Vol. 3, Issue 1, August 2026 Subject-Law ISSN 3049-3099 (Print)
ISSN 3108-0561 (Online)

Peer Reviewed

VIPS JOURNAL OF LAW & DEVELOPMENT

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES-TC (VIPS-TC)
Affiliated to GGSIP University, Delhi & Approved by Bar Council of India & AICTE
Grade 'A++' Accredited Institution by NAAC &
Recognized by UGC under Section 2 (f) & NBA Accredited for MCA Programme
ISO 9001:2015 Certified Institution

About Vivekananda Institute of Professional Studies – TC (VIPS-TC)

Vivekananda Institute of Professional Studies - TC (VIPS-TC) was established in the year 2000. Even as a sapling, its roots were firm, for they were energized by Swamiji's teachings. Today, VIPS – TC has progressed and is nestling sixteen courses under seven different Schools. It continues to stand with determination, moral sight and strength of mind to create capable and ethical human beings with infinite power, infinite knowledge and indomitable positive energy. Under the aegis of VIPS – TC, Vivekananda School of Law and Legal Studies (VSLLS) is committed to realizing the words of Swami Vivekananda: "Man Making, Character Building and Nation Building" and is well known for its robust efforts in legal education. Research is integral to academics as it forms the foundation for knowledge creation and intellectual growth. It enables students, scholars, and professionals to explore new concepts, test theories, and contribute to the existing body of knowledge in their respective fields. VSLLS works towards development-oriented research in the Legal domain.

About the VIPS Journal of Law & Development

VIPS Journal of Law & Development is an annual double blinded peer reviewed journal accepting submissions in English language. The inception year of the Journal is 2024 and it is further envisioned to promote global development of Law as it provides a platform for scholarly research dedicated to exploring the intersection of legal frameworks and socio-legal development with an inter disciplinary approach. The research articles are selected for publication after a rigorous double-blind review by subject experts. The mode of citation for the journal is VIPS VSLLS VOL 3 VJLD (2026). As a policy of the Journal the contributing authors are regularly updated about the status of their submission.

Table of Contents

Title of the Paper / Author	Page No.
Concerns of Modern Jurisprudence and Solutions from Indian Wisdom: Basic Thoughts and Foundational Understandings *Prof. (Dr.) K. Parameswaran*	**1-17**
Artificial Intelligence, Platform Work, and the Structural Limits of Indian Labour Law *Dr. Shilpi Sharma & Subarna Ghosh*	**18-40**
Mapping Privacy in Tax Governance: Critical Analysis of Taxation Models of India and Abroad *Dr. Zubair Ahmad Khan, Dr. Vinayak Jhamb & Dr. Gurpreet Kaur*	**41-64**
Mental Health of Prisoners in India: A Socio-Legal Study with Reference to the State of Punjab *Dr. Vinod Kumar & Dr. Poonamdeep Kaur*	**65-82**
The Tyranny of Calendar: Evaluating the Judicial Transition towards a Rights-based Abortion Framework in India *Dr. Manisha Sharma & Dr. Sonali Sharma*	**83-97**
From Recognition to Reality: Implementation Challenges of Victim Participation under the Bharatiya Nagarik Suraksha Sanhita, 2023 *Sunny Yadav*	**98-114**
Mandatory Videography in Criminal Investigations: Admissibility and Enforcement Under Section 105 BNSS *Apurv Shaurya & Surabhi Dalal*	**115-131**
Mapping the Digital Sanctum: Cybercrime and the Fragile Desire of Law in Virtual Jurisprudence *Sneha Hooda & Dr. Parmod Malik*	**132-143**

Analysis of Role of Trademark Protection in Brand Management: Focus on Character Merchandising **144-161**
Purnashri Das

Strengthening Reproductive Rights: Opportunities and Challenges in Prenatal and Postnatal Health Services **162-173**
Anita & Dr. Manjinder Gulyani

The Unfulfilled Promise: Examining the Efficacy of Constitutional Guarantees in Securing the Human Rights of Transgender Persons **174-185**
Aaradhya Nagyan & Akanksha Singh

Brain Data as Evidence and Constitutional Right to Mental Privacy: Challenges for Indian Criminal Law **186-206**
Rashmi Raghav

Substantive Equality in Women's Rights under Indian Constitutional Law Since K. S. Puttaswamy Case **207-225**
Anurag Singh & Dr. Richa Srivastava

Green Mediation in Environmental Justice: Analysing in Comparative Domain **226-248**
Shalini Maurya & Dr. Rama Sharma

Are Federal Democracies Truly Federal in the 21st Century? **249-262**
Durgesh Pratap

Establishing Ownership to Determine Responsibility for Algorithmic Bias **263-276**
Arshita Jain & Radhika Chachria

The Ghost of the Termination Treaty: Sunset Clauses, Legacy ISDS Exposure, and Sovereign Regulatory Space **277-297**
Venkata Raghuvamsy D

Submission Guidelines **298-302**

SUBSTANTIVE EQUALITY IN WOMEN'S RIGHTS UNDER INDIAN CONSTITUTIONAL LAW SINCE K. S. PUTTASWAMY CASE

Anurag Singh*
Dr. Richa Srivastava**

VIPS Journal of Law & Development
Subject - Law
August 2026, Vol. 3, Issue 1, 207-225
ISSN 3049-3099 (Print)
ISSN 3108-0561 (Online)
©Vivekananda Institute of Professional Studies-TC
(VIPS-TC)
https://vips.edu/vslls/Publications/VJLD

ABSTRACT

Indian jurisprudence has evolved over several past decades with respect to gender issues. However, the transformation has been slow considering the political and social constraints. However, the recent Puttaswamy judgment by a nine-judge bench of the Supreme Court in the year 2017 was a watershed moment. This judgment established privacy, dignity, autonomy and bodily integrity under Article 21. This landmark judgment became a framework on which subsequent judicial decisions regarding adultery, temple entry, reproductive rights and equal roles for women officers relied. This research article analyses the evolution of Indian jurisprudence with respect to gender issues by moving beyond formal, statutory equality towards substantive freedom. This evolution is charted by the interaction of constitutional mandates, judicial interpretations, political establishment and social environment. Each of these follow their own path and work in its own sphere of limitations. These limitations, doctrinal gaps and political resistance represent contingent challenges and are not structural constitutional defects. Despite these constraints, the overarching vector of Indian gender jurisprudence continues forward, relying on the framework developed in the landmark Puttaswamy case.

Keywords: *Transformative Constitutionalism, Substantive Equality, Article 21, Women's Rights, Constitutional Morality*

* Research Scholar, Sarojini Naidu Centre for Women's Studies, Jamia Millia Islamia, New Delhi, India. Email ID: anurag2500680@st.jmi.ac.in

** Assistant Professor (Selection Grade), Vivekananda School of Law & Legal Studies, Vivekananda Institute of Professional Studies-TC, New Delhi, India. Email ID: richa.srivastava@vips.edu

I. INTRODUCTION

The Constitution of India, enforced on 26th January 1950, abolished untouchability and paved the way towards equal protection of religion, caste, race or sex. The Constitution's foundation is enshrined in equality. Dr B. R. Ambedkar, the architect of the Indian Constitution, understood that only formal declarations cannot bring change on the ground and they need to be supplemented with material conditions to bring them to life. Therefore, the text drafted by the drafting committee of the Constitution was not simply an administrative schedule but was transformative in nature, with a commitment to a future India rather than entangled in the reflections of the past[1].

The Constitution, through the fundamental rights under Article 14, 15 and 21, was conceived as a mechanism for transformation leading to substantive gender equality. However, the personal laws, by and large, were outside the purview of constitutional scrutiny through the judiciary for decades. This was specifically seen in the Bombay High Court ruling in 1951[2] in the case of *State of Bombay v. Narasu Appa Mali.* This case excluded the personal laws from the purview of Article 13. Similarly, the legislature also worked on a similar track, as seen in the case of Shah Bano decided by the Supreme Court of India in 1985. The Supreme Court recognised maintenance rights, which were effectively rolled back by parliamentary intervention on the behest of political calculations outweighing the commitment towards women's rights.

However, after 2017, Indian jurisprudence has seen rulings on several issues moving towards substantive equality as conceptualized by Sandra Fredman[3]. These include rulings on issues such as triple talaq, temple entry, adultery, reproductive autonomy, and military gender equity etc. The judicial interpretations have broadened and have moved from simply formal parity before the law towards the question whether women enjoy substantive liberty and foundational dignity as provided by the Constitution in letter and spirit. This shift, which accelerated from 2017, has become much more evident, but is not devoid of challenges.

The watershed moment with respect to gender rights in Indian jurisprudence came in August 2017, when a nine-judge bench of the Supreme Court of India decided

1 UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (3d ed. 2012).

2 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84 (India).

3 Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 712 (2016).

Justice K.S. Puttaswamy v. Union of India[4] case unanimously. The bench acknowledged privacy as a fundamental right under Article 21 of the Constitution. This case, although it doesn't directly deal with the question of gender rights, provided valuable insights and interpretations on the related concepts of dignity, autonomy and bodily integrity and synthesised them in the form of a doctrinal statement. This framework provided the essential foundation for Joseph Shine, Sabarimala, Lt. Col. Nitisha, and X v. Principal Secretary Judgment. Thus, 2017 represents a consolidation of a movement that was underway in a subtle way.

This paper adopts a triadic approach, arguing that none of the three actors can be evaluated in isolation. Although the Constitution provided a transformative framework from its inception, Article 25 and the absence of a Uniform Civil Code created discretionary space for political and judicial manoeuvring. The judiciary has fluctuated between constraining and conceding within that space, most notably on questions of personal law under political & social scenarios. The current jurisprudence marked by both advancements and limitations is the direct product of these three interacting forces.

Although the jurisprudence manifests continuing friction among competing forces, its long-term direction is clear. The constitutional core is secure, and remaining barriers are contingent functions of political feasibility and social inertia rather than structural constitutional flaws. Transformative change in societies is inherently incremental, yet undeniable. Ultimately, the Supreme Court's post-2017 decisions have anchored this evolution in its most doctrinally coherent framework yet.

Theoretical Framework

A rigorous analysis of post-2017 jurisprudence necessitates a well-defined theoretical framework. Although these decisions lend themselves to varied interpretations, when analysed through the appropriate conceptual lens, they signify progressive rulings. They expose a constitutional order actively fulfilling its intended transformative purpose. This trajectory is best conceptualized through transformative constitutionalism—a paradigm pioneered by Karl Klare to describe the long-term deployment of constitutional adjudication to advance democracy, equality, and human dignity[5] . In the Indian context, Gautam Bhatia posits that the

4 Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1. For an analysis of the decision's significance within the global constitutional imagination, *see* Menaka Guruswamy, *Case Report on Justice K.S. Puttaswamy v. Union of India*, 111 AM. J. INT'L L. 994 (2017).

5 Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998).

Constitution was consciously designed as a tool for social transformation rather than a mechanism for status quo preservation[6]. Upendra Baxi echoes this thesis, framing the Constitution as a dynamic instrument directed at reconfiguring societal conditions rather than simply constraining state action. This framework yields a precise analytical conclusion for this study: instances of judicial constraints do not reflect principled deference, but a structural process which has inherent inertia. Seen in this light, the post-2017 jurisprudence does not constitute aggressive judicial activism; it represents the Court slowly and steadily aligning with its foundational 1950 mandate.

Another important aspect is to figure out the relative importance and supremacy between formal and substantive equality. The two paradigms of formal and substantive equality are described in detail by Fredman. The two are differentiated on the basis of the scope and applicability of the paradigms. Fredman has differentiated between formal equality and substantive equality, as the former requires the identical treatment of similarly placed actors, whereas substantive equality looks to find out whether the practical requisites for liberty and dignity are available for equality. Therefore, formal equality largely aims towards statutory symmetry; on the other hand, substantive equality evaluates whether the real-world situation provides an environment where the constitutional rights can be genuinely enjoyed, particularly in the gender rights domain. The jurisprudence in the Lt. Col. Nitisha case after 2017 displays fundamental realignment towards substantive equality going beyond only formal equality. This case contested the same evaluation criteria for promotion for the male and female officials. These evaluation criteria were largely based on the historical male career trajectories and don't take into consideration the historical and operational disadvantages experienced by the women officers. Therefore, these criteria did not constitute equal treatment in the real sense from the lens of gender rights. Therefore, giving due weightage to these facts, the judicial interpretation through a critical doctrinal precedent recognised that the identical application of neutral standards can produce substantively unequal outcomes[7].

Another important aspect for the applicability of substantive equality is the interplay of constitutional morality vis-à-vis social morality, thereby considering the role of societal friction. The constitutional morality is based on human rights, dignity and equality, whereas the social morality is based on the old customary practices,

6 Gautam Bhatia, The Transformative Constitution (2019).

7 Lt. Col. Nitisha v. Union of India, (2021) 15 SCC 533 (India).

religious orthodoxy and cultural conservatism. The constitutional morality was articulated by Dr. B. R. Ambedkar during the drafting of the Constitution. It was acknowledged that for a nation waiting to transform itself must also break old traditions, habits & outdated rules and look towards building a new path. If there are differences and disagreements between these moralities, then it could lead to systemic frictions. However, in landmark cases such as Sabarimala and Joseph Shine, the judiciary upheld the constitutional benchmarks of morality over popular public sentiments. Thereby, courts sustained the normative tension between current social practices and aspirational constitutional goals. The resulting public resistance does not invalidate these decisions; rather, it confirms that the judiciary is actively applying the constitutional framework envisioned by the Constitution's makers.

The three streams discussed above have worked in tandem to help the judiciary to interpret the laws in a way to make gender rights achievable. These three pillars namely transformative constitutionalism, substantive equality and constitutional morality have reinforced each other

These three theoretical pillars discussed above, i.e. transformative constitutionalism, substantive equality, and constitutional morality, operate in a mutually reinforcing manner. These have helped to make a better society, by treating everyone fairly by doing the right things based on the core values of the constitution. Transformative constitutionalism routes the law towards positive social changes in place of maintaining the status quo. Substantive equality provides a measurement regarding the real support and fair chance available to all and constitutional morality strengthens the judiciary to take the path of fairness & human rights over popular habits and old customs. These principles demonstrate that post-2017 jurisprudence signifies the execution of the judiciary's role in the letter & spirit of constitutional mandates.

Importance of 2017 in gender jurisprudence: Puttaswamy Case [8]

The post -2017 jurisprudence, subsequent to the Puttaswamy case, was a watershed moment whereby the intermittent steps taken by the judiciary for decades were realised in the form of a standardised framework to be relied on for gender rights. The judicial interpretations are very challenging as they can get influenced to match the popular feelings and beliefs of that time. Before the 2017 judgement, the judiciary advanced the paradigm of gender equality through individual decisions, but there

8 Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

was no doctrinal framework for future jurisprudence to rely on. *Maneka Gandhi v. Union of India* [9] provides a clear precedent for this structural evolution. It could be understood from the fact that Article 21 has been present in the Constitution since its inception, but its transformative interpretation was pronounced by the judiciary in the year 1978 in Maneka Gandhi v. Union of India case. Similar to it, Puttaswamy was a transformative case for jurisprudence related to gender rights and equality which provided a doctrinal anchor for the principles which the judiciary has long aspired to enforce.

This doesn't imply that the jurisprudence before 2017 was stagnant on the matter of gender rights and equality. There are instances when the judiciary has applied substantive equality principles to gender issues before the Puttaswamy case. In *Anuj Garg v. Hotel Association of India* [10], the Court invalidated statutory prohibitions on female employment in liquor-vending premises, holding that state action premised on gendered stereotypes offends Articles 14 and 15.[11] Similarly, in NALSA, the Court recognised non-binary gender identity i.e. the third gender, deriving the right to self-identification from fundamental guarantees of autonomy and dignity.[12] What these precedents lacked was not conceptual force but doctrinal coherence. They remained distinct strands of constitutional reasoning rather than constituting a unified jurisprudence. The significance of the 2017 watershed lies not in inaugurating substantive equality, but in crystallising it into a coherent constitutional framework that has since provided the doctrinal foundation for subsequent gender rights jurisprudence.

The exclusion of personal laws from the purview of fundamental rights under Article 13 can be traced back to the 1951 decision of *Bombay High Court in Bombay v. Narasu Appa Mali*[13]. These rulings have very harsh practical consequences for women, considering the unfavourable customary norms followed for marriage, dissolution and succession. In addition, these were shielded from judicial review, being outside the scope of fundamental rights. The judicial system took a long time to dismantle

9 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

10 Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1.

11 Anuj Garg v. Hotel Ass'n of India, (2008) 3 SCC 1 (India). The Court held that legislation resting on sex stereotypes offends Articles 14 and 15, an early articulation of substantive equality in the Court's gender jurisprudence.

12 National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India).

13 Bombay High Court in Bombay v. Narasu Appa Mali, AIR 1952 Bom 84. For a detailed critique of the reasoning and its constitutional implications, *see* Saptarshi Mandal, *Out of Shah Bano's Shadow: Muslim Women's Rights and the Supreme Court's Triple Talaq Verdict*, 2 IND. L. REV. 89, 94 (2018).

the precedent laid out in the Narasu case, by following a cautious incremental workaround approach preserving the structural exceptions.[14] In the case of *Mohd. Ahmed Khan v. Shah Bano Begum*[15], the judiciary took a structural shift. In the case the Supreme Court held that the Section 125 of the Code of Criminal Procedure applied uniformly, providing a statutory maintenance remedy to divorced Muslim women.[16] However, the gains from this structural shift were nullified by legislative actions. Parliament overruled the judicial decisions, considering the electoral gains at the cost of gender rights. It is also seen in several analyses, such as those done by Ummul Fayiza, demonstrating that considering the cases from Shah Bano to Shayara Bano, the rights of women in general and Muslim women in particular have been curtailed, considering it as a political instrument for electoral gains. The substantive claims to constitutional equality are competing against the ideological factions.[17] Similarly, the 1997 Vishakha Judgment on workplace sexual harassment directives are hailed as a major advance in gender jurisprudence.[18] However, if it is seen in totality, then it reflects the judiciary's attempt to fill a governance vacuum. It was filling the gap left by the legislature and doesn't expand it to the issues which are likely to face social or political resistance.

Taken together, these three factors reveal the structural limitations of the pre 2017 jurisprudence. The personal law remained shielded from constitutional scrutiny; a major victory for Muslim women was undone by parliamentary override; and judicial proactiveness was largely confined to legislative vacuums. The Puttaswamy case in 2017 transformed this pattern.

14 Shayara Bano v. Union of India, (2017) 9 SCC 1 (India). Justice Nariman's opinion directly negated the rationale on which Narasu was based while stopping short of expressly setting it aside, noting that the question of its continuing validity should be examined in a suitable case.

15 Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945; Muslim Women (Protection of Rights on Divorce) Act, 1986.

16 Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945; Muslim Women (Protection of Rights on Divorce) Act, 1986.

17 Ummul Fayiza, *From Shah Bano to Shayara Bano (1985–2017): Changing Feminist Positions on the Politics of Muslim Personal Law, Women's Rights and Minority Rights in India*, 41 J. Muslim Minority Aff. 1 (2021).

18 Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

II. K.S. Puttaswamy Judgment as Constitutional Pivot

Public attention in 2017 centred predominantly on *Shayara Bano v. Union of India*[19], where the Supreme Court intervened in Muslim personal law to invalidate talaq-e-biddat or triple talaq. However, the more structurally consequential legal development emerged on 24 August 2017, when a unanimous nine-judge bench delivered its verdict on the *Justice K.S. Puttaswamy v. Union of India* case, establishing a coherent constitutional framework upon which all subsequent gender rights decisions would rely.

The watershed decision in *Justice K.S. Puttaswamy v. Union of India*[20] stemmed from a challenge to the government's national biometric identification initiative under Project Aadhaar. The central constitutional inquiry was whether the right to privacy constitutes a fundamental right under the Indian Constitution. The nine-judge bench unanimously affirmed that privacy is part of fundamental rights; however, with different judicial interpretations. Six separate opinions were authored in this case, each following a distinct route but converging into the fact that privacy is part of fundamental rights under Article 21. Therefore, the Puttaswamy[21] case consolidated the principle that bodily autonomy, intimate decision-making, and individual identity are fundamental rights.

Amongst the different opinions provided by different judges, the interpretation provided by Justice Chandrachud becomes very important as it serves as a foundational reference point for subsequent gender rights jurisprudence. He interpreted privacy as an outcome of liberty and dignity, which encompasses many physiological and psychological factors to be protected against the state's interference. These include bodily autonomy, sexual identity and intimate associations, etc. He also gave preference to individualistic rights & constitutional morality over social morality, which comprises communal or religious affiliations. This individualistic rights preference weakens the framework put forward in the *State of Bombay v. Narasu Appa Mali*[22], which had long insulated personal laws from fundamental rights review. By putting forward the primacy of individual personhood, this judgment ensures that community customs based on religious protection do not justify the subordination of individual rights.

19 Shayara Bano v. Union of India, (2017) 9 SCC 1.

20 K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161 (India).

21 K.S. Puttaswamy v. Union of India AIR 2017 SC 4161, at 7.

22 Narasu Appa Mali, AIR 1952 Bom 84, at 2.

The Puttaswamy Judgment is very much analogous to the precedent of *Brown v. Board of Education*.[23] The brown case provided the constitutional framework for subsequent civil rights litigation without directly and immediately banning racial segregations. Similarly, the Puttaswamy judgement acts as a catalyst for Indian jurisprudence to transform gender rights and equality. Leading analyst Menaka Guruswamy, through her writing in the American Journal of International Law, highlighted this analogy, suggesting that Puttaswamy case has the same transformative potential for Indian jurisprudence and Brown held for American law.[24] Each judgment provides a mandate for the future and subsequent adjudication. Following Puttaswamy[25]Gender justice decisions shared a common constitutional vision, a shift clearly seen from *Joseph Shine*, *Sabarimala*, *Lt. Col. Nitisha*, and *X v. Principal Secretary* cases.

III. The Post-2017 Jurisprudence

Constitutional jurisprudence grows through shifting ideas and facts rather than a straight timeline. Post-2017 rulings like *Navtej Singh Johar v Union of India* [26], *Joseph Shine v Union of India* [27], and *Indian Young Lawyers Association v State of Kerala* [28] arrived quickly together, showing deep ties to real-world disputes, mixed judge votes, and sharp public debates. What runs through this body of case law is not a standardized outcome, but a unifying constitutional probe: Does this legal framework leave a woman substantively free?

Shayara Bano v. Union of India [29], delivered three weeks post-Puttaswamy [30], secured a 3:2 majority invalidating talaq-e-biddat, yet the decision reflected severe analytical divergence. Justices Nariman and Justice Lalit invalidated the practice under the doctrine of manifest arbitrariness pursuant to Article 14. Justices Khehar and Justice Nazeer authored a conservative dissent, framing the custom as protected religious practice under Article 25. Concurring in the result, Justice Joseph rested his opinion on Islamic jurisprudence, finding the practice un-Quranic and thereby evading

23 Brown v. Board of Education, 347 U.S. 483 (1954).

24 *Id.*

25 *Id.*

26 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

27 Joseph Shine v. Union of India, (2019) 3 SCC 39

28 Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.

29 Fayiza, *supra* note 15.

30 Fayiza, *supra* note 15.

fundamental rights adjudication[31]. Although the Court intervened in uncodified personal law, three of five judges declined to resolve the constitutional question. The overarching issue- whether personal laws are subject to Part III scrutiny- remained unaddressed.

Subsequent statutory developments exposed the limits of judicial reform in personal law. Through the Muslim Women (Protection of Rights on Marriage) Act 2019, Parliament criminalised talaq-e-biddat as a cognizable, non-bailable offence carrying a three-year prison term[32] . This converted a judicial declaration of civil nullity into a punitive sanction, risking economic destabilisation for women whose spouses faced incarceration. While scholars criticised the measure as an instrument of political majoritarianism rather than substantive gender empowerment[33] , it also reflected legislative responsiveness to communal anxieties over judicial interference in religious custom.

Joseph Shine v. Union of India[34] represents the most doctrinally refined expression of post-2017 gender jurisprudence. Unanimously striking down Section 497 of the Indian Penal Code, the five-judge bench invalidated the statutory criminalisation of adultery, which had treated married women as legal non-entities devoid of standing as either complainants or defendants[35]. Section 497 structurally codified paternalistic subordination, treating female sexuality as proprietary to the husband. Rejecting a formalistic Article 14 approach, the Court adopted a substantive equality framework, holding that marital status cannot diminish a woman's entitlement to constitutional personhood. The analytical doctrine established in Puttaswamy[36] grounding individual autonomy, dignity, and bodily integrity within Article 21 served as the operational foundation for the judgment.

The post 2017 jurisprudence has seen the intersection & influence of constitutional & religious traditions. The Indian Young Lawyers Association (Sabarimala case)[37]

31 Shayara Bano, (2017) 9 SCC 1. For a detailed analysis of each opinion and their implications for personal law reform, *see* Mandal, *supra* note 12, at 96-105.

32 Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019 (India). Section 4 makes the pronouncement of triple talaq a cognizable and non-bailable offence punishable with imprisonment of up to three years.

33 FAYIZA, *supra* note 15.

34 Joseph Shine v. Union of India, (2019) 3 SCC 39 (India).

35 *Id.*

36 K.S. Puttaswamy v. Union of India AIR 2017 SC 4161.

37 Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 (India).

represents one of the important legal discourses in this regard. In this case, Justice Indu Malhotra's provided a key limitation to the essential religious practice's doctrine in the form of a dissenting note. In this case, the religious practice doesn't allow a class of women to participate, thereby effectively excluding an entire class of women from public spaces. This practice was challenged with a demand for substantive equality, which in itself could have been an independent basis for judicial review without any reference to religious orthodoxy. In this case, the judiciary interpreted it in favour of constitutional morality over customs with a 4:1 majority.

The judicial decision invalidated the exclusion of women aged ten to fifty under Articles 14, 15, and 25 in this case [38]. However, the decision was again challenged in the review petition to a nine-judge bench. This shows the tussle & friction between popular habits, majoritarian rights, constitutional morality and public consensus. The status of Sabrimala case is still not fully resolved, indicating that the social transformation through legal route is not very straight forward and linear process[39].

Lt. Col. Nitisha v. Union of India[40] indicates the integration of Sandra Fredman's substantive equality framework[41] into Indian jurisprudence. This case, in core, was about filling a crucial gap in existing gender justice scholarship. In this case, the litigation challenged the physical assessment criteria mandated by the Indian Army to evaluate female officers for Permanent Commissions. The Supreme Court struck down facially neutral benchmarks constructed around male physiological baselines that ignored the officers' history of institutional exclusion. Rejecting a formalistic Article 14 review, the Court established that neutral standards operating within historically unequal structures constitute indirect discrimination. In Fraser v. Canada the Supreme Court of Canada used the same logic to find adverse effect discrimination where facially neutral pension rules fell disproportionately on women who had reduced their hours for childcare.[42]

38 See BHATIA, *supra* note 7. Bhatia argues that the essential practices inquiry draws courts into theological determinations they are institutionally poorly suited to make.

39 Kantaru Rajeevaru v. Indian Young Lawyers Association (2020) 2 SCC 1 (India). Nariman J., dissenting from the referral, held that the review petition disclosed no error apparent on the face of the record and that entertaining it amounted to yielding to public pressure rather than applying legal principle.

40 Lt. Col. Nitisha v. Union of India, (2021) 15 SCC 125 (India). The Court held that assessing women officers against standards blind to their history of service under discriminatory conditions was to perpetuate the original discrimination through facially neutral means.

41 Fredman, *supra* note 4.

42 Fraser v. Canada (Attorney General), 2020 SCC 28 (Can.). The Court held that a facially neutral rule producing a disproportionate and disadvantageous impact on women amounted to discrimination

The Medical Termination of Pregnancy Rules, as they stood before *X v. Principal Secretary*, Health and Family Welfare Department, listed the categories of women eligible for termination of pregnancy between twenty and twenty-four weeks of gestation. Unmarried women were not on that list. The petitioner was an unmarried woman with a twenty-two-week pregnancy seeking termination. The Delhi High Court denied her petition. The Supreme Court reversed this.[43] Chandrachud's majority opinion grounded the right to reproductive autonomy directly in Article 21, drawing on his Puttaswamy[44] concurrence to establish that a woman's right to decide about her own pregnancy is a fundamental right, not a statutory entitlement contingent on marital status.[45] When Puttaswamy's individual dignity reasoning is applied to reproductive autonomy, it leads to one unavoidable conclusion: that marriage cannot be the threshold for constitutional rights. What *X v. Principal Secretary* shows, perhaps more than any other case, is that the same constitutional thinking applied across different areas of law produces results that actually hold together.

Not every post-2017 judgment conforms to this transformative trajectory, with the hijab litigation presenting the sharpest counter-example. In *Aishat Shifa v. State of Karnataka* [46], a two-judge bench fractured on whether a government order effectively banning the hijab in state educational institutions was constitutional. Justice Gupta upheld the restriction on grounds of institutional discipline and uniformity, while Justice Dhulia invalidated it, anchoring the right to wear the hijab in dignity, privacy, and personal autonomy. [47] The issue is referred to a larger bench & is under sub judice. Aishat Shifa exposes the limits of a linear narrative of judicial progress. Notably, the same constitutional vocabulary of dignity and choice that drove consensus in Joseph Shine and X v. Principal Secretary failed to produce agreement here, as one judge treated state-enforced uniformity as a valid override of a Muslim woman's personal

under section 15(1) of the Charter, a clear statement of the substantive equality principle.

43 X v. Principal Secretary, Health & Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC OnLine SC 1321 (India).

44 K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

45 *Id.* For a comparative analysis of the feminist legal methods employed in this judgment and the contrasting approach of the Delhi High Court in the contemporaneous marital rape split verdict, *see* Shraddha Chaudhary, *The Value of Feminist Legal Methods in Adjudicating Women's Issues: A Critical Comparison of Two Judicial Approaches from India*, 8 Indian L. Rev. 66 (2024).

46 Aishat Shifa v. State of Karnataka, (2023) 2 SCC 1

47 Aishat Shifa v. State of Karnataka, Supreme Court of India, judgment of 13 October 2022 (Gupta and Dhulia JJ.). The split verdict left the Karnataka High Court's order in force and referred the question to a larger bench, where it remains pending.

expression. This case law suggests that the post-2017 jurisprudence has relied on a foundation, but this foundation doesn't provide any automated formula to achieve gender equality. It provides clear paths against state paternalistic behaviour but has limitations where individual autonomy & religious practices are placed against each other or where the state frames restrictions as secular neutrality.

IV. The Gaps that Remain

The post-2017 jurisprudence has been a story of substantive steps towards gender equality with limitations marked by doctrinal gaps and political & social resistance. The following section examines these limitations as an intrinsic component of the ongoing transformative adjudication in the realm of gender equality and rights.

The most serious challenge to this thesis derives from Pratap Bhanu Mehta's critique of judicial behaviour.[48] Mehta contends that the Supreme Court exhibits institutional inconsistency rather than principled coherence, with legal scholars relying on selection bias to construct a narrative of constitutional progress that ignores the Court's limited impact on institutional reality. Under this account, post-2017 jurisprudence represents not a coherent transformative project, but a series of fragmented rulings. This critique is underscored by the split in Aishat Shifa and the distance between Supreme Court pronouncements and bureaucratic practice. The existence of enforcement gaps illustrates the complexity of judicial transformation rather than the absence of a foundational shift.

Judicial reticence

Among the instances where the Court retreated from its transformative principles, Sabarimala is the starkest, as analysed above. The marital rape exception presents a more persistent and institutional hesitation. The Delhi High Court's split verdict in *RIT Foundation v. Union of India*[49] left the constitutionality of the marital rape exception unresolved[50]. Justice Shakdher struck down the exception under Articles

48 Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. Democracy 70 (2007). Mehta argues that the proclamation of rights by courts does not, on its own, produce results, and that assessments of the judiciary too often rest on a handful of success stories rather than evidence of effect.

49 RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

50 RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404 (India). The appeal to the Supreme Court remains pending. The marital rape exception was contained in Exception 2 to Section 375 of the Indian Penal Code, 1860, and now appears, with the relevant age raised to eighteen, in Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code with effect from 1 July 2024. The age threshold was read as eighteen in Independent Thought

14, 15, and 21, whereas Justice Hari Shankar upheld it, asserting that marriage constitutes an intelligible differentia justifying distinct treatment under criminal law. Shraddha Chaudhary's critical analysis identifies the core analytical flaw in Justice Hari Shankar's reasoning: it substituted a discourse on the sanctity of marriage for the actual constitutional inquiry, whether a married woman retains an enforceable right to bodily integrity and sexual autonomy[51] . The matter is under adjudication with the Supreme Court. The definitive ruling from the judiciary is awaited as the current situation denies a married woman criminal protection in a domain that Puttaswamy[52],explicitly mandates it.

There have been strikingly incongruent rulings seen in the jurisprudence. Where, on one hand, the judiciary recognised absolute reproductive autonomy for women in *X v. Principal Secretary*, it simultaneously has been tolerant on the issue of sexual violence within the institution of marriage. However, in the core, the constitutional question is similar in both scenarios. From a gender rights perspective, these incongruent rulings necessitate an urgent course correction from the judiciary. On one hand, the Court gave women reproductive autonomy; on the other it has continued to allow husbands legal immunity from rape within marriage. The constitutional question in both cases is the same. The Court answered it clearly in one context and avoided it in the other. From a gender justice perspective this is not a constitutional limitation. It is an institutional choice, and one that still needs to be revisited.

Constitutional Ambiguity and the Implementation Gap

State of Bombay v. Narasu Appa Mali[53] has endured on the books for over seven decades and remains intact. Justice Nariman's opinion in Shayara Bano came exceptionally close to unsettling it, dismantling the core logic on which the doctrine rested yet stopped short of a formal overruling[54]. As a result, personal law practices that could not survive Part III scrutiny if enacted as ordinary legislation continue to persist in a constitutional twilight zone. While the Supreme Court has demonstrated an increasing willingness to subject personal law to constitutional values in practice,

v. Union of India, (2017) 10 SCC 800 (India), but the broader exception for adult married women remains in force.

51 Chaudhary, *supra* note 45, at 77-79.

52 K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

53 *Shah Bano*, AIR 1985 SC 945; Muslim Women (Protection of Rights on Divorce) Act, 1986.

54 *Shayara Bano*, (2017) 9 SCC 1. Nariman J. declined to formally set aside Narasu, observing that the question of its continuing validity should be examined in a suitable case. No such case has yet provided the occasion for a definitive overruling.

judicial willingness without an explicit overruling leaves the doctrine vulnerable to challenge and a doctrine subject to ongoing debate is fundamentally distinct from settled law.

The concept of transformative constitutionalism can also be analysed through a comparative lens between India and South Africa. South Africa enforced its constitution in a similar situation to that of India, which included vibrant customary laws in practice, influential traditional authorities and constitutional provisions safeguarding cultural & religious rights on one hand and equality on the other. The judiciary in the case of *Bhe v. Magistrate*[55], Khayelitsha, invalidated the customary rule of male primogeniture in intestate succession for violating rights to equality and dignity. In this instance, the judiciary established that though the customary laws are protected within the Constitution, they are not above the fundamental rights of equality. Thereby, bringing all the customary and personal laws under the ambit of constitutional review, which is also seen to be happening in Indian jurisprudence. Although this has to be also seen in the context of South Africa's history, where the post-apartheid constitution was drafted with a specific aim to subordinate the customary laws to the bill of rights. On the other hand, in the context of the Indian constitution, the right to freedom of religion under Article 25 is more guaranteed as compared to the unenforceable Uniform Civil Code as part of a Directive Principle under Article 44. Yet this textual divergence is narrower than it seems. The structural immunity granted to personal law in India derives not from the constitutional text itself, but from Narasu, a High Court precedent, which the Supreme Court has never formally affirmed and whose analytical core Justice Nariman thoroughly dismantled in Shayara Bano case.

The constitutional capacity to subject personal law to equality exists in India as it did in South Africa. The difference lies in the will of the stakeholders to use it. The gap seen in Indian context is a result of political caution for electoral gains and judicial reticence and is not completely a constitutionally framed limitation. The review of personal laws with respect to fundamental rights exists in India similar to South Africa. Therefore, the judicial & political intent is necessary to exercise this will. Ultimately, this comparative exercise indicates that the persistent immunity of personal law is an artefact of political caution and interpretive reticence. A further disconcerting scenario than the constitutional implementation can be seen in the procedure of the two-finger test followed in the case of rape survivors. Supreme

55 Bhe and Others v. Magistrate, Khayelitsha and Others, 2005 (1) SA 580 (CC) (S. Afr.)

court of India held it unconstitutional in 2013 as it violated the fundamental rights to dignity and bodily integrity of women under Article 21[56]. However, a decade later, in a 2022 judgment, the court had to reiterate this prohibition as this practice continued in clinical settings[57]. From a gender rights perspective, this doesn't indicate a minor failure in the implementation but signifies the absence of constitutional transformation that never reached the clinics & examination rooms and kept women devoid of gender justice. Without enforcement, without institutional change, without people on the ground who actually follow what the law says, the words on paper can't bring changes on the ground leading to gender equality.

V. Political Resistance and Public Sentiment

The fallout from Shah Bano established a recurring pattern of legislative resistance that warrants close analysis. Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act 1986 not out of legal necessity, but in response to widespread communal anxieties that viewed judicial intervention as an assault on personal law and religious identity. Despite commanding a substantial parliamentary majority, the government deferred to popular backlash over constitutional principle. The Muslim Women (Protection of Rights on Marriage) Act 2019 operated through a related yet distinct logic[58]. Rather than overriding a judicial decree, Parliament instrumentalised the Court's declaration of nullity in Shayara Bano by imposing criminal sanctions a measure feminist scholarship criticized as misdirecting state power and ultimately disempowering the women it purported to protect[59]. The dynamic in both instances reveals a persistent institutional tension: when constitutional adjudication advances beyond prevailing social consensus, the political establishment routinely prioritizes electoral and majoritarian considerations over transformative constitutional mandates.

The executive branch's persistent opposition to criminalizing marital rape reflects a similar socio-political calculation. The defense that criminalization would 'destabilize the institution of marriage' lacks constitutional grounding; yet, it accurately mirrors

56 Lillu @ Rajesh v. State of Haryana, (2013) 14 SCC 643 (India).

57 State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai, (2022) SCC OnLine SC 1494 (India). The Court reiterated the prohibition after finding the test had continued to be administered despite the 2013 ruling, illustrating the gap between constitutional pronouncement and institutional practice.

58 Shah Bano, AIR 1985 SC 945; Muslim Women (Protection of Rights on Divorce) Act, 1986.

59 Muslim Women (Protection of Rights on Marriage) Act, 2019. For the feminist critique of criminalisation as a response to triple talaq, *see* Fayiza, *supra* note 15, at 131-134; *see also* Mandal, *supra* note 12, at 105-107.

a traditional view of marriage still held by significant segments of Indian society[60]. While the judiciary has demonstrated a willingness to challenge majoritarian norms as evidenced by Sabarimala and Joseph Shine, legislatures remain inherently tied to popular sentiment. The state's resistance to marital rape reform is thus better understood through the lens of electoral caution than simple institutional bad faith.

This societal friction also explains why Article 44 has remained an unrealised Directive Principle across successive administrations[61] . The personal law system endures not because the constitutional text insulates it, but because a popular consensus to dismantle it has yet to materialize. Article 44 serves as a persistent reminder of how deeply the transformative constitutional project relies on the gradual pace of societal evolution rather than judicial declarations alone. None of these impediments are permanent. Because they stem from social sentiment and political alignment rather than immutable constitutional design, they remain subject to change. The doctrinal tools are firmly established, and the constitutional path is clear; the transformative work that remains must now unfold beyond the courtroom.

VI. Conclusion

India has travelled a significant distance from its founding, and across all the contradictions of a developing democracy, that progress remains undeniable. The Constituent Assembly did not incorporate equality and dignity into the Constitution as abstract ideals. Dr. B. R. Ambedkar and his contemporaries recognized that these principles had to translate into tangible social conditions into how women live, labour, exit marriages, hold property, and worship. For over three-quarters of a century, the Constitution has anchored that commitment, even as courts, legislatures, political parties, and communities have resisted its reach at various junctures. Puttaswamy was not the first instance of the Supreme Court correctly adjudicating gender rights; rather, it was the moment the Court established the analytical architecture necessary to sustain doctrinal consistency. Following Puttaswamy, individual dignity, personal autonomy, and bodily integrity ceased to be ad hoc, case-by-case arguments and coalesced into foundational constitutional guarantees. That structural shift is the

60 Law Commission of India, Review of Rape Laws, Report No. 172 (2000); Law Commission of India, Marital Rape, Report No. 205 (2008). The 2008 report declined to recommend removal of the marital rape exception, citing the need to protect the institution of marriage.

61 India Const. art. 44. As a Directive Principle under Part IV, it is not enforceable by any court but is described in Article 37 as fundamental to governance and as the duty of the state to apply in making laws.

true legacy of post-2017 jurisprudence.

The post-Puttaswamy[62] jurisprudence did not unfold along a uniform trajectory. Shayara Bano[63] fractured in its reasoning, Joseph Shine[64] achieved unanimous consensus, Sabarimala[65] provoked intense public contestation and review, Lt. Col. Nitisha[66] fundamentally redefined the Court's approach to substantive inequality, and X v. Principal Secretary[67] extended reproductive autonomy to unmarried women. Yet what unites these disparate decisions is a shared analytical orientation: each operates from a common constitutional foundation anchored in individual dignity, bodily integrity, and personal autonomy, a foundation definitively settled in August 2017.

Since its founding, India's society has come a long way, and the Constitution has served as a central catalyst for it. The judiciary has encountered societal resistance, procedural delays, and political friction along the way, which signifies not institutional inertia, but the ongoing vitality of the constitutional project. Since independence, the chasm between constitutional principles and lived social realities has narrowed dramatically, rendering the gap negligible in several key domains. The structural limitations highlighted in this study the persistent vitality of Narasu[68], the continued deferral of marital rape reform, and the implementation failure separating judicial declarations from clinical practice are challenging. Yet none of these impediments is inherent to constitutional design. They remain the artifacts of social conditions and political calculations contingencies that remain inherently capable of transformation.

In the Indian context, transformative constitutionalism remains an enduring project, precisely as conceptualized by Karl Klare[69] and expanded in Indian legal scholarship by Gautam Bhatia[70]. The Supreme Court's jurisprudence since Puttaswamy reveals a structural coherence that was absent for decades. The record is by no means flawless: judicial retreats have occurred, and institutional hesitations will undoubtedly reemerge. Yet the Court has pursued a transformative trajectory with

62 K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

63 Shayara Bano v. Union of India, (2017) 9 SCC 1.

64 Joseph Shine v. Union of India, (2019) 3 SCC 39.

65 Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1.

66 Lt. Col. Nitisha v. Union of India, (2021) 15 SCC 125.

67 K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

68 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

69 Fredman, *supra* note 8.

70 Lt. Col. Nitisha v. Union of India, (2021) 15 SCC 533.

greater analytical consistency. The doctrinal and enforcement gaps identified in this study are formidable, but they do not negate the fundamental evolution that has taken place. The Court has established its constitutional destination; the ongoing imperative is to sustain the journey.



VIPS
योगः कर्मसु कौशलम्
IN PURSUIT OF PERFECTION

NAAC Accredited A++ Grade 3.58/4

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES-TC (VIPS-TC)

AU Block (Outer Ring Road), Pitampura, Delhi-110034
Nearest Metro Station – Pitampura (2 KM) & Haiderpur (0.5 KM)
Website : www.vips.edu, www.dsb.edu.in
Tel.: +91 11 27343401 / 02 / 03, Fax : +91 11 27343404
E-mail : vslls.clrd@vips.edu