

CONSTITUTIONALIZING WOMEN'S EQUALITY IN INDIA: ASSESSING THE *SABARIMALA* DECISION

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INTRODUCTION

On January 2, 2019, at 3:45 AM, Bindu Ammini and Kanaka Durga undertook a three-mile hike up the Sabarimala Hill in Kerala, southern India, to enter the Sabarimala Temple.¹ The temple attracts an estimated twenty-five to forty million pilgrims annually,² but Ammini and Durga were no ordinary pilgrims. For one, they needed to be escorted by police.³ Further, their pilgrimage captured international headlines while triggering heated debates and mass protests across India.⁴ Most importantly, they were *women*. To understand why such a seemingly trivial fact is so crucial in the context of Sabarimala, one must rewind to the nascent years of post-

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¹ Kai Schultz, *Her Visit to a Men-Only Temple Went Smoothly. Then the Riots Started.*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/world/asia/temple-india-sabarimala-ammini.html> [<https://perma.cc/F9UX-KH46>].

² K. Rajasekharan Nayar et al., *Call to Avert Acceleration of COVID-19 from India's Sabarimala Pilgrimage of 25 Million Devotees*, 27 J. TRAVEL MED. 1, 1 (2020).

³ Ashutosh Sharma, *First Woman to Enter Sabarimala, Dalit Activist Bindu Ammini Continues to Brave Social Backlash*, OUTLOOK INDIA (Jan. 9, 2022, 12:16 PM), <https://www.outlookindia.com/website/story/dalit-activist-bindu-ammini-continues-to-brave-social-backlash/408902> [<https://perma.cc/CLF6-TDB3>].

⁴ *Sabarimala: India's Kerala Paralyzed Amid Protests Over Temple Entry*, BBC NEWS (Jan. 3, 2019), <https://www.bbc.com/news/world-asia-india-46744142> [<https://perma.cc/D7VM-LE5Q>].

colonial India. Since the early 1950s, women of menstruating age were prevented from entering the centuries-old shrine,⁵ a prohibition formalized by statute in 1965.⁶ But on September 28, 2018, in a ground-breaking decision mediating the perceived opposition between religious freedom and women's equality rights, a 4-1 majority of the Supreme Court declared the impugned statute ultra vires the Constitution, effectively lifting the ban on female pilgrims.⁷ What followed can only be described as political and legal mayhem.

When the temple temporarily reopened in October, several women attempted the trip; all were accosted with threats of violence, subjected to physical harassment and property vandalism, and blocked from completing the trail.⁸ Kerala's communist-coalition government had been receptive to the decision, promising police protection to female pilgrims and cracking down on blockades at the temple's entry points.⁹ Further, Kerala's government accused the ruling federal Hindu nationalist Bharatiya Janata Party ("BJP") of stoking division and violent protests in a bid to instrumentalize the court decision as a wedge-issue in the coming election and manufacture a narrative of Hindu values "under threat."¹⁰ The BJP seemed to confirm the accusations, describing the evolution of events in Kerala as "a struggle . . . between religious beliefs and state government's cruelty,"¹¹ while denouncing

⁵ Rashmi Kumari, *Menstruating Women and Celibate Gods: A Discourse Analysis of Women's Entry into Sabarimala Temple in Kerala, India*, 4 THIRD WORLD THEMATICS: THIRD WORLD Q. J. 288, 293 (2019).

⁶ The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, §3, <https://www.indiacode.nic.in/bitstream/123456789/12386/1/7.pdf#search=hindu%20places%20of%20public%20worship> [<https://perma.cc/E327-57M9>].

⁷ Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1 (2018).

⁸ Schultz, *supra* note 1.

⁹ Kai Schultz, *An Indian Court Ordered a Temple to Admit Women. So Far, It Hasn't.*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/world/asia/india-sabarimala-temple-women.html> [<https://perma.cc/Y543-WDJM>].

¹⁰ *Id.*

¹¹ The Wire Staff, *Sabarimala: Ashram of Swami Who Supported Women's Entry Attacked; Amit Shah Supports Protestors*, THE WIRE (Oct. 27, 2018), <https://thewire.in/politics/sabarimala-swami-ashram-attacked-amit-shah> [<https://perma.cc/QKY4-EMY7>].

the Kerala administration as “a government headed by non-believers [that] is out to destroy the sanctity of the temple where more than four crore pilgrims throng during the season. We won’t sit idle. We are planning a massive movement to save the temple.”¹²

To further complicate matters, by February, at least sixty-five petitions had been filed in the Supreme Court requesting a review of the judgment as well as an interim stay.¹³ Unsurprisingly, many of the petitioners were religious or Hindu nationalist organizations, including the All Kerala Brahmins Association, the Nair Service Society, and the National Ayyappa Devotees (Women) Association.¹⁴ On November 14, 2019, a 3-2 majority of the Supreme Court noted that the issues raised in the *Sabarimala* judgment were not limited to the Sabarimala Temple.¹⁵ Specifically, it singled out three cases currently before the courts: one concerning Muslim women entering a mosque through the main door;¹⁶ another concerning Parsi women married

¹² Ramesh Babu, *Over 1400 Detained in Kerala as Police Cracks Down on Sabarimala Protesters*, *BJP Warns of Mass Stir*, HINDUSTAN TIMES (Oct. 25, 2018, 10:03 PM), <https://www.hindustantimes.com/india-news/over-200-held-in-crackdown-on-sabarimala-protesters-bjp-warns-of-mass-stir/story-BQy7aMg4OXG4k6cPJJfaAO.html> [<https://perma.cc/WR8U-UEGJ>].

¹³ Bhadra Sinha, *Supreme Court Refers Entry of Women to Sabarimala to Larger Bench*, HINDUSTAN TIMES (Nov. 14, 2019, 2:47 PM), <https://www.hindustantimes.com/india-news/supreme-court-refers-entry-of-women-to-sabarimala-mosques-to-larger-bench/story-V5M5W0ibYxVWwCGUMVXXAK.html> [<https://perma.cc/99SZ-R3TT>]. Article 137 of the Constitution of India provides that, subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it. INDIA CONST. art. 137. The process of filing a review petition is subject to the Supreme Court Rules, Part IV, 2013. Order XLVII (2) provides that a petition for review must be filed within thirty days of the judgment and must clearly delineate the grounds for review. Additionally, per Order XLVII (3), the application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment.

¹⁴ Debayan Roy, *What the Sabarimala Review Petition Supreme Court Will Rule on Today is All About*, THEPRINT (Nov. 14, 2019, 8:15 AM), <https://theprint.in/theprint-essential/what-the-sabarimala-review-petition-supreme-court-will-rule-on-today-is-all-about/320668/> [<https://perma.cc/8FQW-UZEH>].

¹⁵ Kantaru Rajeevaru v. Indian Young Laws. Ass’n, (2019) SCC Online SC 1461 [Review Petition (Civil) No. 3358 of 2018 in Writ Petition (Civil) No. 373 of 2006].

¹⁶ Yasmeen Zuber Ahmad Peerzade v. Union of India, (2020) 2 SCC 50 (2019) Writ Petition (Civil) No. 472/2019.

to non-Parsis entering the Agyari,¹⁷ and a case assessing whether female genital mutilation constitutes an essential religious practice with respect to the Dawoodi Bohra community.¹⁸ Though the majority refused to stay the *Sabarimala* ruling, it nonetheless listed seven questions related to the above three cases that must be referred to a bench of no fewer than seven judges.¹⁹ Consequently, the review process of the *Sabarimala* judgment is paused, pending a larger bench resolution of these questions.²⁰ The referral decision has been met with considerable criticism, with many expressing fears that the protests and the Executive's disapproval of the ruling influenced the Court to adopt an overly liberal approach to its review competence.²¹

If the *Sabarimala* saga is a glaring reminder of the tired political dichotomization of religious freedoms and women's rights, it is also a testament to Indian women's long battle for substantive equality. Indeed, the importance of constitutionalism as the key difference between equality as a *promise* and equality as a *fact* is best exemplified in India, where despite the existence of constitutionally guaranteed fundamental rights, the material reality of women's lives does not reflect much improvement. Women in India constitute an oppressed group. They are marginalized, exploited, and excluded in virtually all aspects of life. India ranks 131st of 189 countries on the 2020 Gender Inequality Index.²² Female labor force participation is an abysmal 20.5%,²³ while female post-secondary education attainment stands at 27.7%.²⁴ Women in India remain disadvantaged with regard to

¹⁷ Goolrokh M. Gupta v. Burjor Pardiwala, (2020) 2 SCC 705 (2017) [Special Leave Petition (Civil) No. 18889/2012].

¹⁸ Sunita Tiwari v. Union of India, (2019) 18 SCC 719 (2018) [Writ Petition (Civil) No. 286/2017].

¹⁹ *Rajeevaru*, SCC Online SC 1461 at para. 6.

²⁰ *Id.* at para. 10.

²¹ Parakash Karat, *An Independent Supreme Court Is a Must for Democracy*, THE CITIZEN (Aug. 27, 2020), <https://www.thecitizen.in/index.php/en/NewsDetail/index/4/19272/An-Independent-Supreme-Court-Is-a-Must-for-Democracy> [<https://perma.cc/YU6E-SWC6>].

²² UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 361–64 (2020), <http://hdr.undp.org/en/composite/GII> [<https://perma.cc/Q4GB-NTKN>].

²³ *Id.* at 363.

²⁴ *Id.*

employment, literacy, educational attainment, and political participation.²⁵ They are disadvantaged within the family, as the private sphere is regulated by discriminatory personal laws that contradict formal equality guarantees in the public sphere.²⁶ Moreover, gender equality has been undermined by the contradictory constitutional embrace of formal equality in the “public” sphere and inequality in the “private” sphere.²⁷ Until recently, the constitutional protection of religious freedoms has been (mis)interpreted to shield discrimination from scrutiny under personal laws, thereby legitimizing women’s inequality within the family and the community.²⁸ Effectively, women have been excluded from equal citizenship.

Whereas Hindu law has been reformed in some aspects, the state has historically done little to legally reform Muslim women’s inequality under religious personal law systems, justifying its inaction on the grounds of minority rights and religious freedom.²⁹ Where the State has recently intervened to regulate or reform matters linked to Muslim law in the name of advancing gender equality, its intentions have been unsurprisingly met with skepticism in light of the amplifying anti-Muslim politics in India.³⁰ This has left the courts, the designated apolitical institution, as the best positioned promoters and guardians of equality rights within minority communities. But despite its transformative mandate, the Supreme Court has been reluctant to enforce laws to protect women’s rights and has even held some social

²⁵ Gender-based inequality is especially palpable in the context of rural and low-income women. In India, rural women make up 81.29% of the female workforce, but only 12.9% of women own land. During the April 2021 wave of the pandemic, 5.7 million rural women’s jobs in India vanished—a job loss that accounts for nearly 80% of all job losses in the country that month. For more information on gender-based disparities relating to labor and class, see Vijay Prashad, *Women Everywhere in the World Are Squeezed into a Tight Corner*, TRICONTINENTAL (July 8, 2021), <https://thetricontinental.org/newsletterissue/27-gender-equality/> [<https://perma.cc/L2R6-DL43>].

²⁶ VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 133–34 (2008).

²⁷ *Id.* at 88–89.

²⁸ *Id.*

²⁹ Vrinda Narain, *Reconciling Constitutional Law, Gender Equality and Religious Difference: Lessons from Shayara Bano, India’s Triple Talaq Decision*, in THE ASIAN YEARBOOK OF HUMAN RIGHTS AND HUMANITARIAN LAW 345–77 (Javaid Rehman, Ayesha Shahid & Steve Foster eds., 2021).

³⁰ Vrinda Narain, *Law, Gender, and Nation*, in ISLAM, GENDER, AND DEMOCRACY IN COMPARATIVE PERSPECTIVE 193–95 (Jocelyne Cesari & José Casanova eds., 2017).

reform legislation unconstitutional.³¹ Although the Constitution promises radical change and substantive equality, democratic institutions and structures of accountability have failed women.³² As things stand, women remain on the margins of democracy and citizenship and gender equality in India is largely illusory.

However, it would be a mistake to presume that, in the face of institutionalized patriarchy, women in India dejectedly abandoned all efforts to expand their rights. On the contrary, women have turned to constitutional litigation to challenge their exclusion and resolve a variety of gender-related claims such as political participation, employment discrimination, equality within the family, and sexual harassment in the workplace, among others.³³ Through these actions, women have challenged orthodoxy, interrogated norms, revised categories, and insisted on substantive equality. The Supreme Court has, in turn, been receptive to Public Interest Litigation (“PIL”) and constitutional challenges to gender inequality in personal and customary laws, showing its interpretational creativity when reading constitutional guarantees, and even drawing on principles of international human rights to fill gaps in domestic legislation.³⁴ Furthermore, in what might be characterized as a constitutional dialogue between the judiciary and legislature, Parliament has drafted bills and legislation in response to calls for protection of women’s human rights.³⁵ Yet, changes in jurisprudence or legislation must be examined with caution before they are celebrated as entrenchments of gender equality.

³¹ Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. 107, 114 (2016).

³² *Id.* at 107.

³³ For a detailed survey of women’s rights activists’ reliance on Public Interest Litigation as a vehicle for gender justice, see Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT’L L. 833 (2008); see also Vrinda Narain, *Muslim Women’s Equality in India: Applying a Human Rights Framework*, 35.1 HUM. RTS. Q. 91 (2013).

³⁴ In *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011, the applicants turned to CEDAW to challenge gaps in domestic legislation; see also *All India Democratic Women’s Association v. Union of India*, (1989) 2 SCR (2) 66; *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864; *Delhi Domestic Working Women’s F. v. Union of India*, (1995) 1 SCC 14 (1994); *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*, AIR 1996 SC 1697; *Apparel Exp. Promotion Council v. A. K. Chopra*, AIR 1999 SC 625; *Chairman, Ry. Bd. v. Chandrima Das*, AIR 2000 SC 988.

³⁵ See, e.g., *The Protection of Women from Domestic Violence Act, 2005*, §43.

Legislative innovations in India relating to gender equality, however ambitious in scope, generally remain paralyzed in formalism, failing to translate into the factual emancipation of the subjects they aim to empower.³⁶ This, I argue, is a symptom of two cancers: first, the failure to recognize that legal reforms require a reorganization of all relevant institutions in order to “de-normalize” oppressive social norms and bridge the gap between the promise of a right and its institutional enforcement;³⁷ second, the failure to delineate constitutionalist principles that ensure a meaningful interpretation of legislation and hold the legislature accountable for their practical shortcomings. It is precisely for the latter symptom that the *Sabarimala* case should command attention—particularly the concurring opinion of Justice Chandrachud which promotes citizenship as a pillar of not only the Constitution, but its foundational morality.

Given the continued political, social, and economic disadvantage of women in India, it is important to ask about women’s substantive equality and question whether the Indian Constitution is for women too.³⁸ While acknowledging the limitations of constitutional challenges generally, this Article seeks to understand the extent to which the Indian Supreme Court has constitutionalized women’s equality rights by turning to *Indian Young Lawyers Association v. State of Kerala*,³⁹ commonly referred to as the *Sabarimala* judgment, as a case study. The ruling, in its high and low points, offers a glimpse of the evolving state of judicial relief for statutorily created gender-based discrimination in India. Focusing on how the Supreme Court balances religious freedom with gender equality, this Article considers whether the Indian Constitution can represent women’s interests, be interpreted in a way that responds to women’s inequality, and promote inclusive citizenship for women.

³⁶ NARAIN, *supra* note 26, at 135, 192.

³⁷ Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, *Introduction: The Idea and Practice of Feminist Constitutionalism*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 1, 3 (Beverley Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

³⁸ Beverley Baines, *Feminist Constitutionalism in Canada*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* 965, 965 (Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds., 2017).

³⁹ *Indian Young Laws. Ass’n v. State of Kerala (Sabarimala)*, (2019) 11 SCC 1 (2018). For insightful analysis, see Gautam Bhatia, *The Sabarimala Judgement: An Overview*, *INDIAN CONST. L. & PHIL.* (Sept. 28, 2018), <https://indconlawphil.wordpress.com/2018/09/28/the-sabarimala-judgment-i-an-overview/> [https://perma.cc/7VH5-RSQD].

The remainder of this Article shall be structured as follows. Part I maps out important areas of concern for feminist constitutionalism. This framework highlights the limitations of traditional constitutional approaches. It problematizes that assessment of alleged gender-neutral laws in isolation from their factual matrix or under the influence of patriarchal assumptions, such as the delineation of the private as feminine and the public as masculine.⁴⁰ Part II surveys the relevant provisions of the Indian Constitution. Part III follows the evolution of the *Sabarimala* case: the religious motivations behind the ban on entry of women (of menstruating age) to the temple, the formalization of the ban and its social impact, and the judicial challenge of the ban. Against the theoretical background presented in Part I, Part IV analyzes the transformative potential of the decision on judicial understandings of equality, paying particular attention to Justice Chandrachud's concurring judgment. This Article concludes with a cautious note against complacency post-*Sabarimala* and makes central recommendations for the enhancement of gender equality in Indian constitutionalism.

I. Theoretical Framework: Feminist Constitutionalism

The importance of constitutionalism in the protection and advancement of marginalized or historically oppressed groups cannot be overstated, especially in a nation's postcolonial chapter. While constitutions are the hallmark of formal rights and liberties, *constitutionalism* is the bridge between the promise of a right and its full enjoyment.⁴¹ It encompasses the dialogues between the state, civil society, and even the international legal community; holding each party responsible for ensuring that the constitution's content is neither temporal nor formalistic. Jurisdictions across the world have embraced a number of terms and expressions to define this *liveliness*

⁴⁰ Catharine A. MacKinnon, *Gender in Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 397, 412 (Michel Rosenfeld & Andres Sajó eds., 2012); see generally Kimberlé Williams 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 (1989); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

⁴¹ See, e.g., Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998); see also Upendra Baxi, *Postcolonial Legality: A Postscript from India*, 45 VERFASSUNG UND RECHT IN ÜBERSEE / L. & POL. AFR., ASIA & LAT. AM. 178 (2012); Upendra Baxi, *Outline of a 'Theory of Practice' of Indian Constitutionalism*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 92–118 (Rajeev Bhargava ed., 2008); Beverley Baines, *Constitutionalizing Women's Equality Rights: There Is Always Room for Improvement*, ATLANTIS, July 13, 2016, at 112.

of the constitution—from the “living tree” of the Canadian Constitution,⁴² to the “living Constitution” of the United States,⁴³ to the “constitutional morality” of India’s postcolonial Constitution.⁴⁴

The notion of the constitution as a living organism evolved naturally from the recognition that constitutions matter, and they matter fundamentally. Their impact on processes of change is not just symbolic; constitutions may entrench rights, developing real avenues to challenge and deconstruct systems of power even where other political institutions have failed to do so.⁴⁵ Constitutions have a special status within the legal order: in many jurisdictions, they are the supreme law and as such take precedence over ordinary legislation.⁴⁶ Naturally, given the transformative potential of constitutions to dismantle structures of inequality and violence, constitutionalism must be attentive to disadvantaged sectors of society, particularly subaltern groups. The inclusion of marginalized groups in constitutional politics allows for the problematization of binaries and categories, and gives women more

⁴² The “living tree” metaphor was first invoked by Lord Sankey in *Edwards v. Attorney General of Canada* [1930] AC 124 to describe a flexible interpretation “capable of growth and expansion within its natural limits.” The metaphor has since come to represent the need for a progressive Canadian Constitution to capture and apply to facts that did not exist and could not have been foreseen at the moment of the drafting of the Constitution. For a more detailed analysis of the origin and purpose of the “living tree” doctrine, see PETER HOGG, *CONSTITUTIONAL LAW OF CANADA* 371, 808 (3d ed. 1996).

⁴³ The “living Constitution” is a theme of American constitutional jurisprudence and a doctrine that refers to the Constitution’s ability to evolve, change, and adapt to new facts without formal amendment, while remaining stable and immune to political manipulations. For a detailed survey of the origin and evolution of the concept, see HOWARD LEE MCBAIN, *LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (1927).

⁴⁴ The concept of “constitutional morality” was first invoked on November 4, 1948, by B. R. Ambedkar, Chairperson of the Constitution Drafting Committee, in a speech to the Constituent Assembly, while introducing and defending the draft of the postcolonial Constitution. The concept has since been developed by the Indian courts “as an interpretive device to help ascertain the (so called) true meaning of the Constitution’s text in contested cases” regarding individual and civil rights, minority rights, and federalism, among others. For a more detailed analysis of the history and application of “constitutional morality,” see Nakul Nayak, *Constitutional Morality: An Indian Framework*, *AM. J. COMP. L.* (forthcoming).

⁴⁵ Narain, *supra* note 31, at 122.

⁴⁶ Adèle Cassola et al., *Where Do Women Stand? New Evidence on the Presence and Absence of Gender Equality in the World’s Constitutions*, 10 *POL. & GENDER* 200, 202, 204, 225 (2014).

power to unsettle historical patriarchal hierarchies in the constitutional order and challenge their validity.⁴⁷

The present analysis is informed by feminist constitutionalism, which brings a critical lens to the gender-neutral approach that is traditionally favored in constitutional interpretation.⁴⁸ Feminist constitutionalism starts from the premise that the law cannot be reformed into an egalitarian tool by merely challenging provisions and articles, as it is the legal foundations and structures that have enabled the historical subjugation of women.⁴⁹ As such, feminist constitutionalism pays particular attention to constitutional norms and the underlying principles that animate the application of constitutional rights.⁵⁰ It treats the constitution as an organic system, where all institutions affect and are affected by the constitution, and hence must be held accountable for the promotion and protection of constitutional rights.⁵¹

Feminist legal scholar Catharine MacKinnon's work offers important insight into the transformative potential of feminist constitutionalism. As she notes: "[T]he more a country addresses the substance of gender hierarchy in its equality jurisprudence, as opposed to taking the traditional sameness-difference approach to sex, the more it will promote gender equality through law."⁵² Consider, for example, Article 3(2) of the German Basic Law. Prior to the 1994 reforms, the provision merely read: "[M]en and women shall have equal rights."⁵³ In the 1970s, debates intensified as to whether Article 3(2) in conjunction with Article 3(3), which prohibits discrimination based, inter alia, on sex, effectively prohibited state

⁴⁷ See Ruth Rubio-Marín, *Women and Participatory Constitutionalism*, 18 INT. J. CONST. L. 233 (2020).

⁴⁸ *Id.*; see also Baines, *supra* note 38, at 975.

⁴⁹ Baines, Barak-Erez & Kahana, *supra* note 37, at 1.

⁵⁰ MacKinnon, *supra* note 40, at 402–03.

⁵¹ Baines, Barak-Erez & Kahana, *supra* note 37, at 3.

⁵² MacKinnon, *supra* note 40, at 403.

⁵³ GRUNDGESETZ [GG] [BASIC LAW], art. 3(2), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/PG2N-JVDP>].

affirmative action.⁵⁴ Ultimately, following a tireless campaign by feminist scholars and politicians, Article 3(3) was amended in 1994 to read: “[M]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”⁵⁵ The emphasis on existing inequality is key to demystifying the misnomer that is “positive discrimination.” Where laws are enacted to eradicate presently occurring discrimination, it is wholly illogical to brand them as discriminatory, even if such discrimination is esteemed positively.⁵⁶ Rather, the enactment of such laws is an exercise in conformity with the German state’s obligation to ensure that men and women enjoy *substantive* equal rights. Relatedly, substantive equality laws optimize the occurrence of *real* and *meaningful* choices for women, rather than consent that is presumed under conditions of social pressure, economic desperation, or coercion.

Importantly, in the spirit of an existential critique of constitutions, feminist constitutionalism problematizes explicit or implicit dichotomies that have traditionally posited freedom of religion as oppositional to gender and racial equality.⁵⁷ It extends this critique to the private-public divide. Normalizing discourse on issues “conventionally regarded as private in the gendered domain” as public issues of sex discrimination is key to weakening gender inequality as a social structure.⁵⁸ Lastly, feminist constitutionalism strips away the political, the cultural, and the religious from its immunity to gender scrutiny.⁵⁹

⁵⁴ Anke J. Stock, *Affirmative Action: A German Perspective on the Promotion of Women’s Rights with Regard to Employment*, 33 J.L. & Soc. 59, 62 (2006).

⁵⁵ GRUNDGESETZ [GG] [BASIC LAW], art. 3(2).

⁵⁶ For a broader discussion of the feminist debates and interpretations surrounding Article 3(2), see Sabine Lang, *Gender Equality in Post-Unification Germany: Between GDR Legacies and EU-Level Pressures*, 26 GERMAN POL. 556, 557, 560–61 (2017).

⁵⁷ Baines, Barak-Erez & Kahana, *supra* note 37, at 3.

⁵⁸ MacKinnon, *supra* note 40, at 403–04.

⁵⁹ *Id.* at 404.

For present purposes, my inquiry is structured around three central areas of concern of feminist constitutionalism: substantive equality, inclusion, and questioning assumptions and categories.⁶⁰

A. Substantive Equality

Feminist constitutionalism insists on a substantive understanding of equality. It seeks to offer “transformative remedies” to structural discrimination by exposing inequalities embedded in seemingly neutral laws, challenging norms, and promoting inclusivity.⁶¹ In contrast to formal equality, substantive equality goes beyond classification. Rather than concern itself with similarities and differences between men and women, substantive equality “tries to identify patterns of oppression and subordination of women as a group by men as a group.”⁶² This is particularly important when addressing the tired defense that the exclusion in question does not affect women *per se*, but merely a biological feature shared by certain women, such as menstruation. This argument erroneously frames gender discrimination as “inhering in sex as a conceptual category,” when in truth it “originates with the long history of women’s inequality in almost every area of life.”⁶³ The implication here is that biological factors, such as menstruation and sexuality, become a means *by which* cisgender men, as a group, exclude others outside that group from civil society. It recognizes that despite biological and physical differences, women have been marginalized as a collective. This marginalization, however, is not experienced equally by all members of the collective. Indeed, substantive equality holds intersectionality as an overarching framework: if women are an oppressed group, the lived experience of oppression is contingent on a woman’s intersecting identity markers.⁶⁴

⁶⁰ Taking inspiration from Beverley Baines, *supra* note 41.

⁶¹ Baines, *supra* note 38, at 975.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297 (1992); see also Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 748 (2006).

B. Inclusion

Challenging the exclusion of marginalized perspectives, feminist constitutionalism critically examines traditional constitutional discourse to assess whose interests are primarily served, whose needs are excluded, and what areas are shielded from constitutional scrutiny.⁶⁵ An inclusive constitutionalist framework must meaningfully survey all perspectives shared by the concerned women, paying close attention to their context. Consider, for example, the multilayered challenges faced by Muslim women members of minority groups. The narrative of Muslim women as victims without agency underlies a number of “deveiling” laws in Quebec,⁶⁶ Europe,⁶⁷ and most recently India.⁶⁸ This hinders Muslim women’s own challenges to gender inequality within the community. Understandably, women

⁶⁵ MacKinnon, *supra* note 40, at 404; Baines, Barak-Erez & Kahana, *supra* note 37, at 2.

⁶⁶ *An Act Respecting the Laicity of the State (Bill 21)*, S.Q. 2019, c 12. Bill 21 was assented to on June 16, 2019 and constitutes the first Quebec law to proclaim Quebec “a lay State.” S.Q. 2019, c 12, s 1. The Act imposes a blanket ban on the wearing of religious symbols among civil servants and the covering of one’s face when receiving public services. Prior to the enactment of Bill 21, Quebec’s Liberal Party had tabled *An Act to Foster Adherence to State Religious Neutrality and, in Particular, to Provide a Framework for Requests for Accommodations on Religious Grounds in Certain Bodies (Bill 62)*, S.Q. 2017, c 19. Bill 62 was understood to target Muslim women exclusively as it mandated that Quebecers only receive or offer public services with their faces uncovered. The Bill was subsequently suspended by a provincial court for a *Charter* violation. However, though Muslim religious symbols are not explicitly singled out in Bill 21, polls show that provincial support for the law is overwhelmingly driven by negative views of the hijab, effectively transforming the remaining affected symbols into “collateral damage.” See Montreal Gazette Staff, *A New Poll Shows Support for Bill 21 Is Built on Anti-Islam Sentiment*, MONTREAL GAZETTE (May 30, 2019), <https://montrealgazette.com/news/local-news/a-new-poll-shows-support-for-bill-21-is-built-on-anti-islam-sentiment> [https://perma.cc/C5FC-W2UM].

⁶⁷ See Jeff Diamant, *Europe Experienced a Surge in Government Restrictions on Religious Activity Over the Last Decade*, PEW RSCH. (July 29, 2019), <https://www.pewresearch.org/fact-tank/2019/07/29/indian-experienced-a-surge-in-government-restrictions-on-religious-activity-over-the-last-decade/> [https://perma.cc/E2Z3-CG6U].

⁶⁸ Since 2022, Karnataka has been embroiled in a state of mass protests over college and high school policies prohibiting the wearing of the hijab in classrooms. Civil unrest escalated severely in early February, prompting the Karnataka state to temporarily shut down all high schools and colleges. A Karnataka court has since referred the question of the constitutionality of the ban to a larger bench. For more information on the Karnataka protests, see Imran Qureshi, *Karnataka Hijab Row: Judge Refers Issue to Larger Bench*, BBC NEWS (Feb. 10, 2022), <https://www.bbc.com/news/world-asia-india-60312864> [https://perma.cc/LR96-QSX9].

within racialized minority communities fear that their advocacy for social reforms may be instrumentalized by an existing racist or Islamophobic agenda.⁶⁹ Community leaders may frame any form of critical examination of community practices as antithetical to group solidarity, which they argue is urgently needed in the face of mainstream hostility.⁷⁰ The effect is that Muslim women's perspectives, and consequently interests, are hardly accounted for by all parties: the state, the male religious community leaders, and mainstream feminists.⁷¹ By virtue of the patriarchy and racism, they are unable to access equal rights within their community, while also being deprived of the citizenship rights enjoyed by women members of majority or dominant religious groups. Constitutional discourse must attend to such multilayered marginalization of women not as a "side issue" but as a fundamental constitutional failure.⁷² The importance of such an analysis is that it highlights the degree to which citizenship, a core pillar of constitutions, has often failed to extend to women by virtue of paternalist and racist tendencies and the contested private (community) and public (state) divide.

C. Questioning Assumptions and Categories

Feminist constitutionalism exposes the existence of normative assumptions and categories that further entrench structural and systemic inequality.⁷³ It calls for challenging and resisting these norms. One such assumption is the traditional distinction between public and private spheres, which in India has translated to religious communities' demands for constitutional immunity in "internal affairs." Feminist constitutionalism also calls into question the hierarchization of rights on the one hand, and the standardization of subjects on the other, such as treating all women or all Muslims as monolithic groups. It seeks to problematize narratives that skew judicial interpretations of laws and policies in favor of the inegalitarian status quo.

⁶⁹ Sherene Razack, *The Sharia Law Debate in Ontario: The Modernity/Pre-Modernity Distinction in Legal Efforts to Protect Women from Culture*, 15 FEM. LEGAL STUD. 3, 6, 29 (2007).

⁷⁰ *Id.* at 6–7.

⁷¹ *Id.* at 6, 29.

⁷² Baines, Barak-Erez & Kahana, *supra* note 37, at 2.

⁷³ Lisa H. Schwartzman, *Feminist Analyses of Oppression and the Discourse of 'Rights': A Response to Wendy Brown*, 28 SOC. THEORY & PRACT. 465, 479 (2002).

Feminist constitutionalism is the project of rethinking constitutional law to reflect feminist thought and experience. It considers the position of women with regard to agency, empowerment, constitutional rights, rights within the family, as well as socio-economic development and democracy rights.⁷⁴ Drawing on these three central themes, this Article considers how the Indian judiciary has interpreted women's constitutional rights. Do judicial decisions recognize women's constitutional agency and empowerment, or do they reinforce a narrative of victimhood and subordination? Do they recognize women's voices and representation? Of particular interest is the use of religion and cultural morality versus constitutional morality to justify the exclusion of women from full participation in community life.

II. Constitutional Framework

Before delving into the substantive analysis of the *Sabarimala* judgment, the present section provides an overview of the relevant constitutional provisions and their standing jurisprudential interpretations. The postcolonial Constitution was drafted as a manifesto for social change to redress harsh inequalities from India's past.⁷⁵ Its drafters were conscious not only of stark inequalities imposed by colonial rulers, but also of those imposed by a hopelessly hierarchical society divided along lines of caste, religion, and gender.⁷⁶ The Constitution enshrines fundamental rights including equality, freedom from discrimination, religious freedom, and protection of minority rights.⁷⁷ Furthermore, the Constitution mandates that the state regulate religion and pass legal reforms to address women's inequality within religious norms.⁷⁸ It gives the judiciary the transformative role of bringing about social change

⁷⁴ Baines, *supra* note 38, at 967–68.

⁷⁵ Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1, 5 (2018) (per Chandrachud, J., concurring).

⁷⁶ *Id.* at para. 2.

⁷⁷ INDIA CONST. art. 14–17, 21, 25–26.

⁷⁸ Upendra Baxi, *Postcolonial Legality*, in A COMPANION TO POSTCOLONIAL STUDIES 545 (Henry Schwartz & Sangeeta Ray eds., 2005).

through enforcement of fundamental rights to promote substantive equality, particularly for women and oppressed castes.⁷⁹

A. Relevant Constitutional Provisions

The petitioners' challenge to the entry ban on women concerned its compatibility with the constitutional guarantees of equality and personal freedoms. Article 14⁸⁰ of the Constitution guarantees equality and equal protection under the law, while Article 15⁸¹ guards against discrimination based on religion, race, caste, sex, place of birth, inter alia. Intriguingly, the intervenor for the petitioners advanced that the entry ban was also contrary to Article 17,⁸² which abolishes untouchability and prohibits its practice in any form. Here, the exclusion of menstruating women from a space for use by the general public is understood to be based on notions of purity, qualifying as a practice of untouchability and segregation.⁸³ Relatedly, Article 21⁸⁴ protects the right to life and personal liberty. The Supreme Court has broadened its meaning by creatively interpreting it to include women's entitlement to the elimination of gender-based discrimination, stating that such barriers impair their

⁷⁹ Narain, *supra* note 31, at 115–18.

⁸⁰ INDIA CONST. art. 14 (“Equality before the law – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”).

⁸¹ INDIA CONST. art. 15, cl. 1 (“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”); INDIA CONST. art. 15, cl. 4 (“Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”).

⁸² INDIA CONST. art. 17 (“Abolition of Untouchability. ‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”).

⁸³ Writ Petition (Civil) at para. 49–66, *Indian Young Laws. Ass’n v. State of Kerala*, (2019) 11 SCC 1 (2018) (No. 373 of 2006) (submissions of the intervenor Nikita Azad Arora) https://www.scobserver.in/wp-content/uploads/2021/10/Sabarimala_Indira_Jaising_Written_Submissions.doc__1_.pdf [<https://perma.cc/3Y2K-XUCD>].

⁸⁴ INDIA CONST. art. 21 (“Protection of life and personal liberty. (1) No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

socioeconomic, cultural, and political rights, which are “inherent . . . in every human being.”⁸⁵ Article 25⁸⁶ bolsters the right to religious freedom by protecting the freedoms to profess, practice and propagate one’s religion; Article 26⁸⁷ provides for the right to manage religious institutions and affairs, with exceptions for public order, morality, and health.

Procedurally, Article 32⁸⁸ creates a writ jurisdiction for the Supreme Court, enabling it to directly hear public interest litigants whose fundamental rights have been violated. Notably, Article 13⁸⁹ confers upon courts the power to void laws that violate the fundamental rights found in Part III of the Constitution. A question that has subsequently emerged in jurisprudence, including in *Sabarimala*, is whether the term “laws” was merely intended to capture state legislations or whether it also

⁸⁵ *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125, 6.

⁸⁶ INDIA CONST. art. 25, cl. 1 (“Freedom of conscience and free profession, practice and propagation of religion. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”); INDIA CONST. art. 25, cl. 2 (“Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”).

⁸⁷ INDIA CONST. art. 26 (“Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.”).

⁸⁸ INDIA CONST. art. 32, cl. 1 (“Remedies for enforcement of rights conferred by this Part.—The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.”); *see also* INDIA CONST. art. 32(2) (“The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.”).

⁸⁹ INDIA CONST. art. 13, cl. 1 (“Laws inconsistent with or in derogation of the fundamental rights.—All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.”); *see also* INDIA CONST. art. 13, cl. 2 (“The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”).

extends to (religious) personal laws and customs. In the seminal *Narasu Appa* case, the Bombay High Court ruled in favour of the former interpretation, finding that “personal law[s] [were] not included in the expression ‘laws in force’ used in, Article 13(1).”⁹⁰ Curiously, in an obiter dictum in the *Masilamani Mudaliar* case, the Supreme Court opined that personal laws granting women an inferior status are “anathema to equality.”⁹¹ It further held that “personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violated fundamental rights.”⁹² More recently, in *Shayara Bano*, Justice Nariman wrote that “it may be necessary to have a re-look at this [*Narasu Appa*] judgment in that . . . at least one part of the judgment . . . in which the learned Judge opines that the expression [‘]law[’] cannot be read into the expression [‘]laws in force[’] in Article 13(3) is itself no longer good law.”⁹³ Though not explicitly overruled, it appears that the *Narasu Appa* interpretation has fallen out of favor among Supreme Court judges, though the fate of “custom” under the framework of Article 13 remains entirely unclear.⁹⁴

B. Evolution of Judicial Interpretations of Gender Equality Guarantees

Equally important to the constitutional text is how the Supreme Court interprets rights guarantees.⁹⁵ Oppressive and discriminatory cultural or religious norms and beliefs are often exempted or immunized from constitutional scrutiny on the grounds of religious freedom. The dichotomization of religious morality versus constitutional morality has had severe consequences for women; women are denied fundamental rights guaranteed by the Constitution on the basis of their religion or culture. Until recently, the Supreme Court had sidestepped women’s challenges to inequality under

⁹⁰ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, para. 12.

⁹¹ *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoli*, AIR 1996 SC 1697, para. 15.

⁹² *Id.*

⁹³ *Shayara Bano v. Union of India*, AIR 2017 SC 4609, para. 22 (per Nariman, J.).

⁹⁴ *Indian Young Laws. Ass’n v. State of Kerala (Sabarimala)*, (2019) 11 SCC 1, para. 95 (2018) (per Chandrachud, J., concurring).

⁹⁵ Baines, *supra* note 60, at 112.

personal law by interpreting the Constitution as stating that religious freedom and minority rights were exempt from constitutional scrutiny and did not have to conform to fundamental rights guarantees. The Supreme Court asserted that personal laws are subject to constitutional scrutiny for the first time in 2017 with its ruling in *Shayara Bano*, which declared the instantaneous divorce procedure under Muslim law called triple *talaq* to be violative of equality and unconstitutional.⁹⁶

Despite the outcome of the case, feminist legal scholars have criticized the *Shayara Bano* judgments for fixating on the integrality and validity of instant triple *talaq* within Islamic law while relegating gender discrimination to a secondary issue. As noted by Jeffrey A. Redding, *Shayara Bano* ironically betrays the hopes of “unity in diversity”—which could have been easily achieved under the framework of citizenship.⁹⁷ Instead, the Court engaged in “sectarian modes of argumentation” during the litigation process, culminating in “a religiously diverse set of Indian Supreme Court justices . . . disagreeing along communal lines about either the necessity or ability of the secular state to ‘reform’ Muslim family law.”⁹⁸ Ultimately, he observes, both the litigation and adjudication of *Shayara Bano* may have “sparked wary boundary-making between social groupings already suspicious of each other,”⁹⁹ all while failing to endorse an interpretation of constitutional religious freedoms that enforces women’s status as equal citizens.

It should also be noted that the *Shayara Bano* and *Sabarimala* decisions have emerged in the context of rising Hindu nationalism, and the subsequent election of a far-right government that has stigmatized Muslim Indians through discriminatory legislation.¹⁰⁰ The effects of this shifting political climate have been doubly

⁹⁶ *Shayara Bano*, AIR 4609 at para. 172.

⁹⁷ Jeffrey A. Redding, *A Secular Failure: Sectarianism and Communalism in Shayara Bano v. Union of India*, 8 ASIAN J.L. & SOC’Y 56, 58 (2021).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The election of Prime Minister Narendra Modi’s Hindu nationalist government in 2014 has been followed by a rise in agrarian protests as well as communal riots and violence targeting religious minorities, particularly Muslim Indians. See Ravi Agrawal, *Why India’s Muslims Are in Grave Danger*, FOREIGN POL’Y (Mar. 2, 2020), <https://foreignpolicy.com/2020/03/02/india-muslims-delhi-riots-danger/> [<https://perma.cc/CQ5G-B3YX>]; Geeta Pandey, *Beaten and Humiliated by Hindu Mobs for Being a Muslim in India*, BBC NEWS (Sept. 2, 2021), <https://www.bbc.com/news/world-asia-india-58406194> [<https://perma.cc/8MAF-HDVM>]. This rise in hate crimes must be contextualized within a

devastating for Muslim women and feminist activists in India. Advocates for Muslim women's equality rights have been constrained by valid fears that their efforts will be misappropriated and instrumentalized by nationalist and Islamophobic political actors.¹⁰¹

Following the *Shayara Bano* decision, the Supreme Court's 2018 decision in *Sabarimala* demonstrated its willingness to weigh discriminatory religious laws and customs against constitutionally protected fundamental rights.¹⁰² In diverging opinions that will be analyzed below, the majority and concurring opinions departed from the near willful blindness toward issues of gender inequality adopted in *Shayara Bano*, moving toward more meaningful engagement with the role of the Constitution in ensuring gender equality.¹⁰³ The significance of *Sabarimala* lies in the Supreme Court's historical contextualization of women's exclusion from public places of worship, and its analysis of constitutional doctrine centered on women's

shifting legal landscape where Muslim Indians are increasingly singled out by the State, notably through the amendment of the Citizenship Act. The amendment paves an administrative path to Indian citizenship for persecuted religious minorities from Afghanistan, Bangladesh, and Pakistan who are Hindus, Sikhs, Buddhists, Jains, Parsis, or Christians, and who have settled in India no later than December 31, 2014. The law excludes Muslims from such eligibility, including, notably, the Rohingya refugees fleeing religious persecution in Myanmar, and marks the first law in which religion is explicitly used as a criterion for citizenship in India. For more information on the Citizenship Act amendment, see *India: Citizenship Bill Discriminates Against Muslims*, HUM. RTS. WATCH (Dec. 11, 2019), <https://www.hrw.org/news/2019/12/11/india-citizenship-bill-discriminates-against-muslims#> [<https://perma.cc/9UKR-5Q6W>]. Additionally, India's most populous state, Uttar Pradesh, has passed a law prohibiting "unlawful religious conversions," informally premised on the far-right conspiracy theory of "love jihad." The latter alludes to the belief that interreligious marriages between Muslim men and Hindu women carry the ulterior motive of recalibrating India's demographic identity as a Muslim-majority nation. At least four other states, all governed by the ruling Bharatiya Janata Party (BJP), have also stated that they are considering passing similar legislation. For more details on India's so-called anti-"love jihad" laws, see Sumit Ganguly, *The Problem with India's 'Love Jihad' Laws*, THE CONVERSATION (Jan. 27, 2021), <https://theconversation.com/the-problem-with-indias-love-jihad-laws-152675> [<https://perma.cc/P2Z2-T3GK>]; Billy Perrigo, *Why India's Most Populous State Just Passed a Law Inspired by an Anti-Muslim Conspiracy Theory*, TIME (Nov. 25, 2020), <https://time.com/5915579/love-jihad-uttar-pradesh/> [<https://perma.cc/K3L3-WGU5>].

¹⁰¹ Narain, *supra* note 30, at 193.

¹⁰² Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1, para. 54 (2018) (per Chandrachud, J., concurring).

¹⁰³ Tanja Herklotz, *Law, Religion and Gender Equality: Literature on the Indian Personal Law System from a Women's Rights Perspective*, 1 INDIAN L. REV. 250, 267 (2017).

equality rights.¹⁰⁴ It upheld women’s right to equality, balanced competing fundamental rights to equality and freedom of religion, delineated the boundaries of religion, and challenged received categories of analysis.¹⁰⁵ The extent to which the *Sabarimala* ruling carves out a precedent that can be used to challenge other allegedly discriminatory religious practices, and interpret laws that enable such practices, remains uncertain.¹⁰⁶ Nonetheless, the case commands attention as a potential catalyst in the adjudication of women’s *substantive* equality rights in India.

III. *Indian Young Lawyers Association v. State of Kerala*

A. Facts

The Sabarimala Temple is a pilgrimage site of Lord Ayyappa, located in the Pathanamthitta district of the State of Kerala.¹⁰⁷ Although particularly popular among the Nair community, a Savarna caste in Kerala, pilgrims from all castes and southern Indian states visit the temple to perform rigorous religious austerities for forty-one days during the months of November, December, and January.¹⁰⁸ According to Brahmanical legend, the presiding deity at Sabarimala is Lord Ayyappa, a teenage god described as a “Yogi with an oath of celibacy.”¹⁰⁹ In the mythology, Ayyappa is the love child of Hindu gods Shiva and Vishnu—when the latter took the female form of Mohini—and was subsequently adopted by a local

¹⁰⁴ *Sabarimala*, 11 SCC at para. 100 (per Chandrachud, J., concurring).

¹⁰⁵ *Id.* at para. 5 (per Chandrachud, J., concurring).

¹⁰⁶ The *Sabarimala* petition review has been paused pending the referral of three cases that engage with similar issues—two cases concerning Muslim and Parsi women’s entry to places of worship, and one case concerning the religious essentiality of female genital mutilation with regard to the Dawoodi Bohra sect. See *Goolrokh M. Gupta v. Burjor Pardiwala*, (2020) 2 SCC 705 (2017) [Special Leave Petition (Civil) No. 18889/2012]; *Sunita Tiwari v. Union of India & Others*, (2019) 18 SCC 719 (2018) [Writ Petition (Civil) No. 286/2017]; *Kantaru Rajeevaru v. Indian Young Laws. Ass’n*, (2019) SCC Online SC 1461 [Review Petition (Civil) No. 3358 of 2018 in Writ Petition (Civil) No. 373 of 2006].

¹⁰⁷ Pathanamthitta, *Sabarimala*, GOV’T OF KERALA, <https://pathanamthitta.nic.in/en/tourist-place/gavi/> [<https://perma.cc/CBZ8-PQ2F>].

¹⁰⁸ Kumari, *supra* note 5, at 292–93.

¹⁰⁹ *Id.* at 292; *Sabarimala*, 11 SCC at para. 10 (per Misra, C.J. and Khanwilkar, J.).

king ignorant of the child's divinity.¹¹⁰ Upon learning of his adopted son's divine genealogy, the king begged Ayyappa to allow him to enshrine a temple for his worship, and the teenage deity suggested the Sabarimala hill as the site.¹¹¹ Other legends recount that Ayyappa mediates and resides in the Sabarimala hill, and that his "powers derive from his ascetism, in particular from his being celibate."¹¹²

The theme of celibacy has been used to justify restrictions on temple entry targeting women considered to be of menstruating age.¹¹³ In 1950, the administration of the temple was conferred to the Travancore Devoswom Board, a move which has been frequently described as "a step towards the imposition of restriction on women's entry based on their menstrual impurity, and celibacy of the presiding deity Ayyappa."¹¹⁴ The overarching assumption appears to be that "the presence of menstruating women devotees will cause a deviation in the god's celibacy, and austerity performed by the male followers during the pilgrimage."¹¹⁵

The restrictions on menstruating women's entry were formalized in 1965 with the enactment of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, which grants the relevant religious denomination the jurisdiction to manage its religious affairs.¹¹⁶ Initially, restrictions were only imposed during the periods of Mandalam (the aforementioned forty-one days of austerity during November, December, and January), the January festival of Makaravilakku, and the Vishu new year locally observed in April. But in 1990, a public interest suit was filed against a woman for violating the restrictions by entering the temple.¹¹⁷ In

¹¹⁰ Kumari, *supra* note 5, at 292.

¹¹¹ *Id.*; *Sabarimala*, 11 SCC at para. 20–21 (per Chandrachud, J., concurring).

¹¹² *Sabarimala*, 11 SCC at para. 19 (per Chandrachud, J., concurring).

¹¹³ Kumari, *supra* note 5, at 293.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Sabarimala*, 11 SCC at para. 26 (per Chandrachud, J., concurring); The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, §3(b).

¹¹⁷ Kumari, *supra* note 5, at 293.

a counter-affidavit, it was argued that the ban was only in effect during the Mandalam, Makarvilaku, and Vishu periods, and that it could not be interpreted as a year-long prohibition on entry for women of menstruating age.¹¹⁸ Notably, the counter-affidavit added that, as a statutory authority, the administrative board could not violate constitutional rights entrenched in Article 15 (protection against discrimination on the basis of, *inter alia*, sex) and Article 25 (freedom to profess, practice, and propagate one's religion).¹¹⁹ In a 1991 decision that fervently captured public discourse, the Kerala High Court sanctioned the year-long restriction, which it concluded was "in accordance with the usage prevalent from time immemorial" and did not violate Articles 15 and 25 (and 26) of the Constitution.¹²⁰

In 2006, a South Indian actress reignited the debate when she confessed that she had unknowingly entered the temple in 1987.¹²¹ Following the brutal criticism thrown at her, feminist public figures and journalists spoke up to reject what one writer called a "tyranny of tradition."¹²² The public debate culminated in the filing of a public interest lawsuit by the Indian Young Lawyers Association in 2006.¹²³ The petition was eventually referred to a Constitutional Bench of the Supreme Court in

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *S. Mahendran v. Sec'y, Travancore Devaswom Bd., Thiruvananthapuram*, AIR 1993 Ker 42, para. 44 (1991).

¹²¹ *Id.* at 294.

¹²² *Id.*; Barkha Dutt, *Scent of a Woman*, HINDUSTAN TIMES (July 1, 2006), <https://www.hindustantimes.com/india/scent-of-a-woman/story-yeYQlfBeIdRi7excuVY07O.html> [<https://perma.cc/5HMU-2NL9>].

¹²³ Writ Petition (Civil), *Indian Young Laws. Ass'n v. State of Kerala (Sabarimala)*, (2019) 11 SCC 1 (2018) (No. 373 of 2006), https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/387/wp_indian_young_lawyers.pdf [<https://perma.cc/NC5Y-BA4K>]; *Sabarimala*, 11 SCC at para. 1 (2018).

2017,¹²⁴ which issued the *Sabarimala* judgment declaring the ban unconstitutional on September 28, 2018.¹²⁵

A key takeaway from this saga is the importance of addressing the widespread neglect of women's rights issues, even in contexts of alleged social improvement. The issuance of the 1991 verdict upholding the ban, much to the public of Kerala's approval, was both curious and alarming. Though the restrictions on women's entry to the Sabarimala Temple may appear to have fallen within the umbrella of Hindu nationalism, Kerala has seen an almost continuous rule of communist regimes since its formal recognition as a separate state in 1956.¹²⁶ The state habitually prides itself as India's garden of social progress, boasting high literacy rates, socialist programs, communal politics, religious diversity, and linguistic unity.¹²⁷ But despite its undeniable history of anti-caste struggle, the Kerala model of development has failed to sustainably dismantle the power structures at the root of Indian women's subjugation.¹²⁸ The writ petition submitted on behalf of the Indian Young Lawyers Association in 2006 pointed to this discrepancy, writing that "the whole incident has shocked the devotees of Hindu religion[,] specially women who are so disgracefully treated in a State which has boasted of achieving 100% literacy."¹²⁹ This also explains why purported left and liberal camps voiced resistance to the Supreme

¹²⁴ Record of Proceedings, Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1 (2018) (No. 373 of 2006) (referring the matter to a five-judges bench), https://www.scobserver.in/wp-content/uploads/2021/10/Sabarimala_Order_13-Oct-2017.pdf [<https://perma.cc/4JW2-4TAK>].

¹²⁵ See *Sabarimala*, 11 SCC.

¹²⁶ For more information on Kerala's unique communist history and present, see NISSIM MANNATHUKKAREN, COMMUNISM, SUBALTERN STUDIES AND POSTCOLONIAL THEORY: THE LEFT IN SOUTH INDIA (2022).

¹²⁷ Kumari, *supra* note 5, at 292.

¹²⁸ J. Devika, *Egalitarian Developmentalism, Communist Mobilization, and the Question of Caste in Kerala State, India*, 69 J. ASIAN STUD. 799, 800, 806 (2010).

¹²⁹ Writ Petition (Civil), *supra* note 123, at para. 17, Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1 (2018) (No. 373 of 2006), https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/387/wp_indian_young_lawyers.pdf [<https://perma.cc/NC5Y-BA4K>].

Court's decision to lift the ban in 2018.¹³⁰ Moreover, as noted by the Supreme Court judgment and the petitioner (and intervenors), the restriction on women's entry was a creation of the modern patriarchal state, which at times relied on a politicized retelling of India's history.¹³¹

B. Issues

The *Sabarimala* petitioners alleged that the exclusion of women aged ten to fifty, justified on the basis of custom and sanctioned by Rule 3(b) of the 1965 Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, was constitutionally invalid.¹³² Whereas Section 3 of the 1965 Kerala Hindu Places of Public Worship (Authorization of Entry) Act required that places of public worship be open to all Hindus, Rule 3(b) allowed religious denominations to exclude women per custom or usage. More precisely, Rule 3(b) reads as follows:

The classes of persons mentioned hereunder shall not be entitled to offer worship in any place of public worship or bathe in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship . . . (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.¹³³

Provisions of this Act were considered in the context of the constitutional guarantees of Article 25(1), which provides for freedom of worship; Article 26, which preserves the freedom of religious denominations to regulate their own practices; and Articles 14 and 15, which guarantee equality and forbid non-

¹³⁰ Kumari, *supra* note 5, at 292.

¹³¹ Historically, women, including public figures such as the Queen (Maharani) of Travancore, have sought worship at the temple. *Id.* at 293.

¹³² Writ Petition (Civil), *supra* note 123, at para. 1.

¹³³ The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, §3(b).

discrimination on the basis of, *inter alia*, gender.¹³⁴ The Court also considered whether the right to religious freedom trumped women's right to equality, and whether the exclusion of menstruating women was an "essential religious practice" under Article 25.¹³⁵ Essentially, the Court had to consider the limitations on the religious freedom guarantee, balancing gender equality and individual rights with religious freedom and group rights, in accordance with the fundamental organizing principles of the Constitution.¹³⁶ The issues, as identified by Justice Chandrachud, were as follows:

- 1) Does an exclusionary practice based on a biological factor exclusive to women amount to "discrimination"? If so, does it amount to an infringement of Articles 14, 15, and 17 that is not protected by "morality" as used in Articles 25 and 26?
- 2) Does the practice of excluding such women constitute an "essential religious practice" under Article 25? If so, can a religious institution assert such a claim under the umbrella of the right to manage its own affairs in matters of religion?
- 3) Does Ayyappa Temple have a denominational character? If so, is it permissible that a "religious denomination" managed by a statutory board and financed under Article 290-A of the Constitution out of the Consolidated Fund of Kerala and Tamil Nadu indulges in such practices violating the constitutional principles and constitutional morality embedded in Articles 14, 15(3), 39(a), and 51-A(e)?
- 4) Does Rule 3 permit a "religious denomination" to ban entry of women between the ages of ten and fifty? If so, does the Rule violate Articles 14 and 15(3) by restricting entry of women based on their sex?
- 5) Is Rule 3(b) *ultra vires* the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act? If *intra vires*, does it violate fundamental rights in the Constitution?¹³⁷

¹³⁴ Record of Proceedings, *supra* note 124, at 3, para. 1.

¹³⁵ *Id.* at para. 2.

¹³⁶ *Sabarimala*, 11 SCC at para. 1, 5, 30 (per Nariman, J., concurring).

¹³⁷ *Id.* at 20 (per Chandrachud, J., concurring).

The Court split in a 4-1 decision, with a “majority” of two judges and two concurrences, and a lone dissent.¹³⁸ The four judges held that the temple entry ban violated women’s right to equality and right to worship, and was not protected under the right to religious freedom.¹³⁹ The Court insisted that all discrimination must be tested against constitutional values, and that any discrimination that perpetuates gender stereotypes and disadvantages will not withstand constitutional scrutiny.¹⁴⁰ It emphasized the importance of substantive equality to contest discrimination against women and challenge structures of oppression that exclude women.¹⁴¹ Finally, it linked women’s equality rights with equal citizenship.¹⁴²

C. Overview of the Reasonings

According to Chief Justice Dipak Misra (writing for himself and Justice A. M. Khanwilkar), freedom of worship cannot be restricted on the basis of gender or biological factors. As the temple is a place of public worship open to all Hindus, Rule 3(b), which bars entry to women of menstruating age, violates their right to freedom of worship.¹⁴³ Such a limitation on women’s right to religious freedom cannot be justified. The majority rejected the use of religious “morality” to deny women their fundamental rights, asserting that public morality must yield to constitutional morality.¹⁴⁴

Justice Nariman, concurring, found that even if it were accepted (for the sake of argument) that the temple ban was an “essential religious practice,” Sabarimala devotees did not constitute a separate denomination and could not enforce the ban,

¹³⁸ It is important to note that, under Indian jurisprudence, only majority results and majority reasonings are binding on lower courts. Concurring opinions, and even dissents, may nonetheless be adopted in future cases to inform the analysis but hold no imperative effect on lower courts.

¹³⁹ *Sabarimala*, 11 SCC at 91–95 (per Misra, C.J. and Khanwilkar, J.), 76 (per Nariman, J., concurring), 163–65 (per Chandrachud, J., concurring).

¹⁴⁰ *Id.* at 141–42 (per Chandrachud, J., concurring).

¹⁴¹ *Id.* at 144–45.

¹⁴² *Id.* at 141–42.

¹⁴³ *Id.* at 64–67 (per Misra, C.J. and Khanwilkar, J.).

¹⁴⁴ *Id.* at 67, 71–72.

as the temple was a place of public worship open to all Hindus.¹⁴⁵ Justice Nariman held that the Kerala Hindu Places of Public Worship Act was social reform legislation and could therefore override religious freedom to ensure free entry to all Hindus.¹⁴⁶ Going further, Justice Nariman concluded that this case more broadly concerned a conflict between women's right to freedom of worship under Article 25(1) and the right of priests to exclude them. He interpreted Article 25(1) in favor of women, citing women's fundamental right to practice religion, and rejected, on constitutional grounds, the denial of women's right of entry based on the biological fact of menstruation.¹⁴⁷ Effectively, he upheld women's fundamental right to religious freedom over priests' managerial right to exclude them.

Justice Chandrachud, also concurring, held that the Sabarimala worshippers did not constitute a separate religious denomination meriting protection under Article 26.¹⁴⁸ He agreed with the majority that the temple ban was neither an essential nor obligatory religious practice.¹⁴⁹ Justice Chandrachud found that even if the exclusion of women were grounded in a religious text, it would not be permissible as it violated constitutional values of liberty, dignity, and equality.¹⁵⁰ Interestingly, he posited that the exclusion of women based on menstruating age was comparable to exclusion based on untouchability.¹⁵¹ Linking notions of exclusion and discrimination, he set discrimination against women within the social context of patriarchal customs and institutions. He noted that the persistence of these norms contradicts the underlying constitutional principles of equality and freedom from discrimination, and is therefore counter to constitutional morality.¹⁵² In arguing that the ban was not an essential religious practice, Justice Chandrachud relied on the notion of

¹⁴⁵ *Id.* at 70–72 (per Nariman, J., concurring).

¹⁴⁶ *Id.* at 48–49.

¹⁴⁷ *Id.* at 72–74.

¹⁴⁸ *Id.* at 85–90 (per Chandrachud, J., concurring).

¹⁴⁹ *Id.* at 70–73.

¹⁵⁰ *Id.* at 169 (per Chandrachud, J., concurring).

¹⁵¹ *Id.* at 70–72, 99–100.

¹⁵² *Id.* at 114–16.

constitutional morality and the imperatives of upholding the constitutional values of equality, dignity, and liberty.¹⁵³ Ruling the temple ban unconstitutional, he asserted that the ban essentialized women by reducing them to biological functions deemed impure and insisted that no constitutional court could accept such discrimination.¹⁵⁴

Justice Malhotra, dissenting, reasoned that the exclusion of women was justified as an essential aspect of religion and further, that it was up to members of the religious group rather than the Court to administer these matters.¹⁵⁵ She rejected the argument that the temple ban was similar to the social exclusion of *Dalits*¹⁵⁶ and disagreed with the argument that as a place of public worship, the temple should be open to all Hindus.¹⁵⁷ Justice Malhotra rejected the contention that constitutional values—or morality—must prevail over religious morality.¹⁵⁸ Despite being the only female judge on the *Sabarimala* bench, she did not rule in favor of women's rights and failed to consider the exclusion of women from the temple through the lens of substantive equality and systemic discrimination.

IV. Critical Analysis: Mapping the Framework of Feminist Constitutionalism

The purpose of this Article is to assess the contribution of the *Sabarimala* judgment to feminist constitutionalism. The present section dissects the judgment through the three guiding principles discussed in Part I, namely substantive equality, inclusion, and questioning assumptions and categories. Placing an important emphasis on Justice Chandrachud's reasoning, this Article argues that his opinion should serve as a template for constitutionalizing women's equality rights in the context of religious freedoms. Diverging from the *Shayara Bano* approach, the

¹⁵³ *Id.* at 76.

¹⁵⁴ *Id.* at 114–17.

¹⁵⁵ *Id.* at 28–29 (per Malhotra, J., dissenting).

¹⁵⁶ *Id.* at 67–68. *Dalits*, otherwise known as “untouchables,” are members of India's lowest caste. The Editors of Encyclopaedia Britannica, *Untouchable*, ENCYC. BRITANNICA (May 18, 2020), <https://www.britannica.com/topic/untouchable> [<https://perma.cc/7CGW-YC98>].

¹⁵⁷ *Id.* at 72–74.

¹⁵⁸ *Id.* at 45–47.

opinion placed women at the center of the analysis, and interrogated existing hegemonic norms and categories.¹⁵⁹ Most importantly, it rejected the principle of constitutions as mere governance, embracing instead the notion of constitutions as *living* values.¹⁶⁰ Indeed, Justice Chandrachud's judgment is exemplary because it considers constitutional identity and compels a much-needed reflection on Indian constitutionalism. Indian constitutionalism must grapple with the legacy and persistence of systemic gender inequality in both social and institutional structures. It must challenge binary modes of analysis that pit women's rights against religious rights, the secular against the religious, and the modern against the traditional.

Until recently, inattention to feminist constitutionalism in India has prolonged the status quo despite the formal enactment of progressive laws.¹⁶¹ Political scientist Partha Chatterjee has described the efforts to normalize constitutional rights for *all* as the "project of turning subaltern subjects into national citizens," a project which has been resisted by "political society."¹⁶² This political society, which he calls the "thicket of contestations," "takes seriously the functions of direction and leadership of a vanguard, but accepts that the legal arm of the state in a country like India cannot reach into a vast range of social practices that continue to be regulated by other beliefs and administered by other authorities."¹⁶³ This resignation is grossly disingenuous, as the political society "knows that those dark zones are being penetrated by the welfare functions of modern governmental practices."¹⁶⁴ Put differently, the public-private divide is far more *political* than *factual*. The realization of substantive equality in India requires a re-evaluation of the "dark zone's" supposed impenetrability and the borders of the private sphere.

Chatterjee's critique of political society in India is essential in understanding the present crisis in constitutionalism. The Constitution fails its emancipatory potential

¹⁵⁹ *Id.* at 77 (per Chandrachud, J., concurring).

¹⁶⁰ *Id.* at 16.

¹⁶¹ NARAIN, *supra* note 26, at 135, 192.

¹⁶² PARTHA CHATTERJEE, THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD 51 (2004).

¹⁶³ *Id.* at 50.

¹⁶⁴ *Id.*

so long as it serves as a mere governing tool to be exploited by political society, rather than as the collection of the most fundamental values of the secular democratic state.¹⁶⁵ The latter aligns with legal scholar Upendra Baxi's compelling definition of constitutionalism:

Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.¹⁶⁶

The strategy to limit the effects of the Constitution to mere governance can be seen “as a variant of the colonial strategy of indirect rule” and involves “dispensing the governmental functions of law and order and welfare through the ‘natural leaders’ of the governed populations.”¹⁶⁷ The ultimate goal is “to preserve the civic virtues of bourgeois life from the potential excesses of electoral democracy,”¹⁶⁸ or to preserve the interests of the patriarchy from the excesses of female electorate by relegating women to the dark zones beyond the state's reach. The *Sabarimala* ruling offers a glimpse of optimism that India's highest court has rejected this relegation. It signals the dawn of a constitutionalist approach centered on the *factual* effects of “internal” religious affairs and personal laws on women's inclusion in society. As it pays particular attention to the link between religious practices and access to civil spaces and institutions, *Sabarimala* questions the arbitrary frontiers of the private and public spheres and reorients the analysis toward the Constitution's commitment to substantive equality for all.

¹⁶⁵ *Id.* at 50–51.

¹⁶⁶ Baxi, *supra* note 78, at 540.

¹⁶⁷ CHATTERJEE, *supra* note 162, at 50.

¹⁶⁸ *Id.*

A. Substantive Equality

Feminist constitutionalism has long been skeptical of formal equality's service to the goal of emancipation.¹⁶⁹ The potency of formal equality is that, unlike outright inequality, it rarely captures the attention of policymakers; on the contrary, it is often lauded by legislators and governments as a metric of a society's social progress.¹⁷⁰ Beyond factually maintaining inequality, the effects of formal equality policies are particularly devastating as they shift the burden of betterment onto the beneficiaries of said policies.¹⁷¹ Ultimately, the narrative transforms into one of "choice," where a person's status is attributed to their personal choices, and, by implication, welfare or affirmative action initiatives adopt a paternalistic tone of helping those who refuse to help themselves.¹⁷² This, in turn, further stigmatizes the so-called beneficiaries and impedes their ability to benefit from their already limited rights. The battle against formal equality is hence complicated by "the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion."¹⁷³ Effectively, formal equality becomes "the means by which groups have secured both entry as formal equals into the dominant order and the survival of their movement in the face of private and state repression."¹⁷⁴ Real equality, however, can only be achieved through an "expansive" project that provides protection against the *substantive* conditions of subordination and obliges the courts to participate in the eradication of oppressive structures that stand between the subject and full citizenship.¹⁷⁵

¹⁶⁹ See Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011); see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

¹⁷⁰ Vrinda Narain, *Muslim Women's Equality in India: Applying a Human Rights Framework*, 35 HUM. RTS. Q. 91, 107 (2013).

¹⁷¹ Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999); Crenshaw, *supra* note 169, at 1378.

¹⁷² Anderson, *supra* note 171.

¹⁷³ Crenshaw, *supra* note 169, at 1384.

¹⁷⁴ *Id.* at 1384–85.

¹⁷⁵ *Id.* at 1341.

Substantive equality through the lens of citizenship has gained traction among women's rights activists in India in recent years.¹⁷⁶ In the context of egalitarian reforms in Muslim family law, for example, the Hindu nationalists' strategic misappropriation of gender equality "to single out the Muslim community as backward and thus justify the denial of minority rights" has compelled many feminists to move away from community-centric reforms to discourse on citizenship rights.¹⁷⁷ But citizenship as a metric of substantive equality is neither novel nor antithetical to the acknowledgement of *gendered* and intersectional realities.¹⁷⁸ Citizenship is not the project of standardizing subjects and their experiences; it is the standardization of subjects' access to the state. This includes their access to civil and political institutions, their recognition as cultural contributors, and their ability to "interrogat[e] received norms and structures of power and representation."¹⁷⁹ The discussion below examines the extent to which the Indian Constitution, as interpreted in *Sabarimala*, allows for such an interrogation, through which women can "confront, deconstruct, and dismantle gender hierarchy."¹⁸⁰

1. The Constitution of India and the Supremacy of Substantive Equality

The Indian Constitution, Justice Chandrachud observed, "was brought into existence to oversee a radical transformation" on two fronts.¹⁸¹ First, the Constitution was adopted to signal the peaceful transition from colonial power to a sovereign democratic regime, where structures of governance were reorganized to answer to a national *polis*.¹⁸² Second, and most importantly, "the Constitution envisages a transformation in the position of the individual, as a focal point of a just society . . .

¹⁷⁶ Narain, *supra* note 30, at 195.

¹⁷⁷ *Id.*

¹⁷⁸ NARAIN, *supra* note 26, at 162, 166–67.

¹⁷⁹ Narain, *supra* note 31, at 124.

¹⁸⁰ MacKinnon, *supra* note 40, at 404.

¹⁸¹ Indian Young Laws. Ass'n v. State of Kerala (*Sabarimala*), (2019) 11 SCC 1, para. 2 (2018) (per Chandrachud, J., concurring).

¹⁸² *Id.*

[.] placing those who were denuded of their human rights before the advent of the Constitution—whether in the veneration of caste, patriarchy or otherwise—. . . in control of their own destinies by the assurance of the equal protection of law.”¹⁸³ The mention of the individual seeking constitutional protection against the forces of the caste system and the patriarchy is an acknowledgement that discrimination is not always at the hands of the state. Rather, discrimination may flow from social institutions, such as culture and religion, so dependent on collective identity that their harm vis-à-vis the individual cannot be reasonably labelled a *private* matter.

Giving meaning to the Constitution requires asking what values shall be lost if the courts sanction the restriction or violation of a certain right, and whether these values are so integral to the Constitution’s morality that their loss is effectively a *public* matter. For Justice Chandrachud, the facts of the case required asking whether “the quest for human dignity [would] be incomplete or remain but a writ in sand if the Constitution accept[ed] the exclusion of women from worship in a public temple;”¹⁸⁴ whether “the quest for equality and fraternity [would] be denuded of its content where women continue to be treated as children of a lesser god in exercising their liberties in matters of belief, faith and worship;”¹⁸⁵ and whether “the pursuit of individual dignity [would] be capable of being achieved if we den[ied] to women equal rights in matters of faith and worship, on the basis of a physiological aspect of their existence.”¹⁸⁶

Recognizing that the Indian Constitution’s purpose is to transform the individual as a constituent of the laws and values of the nation, the above questions must be transposed onto the analysis of Article 25 (or any constitutional right). Article 25 does not create an absolute right. Indeed, the Constitution explicitly states that the freedom to profess, practice, and propagate one’s religion is “subject to public order, morality and health and to the other [fundamental rights],” including the rights to equality and freedom from discrimination enshrined in Articles 14 and 15.¹⁸⁷ Importantly, Article 25 departs from its neighboring provisions, which have not been

¹⁸³ *Id.*

¹⁸⁴ *Id.* at para. 5.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ INDIA CONST. art. 25.

subjected to any restriction in the metatext.¹⁸⁸ In fact, neither the guarantee of equality and equal protection provided in Article 14, nor the protection from discrimination on the basis of sex provided in Article 15 are conditional in relation to the other fundamental rights outlined in Part III of the Constitution.¹⁸⁹ This lack of limitation allows them to “assume the character of a shining star in the constellation of fundamental rights.”¹⁹⁰ It logically follows that “the right to religious freedom was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty, and personal freedom recognised in the other provisions of Part III.”¹⁹¹

Similarly, there is no textual ambiguity as to the universality of Article 25. To put it bluntly, “in clause (1), Article 25 protects the **equal** entitlement of **all** persons to a freedom of conscience and to freely profess, protect and propagate religion. By all persons, the Constitution means exactly what it says: every individual in society without distinction of any kind whatsoever is entitled to the right.”¹⁹² It may seem superfluous to state the unequivocal, and yet this only adds relevance to Justice Chandrachud’s (and Justice Nariman’s) overarching question: If it is indisputable that Article 25 guarantees all genders the right to practice one’s faith subject to morality and other fundamental rights, including Articles 14 and 15, how can instances of gender inequality at holy premises administered by statute qualify as *private* and hence outside the scope of judicial review?¹⁹³

Contrary to the dissenting point of view, Justice Chandrachud rejected the contention that courts, in assessing whether certain religious practices must be struck down, trespass into the jurisdiction of legislatures.¹⁹⁴ The weakness of this argument is that it presumes a constitutional neutrality that is not only impossible, but is also

¹⁸⁸ *Sabarimala*, 11 SCC at para. 7 (per Chandrachud, J., concurring).

¹⁸⁹ INDIA CONST. art. 14–15.

¹⁹⁰ *Sabarimala*, 11 SCC at para. 17 (per Chandrachud, J., concurring).

¹⁹¹ *Id.* at para. 9.

¹⁹² *Id.* at para. 8.

¹⁹³ *Id.* at para. 17, 99.

¹⁹⁴ *Id.* at para. 100.

detached from the text of the Constitution. The Constitution's explicit reference to notions of "morality," "public order," and "decency,"¹⁹⁵ among others, necessitates the judicial delineation of values that *constitute* India's secular democracy.

In her dissent, Justice Malhotra noted that since the right to equality claimed by the petitioners under Article 14 conflicted with the rights of the male worshippers guaranteed in Articles 25 and 26, "it would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like *Sati*."¹⁹⁶ This argument shall be more closely deconstructed in the coming sections. For the present purposes, it is important to highlight that Malhotra's assessment of *Sati*—a historical Hindu practice during which a widow sacrifices herself by laying atop her deceased husband's funeral pyre¹⁹⁷—as a social evil is an exercise in delineating the boundaries of morality. This is not to say that the harms linked to *Sati* are comparable to those from a ban on entry to a religious site. Rather, this is to ask why the latter is *not* considered oppressive or a social evil, given that the subjugation of women is at the foundation of both practices.¹⁹⁸ In advancing that one practice is oppressive—thus justifying judicial intervention—while the other is not, Justice Malhotra drew a boundary between morality and rationality; the very exercise she rebuked.¹⁹⁹ At best, she may have departed from her colleagues' analysis of the present facts. But she cannot claim that by merely taking a non-interventionist approach, she avoided assessing the morality of religious practices.

Ultimately, this is because constitutions are moral; they embrace "the founding faith" or "morality" of the *polis*. In the Indian constitutional context, this morality "is the belief that it is in the dignity of each individual that the pursuit of happiness

¹⁹⁵ INDIA CONST. art. 19, 25–26.

¹⁹⁶ *Sabarimala*, 11 SCC at para. 8.2 (per Malhotra, J., dissenting).

¹⁹⁷ Wendy Doniger, *Suttee*, ENCYC. BRITANNICA (May 8, 2019), <https://www.britannica.com/topic/suttee> [<https://perma.cc/93LA-MEZ8>].

¹⁹⁸ *Sabarimala*, 11 SCC at para. 81 (per Chandrachud, J., concurring).

¹⁹⁹ *Id.* at para. 8.2 (per Malhotra, J., dissenting).

is founded.”²⁰⁰ The guarantee of equality is inherent to the concept of individual dignity.²⁰¹ Equality between the sexes necessarily implies a freedom from discrimination in all social institutions: “Equality above all is a protective shield against the arbitrariness of any form of authority.”²⁰² These founding principles “must govern our constitutional notions of morality.”²⁰³ Consequently, where a conflict between religious freedoms and constitutional morality arises, “the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the Constitution has willed that its values must reign supreme.”²⁰⁴ To interpret the Constitution as compatible with a hierarchy of rights that is effectively “destructive” of human dignity, and by implication, of liberty and equality, is not only “anachronistic to our constitutional ethos,” but also transforms the Constitution into “an instrument for the perpetuation of patriarchy.”²⁰⁵

Endorsing a definition of religious freedom compatible with the exclusion of women from a place of worship on the grounds that such an exclusion is a matter for the religious community to regulate “is to blink at the Constitution itself.”²⁰⁶ Moreover, such a definition cannot foster any hope for substantive equality, which requires a careful consideration of the *factual* matrix. In interpreting religious freedoms, courts cannot be agnostic to the reality that historically, women lacked the means to effect structural change without the cooperation of state institutions. If the courts’ response to what is considered discrimination violative of Articles 14 and 15 is to delegate the responsibility for change to the community or the electorate, what is left of the Constitution for minorities and women who remain politically underrepresented?

²⁰⁰ *Id.* at para. 15 (per Chandrachud, J., concurring).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 158 (per Chandrachud, J., concurring).

²⁰⁵ *Id.* at 160–61.

²⁰⁶ *Id.* at 162.

B. Inclusion

Feminist constitutionalism calls for the exploration of historically marginalized perspectives. In critiquing the exclusion of certain theories, feminist constitutionalism exposes the mainstream resistance to recognizing gender inequality—Whether it is treated as a secondary consideration, or, as in the *Shayara Bano* ruling, as a parenthesis in a matter best settled on technical grounds.²⁰⁷

The analysis that follows focuses on Justice Chandrachud’s receptiveness to the analogy between a discrimination premised on a biological factor, namely menstruation, and the constitutionally prohibited practice of “untouchability.” It argues that in drawing comparisons between restrictive policies affecting menstruating women and the complete segregation of “untouchables,” Justice Chandrachud correctly situates the temple entry ban within a historical trend to exclude women from society. This understanding frames the challenge raised in *Sabarimala* not as a contest between modernity and tradition, but rather as a call for courts to detangle themselves from the historical paradigm in which gender discrimination is entrenched.

1. Untouchability and Female “Impurity”

The intervenor, Nikita Azad Arora, argued that Article 17’s abolition of untouchability was applicable to the exclusion of women from the Sabarimala Temple.²⁰⁸ Article 17 provides that “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”²⁰⁹

Untouchability refers to the historic practice of social grouping. This grouping is believed to derive from Hindu Vedic scriptures and poems, where certain populations constitute the lowest caste by virtue of their impurity, compelling higher caste groups to refrain from “touching” or interacting with them to avoid being

²⁰⁷ Herklotz, *supra* note 103, at 267.

²⁰⁸ Writ Petition (Civil), *supra* note 83, at 24–31.

²⁰⁹ INDIA CONST. art. 17 (“Abolition of Untouchability. ‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”).

rendered impure.²¹⁰ This religious precept has translated, in the social context, into the segregation and apartheid of “untouchables,” or *Dalits*, members of India’s lowest caste.²¹¹ This segregation has been further intensified with adherence to the social rule of caste endogamy (marriage exclusively within one’s own caste).²¹² It has been a major source of social tension and inequality for much of India’s Hindu history.²¹³ As such, the adoption of the postcolonial Constitution in 1949, with its total prohibition of “untouchability” and any related discrimination, marked a pivotal moment in India’s history and Hindu law.²¹⁴ But despite the formal abolition, discrimination based on caste remained widespread and, as the intervenors in the *Sabarimala* case submitted, is analogous to forms of exclusion based on perceived physiological impurity, such as menstruation.²¹⁵ The majority and Justice Nariman found no need to address this contention, having declared Rule 3(b) ultra vires the Constitution on other grounds. Justice Malhotra rejected the analogy entirely.²¹⁶

Despite having reached a finding of constitutional invalidity through an analysis of Articles 14, 15, 25 and 26, Justice Chandrachud nonetheless considered the applicability of Article 17. He began with a survey of the Constituent Assembly debates that culminated in the enactment of Article 17.²¹⁷ He noted the significance of the drafters’ decision not to define “untouchability,” while adding the phrase “in any form” to “make the prohibition of practice [of ‘untouchability’] comprehensive.”²¹⁸ The Assembly’s resistance to calls for a restricted definition of “untouchability,” or any definition, reasonably suggests that the purpose of Article

²¹⁰ ENCYCL. BRITANNICA, *supra* note 156.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Sabarimala*, 11 SCC at 210 (per Chandrachud, J., concurring).

²¹⁵ HUM. RTS. WATCH, CASTE DISCRIMINATION: A GLOBAL CONCERN 5 (2001), <https://www.hrw.org/reports/2001/globalcaste/caste0801.pdf> [<https://perma.cc/4PZS-6Z4V>].

²¹⁶ *Sabarimala*, 11 SCC at 283 (per Malhotra, J., dissenting).

²¹⁷ *Id.* at 202–11 (per Chandrachud, J., concurring).

²¹⁸ *Id.* at 202 (citing B. SHIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION: A STUDY 202 (1968)).

17 is to not only usher political freedom, but also “a radical transformation of society.”²¹⁹ There is reason to presume that the drafters understood “untouchability,” conceded to take many forms, as neither unique to the Hindu religion, nor an evil of the past.

Of course, not every form of discrimination may benefit from the protection of Article 17; otherwise, Article 15 would be redundant. Nor did Justice Chandrachud advance this claim. Indeed, why proceed to demonstrate that the exclusion of women from the Sabarimala Temple falls under Article 17, if proof of discrimination is sufficient for an Article 17 claim? In the present case, however, it is difficult to ignore the common denominator of “impurity” based on a birth characteristic. For instance, Justice Nariman detailed the exclusion of menstruating women from noble practices to connect with the Divine: Prayer and fast, exclusion from holy sites and royal premises, and explicit verses in the *Dharmasutra of Vasistha*, the Old Testament, and the Qur’an all refer to the impurity and polluting effect of menstruation.²²⁰ Further, men must consult these scriptures for directives, both physical and spiritual, to cleanse or purify themselves after sinful contact with menstruating women.²²¹

Justice Chandrachud made a similar observation, noting that the notion of “purity and pollution” linked to menstruation has played a major role in stigmatizing women in Indian society.²²² Evidence of such exclusion can be found in ancient religious texts and historical cultural norms, where “[i]rrespective of the status of a woman, menstruation has been equated with impurity, and the idea of impurity is then used to justify their exclusion from key social activities.”²²³ Similarly, “[t]he caste system represents a hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste.”²²⁴

²¹⁹ *Id.* at 206 (per Chandrachud, J., concurring).

²²⁰ *Id.* at 144–47 (per Nariman, J., concurring).

²²¹ *Id.* at 146.

²²² *Id.* at 215 (per Chandrachud, J., concurring).

²²³ *Id.* at 216.

²²⁴ *Id.* at 210.

Here, the contrast between the dissent's opinion and Justice Chandrachud's constitutionalist approach becomes clear. Whereas the former relied on a static interpretation of Article 17, despite the drafters' rejection of a standard definition of "untouchability," Justice Chandrachud was concerned with the underlying morality of Article 17.²²⁵ This morality is intimately linked with the Constitution's broader objective of social emancipation and "the replacement of an unequal social order. . . . The Constitution represents the aspirations of those, who were denied the basic ingredients of a dignified existence."²²⁶ Hence, it is not that Article 17 applies to *any* gendered discrimination. Rather, it applies to discrimination based on the notion that there exist individuals in our society so impure for their genealogy, their culture or their physiology that they merit no civil participation, right of worship, nor dignified existence.

C. Questioning Assumptions and Categories: The Public/Private Divide

The public and private distinction, "a third principled dimension of gender under constitutional law," is multileveled and structural.²²⁷ As MacKinnon advances, "The public has traditionally been gendered masculine, conceived as superior and dominant and external, and thought associated with and appropriate for men. The private is gendered feminine, considered subordinate and inferior and internal compared with the public, and is associated with and considered the sphere for women."²²⁸ This framework lends itself to a dangerous paradox: if men are exempt from public intervention within the private sphere, the private becomes the "crucible of gender inequality."²²⁹

Institutionally, the distinction has served the patriarchal status quo by justifying limits on constitutional intervention against gender inequality.²³⁰ The principle that

²²⁵ *Id.* at 162.

²²⁶ *Id.* at 206–07.

²²⁷ MacKinnon, *supra* note 40, at 412.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

governments are abusive when they intervene in private spheres—including the realms of religion, culture, or family—is premised on the assumption that such spheres are *wholly* private. Critics argue that even if the divide is accepted as empirically sound in classical liberal theory, the rise of capitalism and the state’s necessary intervention in economic activity have rendered the present delineation of the spheres an impossible exercise.²³¹ The implication is that the modern public/private dichotomy, “[f]ar from representing two analytically discrete realms arising from ‘natural’ differences and the complementary biological roles of men and women,” serves instead as a political and legal creation, which “can be effectively utilized to safeguard dominant interests under the guise of seeming neutrality” and allows for “reasserting the traditional parameters of civil society to secure its immunity from the purview of state regulation.”²³² The struggle for equality has been further complicated by the normalization of this ambiguous divide as a constitutional principle in most liberal democracies.²³³

Whether the *private* exists or can exist in modern states, and whether society can justly delineate its borders are questions beyond the scope of this Article. Rather, the aim of this section is to highlight how the public-private binary can function to deprive Indian women from the protection of their own Constitution, further entrenching their subordination.

1. The Public Nature of “Private” Discrimination

In *Sabarimala*, the issue of the applicability of Article 13—a long jurisprudential saga in India—was once again raised.²³⁴ The State of Kerala argued in its submission that Article 13 could not apply to the facts of the case, as the exclusion of women from the Sabarimala Temple constituted a custom.²³⁵ According to Justice Chandrachud, this was a reductive interpretation of the fundamental purpose of the

²³¹ Margaret Thornton, *The Private/Public Dichotomy: Gendered and Discriminatory*, 18 J.L. & Soc’y 448, 449 (1991).

²³² *Id.* at 450–51.

²³³ Baines, Barak-Erez & Kahana, *supra* note 37, at 2–3.

²³⁴ Indian Young Laws. Ass’n v. State of Kerala (*Sabarimala*), 11 SCC 1, 222–34 (2018) (per Chandrachud, J., concurring).

²³⁵ *Id.* at 222.

Constitution.²³⁶ The application of the fundamental rights entrenched in the Constitution does not depend on whether a reality, occurring in a temple administered by statute, is labeled a custom or not. Rather, its application depends on whether this reality is “connected with the civil status of individuals.”²³⁷ This is so because the violation of the right incurred can no longer be considered *private* and, hence, to shield it from “constitutional scrutiny, is to deny the primacy of the Constitution.”²³⁸ Beyond finding that Article 13 applied to the case, this analysis set the stage for arguably the most transformative theme of Justice Chandrachud’s judgment: a questioning of the boundaries of the public-private divide that consequently informed the boundaries of judicial review.²³⁹

Recall that under Article 26 of the Constitution, “every religious denomination or any section thereof” shall have the right “to manage its own affairs in matters of religion.”²⁴⁰ This provision, however, does not apply to Hindus (which the Constitution defines to include persons professing the Sikh, Jain, or Buddhist religion), as Article 25(2)(b) empowers the state to provide for “social welfare and reform or [throw open] Hindu religious institutions of a public character to all classes and sections of Hindus.”²⁴¹ Where a religious community seeks to rely on Article 26, it must demonstrate that it constitutes a separate denominational group from Hindus. To meet this demonstration, “it must be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and . . . the said collection of individuals must be [labeled], branded and identified by a

²³⁶ *Id.* at 232–33.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.*

²⁴⁰ INDIA CONST. art. 26 (“Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.”).

²⁴¹ INDIA CONST. art. 25, cl. 2(b) (“Nothing in this article shall affect the operation of any existing law or prevent the State from making any law . . . (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”).

distinct name.”²⁴² For reasons unrelated to the thesis of this article, both the majority and concurring opinions swiftly concluded that the respondents lacked all three.²⁴³ Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act of 1965 provides that “every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship.”²⁴⁴ Since “class and section” includes sex, Rule 3(b) of the Act is ultra vires the parent Act.

It should be noted that social reforms or regulations contemplated by Article 25(2) “cannot obliterate essential religious practices” or their performance.²⁴⁵ Intriguingly, despite Justice Malhotra’s alleged adherence to minimal court adjudication in religious affairs, it was Justice Chandrachud, and not the dissent, who adopted a critical stance on the essential religious practice test. Indeed, looking at the evolution of religious freedom jurisprudence, he noted that the Court had historically separated the secular and religious aspects of a religion for purposes of adjudication.²⁴⁶ The text of Article 25(2)(a) permits the state to regulate or restrict any economic, financial, political, or other secular activity which may be associated with religious practice. There is, however, no textual basis for the essential aspect test, which Justice Chandrachud branded a “judicial creation.”²⁴⁷ Through common law, the Court reserved “to itself the authority to determine practices which are essential or inessential to religion,” ultimately assuming “a reformatory role which would allow it to cleanse religion of practices which were derogatory to individual dignity.”²⁴⁸

²⁴² *Sabarimala*, 11 SCC at 97.

²⁴³ *See id.*; *id.* at 147–48 (per Nariman, J., concurring), 197–200 (per Chandrachud, J., concurring).

²⁴⁴ The Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, §3.

²⁴⁵ *Sabarimala*, 11 SCC at 139 (per Nariman, J., concurring) (quoting *Riju Prasad Sarma v. State of Assam*, (2015) 9 SCC 461, 495.).

²⁴⁶ *Id.* at 236–38.

²⁴⁷ *Id.* at 238.

²⁴⁸ *Id.* at 237.

While Justice Chandrachud joined the majority in finding the ban on entry of women to the temple was not integral to the Hindu religion,²⁴⁹ he nonetheless explained, as obiter dictum, the shortcomings of the test. At a formal level, by applying the test “the Court continued to adopt a view which placed credence on the role of the community in deciding what constitutes a part of its religion,” but “there is a superimposed adjudicatory role of the court which would determine as to whether something is essential or inessential to religion.”²⁵⁰

The bulk of Justice Chandrachud’s critique can be summarized as the following question: Given the intended strength of Articles 14 and 15, what is the relevance of the essentiality of a discriminatory religious practice when it interacts with—or more alarmingly imposes limitations on—the constitutional right to gender equality?²⁵¹ According to Justice Chandrachud, if the essential religious practice test is to be salvaged, despite its lack of textual basis, it must be “infused with . . . necessary limitations.”²⁵² These limitations are the pillars of constitutional morality, notably equality and human dignity, the loss of which so fundamentally alters the individual’s position in civil society that the individual can no longer be reasonably considered a constituent of the nation.

To best illustrate this point, consider Justice Malhotra’s contrast of *Sati* and a temple’s exclusion of women. For Justice Malhotra, judicial review of religious practices’ morality or rationality was inappropriate as “doing so would negate the freedom to practise one’s religion according to one’s faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of courts.”²⁵³ This is a curious argument because, as mentioned above, Justice Malhotra was uncritical of the essential religious aspect test, which allows courts to determine which features are integral to one’s faith. And yet, Article 25 explicitly singles out

²⁴⁹ *Id.* at 189–90. Of note, Justice Chandrachud bases his finding of the inapplicability of Article 26 on the grounds that the entry ban is ahistorical, that it lacks scriptural basis, that many Lord Ayyappa temples across India do not follow the custom, and that its reversal would not alter the character of Hinduism.

²⁵⁰ *Id.* at 237.

²⁵¹ See *Sabarimala*, 11 SCC at 192 (per Chandrachud, J., concurring).

²⁵² *Id.* at 189.

²⁵³ *Id.* at 269 (per Malhotra, J., dissenting).

“morality” as a restraint on the freedom to profess, practice, and propagate one’s religion.²⁵⁴

To her credit, Justice Malhotra did identify the harms that compel a court to strike a provision on the basis of constitutional morality, namely that the practice be “pernicious, oppressive, or a social evil, like sati.”²⁵⁵ The use of the term “social evil” implies a *public* nature to the harm; the sacrifice of widows is not a merely *private* matter. Even if presumed to be voluntary, it involves the dignified personal sacrifice of a woman in a “demeaning world” ruled by patriarchal values and gender hierarchies.²⁵⁶ In that sense, the willingness to commit an empowering act cannot be assessed in isolation from the existing social power structures “in which women’s lower status is disguised to be an honorable act.”²⁵⁷ Rather, this willingness must be contextualized “against a continued life of oppression,” where she is prohibited from remarriage, from donning jewelry or colorful clothes, from travel or even going outdoors, and from festivities, so that the “choice” is one between two forms of patriarchal power.²⁵⁸ To brand the sacrifice as a purely private manifestation of devotion is to selectively turn a blind eye to the birthplace and public consequences of *Sati*. But as Justice Chandrachud noted, so too should this willful blindness be rejected in the context of menstruating women’s exclusion from a place of worship. As he explained:

The Respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya: Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, women between the ages of ten and fifty must not be

²⁵⁴ *Id.* at 261–62; INDIA CONST. art. 25, cl. 1 (“Freedom of conscience and free profession, practice and propagation of religion. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”).

²⁵⁵ *Sabarimala*, 11 SCC at 258–59 (per Malhotra, J., dissenting).

²⁵⁶ Julia Leslie, *Suttee or Satī: Victim or Victor?*, in *ROLES AND RITUALS FOR HINDU WOMEN* 175, 190 (Julia Leslie ed., 1991).

²⁵⁷ Cheyanne Cierpial, *Interpreting Sati: The Complex Relationship Between Gender and Power in India*, 14 DENISON J. RELIGION 1, 8 (2015).

²⁵⁸ *Id.*

allowed in Sabarimala. There is an assumption here, which cannot stand constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be *caused* by the presence of women. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratam is to stigmatise them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognise such claims.²⁵⁹

Justice Chandrachud's judgment does not merely question the claim that the ban is a private religious matter when the "personal" faith of the male worshipper is allegedly contingent on the absence of the other sex. It also rejects the claim that this ban flows from religion *exclusively*. Echoing Justice Nariman's analysis of the common thread of menstrual impurity across numerous societies, Justice Chandrachud noted that the "stigma around menstruation" has been exploited to "shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order" even in the secular sphere.²⁶⁰ This stigma is not the origin of gender inequality. Rather, it reflects a broader discourse on the subordination of women in the political, economic, and social life—the very same discourse at the heart of the millennia-long practice of *Sati*.²⁶¹

Moreover, the interpretation of religious beliefs and practices has been historically monopolized by a ruling class of men at the exclusion of the interests of other groups.²⁶² This should not be misunderstood as a critique of religion. On the contrary, this is a testament to the potential of substantive equality laws and jurisprudence to optimize religious freedoms. Where the law is guided by principles

²⁵⁹ *Sabarimala*, 11 SCC at 191–92 (per Chandrachud, J., concurring).

²⁶⁰ *Id.* at 192.

²⁶¹ See Cierpial, *supra* note 257, at 8.

²⁶² See Nancy Frankenberry, *Feminist Approaches*, in *FEMINIST PHILOSOPHY OF RELIGION: CRITICAL READINGS* 3, 6–7 (Pamela Sue Anderson & Beverly Clack eds., 2004).

of human dignity and meaningful choice, “men of each religious culture [are] no longer doing all the speaking for the culture as a whole.”²⁶³ Instead, women and marginalized groups are finally recognized as constituents of a religious community, capable of and entitled to their own religious interpretations. They are free to choose their “sex equality rights,” whether they believe they are best represented by their community’s personal laws or by the Indian state’s universal laws.²⁶⁴ Of course, this choice must not be romanticized as an easy one, given the communal pressures at play and the fear of isolation and banishment.²⁶⁵ Yet, this only serves to reinforce the present point: gender inequality neither begins with nor is confined to the parameters of religion so as to be branded a purely *private* matter.²⁶⁶ When it comes to religion or collective faith, the line between cause and effect is blurred in matters of gender inequality; discrimination experienced within the religious community affects and is caused by discrimination in the broader, even secular community.

If it is accepted that the lines between cause and effect, private and public, and personal harm and social evil are not straightforward, a constitution—to be meaningful in its text and just in its application—must abide by an overarching peremptory morality. This morality places the individual, as the basic unit, at the heart of the Constitution.²⁶⁷ Where individual access to human dignity and the most essential civil institutions is severed, the impugned norm or practice, “irrespective of the source from which [it] claims legitimacy,” cannot withstand constitutional scrutiny.²⁶⁸ This morality “enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship” and is “rooted in the transformative vision of the Constitution.”²⁶⁹ It was for this reason, premised on the

²⁶³ Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and “Personal Laws”*, 4 INT’L J. CONST. L. 181, 202 (2006).

²⁶⁴ *Id.* at 200.

²⁶⁵ *Id.* at 202.

²⁶⁶ *Id.* at 196–97.

²⁶⁷ *Indian Young Laws. Ass’n v. State of Kerala (Sabarimala)*, (2019) 11 SCC 1, para. 100 (2018) (per Chandrachud, J., concurring).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

rejection of a clear public-private divide, that Justice Chandrachud opined that the essential religious practice test itself needs to be transformed. Moving away from an inappropriate inquiry as to whether a practice is essential to a particular faith, he said, the analysis must instead ask whether the practice excludes the claimant from equal participation in civil society, from the pursuit of happiness and a dignified life, and from being treated as a constituent of the nation.²⁷⁰

CONCLUSION

Ultimately, *Sabarimala* is transformative²⁷¹ because it relied on constitutional values, discourse, and doctrine to combat women's inequality. It entrenched women's equality rights, challenged the public-private binary, undertook a purposive and contextual constitutional analysis of discrimination against women, and called for an intersectional framing of women's equality. Most importantly, it insisted on women's substantive equality as an interpretive principle to respond to discrimination against and exclusion of all marginalized groups.²⁷²

Justice Chandrachud's concurrence is notable for his analysis of a constitutional doctrine that interpolated women's equality rights. His analysis collapsed the public-private distinction by holding that, where exclusion is inherently connected to one's civil status, it can no longer be branded a private matter.²⁷³ He questioned oppressive customs and practices rooted in a patriarchal social order and rejected the denial of equality to women on such grounds.²⁷⁴ Significantly, he contextualized women's exclusion from the temple as an aspect of structural inequality and relations of domination and subordination. He linked untouchability with discrimination against women, drawing connections between exclusion and inclusion and situating

²⁷⁰ *Id.* at para. 112.

²⁷¹ Vrinda Narain, *Transformatory Jurisprudence: The Supreme Court of India and Maintenance for Muslim Women*, in HANDBOOK ON GENDER IN SOUTH ASIA (Leela Fernandes ed., 2014); Bhatia, *supra* note 39.

²⁷² *Sabarimala*, 11 SCC at para. 100–106 (per Chandrachud, J., concurring), 111 (per Misra, C.J. and Khanwilkar, J.).

²⁷³ *Id.* at para. 99 (per Chandrachud, J., concurring).

²⁷⁴ *Id.* at para. 57.

discrimination within a larger systemic and structural disparity.²⁷⁵ He also tackled broader questions of social emancipation for all marginalized groups in his anti-discrimination analysis.²⁷⁶ This signals an understanding of the linkages between multiple axes of discrimination and intersectionality, the role of patriarchy, and recognition of systemic discrimination.²⁷⁷ Justice Chandrachud reaffirmed that religion and custom must yield to fundamental rights. He insisted on the centrality of women's substantive equality, refusing to allow religious morality to trump constitutional morality.²⁷⁸

But despite the victory for women's equality rights in *Sabarimala*, it may be too premature to celebrate. As noted earlier, in a controversial postscript to *Sabarimala*, then-Chief Justice Rajan Gogoi (who replaced the retired Chief Justice Dipak Misra) refused to deny the review petitions of the 2018 ruling, instead pausing the review process pending determinations of relevant constitutional questions in other cases.²⁷⁹ The Chief Justice noted that, as the question of entry into holy places is not confined to *Sabarimala* but also concerns the entry of women to Muslim and Parsi places of worship, the review bench will consider these larger implications.²⁸⁰ Significantly, following Chief Justice Gogoi's retirement, Chief Justice Sharad Arvind Bobde convened a nine-judge bench—which does not include any of the judges who heard

²⁷⁵ *Id.* at para. 70–82.

²⁷⁶ *Id.* at para. 74.

²⁷⁷ *Id.* at para. 81.

²⁷⁸ *Id.* at para. 12.

²⁷⁹ The Wire Staff, *In 3:2 Decision, Supreme Court Refers Sabarimala Women's Entry Matter to a Larger Bench*, THE WIRE (Nov. 14, 2019), <https://thewire.in/law/sabarimala-verdict-supreme-court> [<https://perma.cc/9BYD-648F>]; for further developments, see also Murali Krishnan, *Sabarimala Verdict on Entry of Women Not the Last Word, Says Chief Justice Bobde*, HINDUSTAN TIMES (Aug. 2, 2020), <https://www.hindustantimes.com/india-news/sabarimala-verdict-on-entry-of-women-not-the-last-word-says-chief-justice-bobde/story-zydWjpsamcTYzlh94mmfnN.html> [<https://perma.cc/V5NE-H6B8>].

²⁸⁰ *Id.*

the *Sabarimala* case—to review these questions.²⁸¹ Critics have expressed concern at this deference to the ruling Hindu nationalist party. More worrying, only four months following his retirement, former Chief Justice Gogoi was appointed by the Modi government to the Rajya Sabha, the upper house of India’s bicameral parliament.²⁸² The appointment was met with protests and walkouts by opposition parties who argued that the decision “disgraced the judiciary” and upended “the distancing between the Executive, Parliament and the judiciary.”²⁸³ With this unprecedented insistence on hearing a review petition against *Sabarimala*, both former Chief Justices Gogoi and Bobde have gravely undermined the credibility of the Supreme Court as an institution and have threatened the very independence of the courts.²⁸⁴

This latest development makes clear that women’s inclusion in constitutional discourse remains fraught and politically contingent. This Article makes four recommendations regarding women’s equality rights in Indian constitutionalism:²⁸⁵

- 1) **Identify harmful cultural norms and practices to advocate for women’s equality.** It is necessary to set out specific contexts in which “women’s equality rights must be guaranteed.”²⁸⁶ Indian women are especially vulnerable in the areas of family law and religious personal law. Harms to

²⁸¹ *Sabarimala Judges Who Ruled in Favour of Women Entry Are Not Part of Nine-Judge Bench*, WEEK (Jan. 7, 2020), <https://www.theweek.in/news/india/2020/01/07/judges-who-ruled-in-favour-of-women-entry-are-not-part-of-nine-j.html> [<https://perma.cc/8A22-V3Q7>].

²⁸² HT Correspondent, *Former CJI Ranjan Gogoi Nominated to Rajya Sabha by President Kovind*, HINDUSTAN TIMES (Mar. 16, 2020), <https://www.hindustantimes.com/india-news/former-chief-justice-of-india-ranjan-gogoi-nominated-to-rajya-sabha-by-president-kovind/story-oZi8I8dbIM5lytOsPZONbL.html> [<https://perma.cc/9BEK-ATKM>].

²⁸³ Sobhana K. Nair, *As Former CJI Ranjan Gogoi Takes Oath as Rajya Sabha Member, Opposition Walks Out*, HINDU (Mar. 19, 2020), <https://www.thehindu.com/news/national/former-cji-ranjan-gogoi-takes-oath-as-rajya-sabha-member/article31106321.ece> [<https://perma.cc/ZP4A-37NZ>].

²⁸⁴ Parakash Karat, *An Independent Supreme Court is a Must for Democracy*, THE CITIZEN (Aug. 27, 2020), <https://www.thecitizen.in/index.php/en/NewsDetail/index/4/19272/An-Independent-Supreme-Court-Is-a-Must-for-Democracy> [<https://perma.cc/8P6U-UEDU>].

²⁸⁵ Drawing inspiration directly from Baines, *supra* note 41.

²⁸⁶ *Id.* at 115.

women are particularly visible in marriage and divorce, inheritance, succession, sexual assault, and child custody, among other matters. Women's equality must also be guaranteed in public contexts, including political participation, democratic inclusion, employment, healthcare, and education.

- 2) **Insist on substantive equality as an adjudicative principle.** We must go beyond a formal equality analysis of classification and categorization to incorporate a contextualized, purposive interpretation of inequality and discrimination. A substantive definition of equality ensures that the lived realities of women are taken into account by judges, the impact of discriminatory laws are recognized and remedied, structural inequality is understood and addressed, and norms are challenged and re-envisioned.
- 3) **Recognize intersectionality as an overarching method and framework when adjudicating women's equality claims.** Intersectional rights claims must find resonance in judges' recognition of both the artificiality of constitutional categories and litigation strategies that force women to choose between their culture or religion and their rights as citizens, as in *Sabarimala*. Recognizing intersectionality is crucial to understanding substantive inequality, whereas forcing women to choose between these grounds denies the reality of their experience of discrimination along multiple axes, including class, caste, and religious community.²⁸⁷ The failure of judges to adopt an intersectional approach may result in a failure to address the roots of oppression that women face.
- 4) **Challenge norms that oppress women and perpetuate their inequality.** Judges' reluctance to challenge oppressive norms must be questioned and challenged. While some progress has been made in *Sabarimala*, women's equality still has a long way to go.

It is necessary to continue advocating for change until these recommendations become a recognized part of the jurisprudence and judicial decision-making processes. Gender equality advocacy must diligently account for the intersectional framing and the multiple identities of Indian women, religious minority women, *Dalit* women, and lower-caste women. We can move toward inclusion only when all women are included, not just some. As Kimberlé Crenshaw famously said, "When

²⁸⁷ *Id.* at 117–18.

they enter, we all enter.”²⁸⁸ India’s constitutional guarantees of equality rights must be interpreted in a way that protects all women’s substantive equality and places those rights at the center of constitutional discourse. A constitution that upholds women’s substantive equality is essential for an inclusive democracy, as it transforms women from the *governed* into the *governing*.

²⁸⁸ Crenshaw, *supra* note 40, at 167.