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In Search of Principle: 70 Years of Gender Jurisprudence in India

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I. INTRODUCTION

The largest democracy in the world – India – with over 1.3 billion people is home to about 660 million women and sexual minorities. Their lives are ridden with contradictions captured in dramatic, but nevertheless true, headlines which announce India as the world's most dangerous country for women[1] and at the same time affirm that India worships its women.[2] Similarly, while *hijras* are celebrated as a unique community enriching India's vibrant democracy, they remain severely discriminated against, facing exponential levels of violence on an everyday basis.[3] The wider community of LGBTQIA+ people too remains vulnerable, facing routine discrimination including stereotyping, exclusion and violence despite proclamations of their equal citizenship by the Supreme Court in 2018.[4]

In fact, every despairing statistic or fact can be matched against an equally progressive development in law. For example, 99 per cent of rape cases are going unreported, and of those which do get reported, only 25 per cent end up in convictions.[5] Yet, the constitutional discourse around

[1] 'Poll Ranks India the World's Most Dangerous Country for Women' (*The Guardian*, 28 June 2018), available at www.theguardian.com/global-development/2018/jun/28/poll-ranks-india-most-dangerous-country-for-women.

[2] 'Gods Reside in Places Where a Woman Is Worshipped' (*Zee News*, 8 October 2015), available at zeenews.india.com/node/6112.

[3] See this dichotomy explored in S Mal, 'The Hijras of India: A Marginal Community with Paradox Sexual Identity' (2018) 34 *Indian Journal of Social Psychiatry* 79; G Kalra, 'Hijras: The Unique Transgender Culture of India' (2011) 5 *International Journal of Culture and Mental Health* 121; V Lal, 'Not This, Not That: The Hijras of India and the Cultural Politics of Sexuality' (1999) 61 *Social Text* 119.

[4] *Navtej Johar v Union of India*, Writ Petition (Criminal) No. 76 of 2016 (Decided on 6 September 2018) [hereinafter *Navtej Johar*].

[5] S Bandyopadhyay, 'A Closer Look at Statistics on Sexual Violence in India' (*The Wire*, 8 May 2018), available at thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india.

sexual violence has thrived, and has even had an impact beyond India.[6] Parliamentary committees such as the Justice Verma Committee[7] and the Supreme Court's decision in *Vishaka v State of Rajasthan*[8] in particular, have been discussed around the world for their transformative thinking on addressing sexual violence. Since these developments seem to have had little impact on the actual incidence of sexual violence *in* India, the question remains: what makes them significant? In fact, what makes constitutional jurisprudence relevant at all to the rights of women and sexual minorities in India, given the bleak reality?

This chapter shows that the now 70-years-strong constitutional jurisprudence in postcolonial India reflects the unremitting struggle for the rights of women and sexual minorities. Constitutional adjudication in particular has served as a key site for challenging the norms and practices which impinge on the enjoyment of fundamental rights. The gender jurisprudence of the constitutional courts – the Supreme Court and the 28 High Courts – bears out the contradiction between avowed rights and their realisation in sharp relief.[9] It shows what Kalapana Kannabiran calls, in the context of sexual assault jurisprudence, 'the self-contradictory moves in the fields of law'[10] where often, neither the reasoning nor the rhetoric of the courts matches the outcomes of the cases. Thus, this chapter aims to exhume the contradictions inherent in the long trajectory of development of this jurisprudence where progressive or transformative outcomes have been celebrated with or without progressive reasoning. A careful perusal of the substantive reasoning behind outcomes in constitutional cases reveals that much of the Indian jurisprudence has been seeped in the very structures of disadvantage – of patriarchy, misogyny, protectionism, homophobia, transphobia, racism, casteism, ableism, classism, etc – which claimants sought to subvert. Only a small, and rather recent, cross-section of cases after the 1990s reveals anything different. Compared to the long and more complicated history of gender jurisprudence, the recent jurisprudence appears ambitious but not conclusive in having transformed the gender jurisprudence in India. Contradictions remain, not least because the condition of women and sexual minorities remains dismal, but because the doctrine itself is more complicated and diverse than assumed when seen simply through the lens of good or bad outcomes.

[6] See esp MC Nussbaum, 'Women's Progress and Women's Human Rights' (2016) 38 *Human Rights Quarterly* 589.

[7] JS Verma, L Seith and G Subramaniam, 'Report of the Committee on the Amendments to Criminal Law' (23 January 2013). The summary of the report is available at prsindia.org/policy/report-summaries/justice-verma-committee-report-summary.

[8] *Vishaka v State of Rajasthan*, 1997 AIR 3011 [hereinafter *Vishaka*].

[9] All cases are in English and available online on legal databases such as Manupatra or IndiaKanoon.

[10] K Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) 303.

The above is the central argument of the chapter. Section II of this chapter provides the backdrop in which constitutionalism has become relevant to the women's movement in India. This is important in understanding the terms in which the Constitution came to incorporate or ignore issues concerning women (sexual minorities were not as much in the picture at the time the Constitution was being negotiated between 1947 and 1950[11]). Section III explains the understanding of 'gender' (used here as the shorthand for characteristics to do with sex, gender and sexuality[12]) embodied in the Constitution. It shows that even though 'sex' and 'women' were frequently referenced, a broader – substantive and intersectional – understanding of gender or gender equality remained absent. Section IV elaborates on how gender and gender equality have developed in constitutional jurisprudence especially in relation to rights claims. It argues that constitutional jurisprudence in India has always been a mixed bag. Women and sexual minorities have had occasional successes. Judicial rhetoric that matched the successes has been progressive in some respects but also deeply regressive in others. The overall tenor of rights jurisprudence in the last 70 years of postcolonial constitutionalism has been largely patriarchal. Section V shows that the recent jurisprudence seems to have disrupted this narrative in a fundamental way: the judicial outcome and rhetoric seemed to match the reasoning deployed by the Supreme Court. Along with some of the previous decisions such as *Anuj Garg v Hotel Association of India* (2007),[13] a slew of pronouncements since the seminal judgment in *Puttaswamy v Union of India*[14] has contributed to the development of gender jurisprudence with a substantive version of gender equality. It is not (only) the good outcomes or rhetoric, but the *explication of* good substantive ideas, and *reasoning with* those substantive ideas, that mattered in these cases. This exercise in interrogating substantive ideas is particularly relevant in the Indian context, where commentators frequently praise the jurisprudence for its good outcomes and rhetoric, but avoid judging it for the content and process of its reasoning. This praise has distorted the picture of what counts as good gender jurisprudence.[15] It is important to set this record straight and to scrutinise, ever so closely, constitutional jurisprudence for what it *is*, rather than what it says it is or purports to be. Section VI concludes with the idea that even though the recent jurisprudence is promising, the promise of that jurisprudence is not fully realised yet. There needs to be an open and continuous

[11] Though they were very much part of the broader social and cultural life. See A Dutta, 'An Epistemology of Collusion: Hijras, Kothis and the Historical (Dis)continuity of Gender/Sexual Identities in Eastern India' (2012) 24 *Gender & History* 825.

[12] 'Gender' is used as an inclusive shorthand in this chapter for categories of sex, pregnancy, sexual orientation, sexuality, transgender status, etc. See generally for an extended explanation J Conaghan, *Law and Gender* (Oxford University Press, 2013) 22–23.

[13] *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [hereinafter *Anuj Garg*].

[14] *Puttaswamy v Union of India* 2017 (10) SCALE 1 [hereinafter *Puttaswamy*].

[15] See this argument developed in: S Atrey, 'Women's Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum' (2018) 40 *Human Rights Quarterly* 859.

dialogue between social movements and gender equality on the firm terrain of the Constitution. This chapter hopes to contribute to that dialogue.

II. BACKGROUND INFORMATION

India is not only the largest democracy in the world, but is also governed by the longest Constitution in the world. With over 470 substantive provisions divided into 25 Parts and 12 Schedules, the Constitution is a formidable document. It is weighty not just because of its sheer volume, but also because it is the centrepiece of moral, social, political, economic and legal discourse in India.[16] It is considered unique in comparison with other significant constitutions of the world because of its overwhelming importance in the life of the postcolonial nation.[17] The Constitution, both in its letter and spirit, shapes the contours of major public debates and social struggles, including those relating to women and sexual minorities.[18] Women and sexual minorities have in turn shaped constitutionalism in India in a fundamental way. It is the dialectic relationship between the Constitution and feminism – or as is said in India, the women's movement[19] – which defines both.

The women's movement in India has spanned the course of modern history since the nineteenth century,[20] and perhaps even for over 2,000 years.[21] But the contemporary writing on gender post-independence (1947 onwards) has

[16] See esp G Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, 1999) (describing India's Constitution as a 'social revolution').

[17] R Bhargava (ed), *Politics and Ethics of the Indian Constitution* (Oxford University Press, 2008); Z Hasan, E Sridharan and R Sudarshan (eds), *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black, 2002).

[18] S Choudhry, M Khosla and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) i ('a living constitution like India's has the extraordinary capacity to rearticulate – some would say domesticate – social struggles in the language of constitutionalism.'); Austin (n 16) 10 ('The Indian Constitution is a live document in a society rapidly changing and almost frenetically political. The touchstone for public and many private affairs, the Constitution is employed daily, if not hourly, by citizens in pursuit of their personal interests or in their desire to serve the public good').

[19] 'Women's movement', instead of 'feminist movement', is the preferred term in India. As Purkayastha et al explain: 'While much of the resistance to the label feminism has been interpreted in some feminist literature as cultural relativism and anti-Westernization, the theoretical controversy is more complex. For many of the scholars who reject a feminist epistemology, their unease arises from how the conceptualization of individuals is taken for granted … A sharp distinction is assumed to separate the individual from any collectivity, between "woman" as an identifiable, embodied individual and woman defined through multiple relationships. Like the reservations expressed by many of the race-gender scholars in the United States, such dichotomization is unacceptable to many Indian scholars.' B Purkayastha, M Subramaniam, M Desai and S Bose, 'The Study of Gender in India: A Partial Review' (2003) 17 *Gender and Society* 503, 506.

[20] M Kishwar, *A History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800–1990* (Verso, 1993).

[21] S Tharu and K Lalita (eds), *Women Writing in India: 600 BC to the Present* vols 1–2 (Feminist Press, 1993).

explicitly invoked the Constitution to articulate and ground the struggles of the movement. The Constitution has thus been more than simply a governance tool or a tool for claiming individual human rights, but a tool for renegotiating the conditions of women's lives completely. There is nothing self-evident about this, even though the Constitution does contain a bill of rights, equality provisions and such. As we show in the next section, the fact that the Constitution came to be negotiated with social movements in the background has had an indelible impact on the way women and minorities (Dalits, Muslims, etc) claimed a stake in the Constitution. This has only been reinforced in the last 70 years against the backdrop of a liberal Constitution, where demands exceed the express text of the Constitution. Thus, for example, the demand for the adoption of a Uniform Civil Code (UCC) to reform and standardise the personal and religious laws in India has been articulated by the women's movement as a distinctly feminist demand – about the well-being and equality of women – even though the Constitution does not articulate the aspiration for a UCC in these terms.[22] Similarly, the Constitution has been key in the perennial fight against gender-based violence and sexual harassment, even though the Constitution, on the face of it, contains no provision on gender-based violence or sexual harassment but only contains general provisions on equality and non-discrimination. For example, the protests ensuing after the decision in *Tukaram v State of Maharashtra*,[23] where the Supreme Court acquitted police officers of rape in custody, were framed centrally around the fate of Indian constitutionalism per se. A key moment in the fight against gender-based violence thus remains the influential open letter dated 16 September 1979, written as a response to *Tukaram*, by leading legal academics – Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar and Lotika Sarkar – whose trenchant criticism of the Supreme Court's decision framed the issue for decades to come as a matter for women who were illiterate, Dalit, tribal and with little political power to not be 'condemned to their pre-constitutional Indian fate'.[24] The discourse on postcolonial constitutionalism, including on gender, has thus consistently been conceived as going beyond the formal limits of the text of the Constitution and constitutional law, and towards a broader discourse in constitutionalism which is in constant interaction with social movements like the women's movement.[25]

[22] See Art 44 of the Constitution couched in gender-less terms. *cf* N Menon, *Seeing Like a Feminist* (Zubaan, 2012) 151; L Arya, 'The Uniform Civil Code: The Politics of the Universal in Postcolonial India' (2006) 14 *Feminist Legal Studies* 293; F Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press, 2004) 71; M Kishwar, 'Codified Hindu Law: Myth and Reality' (1994) 29 *Economic and Political Weekly* 2145; A Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage, 1992).

[23] (1979) 4 SCC (Jour) 17.

[24] U Baxi, V Dhagamwar, R Kelkar and L Sarkar, 'An Open Letter to the Chief Justice of India' (16 September 1979), available at aud.ac.in/uploads/1/admission/admissions2014/open%20letter.pdf.

[25] S Atrey, 'Feminist Constitutionalism: Mapping a Discourse in Contestation' (2022) 20 *International Journal of Constitutional Law* 611.

Furthermore, this broader discourse in constitutionalism has come to be embodied in one institution more than any other – the Supreme Court of India.[26] In fact, in the words of Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, 'the greatest success of constitutionalism in India is now the promiscuity of the language of constitutionalism … [wherein] a vast range of political, administrative, and judicial matters have become constitutional questions that are routinely brought to the [constitutional] courts.'[27] As the apex constitutional court in the country, the Supreme Court, has serviced this idea of constitutionalism being a site of resistance for key social struggles.[28] The Supreme Court is considered to have shown 'interpretational creativity' and 'receptiveness' to '[craft] thoughtful, contextual responses to women's inequality'.[29] Chief amongst these is *Vishaka*, a decision which has been praised far and wide for the Supreme Court's activism in judicially legislating sexual harassment guidelines in the absence of a domestic law on the subject.[30] The Supreme Court took its cue from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which India had ratified but not implemented. The Court in *Vishaka* made CEDAW directly applicable when the legislature had failed to implement it through a law promoting sex equality or prohibiting sexual harassment. But equally, the Supreme Court is known to have blundered and has been called out for its less-than-progressive decisions. For example, it has viewed mothers as subordinate to fathers,[31] a bar on marriage of female employees as promoting the institution of marriage,[32] and the requirement to reveal reproductive history to employers as unconstitutional because it is embarrassing and humiliating but not because it was an invasion of privacy.[33]

Nonetheless, regardless of the actual results, the Supreme Court has remained an active site of engagement for the women's movement for litigating a range of issues including – personal or religious laws governing matters like marriage, property and maintenance; gender-based violence and sexual harassment; public employment; and sexual expression and reproductive justice. Part of the reason for this is the lack of opportunity structures for women elsewhere – either in the legislature or the Government. A relatively

[26] U Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company, 1980); U Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (NM Tripathi, 1985).

[27] Choudhry, Khosla and Mehta (n 18).

[28] *cf* AK Thiruvengadam, 'Revisiting the Role of the Judiciary in Plural Societies' in S Khilnani, V Raghavan and AK Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (Oxford University Press, 2013).

[29] V Narain, 'Postcolonial Constitutionalism in India: Complexities and Contradictions' (2016) 25 *Southern California Interdisciplinary Law Journal* 107, 112–13.

[30] ibid.

[31] *Gita Hariharan v Reserve Bank of India*, AIR 1999 SC 1149.

[32] *Air India v Nargesh Meerza*, AIR 1981 SC 1829.

[33] *Neera Mathur v Life Insurance Corporation of India*, AIR 1992 SC 392.

underdeveloped and unsophisticated state infrastructure to deal with social justice issues has made the constitutional role of the courts urgent and perhaps inevitable.[34] The Supreme Court has even relaxed its standing requirements through its famed public interest litigation (PIL) system to allow direct access to dispossessed communities.[35] While enhanced access and openness to intervene cannot, in fact, have not, led to social change or been effective per se,[36] they have certainly contributed to the production of an enormous body of jurisprudence, including on gender and sexuality. This jurisprudence is also extremely diverse internally, given that the Supreme Court is rather different from its counterparts in South Africa or the United States. It is, like much else in India, a rather large court with 34 sitting judges. Benches are normally constituted of two or three, sometimes five, and rarely seven, nine or 13 judges. The Supreme Court never sits *en banc*. The turnover of judges is very high with appointments to the Supreme Court made close to the retirement age, which itself is rather low at 65 years.

These structural features make the Supreme Court unique in that it does not ever speak in one voice. On top of that, judgments are often lengthy, stretching several hundred pages. Concurring and dissenting opinions are common. All this makes it hard to decipher a clear and coherent line of constitutional jurisprudence, let alone precedent. These factors have thus led to a highly variegated gender jurisprudence straddling themes of protectionism, misogyny, formal equality, substantive equality and transformation, often all at the same time. It is in this context – of the close association between the women's movement and postcolonial constitutionalism, and in particular, the diverse history and context of constitutional adjudication – that the wide-ranging constitutional jurisprudence in sections IV and V will be discussed.

III. CONSTITUTIONAL FRAMING OF SEX/GENDER/SEXUALITY

The Constitution of India came into force on 26 January 1950. The preamble orientates the Constitution toward values of justice, liberty, equality and fraternity. Article 14 guarantees the right to equality. Article 15(1) prohibits discrimination against citizens 'on grounds only of religion, race, caste, sex,

[34] D Kapur and PB Mehta, 'Introduction' in D Kapur and PB Mehta (eds), *Public Institutions in India: Performance and Design* (Oxford University Press, 2005) 1.

[35] SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002); W Vandenhole, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 3 *Asia-Pacific Journal on Human Rights and Law* 136; U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107.

[36] A Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2016); AK Thiruvengadam, 'Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India' in O Vilhena, U Baxi and F Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts in Brazil, India and South Africa* (Pretoria University Law Press, 2013).

place of birth or any of them'. Article 15(3) allows the state to make special provisions for women and children. Article 16 guarantees equality of opportunity for all in public employment. Article 21 guarantees the right to life for everyone. Article 39 – which is part of the unenforceable 'Directive Principles of State Policy' – asks the state to direct its policies for securing, amongst other things, equal rights to livelihood and equal pay for equal work for men and women. Article 51A on fundamental duties directs the citizens to renounce practices derogatory to the dignity of women. Women are also mentioned specifically in Part IX on 'Panchayats' or the local self-governing units at the village level. Articles 243D and 243T secure at least one-third of the seats for women (including women belonging to 'Scheduled Castes' (ie, the group of castes most disadvantaged due to structural and institutional discrimination over the years) in panchayats and municipalities. These were added by the 73rd Amendment to the Constitution in 1992. The Constitution in Article 253 allows for international norms to be implemented in India in the classic dualist mode of being incorporated in domestic law by the Parliament, thus making way for implementing international treaties like CEDAW through domestic legislation like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. This is however not guaranteed, such that while signing up to international human rights treaties like CEDAW is rapid, their incorporation by passage of domestic legislation is a matter of chance. Thus, for example, India signed up to CEDAW in 1980 and since then has never passed a single comprehensive sex-equality legislation. So even though India signed up to CEDAW without much difficulty, the will to guarantee sex equality in domestic legislation has been lacking.

Given the historical context in which the Constitution came about, a broad understanding of gender is extant in constitutionalism in India.[37] Even though the word 'gender' itself is absent in the provisions identified above, its discourse can be traced to the text of the Constitution, where it refers to 'sex' or 'women' (Articles 14, 15, 16, 39, 51A, 243D and 243T), where the understanding of sex or women has always been infiltrated with gendered aspects of sex and women's lives, rather than being limited by the biological condition. As we will see in the following sections, constitutional jurisprudence has since come to interpret these terms broadly to include sexual orientation[38] and trans status[39] in the twenty-first century. At this stage, what is significant to note is that these developments have only been possible because of the historical context in which the Constitution was negotiated and drafted by the Constituent Assembly (1947–1950). Only 15 of the 299 members of the Constituent Assembly were women. However, the socio-political context in which the Constituent Assembly

[37] See for a reclamation of the historical archive of gender and sexuality: A Arondekar, *For the Record: On Sexuality and the Colonial Archive in India* (Duke University Press, 2009).

[38] *Navtej Johar* (n 4) (see esp Chandrachud and Malhotra JJ's concurring opinions).

[39] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

operated had come to be defined by women and women's issues. This context, and especially, the anti-colonial nationalist movement against the British rule and the social reform movement against social evils like *Sati* (burning widows on the funeral pyres of their husbands) and the *Devdasi* system (sacrificing lower-caste women to temples for sexual exploitation) in the late eighteenth and nineteen centuries placed women and women's issues at the forefront.[40] Women's participation in the anti-imperial struggle had ensured that they were perforce considered equal democratic citizens in independent India. There was no need to advocate for universal suffrage or the inclusion of sex equality in the Constitution – both of which they had already successfully negotiated with the imperial rulers.[41] Similarly, the ongoing concern with social and religious practices which subordinated women had ensured that the Constitution included not only a general prohibition on sex discrimination, but also gave the state the power to make special provisions for women and children (these have been interpreted as allowing affirmative action for women in various spheres, while also – occasionally – serving to justify patriarchal, 'protective' laws, such as the criminalisation of adultery). Against this backdrop, the importance of women and women's equality became the starting point for the Constitution and did not need to be especially established or fought for.

But perhaps because these were already a given, the Constitution did not specifically provide, for example, a women's quota or reservation in constitutional bodies, especially legislative and judicial bodies.[42] Nor did it provide for an overhaul or reform of personal and religious laws which governed women's private lives at home and in families in relation to matters of marriage, guardianship, adoption, inheritance, etc.[43] Further, women, under the Constitution, were considered a monolith, reflecting little of the fundamental differences between them based on their religion, caste, sexuality, disability, etc.[44] In fact, the strong presence of upper-caste middle-class urban women in the anti-colonial struggle may have overdetermined, even romanticised, women's equality and progress at the time. So while sex or gender equality was a given, it was only understood as formal equality. Substantive equality for women and sexual minorities in the

[40] R O'Hanlon, *A Comparison between Women and Men: Tarabai Shinde and the Critique of Gender Relations in Colonial India* (Oxford University Press, 1994).

[41] See for an historical account of women suffragettes in India in the early 20th century, S Mukherjee, *Indian Suffragettes: Female Identities and Transnational Networks* (Oxford University Press, 2018).

[42] ME John, 'Alternate Modernities? Reservations and Women's Movement in 20th Century India' (2000) 35 *Economic and Political Weekly* 3822.

[43] *cf* Art 44, a directive principle of state policy not an enforceable fundamental right, on the state to enact a uniform civil code.

[44] See for an intersectional understanding of gender in India: S Rege, 'Dalit Women Talk Differently: A Critique of "Difference" and towards a Dalit Feminist Standpoint Position' (1998) 33 *Economic and Political Weekly* WS39; G Omvedt, *Reinventing Revolution: New Social Movements and the Socialist Tradition in India* (Sharpe, 1993); G Dietrich, *Reflections on the Women's Movement in India* (Horizon Books, 1992).

context of 'the woman question', to do with their actual life conditions, was muted when the Constitution came into force in 1950.[45]

This discourse on gender in early constitutionalism confirms that: (i) the concern for women, women's issues and women's equality was recognised but only to a limited or instrumental extent, defined in the context of women's participation in the nationalist movement and the project of establishing the postcolonial nation state; but (ii) that a broader conversation around women, women's issues and women's equality – to do with the lived reality of women and sexual minorities as shaped by the social, economic, cultural and political norms – was absent in the run-up to and in the early days of Indian constitutionalism. The succeeding gender jurisprudence, discussed in the next section, confirms this. It reveals a slow and inconsistent march towards achieving substantive gender equality for women and sexual minorities in India.

IV. CONSTITUTIONAL JURISPRUDENCE

As indicated above, Article 14 of the Indian Constitution guarantees the equal protection of laws, and Article 15(1) specifically proscribes discrimination on the ground of sex. In the seven decades since the Constitution came into being, women and sexual minorities have invoked Articles 14 and 15 as springboards for making constitutional claims upon the state. These claims have ranged across discrimination, including but not limited to, in access to the labour market and government employment, criminal law, family and inheritance rules, personal and religious laws, sexual harassment, and the criminalisation or non-recognition of sexual minorities.

The existence of multiple constitutional courts (the Supreme Court of India, and the 28 High Courts), with huge dockets, means that an issue-based survey of jurisprudence would take up far more space than this chapter allows. The structure of this section, therefore, is chronological: it traces the development of ideas around the constitutional rights of women and sexual minorities, as articulated in the jurisprudence of the Indian courts, and their evolution over seven decades. This approach – we suggest – itself brings in a representative cross-section of cases from different domains.

Consistent with the argument in the previous sections, in this section we will argue that feminist jurisprudence in India is an evolving, and a very much unfinished project. For more than 50 out of 70 years, issues around sex discrimination were decided in the absence of any legal or constitutional *reasoning* that addressed – or incorporated – feminist concerns. While this has

[45] RS Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Duke University Press, 2003). See also JW Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Harvard University Press, 1996).

begun to change in the last decade and a half – along with litigation concerning the rights of sexual minorities, feminist reasoning in Indian constitutional jurisprudence is still only in its early stages, and its future directions remain unclear.

Let us begin with the constitutional text, in particular Article 15(1), which merely prohibits 'discrimination on grounds only of … sex', but provides no further guidance. From the outset, therefore, it was perhaps inevitable that the meaning of these words – and whether and to what extent they could map onto the lived experiences of discrimination and disadvantage experienced by women and sexual minorities – would have to be developed in judicial forums.

Opportunities for this development arose soon after independence. The Indian Constitution had a 'savings clause' (Article 372), which ensured that until affirmatively challenged and struck down by a court, pre-colonial laws would continue to operate as if they were presumptively valid. Effectively, this decision by the constitutional framers transposed the bulk of colonial law (along with its many patriarchal premises) into the postcolonial nation.

Initial constitutional challenges, therefore, focused upon 'colonial holdovers' that seemed starkly at odds with the constitutional guarantee against sex discrimination, as well as postcolonial laws, rules and regulations that were mechanically modelled upon their colonial antecedents. These ranged across civil law, criminal law and employment law (to name just a few legal domains), and included, for example, different rules to determine when plaintiffs in legal proceedings could be compelled to furnish securities, different rules governing the consequences of marriage for employment in the civil services, outright prohibitions upon certain forms of employment, such as a jail superintendent or a nurse, and different punishments for 'adultery'.

As indicated above, in terms of outcomes, courts came down on different sides. A closer look at the reasoning, however, reveals that whether or not specific discriminatory laws or regulations were struck down, judicial reasoning around issues of sex, gender and discrimination was severely constricted. In the first set of cases – where discriminatory rules were upheld – the Court resorted either to a formalistic analysis in order to argue that there was no discrimination at all, or invoked unreconstructed stereotypes about gender roles to hold that there was differential treatment, but that it did not amount to discrimination. An example of the former is *Mahadeb Jiew v BB Sen*.[46] The Code of Civil Procedure authorised courts to demand securities from male plaintiffs if they were living abroad *and* did not possess sufficient immovable property in India, while for female plaintiffs, regardless of where they lived, securities could be demanded where they did not have sufficient immovable property. The High Court of Calcutta upheld this rule on the basis that the distinction it drew mapped onto *both* sex and place of property, and therefore did not discriminate on grounds *only* of

[46] *Mahadeb Jiew v BB Sen*, AIR 1951 Cal 563.

sex. That the rule was based on assumptions about men and women's relative financial capacities was deemed irrelevant by the Court.

An example of the latter is *RS Singh v State of Punjab*,[47] where a host of assumptions about gender roles – from differing physical strength to the performance of 'maternal functions' – were invoked to uphold an order disqualifying women from being appointed as superintendents in men's jails. This line of judicial reasoning reached its apotheosis at the Supreme Court in the (in)famous *Nargesh Mirza* case, which concerned airline service regulations about the employment of (male) air flight pursers and (female) air hostesses. The former were required to retire at the age of 58, while the latter were compelled to do so at the age of 35 years, or upon their first pregnancy, or upon marriage (if they were married within four years of joining the service). During the litigation, the Court essentially entered into a form of 'negotiated settlement' between the parties, where the first pregnancy rule was altered to a third pregnancy, a number of intrusive physical examinations of women employees were introduced, and the amended rules were then upheld. Here again, the Supreme Court's rationale for upholding these Rules turned upon women's role as mothers and caregivers, and – almost bizarrely – the national imperative towards 'population control'.[48]

Even in decisions in which discriminatory rules and laws were found unconstitutional and were struck down, there was no analysis of the context in which they arose, or the patriarchal structures that they exemplified. In essence, these judgments were formalistic as well, only in a different direction. An early judgment concerned the constitutional validity of a state law that allowed the Government to declare certain individuals to be 'incapable of managing their property' (after which, the Government could essentially take over the property). If the individual was a man, this could only be done if a series of conditions existed (convictions for serious offences, unpaid debts, etc). If the individual was a woman, however, no such condition needed to be fulfilled. While the patriarchal assumptions underlying this law are evident (women were deemed to be less competent managers of property than men), the Supreme Court's reasoning was terse: the law treated men and women differently (it disadvantaged the latter), and therefore fell foul of the blanket, non-discrimination guarantee.[49] A different High Court's judgment striking down a rule that disqualified a woman from eligibility for civil service employment upon marriage was similarly formalistic and terse.[50]

Thus, even as the outcomes of these judgments were in favour of women litigants, and sex discriminatory laws were struck down, there was no engagement with the context of disadvantage that had given rise to such laws (and which, then, these laws served to reinforce), or – at a deeper level – with the question

[47] *RS Singh v State of Punjab*, AIR 1972 P&H 117.
[48] ibid [101].
[49] *Rani Raj Rajeshwari Devi v State of UP*, AIR 1954 All 608.
[50] *Radha Charan Patnaik v State of Orissa*, AIR 1969 Ori 237.

of *what*, precisely, the non-discrimination clause of the Constitution was meant to do. This absence of strong conceptual underpinnings ensured that, despite the existence of these judgments, other judges could – and, as we have seen, *did* – continue to hold that when discriminatory legislation tracked putatively *real* differences between men and women, it was not discriminatory in a legal or constitutional sense. It is of little surprise though that courts heavily dominated by upper-caste, upper-class cis-gendered heterosexual men (a situation that continues to date), appeared to read in their own prejudices into what was deemed to be 'natural'.[51]

Another fall-out of the absence of conceptual analysis was that the courts lacked a framework within which to analyse cases which did not fall neatly into any of the categories discussed above. A good example of this is the adultery law. Under the adultery law, a male adulterer stood to be criminally punished, while his female partner did not – and the prosecution could be brought only by the husband of the latter. This, then, was a law that was seen as benefiting women (by granting them immunity from criminal prosecution), though it was based on gendered assumptions of women's sexual passivity. In adjudicating an early challenge to the law, however, the Supreme Court limited itself to holding that Article 15(3) of the Constitution allowed the state to pass 'special provisions' for women and children, and that therefore, the adultery law had a safe harbour.[52] Of course, this is not enough; if the purpose of Article 15(3) was to provide a form of affirmative action in order to enable the overcoming of structural and systemic disadvantage, it is fairly clear that, far from falling within its scope, the adultery law ran counter to its basic premises because it reinforced women's disadvantage. On the other hand, if Article 15(3) was animated by a theory of state protectionism – where women and children were treated as devoid of agency and as 'wards' of the state – then, in that case, the adultery law would fit Article 15(3) like a glove. The Court's failure to even ask the question in those terms, however, meant that it was unable to frame, confront, and address the actual issues at stake in interpreting the constitutional prohibition on sex discrimination.

The judiciary's failure to articulate a coherent, conceptual account of equality and non-discrimination had other consequences too. One consequence was a straight-up *evasion* of judicial responsibility altogether, in cases where a finding of sex discrimination might have led to upsetting long-established social arrangements. This is evident, for example, in the judgment of a five-judge bench of the Supreme Court, which concerned the constitutionality of a provincial law that explicitly and directly discriminated against daughters when it came to inheritance. It would be difficult to imagine a *legally* simpler case of unconstitutional

[51] A critique of this discourse of judging is undertaken by the two feminist judgment rewriting projects underway in India.

[52] *Yusuf Abdul Aziz v State of Bombay*, 1954 SCR 930.

discrimination. The Court, however, ignored the issue by noting that the struggle 'for gender equality must be waged elsewhere'.[53] In essence, the Supreme Court created a constitutional black hole: a space where gender discrimination existed, but the laws that sanctioned it were, nonetheless, accorded immunity from constitutional scrutiny. Indeed, this approach exemplifies another feature of the Indian judiciary's long-held view: that uncodified 'personal laws' (ie, religious norms not formally codified by the state, and governing personal relations) were not subject to constitutional scrutiny.[54]

The second impact of this failure was that of *invisibilisation*. For example, over the years, Indian state legislatures have passed a number of laws restricting the ability of individuals to contest local government elections. One such law, passed by the State of Haryana, barred people with more than two children from contesting local elections, ostensibly as a part of the national project of population control.[55] The discriminatory impact of such a law is not hard to spot: in a country that remains riven with deeply unequal patriarchal social relations and class arrangements, whether, when and how many children to have is not always a straightforward question of 'individual choice', especially as far as women are concerned. The Supreme Court's analysis, however, did not even acknowledge that discriminatory impact existed, let alone asking whether it was justified or not.[56]

It was only in the late 2000s that we saw the first glimmers of a constitutional articulation of the scope and purpose of the constitutional right against discrimination. The beginnings were tentative: in *Anuj Garg*, for example, an 80-year-old prohibition upon the employment of women as bartenders was struck down by the Supreme Court. In doing so, the Court adopted the 'anti-stereotyping' approach, borrowed from American law: discriminatory legislation would be unconstitutional if it tracked unjustifiable 'stereotypes' about men and women, their relative capacities, or their social roles, or if it sought to 'generalise' about any of these aspects.[57]

Needless to say, the anti-stereotyping approach, while representing a beginning of sorts, is nonetheless an insufficient account of gender discrimination. Implicit within the approach is the assumption that *if* discriminatory legislation mapped on to real or 'actual' differences between men and women, it would be justified. Such an account – as has been well-documented – ignores the context in which those differences arise and the social and cultural norms that make

[53] *Ambika Prasad Mishra v State of UP*, AIR 1980 SC 1762.
[54] *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84.
[55] *Javed v State of Haryana*, AIR 2003 SC 3057.
[56] The Supreme Court has since recognised indirect discrimination as a form of discrimination prohibited under Art 15(1) of the Constitution as recently as 2021 in the seminal judgment of *Nitisha v Union of India*, Writ Petition (Civil) No 1109 of 2020 (decided on 25 March 2021).
[57] *Anuj Garg* (n 13).

them salient.[58] In that sense, a strict adherence to the anti-stereotyping approach would severely limit the future development of gender discrimination doctrine.

That, however, has not been the case. Recent judgments of the Supreme Court have marked another potential beginning: the beginning of a more nuanced and context-sensitive approach to gender discrimination and equality. It is to this development that we turn in the next section.

V. FLAGSHIP CONSTITUTIONAL DEVELOPMENTS IN TERMS OF GENDER AND SEXUAL EQUALITY

In more than 70 years of Indian constitutional jurisprudence, it would perhaps be difficult to pick a specific flagship constitutional moment. Likely candidates would include, for example, the 1985 *Shah Bano* judgment where, notwithstanding the legal position that uncodified 'personal law' could not be made subject to the Constitution's fundamental rights chapter, the Supreme Court located a Muslim woman's right to maintenance within ordinary statutory law and extended to the Court's subsequent judgments that undermined legislative attempts to stymie that ruling;[59] the 1997 *Vishaka* judgment, that held that sexual harassment at the workplace constituted a violation of equality and non-discrimination, and passed legally enforceable guidelines until legislation was enacted 16 years later;[60] and the 2014 *NALSA* judgment, where the constitutional rights of the transgender community were recognised for the first time, along with a (yet unfulfilled) direction to the Government to bring the community within the ambit of affirmative action.[61]

All these rulings are no doubt extremely important, in terms of *outcome*, for advancing the rights of women and sexual minorities. Our selection of a 'flagship moment', however, is in keeping with our analysis in the previous section: Indian constitutionalism on gender has been constricted by a continuing judicial failure to engage with, and to articulate, a principled underlying basis to the Constitution's non-discrimination guarantee. In our flagship moment, we see the beginnings of an attempt – still embryonic, and with its future uncertain – on the part of the Supreme Court to address that failure.

Our 'flagship moment' covers a period of slightly more than a year: from 24 August 2017 to 27 September 2018, and spans four judgments of the Supreme Court. On 24 August 2017, a nine-judge bench of the Supreme Court (a rare bench strength) held that the Indian Constitution guaranteed a fundamental

[58] See, eg CA MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 *Yale Law Journal* 1281, 1305–06.

[59] *Mohd Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556; *Danial Latifi v Union of India* (2001) 7 SCC 740.

[60] *Vishaka* (n 8).

[61] *NALSA v Union of India* (2014) 1 SCC 1.

right to privacy and went on to explain and conceptualise the scope and meaning of that right.[62] Within a year, that judgment – *Puttaswamy v Union of India* – or the principles flowing from it, were invoked by five-judge benches of the Court in three cases involving the rights of women and sexual minorities. These included judgments decriminalising same-sex relations,[63] striking down the adultery law,[64] and striking down a statutory rule that prohibited the entry of menstruating-age women into a South Indian temple.[65]

The starting point was the nine-judge privacy judgment, which came to the Supreme Court as a straightforward question: did the Indian Constitution guarantee the right to privacy (even though it did not find a place in the constitutional text)? The Court answered, unanimously, in the affirmative; and then proceeded to elaborate upon that in six concurring – but separate – opinions.

In the course of these concurring opinions the Court discussed many aspects of the right to privacy. Relevant to our purposes here is that by a clear majority, the Court rejected both the spatial and the institutional conceptions of privacy (ie, that privacy vested in spaces such as the home, or institutions such as the family) – conceptions that have historically been turned to anti-feminist ends, and to subordinate the rights of women and sexual minorities by leaving power relations within private spaces untouched.[66] Instead, the Court crafted a more nuanced, individualist but contextual idea of privacy, that – in the lead, plurality judgment – explicitly acknowledged feminist concerns,[67] and elsewhere, indicated that the Supreme Court's own prior judgments upholding the criminalisation of same-sex relations[68] and the restitution of conjugal rights,[69] might have to be reconsidered. Examples of this approach to privacy are scattered throughout the concurring opinions. They include, for example, locating the right to abortion and reproductive rights as a facet of the right to privacy;[70] bodily integrity as an aspect of privacy;[71] linking autonomy with the right to take 'intimate decisions'; and, as the lead plurality opinion specifically observed:

> Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. As a result, gender violence is often treated as a matter of 'family honour' resulting in the victim of violence suffering twice over – the physical and mental trauma

[62] *Puttaswamy* (n 14).
[63] *Navtej Johar* (n 4).
[64] *Joseph Shine v Union of India* (2018) 2 SCC 189.
[65] *Indian Young Lawyers Association v Union of India*, 2018 SCC OnLine SC 690 [hereinafter *Sabarimala*].
[66] For a specific example of this observation in the context of Indian constitutional jurisprudence pre-*Puttaswamy*, see M Nussbaum, 'Is Privacy Bad for Women?' (*Boston Review*, 1 April 2000), available at www.bostonreview.net/articles/martha-c-nussbaum-privacy-bad-women.
[67] *Puttaswamy* (n 14) [140] (plurality opinion of Chandrachud J).
[68] ibid [128] (plurality opinion of Chandrachud J).
[69] ibid [40] (concurring opinion of Chelameswar J).
[70] ibid [38]–[40] (concurring opinion of Chelameswar J).
[71] ibid [81] (concurring opinion of Nariman J).

> of her dignity being violated and the perception that it has cause[d] an affront to 'honour'. *Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets.* Catherine MacKinnon in a 1989 publication titled 'Towards a Feminist Theory of the State' adverts to the dangers of privacy when it is used to cover up physical harm done to women by perpetrating their subjection. *Yet, it must also be noticed that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state imposed sterilization programmes or mandatory state imposed drug testing for women. 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.*[72]

Of course, in *Puttaswamy*, the Supreme Court was only answering an abstract question on the existence of the right to privacy under the Constitution. Its observations, therefore, were indicative at best, offering a gateway to a possible feminist jurisprudence. These observations were put into practice the year after, in a series of cases heard successively by a bench of five judges, and in which judgments were issued in quick succession – all in the month of September 2018.

In *Navtej Johar v Union of India*,[73] the Supreme Court reversed its own prior judgment in *Suresh Kumar Koushal v Naz Foundation*,[74] and decriminalised same-sex relations. As a prefatory point, it is important to note that unlike some of the other judgments discussed in this section, *Navtej Johar* was not primarily court-driven: it was the culmination of 16 years of litigation, which had already seen the Delhi High Court decriminalise same-sex relations in 2009,[75] which had then been initially overturned by the Supreme Court in *Koushal*. Both prior to, and during, the course of litigation, the case in court was supported and buttressed by a powerful community-led movement.[76] At all stages, testimonies of the community were placed before the various courts that heard the case. It was in this socio-political context that *Navtej Johar* finally came to be decided.

Section 377 of the Indian Penal Code – as it then stood – criminalised 'carnal intercourse against the order of nature'. *Suresh Kumar Koushal* had upheld the constitutionality of this section by applying a formalistic legal analysis, according to which the equality and non-discrimination provisions were not attracted at all, because the provision only criminalised 'acts' (ie, carnal intercourse against the order of nature), and not 'identities'. This specific finding was reversed by the Supreme Court in *Navtej Johar*, by paying close attention to the *context* in which a provision like section 377 operated, and the *impact* it had in entrenching the continued legal and social subordination of the LGBTQIA+ community. In this regard, the concurring judgment of Chandrachud J went even further,

[72] ibid [140] (concurring opinion of Chandrachud J) (emphasis supplied).
[73] *Navtej Johar* (n 4).
[74] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.
[75] *Naz Foundation v NCT of Delhi*, 160 DLT 277.
[76] For documentation, see, eg, Orinam, 'A Community Effort: The Battle Against S377', available at orinam.net/377/background-of-sec-377/community-effort-battle-against-s377.

and directly addressed the overlap between discrimination on the basis of sexual orientation, and the underlying assumptions about 'correct' or 'normal' gender identity, upon which it was based.[77] In addition, Chandrachud J did two things in his concurring judgment. First, he acknowledged 'the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context.'[78] Secondly, he observed that 'any ground of discrimination, whether *direct or indirect*, is … prohibited by article 15.'[79] This marked the first time that the concepts of intersectionality and indirect discrimination were acknowledged, in those terms, in a judgment of the Supreme Court.

Chandrachud J's concurring opinion thus broke new ground, although in a limited way. He himself did not develop these concepts in greater detail, and the three other concurring opinions were premised on narrower, more limited reasoning: on the concept of individual choice;[80] on the arbitrariness of the phrase 'carnal intercourse against the order of nature';[81] and on the impermissibility of discriminating on the basis of 'immutable characteristics'.[82] Thus – as we have argued previously in this chapter – even though feminist jurisprudence found a voice in *Navtej Johar*, its constitutional standing remained fragile and tenuous.

The second judgment, *Joseph Shine v Union of India*,[83] also entailed a revisiting of the Supreme Court's own prior pronouncement, this time a far older one, the 1954 judgment where the adultery law was upheld on the basis that it was a 'special provision' that benefited women. In *Joseph Shine*, however, the Court examined the unarticulated premises of the adultery law and, unsurprisingly, concluded that even as it sought to confer a dubious 'benefit' upon women (by immunising them from criminal prosecution), it did so upon a set of premises (such as women's sexual passivity) that served to lock them into continued subordinate status. What also counted with the Court was a post-*Puttaswamy* scepticism of the use of criminal law and state power to control social relations within the framework of a dominant, patriarchal morality. Importantly, in the course of their analyses, the concurring opinions in the judgment united in affirming women's sexual autonomy, and consciously rejected the patriarchal approach that had characterised prior jurisprudence on sex discrimination. For example, Chandrachud J noted:

> Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. In remedying injustices, the Court cannot shy away from delving

[77] *Navtej Johar* (n 4) [44] (concurring opinion of Chandrachud J).
[78] ibid [36].
[79] ibid.
[80] ibid (plurality opinion of Misra CJI).
[81] ibid (concurring opinion of Nariman J).
[82] ibid (concurring opinion of Malhotra J).
[83] *Joseph Shine v Union of India* (n 64).

> into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and 'granting' rights.[84]

On a similar note, Malhotra J found:

> Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender. The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.[85]

A corollary of the substantive feminist reasoning employed by the judges in *Joseph Shine* was also that the purpose of Article 15(3) could be articulated with greater clarity. 'Special provisions' for women could no longer be justified under a protective-patriarchal logic; this left the alternative – also recognised by Malhotra J – that Article 15(3) was to be understood as an *affirmative action* provision, designed to allow the State to pass laws mitigating historical and structural disadvantages suffered by women.[86]

The final judgment – *Indian Young Lawyers' Association v Union of India*[87] – has proven to be the most controversial, and has faced a sustained backlash both from outside and within the Court, where it is presently being reviewed again. *Indian Young Lawyers' Association* – popularly known as 'the Sabarimala Case' – was a split 4–1 decision. The judges in the majority provided different reasons for why they believed the rule prohibiting the entry of menstruating-age women into the Sabarimala temple was invalid. Three judges out of four decided the case on somewhat narrow grounds: relying upon the doctrine of ultra vires, and the fact that, on evidence, it had not been demonstrated that the exclusion of women was a religiously mandated diktat. However, between the dissenting opinion of Malhotra J (the only woman judge on the bench) and the concurring opinion of Chandrachud J, there was substantive disagreement with respect to the intersection of religious norms and gender equality. Malhotra J argued that the exclusion of women from the temple did not amount to a 'pernicious practice', or a 'social evil', which warranted a secular court stepping in and overriding the internal autonomy of the religious group in question.[88] For Malhotra J, constitutional pluralism required respect for different internal norms, even when they might not strictly comport with constitutional commitments to gender equality.[89] Chandrachud J did not see the matter in this way. He referred to the social and structural role of menstruation in the subordination of

[84] ibid [51]–[52] (concurring opinion of Chandrachud J).
[85] ibid [12.2] (concurring opinion of Malhotra J).
[86] ibid [14] (concurring opinion of Malhotra J).
[87] *Sabarimala* (n 65).
[88] ibid [7.4] (dissenting opinion of Malhotra J).
[89] ibid [11] (dissenting opinion of Malhotra J).

women, and how its integration into a symbolic universe of purity and pollution had been historically used to exclude women from equal access to public spaces, as well as to justify discrimination (and even violence) upon them.[90] Thus, for Chandrachud J, the exclusion of women from the Temple was not simply a pure question of faith, to be left to the determination of the religious group or denomination. To Chandrachud J, its basis was integral to, and reinforced, the subordination and exclusion of women from broader social life.[91]

The difference of opinion between Malhotra and Chandrachud JJ thus revealed a fault line at the intersection of group autonomy and gender equality. While the correctness of the outcome of the judgment might be debated, Chandrachud J's reasoning is nonetheless important for its acknowledgment of crucial feminist insights – not least of which is an interrogation of the traditional public–private divide, and an acknowledgment that practices of oppression in the 'private' domain need not *automatically* be granted an immunity from constitutional scrutiny.

A combined reading of these four judgments, therefore, gives us what we may call a 'flagship constitutional development in terms of gender and sexual equality'. In short, these judgments reflect the following principles: (a) an acknowledgment that the focus of the Constitution's non-discrimination guarantee – as applied to women and sexual minorities – is to mitigate the structural and institutional disadvantage suffered by women and sexual minorities; (b) an understanding that disadvantage can be identified and remedied only through close attention to context – both historical and structural; (c) an understanding that the public–private divide is itself contingent (as opposed to 'natural'), has often served to entrench power relations, and must therefore be interrogated; (d) and an acknowledgment that discrimination can, therefore, be both direct and indirect, and that its impact is as important as legislative form or purpose.

We must be careful, however, not to overstate the case. These judgments represent a beginning – but only that. Some of the ideas *within* the judgments remain embryonic: as pointed out above. For example, in *Navtej Johar*, Justice Chandrachud cited the concept of intersectionality, but did not proceed to analyse it or apply it to the case at hand. The *Sabarimala* judgment – as also indicated above – is under review, and may yet be rolled back, as part of a forthcoming, overarching, nine-judge bench hearing that has been set up to decide the interplay between religious freedom and gender equality. The final scope that this case may take is as yet unclear, but an overarching judgment on whether and to what extent women have rights within and against their religious communities will certainly be momentous.

Furthermore, after its brief flourish in September of 2018, the Supreme Court has yet to take forward the jurisprudence that it began in those judgments. The

[90] ibid [57] (concurring opinion of Chandrachud J).
[91] ibid.

intervening two years have seen no further developments. That is not to say that opportunities have been lacking. For instance, the Transgender Act 2019 has been challenged by a number of transgender petitioners, on the basis that under the guise of securing their rights, it only perpetuates discrimination against sexual minorities (for example, by requiring magistrate-approved certificates as proof of trans status). These challenges have come upon the heels of extensive protests against the Act, itself a culmination of many years of campaigning and social movements, led by the transgender community.[92] When cases such as these are eventually heard, the endurance – and durability – of the 2017–18 'flagship moment' will be finally put to the test. Meanwhile, the social movement and struggle for gender justice continues.

VI. CONCLUSION

In this chapter, we set out to answer the question of whether constitutional law has provided a meaningful venue for the advancement of equal citizenship for women and sexual minorities in India. Our analysis in this chapter shows that the question admits of no straightforward answer. Over seven decades, Indian constitutional law has proven to be an uneven terrain when it comes to the claims of women and sexual minorities. In terms of the outcomes of court cases, there have been both victories and setbacks; however, not until very recently have the Indian courts begun to pay serious attention to the possibilities of substantive feminist *reasoning*, and the evolution of a sustainable constitutional doctrine around issues of the rights of women and sexual minorities.

The reasons for this have been explored in the previous sections. During the framing of the Constitution, a long history of women's participation in the public sphere (during the course of the nationalist movement), as well as an existing vocabulary of gender equality and women's rights going back many decades, directly influenced Constitutional provisions. Unlike in many other countries, women did not have to wage a long, post-Constitutional struggle for formal recognition as equal citizens, or for the right to vote. At the same time, however, the nature of the participants in the nationalist movement, as well as the subsumption of a distinct and identifiable women's movement into the broader struggle for political independence, meant that there was a certain *flattening* of issues. There was, thus, little to no discussion of how, precisely, the Constitution – and nascent Indian constitutionalism – would engage with the multiple and intersectional facets of disadvantage that constituted sex discrimination, in all its forms.

[92] For documentation, see 'The Transgender Persons (Protection of Rights Bill), Act 2019 and Rules 2020', available at orinam.net/resources-for/law-and-enforcement/the-transgender-persons-protection-of-rights-bill-2019.

This absence during the moment of constitutional framing spilt over into constitutional jurisprudence. Faced with constitutional claims made in the language of sex discrimination and gender equality, for the longest time, Indian judges (almost exclusively male) answered them either with a formalist reasoning (that did, admittedly, lead to positive outcomes for women at times), or within a patriarchal framework that the Constitution was (ostensibly) committed to dismantling. In these judgments, therefore, we see explicit articulations of paternalism (by framing discriminatory legislation as 'protective') and patriarchy (an endorsement of gender roles, and a dismissal of, or rendering invisible structural disadvantage).

The last decade or so, however, has seen the beginnings of what we may call a 'contrapuntal canon'. While feminist constitutional claims have always been advanced before courts, it is only in recent years that courts have begun to respond to them by framing the reasoning in response to such claims. In some cases this development has been the product of long-running social movements that first articulated their constitutional claims outside the courtroom, and then in it. A good example of this is the social movement and long-running litigation that was finally responsible for the decriminalisation of same-sex relations in 2018. Another is the movement of the transgender community, responsible for the 2014 *NALSA* judgment, and which continues to mobilise against the 2019 Transgender Act, which undermines the core principles of that judgment. In other cases, judicial doctrine appears to be court-driven, and – often – the product of one or two judges, writing disparate concurring judgments as part of larger benches.

For precisely this reason, the new jurisprudence is fragile, and its future remains uncertain within the Supreme Court – an institution that can have up to 34 judges – there is evidently no consensus around it. Outside the Court, there is no obvious overlap between the claims that women's movements consider to be urgent, and the decisions of the Court (for example, there was no widespread movement to decriminalise adultery, or for the entry of women into the Sabarimala Temple). This does not, of course, detract from the importance of these judgments, or from the reasoning in them, from a substantive feminist perspective. What it does indicate, however, is that if these green shoots are to blossom into something more long-lasting, there is a pressing need to deepen the dialogue between social movements and the courts, upon the terrain of the Constitution.