foreword* to *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES*, *supra* note 7, at ix, xi (emphasis added).

<sup>11</sup> CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 399 (1989).

<sup>12</sup> In fact, out of about 200 written constitutions in the world, 184 guarantee gender equality in some form, and 139 guarantee sex or gender equality explicitly. See Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J.L. & GENDER 569, 579 (2014); Catharine A. MacKinnon, *Gender in Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 397, 398 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>13</sup> MACKINNON, *supra* note 11, at 242.

<sup>14</sup> Kathleen Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 747 (2002).

project perforce enlists constitutional rights as both the means to and an end of gender equality. This involves drafting, interpreting, litigating, mobilizing, and enforcing constitutional rights to address specific issues concerning women, such as equal pay, gender-based violence, reproductive justice, prostitution, pornography, and religious and customary laws governing private and family life. Women's equality and women's issues more broadly have thus framed the discourse on feminist constitutionalism in a substantive sense.<sup>15</sup>

The discourse is now expanding. While keeping this central focus, feminists have shown increasing interest in constitutionalism from a governance and an institutional perspective.<sup>16</sup> For example, women's participation in constitution making, constitutional amendments, and legislative norm setting is now of genuine concern to realize constitutionalism's full potential to achieve women's equality.<sup>17</sup> Similarly, issues of constitutional design and governance such as the distinctions between parliamentary and presidential forms of democracy are being mooted from a feminist perspective with the aim of realigning the current power imbalance favoring men.<sup>18</sup> Engagement beyond the constitutional text and constitutional law too has emerged as part of the broader discourse of constitutionalism to do with social movements, free press, and self-governance.<sup>19</sup> With this expanded range of inquiry, feminist constitutionalism now seems to map onto constitutionalism tout court defined as "the relationship among a constitution's authority, its identity, and possible methodologies of interpretation"<sup>20</sup> or about "institutions of government, the rights of individuals and groups, and the formulation of limitations on institutional power."<sup>21</sup>

In these broad formulations of constitutionalism, just as in the formulations of feminist constitutionalism, we find an emphasis on *doing* constitutionalism, through contestation, interpretation, formulation, debate, deliberation, and resistance. For example, Irving describes constitutionalism as a matter of culture, one which sustains a constitution in which its authority is recognized and accepted.<sup>22</sup> It is thus both political and legal and goes

<sup>15</sup> Julie Suk, *Gender Equality and the Protection of Motherhood in Global Constitutionalism*, 12 LAW & ETHICS HUM. RTS. 151 (2018).

<sup>16</sup> Beverley Baines & Ruth Rubio-Marín, *Introduction: Towards a Feminist Constitutional Agenda*, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 1, 4 (Beverley Baines & Ruth Rubio-Marín eds., 2005); HELEN IRVING, GENDER AND CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 32 (2008).

<sup>17</sup> WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES (Alexandra Dobrowlosky & Vivien Hart eds., 2003); Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643 (2006); Helen Irving, *Drafting, Design and Gender*, in COMPARATIVE CONSTITUTIONAL LAW 19 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>18</sup> IRVING, *supra* note 16, at 30.

<sup>19</sup> Gavin W. Anderson, *Societal Constitutionalism, Social Movements, and Constitutionalism from Below*, 20 IND. J. GLOBAL LEGAL STUD. 881 (2013); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013); Ruth Rubio-Marín, *Women and Participatory Constitutionalism*, 18 INT'L J. CONST. L. 233 (2020).

<sup>20</sup> Larry Alexander, *Introduction to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 1, 1 (Larry Alexander eds., 1998).

<sup>21</sup> Beverley Baines, Daphne Barak-Erez, & Tsvi Kahana, *The Idea and Practice of Feminist Constitutionalism*, in FEMINIST CONSTITUTIONALISM, *supra* note 7, at 1, 1.

<sup>22</sup> IRVING, *supra* note 16, at 23.

beyond the text of the Constitution as the sole authority on the exercise of public power and towards its actual workings in terms of how public power is wielded or resisted. To her, *contestation* not *conclusion* defines constitutionalism in the twenty-first century.<sup>23</sup>

In the case of feminism, contestation involves both the practice of staking a claim or making an argument from a gendered perspective but also acknowledging the diversity of such claims or arguments within feminism. Contestation in fact is key to feminism (and in turn constitutionalism which has to do with feminism), because substantively, feminism is not one thing.<sup>24</sup> It spans the full range of feminist thinking and practice and encompasses its many framings, including formal equality,<sup>25</sup> substantive equality,<sup>26</sup> dominance theory,<sup>27</sup> standpoint theory,<sup>28</sup> different voice theory,<sup>29</sup> intersectionality theory,<sup>30</sup> anti-essentialism,<sup>31</sup> vulnerability approach,<sup>32</sup> post-colonial feminism,<sup>33</sup> post-structural feminism,<sup>34</sup> post-modern feminism,<sup>35</sup> ecofeminism,<sup>36</sup> and socialist or Marxist feminism.<sup>37</sup> It also involves, as we see in the next section, a slew

<sup>23</sup> *Id.* at 26.

<sup>24</sup> Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413 (1994).

<sup>25</sup> SANDRA FREDMAN, DISCRIMINATION LAW 8–14 (2011).

<sup>26</sup> Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 712 (2016); Catherine A. MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman*, 14 INT'L J. CONST. L. 739 (2016); Sandra Fredman, *Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon*, 14 INT'L J. CONST. L. 747 (2016); Catharine A. MacKinnon, *Substantive Equality Revisited: A Rejoinder to Sandra Fredman*, 14 INT'L J. CONST. L. 1174 (2016).

<sup>27</sup> Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINIST LEGAL THEORY READINGS IN LAW AND GENDER 81 (Katherine Barlett eds., 1984); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, esp. ch. 2 (1987).

<sup>28</sup> Uma Narayan, *The Project of Feminist Epistemology: Perspectives from a Nonwestern Feminist*, in GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING 256 (Alison M. Jaggar & Susan Bordo eds., 1989); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT (1990); Sandra Harding, *Rethinking Standpoint Epistemology: What Is Strong Objectivity?*, in FEMINIST EPISTEMOLOGIES 49 (Linda Alcoff & Elizabeth Potter eds., 1993).

<sup>29</sup> CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

<sup>30</sup> Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

<sup>31</sup> ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1988).

<sup>32</sup> Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

<sup>33</sup> DE-CENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, AND FEMINIST WORLD (Uma Narayan & Sandra Harding eds., 2000).

<sup>34</sup> Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or the Uses of Poststructuralist Theory for Feminism*, 14 FEM. STUD. 33 (1988).

<sup>35</sup> Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education, or "The Fem-Crits Go to Law School."* 38 J. LEGAL EDUC. 61 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 41 DUKE L.J. 296 (1991).

<sup>36</sup> MARIA MIES & VANDANA SHIVA, ECOFEMINISM (1993); ECOLOGICAL FEMINISM (Karen J. Warren ed., 1994).

<sup>37</sup> Barbara Ehrenreich, *What Is Socialist Feminism?*, in MATERIALIST FEMINISM: A READER IN CLASS, DIFFERENCE, AND WOMEN'S LIVES 65 (Rosemary Hennessy & Chrys Ingraham eds., 1976); LISE VOGEL, MARXISM AND THE OPPRESSION OF WOMEN: TOWARDS A UNITARY THEORY (1983).



of actors from constitutional makers and judges to feminist groups and litigants who invoke feminist reasoning in their work. Feminist constitutionalism thus inevitably includes a whole range of feminist viewpoints and reflects a commitment to engaging with the entire range as invoked by the range of actors, resisting the urge to choose the interpretation of one as the right kind comprising feminist constitutionalism. Rather, it is concerned with the particular kinds of reasoning associated with each and their impact on constitutionalism in turn, in terms of the stakes they claim to the normative meaning of sex, gender, sexuality, equality, rights, citizenship, democracy, federalism, and so on, within the Constitution.

Given the multiplicity and diversity of feminist viewpoints which make up the substantive content of feminist constitutionalism, how these viewpoints are couched and contested across time and at particular points in constitutional history assumes significance. Take, for example, a decision which patently declares that women are not to be men's equals in public employment but that they deserve jobs because they are efficient or because there is a shortage of male workers or just because the judges are feeling magnanimous. The outcome, however, seemingly good for litigants who argue for equality in access to employment, is also based on curious reasoning(s). Surely, feminist constitutionalism would have to engage in that reasoning to say anything meaningful about the "feminist" groundwork of a good outcome. It would, for example, have to say something about litigants who may be cultural feminists and who would agree with the court's reasoning and the differential abilities of women in certain kinds of "unfeminine" employment; or those who would argue for formal equality only to the extent that women *are* actually men's equals or efficient in certain jobs; or those who take a more substantive view of equality and thus reject equality based on the very stereotypes that disadvantage women in employment; or those who believe in critical legal theory so that judges decide on what they have for breakfast any way. If constitutional claims can be couched in multiple and diverse feminist molds, it would matter to have these claims laid out and examined to better appreciate the complete substantive thrust of feminist constitutionalism.

For this reason, feminist constitutionalism is couched both in terms of its substantive content as well as the discourse in which that content exists, rather than focusing exclusively on the former. Although focusing on the discourse alone is insufficient in speaking to the totality of feminist constitutionalism, it appears necessary in order to access the totality of it, or to access the content of feminist reasoning at all. That is, it is through the discourse that we come to appreciate the actual contours of feminist constitutionalism, in terms of, viz. whether it is based on formal equality or goes towards substantive equality; whether it is based on liberal, cultural, or radical feminism; whether it embraces intersectionality; or whether it is located predominantly in equality, dignity, or autonomy or some combination of values, etc. Because feminist labels, text, or outcomes in constitutional law mask the diversity within these feminist debates, this article is dedicated to going behind them and into the discourse to unpick these debates which help understand the feminism of feminist constitutionalism.

### 3. A feminist constitutionalism landscape

Constitutions often declare themselves to be secular, socialist, or democratic, but seldom declare themselves as feminist. Feminism is often read into constitutions, especially via their constitutional rights provisions such as the right to equality or the prohibition of sex discrimination. But feminist thought and practice may also come to define constitutionalism from outside the written text of the constitutions and formal constitutional law. This is particularly true of India where the postcolonial constitution came to be framed against the backdrop of the women's movement, and has throughout continued to develop against this backdrop, giving rise to a constitutional landscape teeming with feminist fervor.

The women's movement in India began in the early twentieth century. It was a mix of the social reform movement, manifest in campaigns like those against *sati* (widow burning) and the *devdasi* system (the dedication of lower caste and Dalit women to temples for sexual exploitation), and the nationalist anticolonial movement against the British rule. Both the leadership as well as the masses were engaged in these social and political contestations of the first half of the twentieth century.<sup>38</sup> This had an indelible impact on the framing of the Constitution, especially in negotiating from a position where women's equality was considered incontestable. Universal suffrage, for example, was a non-issue in 1947 when the Constituent Assembly convened to negotiate independent India's first Constitution. Women, having led their own movement and having participated on equal terms with men in the social reform and anticolonial struggles, were perforce equal citizens in a democracy. There was thus no need to fight for an equal rights provision or an "equal rights amendment" like in the United States when equality on the basis of sex was deemed part of the Constitution from its inception.<sup>39</sup> Gender equality as a norm,<sup>40</sup> as reflected in the text of the Indian Constitution in provisions like Articles 15 and 16, had already been negotiated prior to and outside of formal constitutionalism initiated at the Constituent Assembly. But what is interesting to note is that the women's movement has influenced the feminist roots of the Constitution more broadly, and beyond the explicit references which recognize women or gender in the text of the Constitution.

A good example of this is the debate around Article 44 of the Constitution which does not mention sex, gender, or women in its text explicitly, and is yet the battleground of feminist constitutionalism. Article 44 enjoins the State to "endeavour to secure for the citizens a uniform civil code throughout the territory of India." Uniform Civil Code (UCC) is no small ask for a country where religious and cultural practices of every

<sup>38</sup> MADHU KISHWAR, *A HISTORY OF DOING: AN ILLUSTRATED ACCOUNT OF MOVEMENTS FOR WOMEN'S RIGHTS AND FEMINISM IN INDIA 1800–1990* (1993); Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in *RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY* 233 (Kumkum Sangari & Sudesh Vaid eds., 1989); JOANNA LIDDLE & RAMA JOSHI, *DAUGHTERS OF INDEPENDENCE: GENDER, CASTE AND CLASS IN INDIA* (1986).

<sup>39</sup> MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, *supra* note 12.

<sup>40</sup> "Gender" is used as an inclusive shorthand in this chapter for categories including sex, pregnancy, sexual orientation, sexuality, and transgender-status. It is thus used in a broad sense to include norms relating to women and sexual minorities (LGBTQIA+), but not only, and may include gendered norms relating to anyone, including men. See JOANNE CONAGHAN, *LAW AND GENDER* 22–3 (2013).



community have enjoyed the status of “personal” laws in governing matters of family, home, marriage, adoption, inheritance, succession, etc. But this has allowed some deeply patriarchal and discriminatory practices to continue. Discrimination against women in parental rights, rights of inheritance to family property, reproductive rights, etc. are all sanctioned by personal laws, including customs and traditions which are given the force of law. Despite the best efforts of the women’s movement which has consistently campaigned against personal laws, the debate over the UCC has not been construed, in the mainstream, as a debate over women’s rights.<sup>41</sup> Flavia Agnes offers an explanation as to why the UCC has been transcribed into secular terms:

[W]hile laying the foundation of a new nation, the scheme of women’s liberation had to be relocated within the master scheme of national integration...[thus] [t]he issue of personal laws was debated primarily in the Constituent Assembly in the context of rights of minorities within the new nation. The trauma of partition had brought in its wake an insecure and defensive Muslim minority who had to be reassured of their right to religious and cultural freedom within the new democracy, which would be governed by majority concerns.<sup>42</sup>

The explanation rings true of the approach of the women’s movement—and in particular of liberal and secular feminism—which has had to negotiate demands for gender justice within the larger project of building a postcolonial nation state and against the painful backdrop of communal violence that accompanied the partition between India and Pakistan. Feminist demand for a “uniform” civil code has thus had to balance opposition to discriminatory practices against women with notions of secularism and tolerance. However, not all feminists have draped gender justice with secular demands and in fact some remain deeply skeptical of secular or any other universal framing of rights and citizenship.<sup>43</sup> So there are feminists who fear that bringing in the UCC will only entrench the hegemony of the already strong Hindu majority. The question for them is not about secularism but about community, because women belonging to minorities cannot overlook the possibility that the UCC, though potentially desirable for women, could run havoc on their status as women who belong to minority communities. Their intersectional position as gendered *and* as religious subjects thus complicates their feminist position on the UCC.<sup>44</sup>

The irony is that, despite the diverse and contested reality of the feminist engagement with the UCC debate, the debate that has persisted for over a century has now been coopted by the current Hindu-nationalist government as one about saving minority women.<sup>45</sup> They project a reality which is far from true: that Hindu women have

<sup>41</sup> NIVEDITA MENON, *SEEING LIKE A FEMINIST* 151 (2012).

<sup>42</sup> Flavia Agnes, *Law and Gender Inequality: Politics of Women’s Rights in India*, in *WOMEN AND LAW IN INDIA* 71 (2004). See also ARCHANA PARASHAR, *WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY* (1992).

<sup>43</sup> Partha Chatterjee, *Secularism and Toleration*, 29 *ECON. POL. WEEKLY* 1768 (1994); Madhu Kishwar, *Codified Hindu Law: Myth and Reality*, 29 *ECON. POL. WEEKLY* 2145 (1994). Cf. Lakshmi Arya, *The Uniform Civil Code: The Politics of the Universal in Postcolonial India*, 14 *FEMINIST LEGAL STUD.* 293 (2006).

<sup>44</sup> Rajeswari Sunder Rajan, *Women between Community and State: Some Implications of the Uniform Civil Code Debates in India*, 65 *SOC. TEXT* 55, 58–9 (2000).

<sup>45</sup> Nivedita Menon, *A Uniform Civil Code in India: The State of the Debate in 2014*, 40 *FEMINIST STUD.* 480, 481 (2014).

been served by progressive reform of Hindu personal laws while minority, especially Muslim, women remain enslaved by their religious and cultural practices. But as Nivedita Menon explains, neither have Hindu women been served by merely codified, not reformed, Hindu personal law, nor have Muslim women been necessarily worse off given the many superior provisions for the protection and welfare of women in Muslim personal law relating to property ownership and maintenance.<sup>46</sup> The nationalist spin to the UCC debate to save minority women and to bring communities together is thus based on the “marginalization and exclusion of a multiplicity of other interests and identities, and therefore [not] a value that feminists can espouse.”<sup>47</sup>

The UCC is perhaps the longest and most challenging debate which shows the workings of feminist constitutionalism—as a discourse of diverse and diverging viewpoints—most vividly. It serves as an example of how the landscape of feminist constitutionalism is shaped by the women’s movement in India, which is extremely diverse and contested, and may affect the normative demands we make on the Constitution, via a provision like Article 44 which is not, on the face of it, about women or gender per se. Another example of the debate over the representation of women in high offices should suffice to appreciate this “landscape” that defines feminist constitutionalism in India.

There are no quotas for women in the Parliament. The demand for 33% reservation for women at the national and state-level legislative bodies in the form of the Women’s Reservation Bill (The Constitution (108th Amendment) Bill) remains pending since 1996. Its success today remains largely hypothetical given the lack of political consensus on why representation matters and whom it would benefit. In fact, according to Indira Jaising: “It is arguable that neither during the framing of the Constitution, nor during the fifty years that followed, or indeed even in the jurisprudence of the Supreme Court, have women enjoyed preferential treatment that caste [for reservations] has at the hands of lawmakers.”<sup>48</sup>

However, the lack of preferential treatment for women legislators is not only stark in comparison to caste-based reservations—which are entrenched—but itself complicated by the caste dimension. For example, Dalit feminists have demanded quota within quota, for they fear that a general quota for women would only favor upper-caste middle-class Hindu (“Savarna”) women.<sup>49</sup> Their fears have a clear history of having been passed over in previous movements especially in 1980s, when the Mandal Commission recommended the introduction of caste-based reservations in government jobs.<sup>50</sup> This was fiercely opposed by upper-caste men and women who regarded reservations as a decline of meritocracy. Upper-caste women in particular

<sup>46</sup> *Id.* at 482.

<sup>47</sup> *Id.*

<sup>48</sup> Indira Jaising, *Gender Justice and the Supreme Court*, in *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 311 (B.N. Kirpal et al. eds., 2000).

<sup>49</sup> VRINDA NABAR, *CASTE AS WOMAN* esp. ch. 1 (1995).

<sup>50</sup> 1–2 REPORT OF THE BACKWARD CLASSES COMMISSION (1980), [www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf](http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf) [hereinafter Mandal Commission Report].

saw this as leaving them with “husbands without jobs,” a patently casteist framing precluding inter-caste marriage. It was a failure of feminist imagination in not seeing educated Dalit men with jobs as husbands, or seeing anything beyond heterosexual relationships and marriage as a possibility for upper-caste women.<sup>51</sup> Dalit women were rightly skeptical of ever being “represented” in and by a general women’s movement or a quota when upper-caste women were all too clear about caste boundaries they would not breach. Dalit feminism has since distanced itself from the mainstream women’s movement and, as a result, the women’s movement in India has never been a single movement at all.<sup>52</sup> Dalit-Bahujan, Adivasi, and Muslim feminists make up the women’s movement which is internally diverse and deeply contested from within.

The UCC and the constitutional reservation for women in legislative bodies are thus complex demands which need to be unpacked from within the feminist landscape that inhabits them. They illustrate several things about this landscape: first, that the women’s movement in India has had a significant relationship with feminist constitutionalism; second, that there is nothing like a single cohesive women’s movement and consequently, that feminist constitutionalism is fractured along caste, class, and religious lines; and third, that the influence of the women’s movement on feminist constitutionalism shows that the latter does not solely depend on constitutional text in terms of what it does or does not allow, but is often aspirational in staking a claim to the normative meaning of the Constitution from a range of feminist positions.<sup>53</sup> As a corollary, it shows that doing feminist constitutionalism within this landscape entails: first, mapping the landscape, not only in terms of constitutionalism but also in terms of the feminist or women’s movement which defines the landscape; second, mapping the women’s movement itself for the diversity of positions assumed in respect of the Constitution; and third, observing how these positions are informed not only by the internal logic or the text of the Constitution but by the normative aspirations of feminists who engage with it.

How well does constitutional jurisprudence reflect this feminist constitutional landscape? The next section turns to this.

#### 4. The feminist trajectory of constitutional jurisprudence

Section 2 defined feminist constitutionalism broadly and beyond the strictures of formal constitutional law. Section 3 explained this in reference to the landscape of feminist constitutionalism in India which has developed in step with the broader women’s movement which itself is extremely diverse and contested from within. Now, it is useful to note that although feminist constitutionalism is broad in this way, it has a

<sup>51</sup> UMA CHAKRAVARTI, *GENDERING CASTE: THROUGH A FEMINIST LENS* 1–5 (2009).

<sup>52</sup> Kumkum Sangari, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, 30 *ECON. POL. WEEKLY* 3381 (1995); Supriya Akerkar, *Theory and Practice of Women’s Movement in India: A Discourse Analysis*, 30 *ECON. POL. WEEKLY* 2 (1996).

<sup>53</sup> See NANDITA GANDHI & NANDITA SHAH, *THE ISSUES AT STAKE: THEORY AND PRACTICE IN THE CONTEMPORARY WOMEN’S MOVEMENT IN INDIA* (1991); GERALDINE FORBES, *WOMEN IN MODERN INDIA* (1996).

special link to constitutional adjudication, especially in India, where feminist contests over the meaning of the Constitution have been frequently fought at the constitutional courts.<sup>54</sup> The Supreme Court and the High Courts in India have thus served as real sites of the discourse in feminist constitutionalism, producing seventy years' worth of gender jurisprudence to be unpacked to understand feminist constitutionalism itself. The trajectory of the fundamental rights jurisprudence is particularly telling in this regard. This section traces that trajectory in three phases: the “modest” beginnings in the first fifty years, the developments in the early noughties, and finally, the most recent jurisprudence of the Court which has, per Chandrachud J and others, been dubbed feminist. These phases are no more real than others in organizing the copious material produced by constitutional courts in India. But they should serve as helpful markers in the evolution of feminist constitutionalism, especially by delineating the “high points” of jurisprudence which bears out the discourse most distinctly. The trajectory as a whole, however, warns against a static view of any one moment as the high point of feminist constitutionalism, and urges us to appreciate the details of the discourse in terms of its diverse and divided feminist mores.

#### 4.1. *Air India, Rupan Deol Bajaj, and their ilk: Of “modest” beginnings*

The period following the enactment of the Constitution was marked by a range of conflicts and contestations over women's rights. Chief amongst these were issues with personal laws, i.e. religious laws governing matters like marriage, property, guardianship, adoption, and divorce; sexual harassment and violence; public employment; and sexual expression. The narrative which came to define most of the early constitutional rights jurisprudence is steeped in patriarchy in two forms—either as a matter of outright misogyny where women's identity and position were treated in a trifling manner, and in any case as subordinate to men; or with romantic paternalism, seeing women in the image of powerless subjects in need of protection by the state.

The equality jurisprudence characterizes this sharply. The constitutional right to equality under Article 14 has been narrowly interpreted along the Aristotelian line of treating likes alike.<sup>55</sup> This has translated into two administrative law-like standards—of reasonable classification and non-arbitrariness, both allowing equality, especially gender equality, to be interpreted abstractly and as nothing to do with the substantive conditions of inequality based on socioeconomic differences, stigma, stereotypes, prejudice, marginalization, and loss of dignity or autonomy based on gender. The case of *Air India v. Nargesh Meerza*<sup>56</sup> exemplifies this. The Supreme Court had before itself a constitutional challenge to Air India Service Regulations which mandated compulsory retirement for female air hostesses on any of the following conditions—upon turning

<sup>54</sup> Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities and Contradictions*, 25 S. CAL. INTERDISCIPLINARY L.J. 107, 124 (2016).

<sup>55</sup> Ratna Kapur, *Gender Equality*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 742, 745–7 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 2016).

<sup>56</sup> AIR 1981 SC 1829.

thirty-five years of age, upon marriage (if within four years of joining service), upon first pregnancy, and at the discretion of the Managing Director between the ages of thirty-five and forty-five years. On applying the test of reasonable classification under Article 14, the Supreme Court found none of the conditions to be violating the general right to equality of women. According to the Court, the service conditions were premised on an intelligible difference between the classes of male and female staff (different bodily capacities, aspirations, etc.) and that the difference furthered a rational objective sought by the airline (of economic efficiency, administrative convenience, etc.). On applying the test of arbitrariness, only the pregnancy condition was said to violate Article 14 because it interfered with “the ordinary course of human nature” and “the natural consequences of marriage” and “an immutable characteristic of married life.”<sup>57</sup> On the other hand, the marriage condition was allowed to stand because it was seen as allowing women to “fully mature and there [being] every chance of such a marriage proving a success.”<sup>58</sup> A differential view of women’s capabilities based on sex, coupled with a paternalistic attitude controlling women’s sexuality and life choices of marriage, pregnancy, and employment, thus defined the Supreme Court’s approach to sex equality under Article 14.

The same approach is reified in Article 15(1) which was confined to discrimination based on sex *alone* such that discrimination is considered justified when combined with “other considerations.”<sup>59</sup> Thus, the Court in *Air India* found none of the conditions as breaching the constitutional right against discrimination under Article 15(1) because they were not exclusively based on sex, but on a host of other considerations including differences in salaries between men and women, women’s aspirations, women’s reproductive role and choices, etc. None of these gendered “considerations” were seen as sex-based, when sex was understood as exclusively determined by female biology and nothing more.<sup>60</sup> *Air India* thus foreclosed the possibility of understanding sex discrimination both (i) in terms of gender and the social conditions in which sex operated;<sup>61</sup> and (ii) in terms of intersectional discrimination, as comprising other forms of discrimination including that based on age and marital status.<sup>62</sup>

Connected to this difference-based view of equality is a strong sense of protectionism: because women are (in reality) not treated as equal to men, they must be protected from men. Thus, Article 15(3) of the Constitution came to be interpreted as justifying provisions which were otherwise downright derogatory, viz. the definition of adultery as a crime against husbands per se,<sup>63</sup> or the definition of sexual harassment

<sup>57</sup> *Id.* ¶ 92.

<sup>58</sup> *Id.* ¶ 83.

<sup>59</sup> See *contra* KALPANA KANNABIRAN, *TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION* (2012).

<sup>60</sup> Jaising, *supra* note 48; Martha Nussbaum, *India, Sex Equality, and Constitutional Law*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 174 (Beverly Baines & Ruth Rubio-Marín eds., 2005).

<sup>61</sup> See also *Air India Cabin Crew Association v. Yashaswinee Merchant*, (2003) 6 SCC 277; *Lena Khan v. Union of India*, 1987 AIR 1515; *Air India Cabin Crew Association v. Union of India*, (2012) 1 SCC 619.

<sup>62</sup> *Navtej Johar v. Union of India*, AIR 2018 SC 4321, esp. ¶¶ 35–6 (Chandrachud, J.) (overruling *Air India v. Nargesh Meerza*, AIR 1981 SC 1829 by implication).

<sup>63</sup> *Yusuf Abdul Aziz v. Bombay*, 1954 SCR 930, reinforced in *Smt Sowmithri Vishnu v. Union of India*, AIR 1985 SC 1618; *V. Revathi v. Union of India* (1988) 2 SCC 72; *W. Kalyani v. State through Inspector of Police* (2012) 1 SCC 358.

as “outraging the modesty of women.”<sup>64</sup> For example, as early as 1954, in *Yusuf Abdul Aziz v. State of Bombay*,<sup>65</sup> the Supreme Court had settled that the exemption of wives for being prosecuted for adultery as an “adulteress” or as an “abettor” was constitutional under both Articles 14 and 15(3) of the Constitution. The Court justified the exemption in these terms:

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 discriminat[ion] in general on that ground, the Constitution itself provides for special provisions in the case of women and children.<sup>66</sup>

Positive measures for women can indeed be justified this way. However, the fact that a colonial criminal provision based on Victorian ideas of adultery as committed by husbands against their wives was not deemed discriminatory but instead an instance of “special provision” betrays even the sense of formal equality, let alone substantive equality.<sup>67</sup>

Curiously, this sense of protectionism evaded the “private” sphere where personal laws were meant to be applicable.<sup>68</sup> Thus, the position of women with respect to religion and issues governed by religion or culture, including marriage, divorce, maintenance, children, property, and remarriage, was beyond the pale of the Constitution, unless embodied in the form of a statutory instrument enacted by the legislature. Yet, judicial oversight was limited. So even in the “best” of Supreme Court decisions concerning Hindu and Muslim women, much is found wanting from a feminist perspective. For example, the landmark decision in *Gita Hariharan v. Reserve Bank of India*<sup>69</sup> extended guardianship of children to Hindu mothers only “in the absence of the father” when the father was dead, missing, inattentive, or incapacitated under the Hindu Minority and Guardianship Act 1956. The decision is, still today, touted as progressive, with little discontent over its unmistakable assumption that women are inferior to men in Hindu law when it comes to the guardianship of children. In other decisions, say the case of *Madhu Kishwar v. State of Bihar*,<sup>70</sup> which challenged women’s exclusion from inheritance under tribal law, the Supreme Court affords itself the shield of non-intervention and respect for different cultures, tribes, and customs in sanctioning discrimination. In fact, intervention in cases involving religion or culture, especially on grounds of equality or non-discrimination, has been seen as “elitist.”<sup>71</sup>

<sup>64</sup> *Rupan Deol Bajaj v. KPS Gill* (1996) AIR 309.

<sup>65</sup> *Yusuf Abdul Aziz*, 1954 SCR 930.

<sup>66</sup> *Id.*

<sup>67</sup> See, for an analysis of the uneven Article 15(3) jurisprudence, Eileen Kauffman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts’ Equality Jurisprudence*, 34 GA. J. INT’L & COMP. L. 557 (2006).

<sup>68</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

<sup>69</sup> AIR 1999 SC 1149.

<sup>70</sup> *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125.

<sup>71</sup> *Id.* at 134–5 (“judicially enforcing on [each religion or culture] the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort”).



Thus, in negating a constitutional challenge to a provision in Hindu law (“restitution of conjugal rights”) which compelled a spouse, most often a woman, to return to her husband, the Supreme Court in *Saroj Rani v. Surdarshan Kumar* found no place for the application of Article 14 or Article 21, and instead found the impugned provision to be serving “a social purpose as an aid to the prevention of break-up of marriage.”<sup>72</sup>

Interestingly, where the Supreme Court *did* intervene in favor of more equitable solutions, say with respect to the rights of Muslim women to alimony under ordinary laws, it did so not on constitutional grounds of equality or justice but on religious grounds, choosing to interpret religious practices and texts (viz. Koran) more favorably.<sup>73</sup> Thus, in *Shah Bano*, the Supreme Court compelled a Muslim husband to pay alimony to his wife under a criminal law provision despite his objection that the criminal law provision ran counter to Muslim personal law. Instead of seizing the opportunity to decide the issue based on the rights of Muslim women, the Supreme Court decided the matter on Koranic law, interpreting the Koran as consistent with criminal law and vice versa.<sup>74</sup> The political implications of having done so were devastating. The Parliament overturned the decision in *Shah Bano* by passing the Muslim Women’s (Protection of Rights on Divorce) Act 1986 which denied Muslim women maintenance after divorce under criminal law. The Parliament was able to do so because the Court’s decision was not grounded in rights, i.e. in the violation of Muslim women’s rights to equality, life, or security, but in the Koran, a text the Court had no formal or moral authority to interpret.<sup>75</sup> The Parliament thus had no obligation to engage with the Court’s reasoning and instead pandered to the Muslim conservatives who had demanded that *Shah Bano* be overruled via legislation because it interfered with their religion.

Yet other favorable decisions were reached by invoking justice, equity, and good conscience, but not explicit feminist reasoning. For example, in *Sarla Mudgal v. Union of India*,<sup>76</sup> the Supreme Court allowed a woman to prosecute her husband for bigamy since he had married a second wife after converting to Islam. The issue of conflict of personal laws was not resolved in reference to the rights of the woman who had complained but to the good sense and judgement of the Court itself. So, while the outcome was women-friendly, it had nothing to do with feminism or any of its approaches to understanding gender equality.

The inconsistency in the Court’s approach to private or religious matters is apparent but so is its obstinacy in *not* invoking either constitutional rights or feminist ideas in deciding women’s issues. Two things emerge. First, the normative assumption is that matters of family and religion are private, where women’s relationships are negotiated within “communities” governed by custom, tradition, culture, caste,

<sup>72</sup> (1984) 3 SCC 90.

<sup>73</sup> Mohd Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945 [hereafter *Shah Bano*].

<sup>74</sup> Cf. Siobhan Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD J. LEGAL STUD. 671 (2004) (reading *Shah Bano* as an intervention based on rights, especially equality).

<sup>75</sup> Danial Latifi v. Union of India (2001) 7 SCC 70 held that the Parliament’s reversal of the *Shah Bano* decision via the Muslim Women (Protection of Rights on Divorce) Act 1986 was not discriminatory under Article 14 of the Indian Constitution.

<sup>76</sup> (1995) 3 SCC 635.

religion, and good ideas of morality, ethics, and justice, and out of the plain sight of the Constitution.<sup>77</sup> Second, the Court misses a whole slew of feminist critique of this normative assumption of the private sphere being beyond constitutional scrutiny.<sup>78</sup>

More “public” matters like sexual harassment and violence have had a better reception. While most such cases are responded to within criminal law, some cases of sexual harassment and violence have drawn the constitutional link explicitly—seeing these crimes as against the fundamental rights of women enshrined in the Constitution, including the right to equality, the right to non-discrimination, and the right to life and liberty. Though that has not led to entirely feminist results either.

In the case of *Bodhisattva Gautam v. Chakraborty*,<sup>79</sup> the Supreme Court granted a claimant’s case for maintenance against a partner with whom she had had a long relationship, been through two abortions at his behest, and yet was abandoned despite a longstanding promise to marry. The Supreme Court interpreted the case as one of rape and as a violation of the right to life of the claimant. This was because there was no consent for a sexual relationship that was pursued on a false promise to marry. The fact that a claim of maintenance for breach of promise to marry was interpreted as “rape” says something about the way both rape and marriage are conceptualized in the Indian context. The chain of inarticulate assumptions may be unraveled thus: consent in the case of sexual intercourse initiated on the promise to marry, which is later breached, is vitiated, making that intercourse rape; although marital rape remains constitutional to date, sexual intercourse that does not lead to marriage is classified as rape and hence unconstitutional and violative of women’s rights; and ultimately, marriage is central to sexual intercourse, the promise to marry thus making that sexual intercourse equivalent to marriage. None of these assumptions are entirely feminist or affirming of a more equal or autonomous position of women per se.<sup>80</sup> In the absence of arguments explaining how a judgment laden with these assumptions is actually feminist or gender-just, it is difficult to accept that simply a pro-women remedy justifies invoking the Constitution and that such remedy thus becomes feminist.

Likewise, *Rupan Deol Bajaj v. KPS Gill*<sup>81</sup> is often seen as reflecting “the increasing sensitivity of the Supreme Court to feminist concerns.”<sup>82</sup> But beneath a pro-women remedy in the case lies a layer of premises, both stated and unstated, that make its “feminist” reading suspect. The case involved a complaint by a senior female officer in the Indian Administrative Service (IAS) for being inappropriately touched by a male police officer at a party. The High Court below had quashed the complaint filed under the Indian Penal Code under sections 394 and 509. They concerned offences of assault or use of criminal force on a woman with the intent to “outrage her modesty” and

<sup>77</sup> Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and “Personal Laws,”* 4 INT’L J. CONST. L. 181 (2006).

<sup>78</sup> *Id.*

<sup>79</sup> (1996) 1 SCC 490.

<sup>80</sup> Although they can be. Some, for example, make the case that promise to marry is a vitiation of consent and hence makes sexual intercourse based on it rape. See Jonathan Herring, *Mistaken Sex*, CRIM. L. REV. 511 (2005).

<sup>81</sup> *Rupan Deol Bajaj v. KPS Gill* (1996) AIR 309.

<sup>82</sup> Jaising, *supra* note 48, at 311.

“insulting the modesty” of a woman by words, acts, or gestures. The High Court had found that the act of hitting a woman on her posterior did not qualify as outraging the modesty of a woman. The Supreme Court disagreed. It found that the act did amount to outraging the modesty of a woman as “an affront to the normal sense of feminine decency but also an affront to the dignity of the lady.”<sup>83</sup> Neither were “sexual” overtones of the act necessary to be established, nor was there a minimal threshold of injury to be achieved before classifying the act as an offence. The Supreme Court thus quashed the High Court order and asked for the offences to be investigated.

At best, the decision reflects a diluted view of cultural feminism which insists on women being seen as essentially feminine subjects. There is no doubt that the Supreme Court order is a step up from the High Court order, in that it does consider the impugned acts to be problematic. But its reasons for why they were problematic are not entirely unproblematic. Linking assault to Victorian notions of modesty, even when couched in terms of dignity, is problematic because it is based on a disempowered notion of women and their bodies rather than treating women as autonomous subjects with mental and bodily integrity. According to the Court, the offence was non-trivial because it was seen as having “affected” the complainant mentally as well as socially, rather than being problematic in and of itself as violating the mental and bodily integrity of a person. The Supreme Court, though pro-women, was pro a very particular kind of virtuous woman, who was modest and feminine and thus only for whom dignity mattered. No reference to constitutional rights was made in assuming these positions.

But even when reference to constitutional rights is made in sexual harassment cases, it seems to be done in a piecemeal manner, making it difficult to substantively appreciate or apply these decisions from a feminist perspective. The *locus classicus* of *Vishaka v. State of Rajasthan* is an apt example of this.<sup>84</sup> The Supreme Court in *Vishaka* ended up quasi-legislating lengthy guidelines to prevent and punish sexual harassment in the workplace in the absence of legislative norms regulating it. The impetus for this was found in the fact that India was a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>85</sup> and was thus obliged to address sexual harassment in the workplace on grounds of having committed to gender equality. *Vishaka* is universally hailed and is indeed an important feat by an activist Court.<sup>86</sup> *Vishaka* was radical in seeing sexual harassment in terms of a breach of fundamental rights, and in particular a violation of the right to equality and the right to life and liberty of women. Furthermore, sexual harassment in the workplace was seen as a violation of the freedom to practice any profession, occupation, trade, or business enshrined in Article 19(1)(g) of the Constitution. The *Vishaka* Court’s view of the woman as a worker deserving of rights in a workplace setting is a breakthrough

<sup>83</sup> *Rupan Deol Bajaj*, (1996) AIR 309.

<sup>84</sup> 1997 AIR 3011 [hereafter *Vishaka*].

<sup>85</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>86</sup> Martha Nussbaum, *Women’s Progress and Women’s Human Rights*, 38 HUM. RTS. Q. 589 (2016). Cf. Shreya Atrey, *Women’s Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum*, 40 HUM. RTS. Q. 859 (2018).

in a sea of jurisprudence which did not conceive of women or women's role in gainful employment at all. When it had, the previous iterations of equality rights of women as workers were still very much about protecting "the gentler of the species" in the workspace than about equality in terms of being able to decide for themselves and to avoid negative stereotypes like being considered "gentle" in pursuing their careers.<sup>87</sup> In fact, before *Vishaka*, sex discrimination in employment, even when found to be unconstitutional, was qualified as leaving open the possibility 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."<sup>88</sup> This is visible in the Supreme Court's sustained hostility towards prostitutes whose lives and work have been consistently seen as a menace, against public morals, and hence to be contained and corrected.<sup>89</sup> On the other hand, where women were considered to be equal to men and deserving of equal pay for equal work, the basis of equality was very much rooted in the idea of protectionism and the gendered role of women, rather than substantive equality which would require difference in treatment to remedy gendered stereotypes.<sup>90</sup> For example, the practice of employers requiring intimate details about women's menstrual cycles, reproductive choices, etc. was considered problematic because sharing these details was "embarrassing if not humiliating" and impinged on women's modesty and self-respect, rather than because it was an infringement of equality and the privacy of women.<sup>91</sup>

The difference is thus far from subtle between the many versions of equality on which women's constitutional rights as workers are exacted. *Vishaka's* unqualified view of women as autonomous beings and as workers deserving of equality not only in terms of formal equality to be considered on par with men, but also substantive equality to have conditions to operate on par with men, viz. free of sexual harassment, marks a shift in terms of imagining women as constitutional subjects.<sup>92</sup>

However, even *Vishaka* was not a perfect feminist judgment. The *Vishaka* Court ignored aspects of discrimination which were not exclusively determined by sex or gender but were intersectional in nature. In *Vishaka*, the Court had willfully sidelined the specific caste and class context the case arose out of—the gang rape of a Dalit woman, Bhanwari Devi, in rural India. Bhanwari Devi was targeted by an unquestionably gendered act of rape, but the reason she was so targeted was because she was Dalit and had transgressed caste lines by campaigning against a family in her village,

<sup>87</sup> C.B. Muthamma v. Union of India (1979) SCC 188 (the Supreme Court struck down the restriction on married women to join Indian Foreign Service on grounds of equality between married men and married women and "fail[ing] to understand the naked bias against the gentler of the species." *Id.* ¶ 5). See also Vijayamma v. State of Kerala, 1978 (2) LLJ 323; Capt. (Mrs.) Dimple Singla v. Union of India 2002 (63) DRJ 216.

<sup>88</sup> *Muthamma*, (1979) SC 188, ¶ 7.

<sup>89</sup> State of Uttar Pradesh v. Kaushilya, AIR 1964 SC 416.

<sup>90</sup> Mackinnon Mackenzie v. Audrey D'Costa, AIR 1987 SC 1281.

<sup>91</sup> Neera Mathur v. Life Insurance Corporation of India, AIR 1992 SC 392.

<sup>92</sup> A somewhat similar approach was previously followed by the Supreme Court in *Maya Devi v. State of Maharashtra* (1986) 1 SCR 743, which found a requirement for women to seek consent from husbands before employment to be unconstitutional.

which was of a caste higher than hers. Her gang rape was reduced to “sexual harassment” and was understood as a caste-less act, affecting women only *as women*. So even where feminist constitutionalism made a huge difference to women in having sexual harassment recognized in law, the benefits were confined to upper-caste middle-class Hindu (“Savarna”) women without a specific recognition of caste in the sexual harassment guidelines. *Vishaka* thus catered to liberal feminism which excluded intersectional feminism; or to put it back in context, it catered to Savarna women at the expense of Dalit women.

To sum up, two things are distinctive about this early, but rather long period of constitutional jurisprudence spanning over five decades. First, that the version of feminism invoked in justifying the outcomes was largely patriarchal, couched in ideas of formal equality and difference-feminism; and second, that little contestation over different versions of feminism seems to have prevailed, with ideas to do with substantive equality and intersectional feminism elided. What is particularly interesting is that this is both true for cases which did not go in favor of women (viz. *Air India*; *Yusef Abdul Aziz*; *Saroj Rani*) and for those which did (viz. *Gita Hariharan*; *Rupan Deol Bajaj*; *Vishaka*). Surely seeing beyond the outcomes of decisions in this period matters to feminist constitutionalism then, to observe its unexpectedly unified thrust signified in the absence of sustained feminist reasoning.

#### 4.2. *Anuj Garg*, *NALSA*, and their ilk: A break from the past

The part outright-misogyny and part romantic-paternalism but always patriarchal brand of constitutionalism came to yield for the first time in the 2007 decision of the Supreme Court in *Anuj Garg*. The case involved a constitutional challenge to the vires of section 30 of the Punjab Excise Act which prohibited the employment of women on any premises selling alcohol. The government sought to justify the prohibition as in the interest of women under Article 15(3) of the Constitution. The Supreme Court began by framing the issue as squarely about women’s rights and not about the state’s interest in protecting women. According to Justice Sinha, “[t]he rights of women as individuals rest beyond doubt in this age. If we consider (various strands of) feminist jurisprudence as also identity politics it is clear that time has come that we take leave of the theme encapsulated under Section 30.”<sup>93</sup> With this, Justice Sinha took leave of themes of protectionism and instead turned to self-determination, autonomy, and equality. He emphasized the importance of employment rights of women under Article 19(1)(g) of the Constitution and the need for the state to preserve and enforce them without putting curbs on women’s freedom to choose and live a life of their own making.<sup>94</sup> Thus, rejecting the romantic paternalism offered by the state government as the rationale for sustaining the impugned provision, he urged the government to find a “new model of security” where measures to protect women’s autonomy did not destroy the essence of autonomy itself.<sup>95</sup> In the final analysis, the Court found that

<sup>93</sup> *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1, ¶ 19.

<sup>94</sup> *Id.* ¶ 41.

<sup>95</sup> *Id.* ¶ 34.

the impugned legislation “suffer[ed] from incurable fixations of stereotype[d] morality and conception of sexual role”<sup>96</sup> and thus declared it unconstitutional as a case of “invidious discrimination perpetuating sexual differences.”<sup>97</sup>

A crucial piece of feminist reasoning in *Anuj Garg* was the reconstruction of the equality of women as workers. *Vishaka* had initiated that work a decade earlier. *Anuj Garg* extended *Vishaka*’s recognition of freedom from sexual harassment to the recognition of the equality of women as workers in terms of autonomy and non-stereotyping.<sup>98</sup> Though equality in employment was not a fundamental right under the Constitution (other than for public employment under Article 16(1)), the general right to equality under Article 14 and the right to practice any profession or to carry on any occupation, trade, or business under Article 19(1)(g) helped recognize an equal right of women to work in the service sector.<sup>99</sup>

On a similarly defiant note, the Delhi High Court in 2009 decriminalized sodomy.<sup>100</sup> The Delhi High Court’s decision was well ahead of its time, constitutionally speaking. In several remarkable moves, Justice Muralidhar excavated the lost ideal of constitutional morality; infused gender and sexuality with a personal content connected to the dignity, privacy, and autonomy of individuals; read sexual orientation as an aspect of the category of sex protected as a ground under Article 15(1) of the Constitution; elevated the standard of scrutiny for sex discrimination; ruefully acknowledged “the harassment, exploitation, humiliation, cruel and degrading treatment”<sup>101</sup> of the LGBTQIA+ community at the hands of the law enforcement machinery; and, finally, provided an antimajoritarian rationale for its radical decision. Not only did the Delhi High Court have no template to support these moves but they had to maneuver the existing gender jurisprudence which, as shown in the previous section, was far from progressive. It thus cut through arguments of formal equality, of dubious religious morality, and of the medicalization of bodies, to extend sex equality under Article 15(1) of the Constitution to LGBTQIA+ people. The explicit rejection of such competing arguments and the express restatement of LGBTQIA+ rights anchored in radical or transformative ideas of equal citizenship of a dispossessed community marked a real leap of faith for feminist constitutionalism in India.

The decision in *Naz Foundation* struck a sore chord with the government which successfully appealed the decision in *Souresh Koushal v. Naz Foundation* in 2013.<sup>102</sup> *Koushal* disregarded the substantive reasoning in *Naz Foundation* and instead proceeded on the doctrines of parliamentary sovereignty and separation of powers, reasoning that if

<sup>96</sup> *Id.* ¶ 45.

<sup>97</sup> *Id.* ¶ 53.

<sup>98</sup> See the discussion in GAUTAM BHATIA, *TRANSFORMATIVE CONSTITUTIONALISM: A RADICAL BIOGRAPHY IN NINE ACTS* esp. ch. 1 (2019).

<sup>99</sup> This reasoning later came in handy in lifting a ban on bar dancers as violating their right to freedom under Article 19(1)(g) in *State of Maharashtra v. Indian Hotel and Restaurants Association*, AIR 2013 SC 2582.

<sup>100</sup> *Naz Foundation v. Government of NCT*, (2009) 160 DLT 277.

<sup>101</sup> *Id.* ¶ 52.

<sup>102</sup> (2014) 1 SCC 1.



anyone could change the criminal law on homosexuality, it should be the Parliament not the courts. *Koushal* proceeded on constitutional formalism and thus evaded the discourse in feminist constitutionalism to do with rights and the way rights claims are articulated and contested by those outside of the formal constitutional power entrusted in the Parliament, the executive, and the courts, i.e. women and sexual minorities.

Though *Koushal* overruled *Naz Foundation*, it could not really undo the leaps made in *Naz Foundation*. This became abundantly clear on April 15, 2014, in *National Legal Services Authority (NALSA) v. Union of India*,<sup>103</sup> when the Supreme Court legally recognized transgender status as a constitutionally protected “third sex” under the Constitution. The decision in *NALSA* extended *Anuj Garg’s* exposition of personal autonomy to the right to choose one’s gender identity and thus made self-identification the norm for gender recognition.<sup>104</sup> This in turn opened doors for the formal recognition of the civil rights of transgenders or *hijras* in India, including “the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver’s license, the right to education, employment, health so on.”<sup>105</sup> The decision in *NALSA* empowered communities of prostitutes, bar dancers, and female make-up artists who were written off from the democratic citizenship in the country to claim their rights under the Constitution in an unprecedented way.<sup>106</sup>

But the trajectory of feminist constitutionalism does not just move in one direction. So, while progressive decisions emerged in the 2000s, they were not the only decisions. In fact, regressive decisions continued to appear alongside more progressive ones. Thus, in *Rajbala v. State of Haryana*,<sup>107</sup> the Supreme Court failed to consider any democratic implications of restrictions on the eligibility for elections of local bodies on rural women. The criteria of eligibility included requirements for the candidates to possess a minimum education qualification of matriculation, and to have a functional toilet at their residence, to be able to contest in the elections. Both the requirements were challenged as violating Article 14 on the right to equality. Writing for the Court, Justice Chelameswar found the requirements to be constitutional. He did not consider the overwhelming evidence that the requirements basically penalized poverty, disqualifying at least 50% of the rural poor from electoral politics. In particular, he paid no heed to the evidence that “women and scheduled castes would be worst hit by the impugned stipulation as a majority of them are the most unlikely to possess the minimum educational qualification.”<sup>108</sup> In fact, the Supreme Court in *Rajbala* seems to have been completely blind to women’s right to democratic citizenship.<sup>109</sup> Not for a

<sup>103</sup> (2014) 5 SCC 438.

<sup>104</sup> *Id.* ¶ 69.

<sup>105</sup> *Id.* ¶ 113.

<sup>106</sup> *Indian Hotel and Restaurants Association*, AIR 2013 SC 2582; *Charu Khurana v. Union of India*, (2014) SCC Online SC 900.

<sup>107</sup> (2016) 1 SCC 463.

<sup>108</sup> *Id.* ¶ 74.

<sup>109</sup> Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (critiquing both the constitutional theory’s lack of engagement with the feminist agenda and vice versa, especially the feminist theory’s lack of engagement with constitutional democratic and citizenship basis).

moment does the Supreme Court comprehend that a restriction such as the one in this case defeated constitutionalism per se—when access to public power via public office was delimited.

Other mixed results continued to follow. Thus, the Supreme Court in *Suchita Srivastava v. Chandigarh Administration*<sup>110</sup> rejected the protectionism offered by the state which had ordered a mentally disabled woman to abort her pregnancy as it was in her own “best interests.” It decried such a reading as not only against the domestic law (Medical Termination of Pregnancy Act 1971) but also against international law, especially norms of gender equality under CEDAW and mental capacity under the Convention on the Rights of Persons with Disabilities (CRPD).<sup>111</sup> But at the same time, the Supreme Court continued to serve as a clearing house for abortions, with little consistency between cases in which the Court ordered one and prevented one.<sup>112</sup> Neither a feminist nor a disability-specific lens explains why the Court serves in this role, anchored neither in legislation nor in any discernible constitutional principle to allow or bar abortions at will. Much of this may be explained in terms of the Supreme Court’s assumed role as *parens patriae*, especially in relation to women and sexual minorities, whom it has deemed in need of perineal protection despite developments since *Anuj Garg*. These conflicting messages in gender jurisprudence show the entangled roots of feminist constitutionalism in a range of normative meanings based on everything from formal equality and romantic paternalism to substantive equality and transformation. But in contrast with the jurisprudence before *Anuj Garg*, at this stage, especially with the reasoning in *NAZ Foundation* and *NALSA*, it is clear that the Supreme Court had begun to ground its good outcomes in feminist thought and practice as well—which laid down a substantive account of feminism and also reasoned with it to reach the outcome.

#### 4.3. *Puttaswamy* and beyond: A feminist constitutionalism epoch?

On August 24, 2017, the Supreme Court of India granted constitutional status to the right to privacy.<sup>113</sup> The rare nine-judge bench in *Puttaswamy* was considering privacy in the context of constitutional law for the purposes of another dispute surrounding the government’s biometric identity program—Aadhar. But in regarding privacy as a constitutional right, the Court took a longer route to connect privacy to personal data and identity, and to all aspects of personal life. Thus, the Court linked privacy to existing rights especially of equality and non-discrimination, and life and liberty, and found that privacy lay latent in the fundamental values protected by those rights, including “individual autonomy, dignity and identity.”<sup>114</sup> This became the basis for the Supreme Court to recognize, for the first time, sexual orientation as an aspect of

<sup>110</sup> (2009) 9 SCC 1.

<sup>111</sup> United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 2515 UNTS 3.

<sup>112</sup> See Severyna Magill, *The Right to Privacy and Access to Abortion, Will the Puttaswamy Decision Change Reproductive Rights in India?*, 3 U. OXFORD HUM. RTS. HUB J. 160 (2020).

<sup>113</sup> *Puttaswamy v. Union of India*, 2017 (10) SCALE 1.

<sup>114</sup> *Id.* ¶ 84 (Chandrachud, J.).

privacy protected under the Constitution.<sup>115</sup> Equally, the Court showed acute awareness towards women and their predicaments with “private life.” Recognizing that privacy had until now been used as a shield against the constitutional rights of women at home and within the family, the Court was unequivocal: “The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.”<sup>116</sup> The Court further explored privacy in the context of women’s issues relating to employment law, reproductive health, and sexual assault. Affirming both the primacy of women’s choices as well as the state’s responsibility in ensuring that those choices are real and made freely, the Court in *Puttaswamy* laid down a foundation of the rights of women and sexual minorities which was grounded in terms of dignity and autonomy, and no longer couched in patriarchal or protectionist terms. The significance of *Puttaswamy* is thus twofold: first, being a rare nine-judge bench decision of a Court which is normally composed of two, three, or five judge benches and never sits *en banc*, the judgment carries extraordinary precedential weight in the context of constitutional adjudication; and second, it changes the discourse on constitutional rights, especially of women and sexual minorities, by changing its substantive grounding for the first time and locating it with the individual at the center whose equal moral worth (dignity) and potential to flourish (autonomy) were inviolable.

The significance of *Puttaswamy* cannot be overstated and is directly borne out in the key judgments which followed in 2018. It is in these decisions concerning women and sexual minorities that the discourse in feminist constitutionalism thrives not only because, like *Puttaswamy*, these were substantively weighty in their consideration of women’s issues from a feminist perspective, but also because they starkly show the range of and contestation between feminist perspectives.

First, on April 9, 2018 in *Shafin Jahan v. Asokan*,<sup>117</sup> the Supreme Court decried the invocation of *parens patriae* jurisdiction by the High Court which had annulled the marriage of a Muslim woman, Hadiya, and had forced her to return to her parents against her will. Much like *Anuj Garg*, the Supreme Court grappled with state paternalism head on.<sup>118</sup> It categorically rejected the High Court having exercised its judicial power in the name of protecting an adult woman on the pretext that it was saving her from being exploited, and thus expressly rejected that the “detenue who is a female in her twenties is at a vulnerable age” and that “[a]s per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married [i.e. according to her parents’ wishes].”<sup>119</sup> Furthermore, the Supreme Court explained that the only power constitutional courts have in issuing writs like *habeas corpus* for forcing someone like Hadiya to appear before the Court is in respect of having her appear to determine her

<sup>115</sup> *Id.* ¶ 126 (Chandrachud, J.).

<sup>116</sup> *Id.* ¶ 140 (Chandrachud, J.).

<sup>117</sup> AIR 2018 SC 357.

<sup>118</sup> The Court in fact cited *Anuj Garg* (2008) 3 SCC 1 in doing so. *Shafin Jahan* AIR 2018 SC 357, ¶ 35–7 (Misra C.J., with Khanwilkar, J.).

<sup>119</sup> *Shafin Jahan* AIR 2018 SC 357, ¶ 13] (Misra C.J., with Khanwilkar, J.).

own choice and will in remaining where she is, i.e. to determine that she is not being forcibly detained. That was the limit. The High Court was thus misguided in having Hadiya “returned” to her parents against her will and have her marriage annulled when she considered herself properly married. Relying on *Puttaswamy*, the Court held that “the ability to make decisions on matters close to one’s life is an inviolable aspect of the human personality. . . [and] [t]he strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.”<sup>120</sup> In fact, Justice Chandrachud wrote a concurring opinion, explaining: “The reason for [the] concurring judgment is that it is the duty of this Court, in the exercise of its constitutional functions to formulate principles in order to ensure that the valued rights of citizens are not subjugated at the altar of a paternalistic social structure.”<sup>121</sup> He thus seemed to have used his own constitutional function as a Supreme Court judge in a concurring judgment to reflect on constitutional principles which protected citizens from state paternalism rather than to sanction state paternalism. Although there is no right to marry under the Constitution itself, he used fundamental rights like the right to equality and the right to life and liberty, including the newly recognized right to privacy, to reaffirm Hadiya’s marriage, her choice of partner, and her choice to convert to his religion to be able to marry him. None of these, said Justice Chandrachud, were matters for the High Court to have entered into because they rested “exclusively with the individuals themselves.”<sup>122</sup> Here, Justice Chandrachud seems to enter and throw open the private sphere or home, hitherto left to religion or culture, to constitutional rights by declaring that not only religion or culture but also state paternalism could not diminish people’s dignity and autonomy within this sphere. Constitutionalism is thus made to emerge not only from state paternalism but also the separate spheres theory of women’s rights, both of which had ruled the roost for almost seventy years.

On September 6, 2018, in *Navtej Johar*, the Supreme Court decriminalized sodomy or consensual sex between adults, overturning the decision in *Koushal* and restoring the Delhi High Court’s decision in *Naz Foundation*. Much of the work for *Johar* was already done by the *Puttaswamy* Court in both recognizing sexual orientation as a protected ground under the Constitution as well as recognizing and extending the right to privacy in sexual relationships. Now, in overturning *Koushal*, the Court in *Johar* only had to follow *Puttaswamy* and its explication of privacy, dignity, and autonomy. But it went further. In a series of significant pronouncements, the *Johar* Court also affirmed the pro-democratic role of courts in protecting minorities against the majoritarian rule; instated the idea of transformative constitutionalism as the “primary objective of having a constitutional democracy. . . to transform the society progressively and inclusively”; and reinstated the primacy of constitutional morality over social morality especially in preserving a pluralistic and inclusive society.<sup>123</sup> The significance of it all no doubt lies in reasoning which is substantively feminist and

<sup>120</sup> *Id.* ¶¶ 22, 53, 54 (Misra, C.J., with Khanwilkar, J.).

<sup>121</sup> *Id.* ¶ 1 (Chandrachud, J.).

<sup>122</sup> *Id.* ¶ 23 (Chandrachud, J.).

<sup>123</sup> *Navtej Johar v. Union of India*, AIR 2018 SC 4321, ¶ 253 (Misra, C.J. with Khanwilkar, J.).

not, as Justice Chandrachud would say, simply something that the Constitution had already implied. The judgment, which comprises four concurring opinions running to nearly 500 pages in total, illustrates this substantive reasoning elaborately. For our purposes, what is significant is that although each opinion was transformative in its reasoning and outcome, it showed a slightly different feminist emphasis than the others, thus showing the true range of feminist framings that were considered, rejected, and adopted. For example, in the leading opinion of the Court delivered by Chief Justice Misra, the reason why section 377 of the Indian Penal Code, which criminalized sodomy, was unconstitutional was because it was against the right to equality, the right to privacy, and the right to liberty. It was against the right to equality because it was both drawing a capricious distinction on the basis of sexual orientation in prohibiting consensual sex and was also manifestly arbitrary.<sup>124</sup> It was against the right to privacy because sexual orientation was considered “an essential and innate facet of privacy” and the right to privacy protected all choices concerning sexual orientation.<sup>125</sup> It was against individual liberty which, amongst other things, protected sexual autonomy.<sup>126</sup> On the other hand, Justice Nariman in his concurring opinion did not seem to have made a great deal of privacy or autonomy, but instead found section 377 to be unconstitutional for a host of reasons but especially on grounds of equality in that the legislative distinction was unconstitutional because (i) it treated heterosexuals and homosexuals differently and hence did not pass the reasonable classification test; and (ii) it penalized consensual gay sex and hence was manifestly arbitrary. His analysis was thus in line with the two traditional tests for equality applied since *Air India*—of reasonable classification and arbitrariness. In contrast, Justice Chandrachud was more capacious than others in reiterating equality, dignity, privacy, liberty, and autonomy as the overarching themes of transformative constitutionalism, but also going further. For example, he too considered equality relevant to gauging constitutionality, though his understanding of the right to equality was different from that of others. In particular, he considered the reasonable classification test to be both formulaic and formalistic which risked “elevating form over substance.”<sup>127</sup> Instead, equality for him was a matter of substantive equality.<sup>128</sup> He thus found no way to apply the test of reasonable classification to a distinction made between “natural” and “unnatural” sexual intercourse, a distinction which did not map onto the classification between heterosexuals and homosexuals per se. The provision was thus considered based on indeterminate and outdated morality rather than reasonable classification. It was *this* substantive view of the basis of classification (“natural” versus “unnatural” sexual intercourse) which led Justice Chandrachud to find that it was its indeterminacy and vagueness that made the

<sup>124</sup> *Id.* ¶¶ 237, 240, 246, 247 (Misra, C.J. with Khanwilkar, J.).

<sup>125</sup> *Id.* ¶ 229 (Misra, C.J. with Khanwilkar, J.).

<sup>126</sup> *Id.* ¶ 230 (Misra C.J. with Khanwilkar, J.).

<sup>127</sup> *Id.* ¶ 27 (Chandrachud, J.).

<sup>128</sup> *Id.*

classification unconstitutional.<sup>129</sup> Then, unlike others, Justice Chandrachud also went on to find the provision discriminatory under Article 15(1). In doing so, he specifically rejected the interpretation of Article 15(1) as prohibiting only single-axis discrimination, and extended it to intersectional discrimination based on several grounds, listed or analogous.<sup>130</sup> Finally, in Justice Malhotra's concurring opinion, she too took equality seriously and as key to the constitutionality question, but applied a rather different test than others. For her, like Justice Chandrachud, the reasonable classification test did not apply, but for a different reason: because inequality in this case was based on "an intrinsic and core trait of an individual," i.e. sexual orientation.<sup>131</sup> No question of reasonable classification could arise when the classification concerned something as fundamental as that. She applied *NALSA* explicitly to conclude that "classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights."<sup>132</sup> Like Justice Chandrachud, this prompted her to view sexual orientation as an analogous ground of discrimination under Article 15(1).<sup>133</sup>

To conclude, what should suffice here is to say that while Justices Malhotra and Chandrachud's concurring opinions are indeed based on explicitly feminist reasoning in comparison with other approaches such as in Chief Justice Misra's lead judgment and in Justice Nariman's judgment, their judgments alone cannot be considered in isolation as the bulwark of feminist constitutionalism. For example, while both view equality under Article 14 as a matter of substantive equality, they apply rather different versions of the tests of equality—Justice Chandrachud relying on the *capricious* quality of distinction based on "natural" and "unnatural" sexual intercourse, while Justice Malhotra relying on what this distinction implied in effect, in barring all consensual sex between homosexuals in comparison to heterosexuals and thus drawing an *impermissible* distinction based on an innate characteristic, viz. sexual orientation. While the former seems more akin to the *Anuj Garg*'s anti-stereotyping approach to equality, the latter is akin to *Naz Foundation* and *NALSA*'s self-definition of an identity-based approach to equality. In a space replete with different versions of equality, including substantive equality, these different versions need to be reckoned with in themselves and within the trajectory of equality jurisprudence of which they are a part. Importantly, for feminist constitutionalism, it would matter to see *Navtej Johar* as representative of, not the dissolution of, such diversity and contestation in ideas. The difference in how equality was spelled out and applied shows this discourse suitably, despite the fact that all versions yielded the same result.

On September 27, 2018, in *Joseph Shine v. Union of India*,<sup>134</sup> the Supreme Court struck down section 497 of the Indian Penal Code 1860 which made adultery a

<sup>129</sup> *Id.* citing Nivedita Menon, *How Natural Is Normal? Feminism and Compulsory Heterosexuality*, in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* (Arvind Narrain & Gautam Bhan eds., 2005).

<sup>130</sup> *Navtej Johar v. Union of India*, AIR 2018 SC 4321, ¶¶ 35–6 (Chandrachud, J.).

<sup>131</sup> *Id.* ¶ 14.3 (Malhotra, J.).

<sup>132</sup> *Id.* ¶ 14.5 (Malhotra, J.).

<sup>133</sup> *Id.* ¶ 15.2 (Malhotra, J.), relying on Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 NAT'L U. JURIDICAL SCI. L. REV. 419 (2009).

<sup>134</sup> *Joseph Shine v. Union of India*, (2018) SCC 1676.



crime understood exclusively as perpetuated against the husband of an adulterous wife. This time the rhetoric was even more categorical. Writing for himself and Justice Khanwilkar, according to Chief Justice Misra, the criminal provision “treats [a wife] as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted.”<sup>135</sup> The provision was thus deemed to suffer “from the absence of logicity of approach” and considered manifestly arbitrary and a violation of Article 14 of the Constitution.<sup>136</sup> The Court’s view of arbitrariness as inequality appears to be substantively linked to the idea of subordination; i.e. the fact that a legislative provision treated women as plainly subordinate to their husbands was what made it fall foul of Article 14 on the right to equality.<sup>137</sup> Meanwhile, the violation of Article 21 was linked specifically to dignity, which was seen as undermined by gender stereotypes which demeaned or degraded women.<sup>138</sup> Again, Justice Chandrachud’s opinion went a bit further. For him, Article 14 was violated not only because the provision was manifestly arbitrary in its treatment of women as subordinate to their husbands but also because it undermined women’s sexual autonomy within marriage.<sup>139</sup> For a similar reason, he found that the provision was also (i) discriminatory under Article 15(1), since unequal sexual autonomy between the husband and wife constituted sex discrimination, and (ii) under Article 15(3), could not be justified as protective in nature, since it was paternalistic<sup>140</sup> and patriarchal.<sup>141</sup> Finally, and for this potpourri of reasons, Justice Chandrachud found that the impugned provision violated Article 21 as well.<sup>142</sup>

Justice Malhotra, the only woman on the five-judge bench in *Joseph Shine*, found different reasons for the violation of Article 14 which were not as much to do with manifest arbitrariness as with the fact that the rationale of the provision which treated women as the property of their husbands was now “outdated,” “obsolete,” and “archaic,” and thus “no longer relevant or valid” or “neutral.”<sup>143</sup> Her reasoning for why the provision was not saved as protective under Article 15(3) was even simpler: “The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as ‘beneficial legislation.’”<sup>144</sup> She thus upturned the six-decade-strong logic of *Yusuf Adul Aziz*. Lastly, in the context of Article 21, which Justice Malhotra construed to be specifically protecting privacy (unlike, say, Justice Chandrachud for whom sexual autonomy was the crux), she stated plainly that the provision failed the three-part test laid down in *Puttaswamy* to establish: “(i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures

<sup>135</sup> *Id.* ¶ 22 (Misra, C.J., with Khanwilkar, J.).

<sup>136</sup> *Id.* ¶¶ 24 (Misra, C.J., with Khanwilkar, J.), 23 (Nariman, J.).

<sup>137</sup> *Id.* ¶¶ 24 (Misra C.J., with Khanwilkar J.), 25 (Nariman, J.).

<sup>138</sup> *Id.* ¶¶ 41 (Misra C.J., with Khanwilkar J.); 26 (Nariman, J.).

<sup>139</sup> *Id.* ¶¶ 36, 41–6 (Chandrachud, J.).

<sup>140</sup> *Id.* ¶ 41 (Chandrachud, J.).

<sup>141</sup> *Id.* ¶ 48 (Chandrachud, J.).

<sup>142</sup> *Id.* ¶ 59 (Chandrachud, J.).

<sup>143</sup> *Id.* ¶¶ 12, 13 (Malhotra, J.).

<sup>144</sup> *Id.* ¶ 14 (Malhotra, J.).

a rational nexus between the object and the means adopted.”<sup>145</sup> In other words, it was so obvious that the provision would not have passed this test that it need not be even shown that it did not.

Again, we come to appreciate feminist constitutionalism in a single decision so aptly. The difference in the feminist reasoning of Justices Chandrachud and Malhotra shows how feminist constitutionalism is done, in terms of expressly spelling out and applying the women/gender/equality-friendly reasoning. In fact, there is no *one* single reasoning which stands out as feminist—neither Justice Chandrachud nor Malhotra is more feminist than the other. But both are engaged in a discourse in feminist reasoning which is progressive, i.e. based on women’s human rights anchored in dignity, equality, and autonomy, and not simply concerned with women having their day in court. Interestingly, like *Navtej Johar*, their feminist reasoning also departs from one another, only more so in *Joseph Shine*. Finally, in contrast with other judgments, the feminist reasoning appears weightier in terms of being substantively feminist both in its formulation and in the way that it is applied or reasoned with, even though the decision was unanimous.

These subtle but significant variations in feminist reasoning, however, come through most unequivocally in the *Sabrimala* judgment, where Justice Malhotra dissents, thus reaching a different outcome, while at the same time engaging with as much feminist reasoning as others like Justice Chandrachud who offer a more favorable outcome to the women petitioners.

Thus, on September 28, 2018, in the *Sabrimala* case,<sup>146</sup> the Supreme Court outlawed the prohibition on women aged between ten and fifty from entering the inner sanctum of the *Sabarimala* temple in Kerala. While three of the four judges in the majority considered the issue primarily as a matter of the right to religion under Article 26, Justice Chandrachud considered the issue as one where the right to religion was expressly limited by Articles 14, 15, 19, and 21 of the Constitution.<sup>147</sup> Though for him, the issue was specifically about Article 17 which prohibited “untouchability” in all forms. Justice Chandrachud went through the drafting history of the provision and found that the provision, although related to the caste system, was broad enough to encompass any exclusionary practice against women.<sup>148</sup>

Justice Malhotra, again the only woman on the five-judge bench, dissented. First, she questioned the standing of the petitioners, who were *not* devotees of the temple, to claim the right to equality with respect to a religious practice. According to her, equality in matters of religion could be claimed only by believers. In any case, she opined that the courts should be slow in judging religious practices at all, unless pernicious or oppressive like in the case of social evils like *sati* (the erstwhile practice of widow-burning). She thus cautioned against exercising judicial review in this matter (one of access to a place of worship). Justice Malhotra’s dissent may seem perplexing,

<sup>145</sup> *Id.* ¶ 15 (Malhotra, J.).

<sup>146</sup> *Indian Young Lawyers Association v. State of Kerala*, 2019 11 SCC 1 [hereinafter *Sabrimala*].

<sup>147</sup> *Id.* ¶ 7 (Chandrachud, J.).

<sup>148</sup> *Id.* ¶ 79 (Chandrachud, J.).

if seen from an outcome-oriented perspective, that eventually she did *not* allow women to enter the *Sabrimala* temple; and if subjected to the ad hominem critique, that she is herself a woman, that too the only one on the bench. But in fact, her dissent was a considered one, not least because she was the only one to take standing seriously in a Court which has seldom been serious about matters of standing, maintainability, and justiciability in human rights.<sup>149</sup> These are not merely procedural matters, especially in a case like *Sabrimala* where standing was integrally connected to the issue at hand—that of right to religion. Standing in religious matters, especially when arguing for *equality* in religious matters, is connected to the status of the claimant *as a believer*. Seen this way, her reasoning does not appear to be anti-women or unfeminist. In fact, in treating standing in religious equality matters as important, she seems to be engaging in feminist judging strongly. Here, Justice Malhotra seems to have uncovered the very nature of the right to religion, as fundamentally a checkered right both inter se (between religions) and intra se (within the religion). She thus became cognizant of the inherent inequality in the right to freedom of religion and urged women and others to press for equality only *as believers* or when particularly grave interests are at stake such as in case of the practice of *sati* where intervention in religious matters is absolutely necessitated. She seems to have been presciently aware of the intersectional lives of women not only as women but as women within a certain belief system for whom upturning the belief system by enforcing equality would not have been an equal result in reality. The ensuing protests from within the community of believers, including women, against the *Sabrimala* judgment vindicate Justice Malhotra's cautionary stance. As a result of these ongoing protests, the matter is now back with the Supreme Court for a review. The whole affair is reminiscent of *Shah Bano*, but only Justice Malhotra seems to have learnt something from the *Shah Bano* fiasco and appears concerned about both the justification of judicial intervention as well as its outcome.

Justice Malhotra's cautionary stance is particularly stark against Justice Chandrachud's very broad approach in *Sabrimala*. Justice Chandrachud's extension of the prohibition of untouchability in Article 17 beyond the context of caste and to women may be viewed with suspicion. This extension is no doubt a leap of faith. It is almost an extension of, say, a prohibition of slavery, to women's unpaid labor. The leap is not entirely unjustified in that there may be a normative overlap between caste-based and gender-based practices of exclusion or subordination generally. However, the necessity to read in women's exclusion from a temple in Article 17 on untouchability, instead of, simply, a matter of inequality or sex discrimination in Article 14 or 15(1), requires justification. Thus, in Justice Malhotra's dissent, she remained unconvinced because: "All forms of exclusion would not [be] tantamount to untouchability. Article 17 pertains to untouchability based on caste prejudice. Literally or historically, untouchability was never understood to apply to women

<sup>149</sup> Gautam Bhatia, *The Sabarimala Judgment—II: Justice Malhotra, Group Autonomy, and Cultural Dissent*, INDIAN CONST. L. & PHIL. BLOG (Sept. 29, 2018), <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/>.

as a class.”<sup>150</sup> “The notion of ‘purity and pollution’”<sup>151</sup> that Justice Chandrachud relied on is not confined to menstruation, but extends to women’s bodies generally. Views on impurity of women’s vaginas that seek to justify the practice of female genital mutilation (FGM), on hair which justify practices pertaining to sacrifice of hair, and of pregnant and post-partem bodies on which a range of religious and cultural exclusions apply, are all *gendered*. Seeing all of these exclusionary views and practices based on them as now simply about untouchability does away with the caste link of untouchability as much as it does away with what may be specific about gendered aspects of sex discrimination. It thus treats not only Dalit men and upper-caste women who suffer caste-based and sex discrimination respectively interchangeably, but also treats those defined at the intersection of caste and gender, viz. Dalit women, triflingly. Equating sex or gender discrimination with untouchability does little to explain the specific position of Dalit women. For Dalit women, untouchability is equally pronounced as for Dalit men, being barred from, say, temples generally; but disconcertingly, also specifically, being admitted to temples as *devdasis*, or temple prostitutes, made available for sexual service to upper-caste men, in the name of God. The intersectional position of Dalit women and their complicated experience of untouchability throws the caste–gender analogy in doubt. The sexual exploitation of Dalit women may need an intersectional lens which is gendered as well as caste aware. Feminist constitutionalism in Justice Chandrachud’s opinion and in fact the whole discourse on temple entry *qua Sabarimala*, however, remains closed off to intersectional feminism of this kind.<sup>152</sup> But importantly, it forecloses the door to such intersectional feminism by drawing a simplistic analogy between caste and gender via untouchability.

Justices Chandrachud and Malhotra’s differences are though not the lone instantiations of contestation in recent times. Each of the landmark judgments—*Puttaswamy*, *Shafin Jahan*, *Navtej Johar*, *Joseph Shine*, and *Sabarimala*—shows a genuinely diverse range of feminist responses to the same question of law and thus represents feminist constitutionalism in a substantive sense, irrespective of the wide consensus between the judges on the outcomes of these cases. No doubt this consensus is in stark contrast and a relief from an earlier era of jurisprudence which often reached outcomes which were not women and sexual minorities friendly. And even when they were, they were not reasoned so substantially well from a feminist perspective. But what this section has tried to show is that consensus, even across good decisions, itself does not stand for feminist constitutionalism in the most progressive jurisprudence. The basis of consensus and the divergence within the bases which merge to generate consensus needs to be studied to say more about feminist constitutionalism. Equally, although these judgments are more in line with progressive feminist values based on substantive equality and intersectionality, in contrast with much

<sup>150</sup> *Sabarimala*, 2019 11 SCC 1, ¶ 14.2 (Malhotra, J.).

<sup>151</sup> *Id.* ¶ 81 (Chandrachud, J.).

<sup>152</sup> See generally Beverley Baines, *Canada: Gender and Constitution: Is Constitutionalism Bad for Intersectional Feminists?*, 28 PENN. STATE INT’L L. REV. 427 (2010).

of the preceding gender jurisprudence which was seeped in cultural feminism, protectionism and formal equality, this difference alone does not make the recent jurisprudence feminist. Feminist constitutionalism in adjudication depends on a layered view of the feminist ideas justices have invoked and contested with over time throughout history and in the contemporary discourse.

## 5. Conclusion

A single court, even the apex court, does not make constitutional adjudication or a constitution itself, feminist. Neither can a constitution which declares itself so. Nor can the adoption of feminist locutions. What makes constitutionalism feminist is a substantial and sustained engagement with feminist reasoning which is diverse and often conflicting. The engagement with such reasoning and the discourse it generates may be called feminist constitutionalism. The article has shown that the feminist constitutional landscape in India—as defined by a highly diverse women's movement in the country—mirrors this discourse. Correspondingly, the article has shown that even within constitutional adjudication, no single point in the seventy years of postcolonial jurisprudence can be isolated as the epoch of feminist constitutionalism on its own. Only a longer and detailed view of the context and point in trajectory in which that point exists helps understand feminist constitutionalism. In particular, while the recent jurisprudence of the Supreme Court may be feminist in a substantive sense, it is internally diverse and contestable still, and it matters to the discourse of feminist constitutionalism that we engage with it in this broader way.