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Introduction: the Indian feminist judgements project

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The Indian Feminist Judgements Project (IFJP) is a collaboration between feminist scholars, practitioners, and activists, drawn from law and other disciplines, who are using a feminist lens to write alternative opinions to existing judgements. The aim of this project is to critically examine judicial archives using feminist tools. The project aspires to be a blueprint for alternative feminist futures of juridical practices and critical lawyering. This special issue of the Indian Law Review presents a set of six re-written judgements and accompanying commentaries that were prepared as part of the IFJP.

IFJP is inspired by similar efforts in other jurisdictions. The precursor to the present trend of feminist rewriting of judgements is the setting up of the *Women's Court of Canada* in 2004.¹ This was a collaborative project by Canadian feminist scholars, activists and lawyers who rewrote Canadian Supreme Court decisions on section 15, the equality clause in the Canadian Charter of Rights and Freedom. The goal of this “shadow judgment” project was to explore what substantive equality could look like in judicial expression. The Canadian experiment was repeated in the UK, Australia, the USA, New Zealand, Ireland and Northern Ireland.² Taking a leaf from its sister projects, IFJP imagines the possibilities of collaboratively writing alternative feminist judgements for landmark Indian cases across a broad range of legal issues such as substantive equality, sexual autonomy and consent, employment discrimination, religious freedom, legal pluralism, and law's relation to indigeneity, disability, and caste, among others.

Feminist scholarship in India has extensively explored how legal rules and their application by the courts continue to remain sites of embedded patriarchy.³ IFJP builds upon this literature by translating the vast body of feminist legal theory into practice by rewriting the

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¹Diana Majury, 'Introducing the Women's Court of Canada', (2006) 18(1) Canadian Journal of Women and the Law 1.

²See e.g. Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgements: From Theory to Practice* (Hart 2010); Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgements: Righting and Rewriting Law* (Hart 2014); Kathryn M. Stanchi, Linda L. Berger, Bridget J. Crawford (eds), *Feminist Judgements: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press 2016); Máiréad Enright, Julie McCandless, Aoife O'Donoghue (eds), *Northern / Irish Feminist Judgements: Judges' Troubles and the Gendered Politics of Identity* (Hart 2017); Elisabeth McDonald, Rhonda Powell, Mamari Stephens, Rosemary Hunter (eds), *Feminist Judgements of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart 2017); Sharon Cowan, Chloë Kennedy, Vanessa E Munro (eds), *Scottish Feminist Judgements: (Re)Creating Law from the Outside In* (Hart 2019); Loveday Hodson, Troy Lavers (eds), *Feminist Judgements in International Law* (Hart 2019).

³See e.g. Usha Ramanathan, 'Images (1920–1950): Reasonable and the Man, Reasonable Woman and Reasonable Expectations', in Amita Dhanda and Archana Parashar (eds), *Engendering Law – Essays in Honour of Lotika Sarkar* (Eastern Book Company 1999); Veena Das, 'A Child Disappears: Law in the Courts, Law in the Interstices of Everyday Life' (2019) 53 (1) Contributions to Indian Sociology 97–132; Srimiti Basu, 'Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India', (2012) 37 (2) Signs 469–492; Mayur Suresh, 'Law and the Vulnerable State: Legal Language in Terrorism Trials in Delhi's Courts', (2016) 46 (2) Indian Anthropologist 35–51; Gee Imaan Semmalar, 'Re-Cast(e)ing Navtej Singh v. Union of India', (2020) 13 (3) NUJS Law Review; Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014); Kalpana Kannabiran, 'Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India', (2009) 44 Economic and Political Weekly 88–98.

judicial archive through a feminist lens. These “alternative judgments” or “missing judgments” or “dissenting opinions” reveal how cases could (and should) have been decided from a feminist perspective while remaining faithful to the legal and constitutional limitations under which the original judgement was written.

IFJP has taken a conscious decision to rewrite judgements in a way that stays within the bounds of the extant law and expectations of judicial role and discipline at the time that the original judgement was delivered. While such an approach blunts some of the radical potential of feminist imaginations of and for the law, it allows us to explore and expose the contingent nature of legal rules, the discretion available to adjudicators to read in meaning into them, and thus question the objectivity and neutrality claimed by and for the judicial process. Indeed, the express acknowledgement of the ideology of feminism that undergirds this project is a counter to law’s claims to neutrality and universalism.⁴

Like other feminist judgement projects, IFJP is not only a form of scholarship but a political, socio-legal movement to rethink judicial/legal reasoning, processes, and outcomes from a feminist perspective. At the heart of the project are a set of basic questions – can we formulate a distinctively feminist judicial practice? If so, what are the possibilities of and limitations to such an approach? In what manner does this approach differ from the common law approach that Indian courts take? In answering these questions, IFJP aims to bridge the distance between feminist theory and praxis by re-imagining judicial outcomes while remaining faithful to the same constitutional and legal rules that bind the judge in the original case that is being rewritten.

The project does not have a singular understanding of what feminism means and requires, particularly in its engagement with the law. Additionally, while the IFJP is committed to gender as the key analytic in rewriting the judgements, it is also cognizant of the multiple axes of identity that shape legal subjectivity. For this reason, the project adopts an intersectional approach, informed by a commitment to feminist ideals of reflexivity, consciousness of power, privilege, and marginality.

This is the background to this special issue of the *Indian Law Review*. The contributions to this volume are a small selection of rewritten judgements and commentaries that were prepared as part of the IFJP. Each contribution comprises a re-written judgement and a commentary. The re-written judgement is a hypothetical opinion by a feminist judge on the original bench that decided the case. The commentary locates the original judgement in its wider political, social, historical and legal contexts, and explores the normative, legal, and other challenges in re-writing the original judgement. It explains and reflects on what the re-written opinion does differently from the original opinion/s and why. Where relevant, the commentary also explains subsequent developments and how they reflect on the choices made by the original and re-written judgement.

The hypothetical feminist judge is bound temporally and normatively to the context of the original judgement. In some cases, such as in the re-writing of *Dadaji Bhikaji v Rukhmabai*,⁵ an 1886 Bombay High Court judgement on the restitution of conjugal rights, this requirement to be faithful to the legal and social contexts of the late 19th century placed significant constraints on the authors’ ability to make use of the legal

⁴See generally, Sandra Harding, ‘Introduction: Is There a Feminist Method?’ in Sandra Harding (ed), *Feminism and Methodology* (Indiana University Press 1988); Katherine Bartlett, ‘Feminist Legal Methods’, (1990) 103(4) *Harvard Law Review* 829.

⁵(1886) ILR 10 Bom 301.

vocabulary and social consciousness of the 20th and early 21st centuries, or even the emancipatory language of the Constitution, in re-writing the judgement from a feminist lens. Nonetheless, within the bounds of legal rules available at the time of the original judgement, the authors, Kanika Sharma, Laura Lammasniemi and Tanika Sarkar, offer an alternative view of the doctrine of restitution of conjugal rights that centres consent to marriage and within marriage in the application of this doctrine. One hundred and thirty-five years after this case was originally decided, the Supreme Court of India is about to begin hearings on a challenge to the constitutionality of the doctrine of restitution of conjugal rights, making this judgement rewriting exercise directly relevant to the present context.⁶

Another case pending before the Supreme Court is the review of its judgement in the matter of temple entry for women of menstruating age in the Sabarimala temple.⁷ Saumya Uma's re-written opinion and commentary in the 1991 Kerala High Court judgement on this issue, *S. Mahendran v The Secretary, Travancore Devaswom Board*,⁸ dissents from the original judgement, and argues that in its reasoning, the High Court consistently overlooked women's right to equality and dignity, and their right to freedom of religion, even though the legal tools to do so were available to the Court at that time. As the Supreme Court continues to grapple with adjudicating this case, and with broader issues at the intersection of women's rights and the freedom of religion, this re-written judgement and accompanying commentary provide a feminist lens to address these concerns. This piece benefited from a close collaboration with Deepa Das Acevedo, who was an initial co-author on the piece with Saumya Uma.

A feminist critique and reconceptualization of judgements focuses not only on different judicial outcomes in decided cases, but equally on judicial reasoning, as well as judicial engagement with facts and processes, and the appreciation of evidence from a feminist lens. The importance of feminist approaches to the entirety of the judicial craft is demonstrated in Rohini Thyagarajan, Tejasvini Puri, and Preeti Pratishruti Dash's rewriting of *Raja v State of Karnataka*,⁹ a Supreme Court judgement regarding Raja and others' appeal against conviction for rape. By deploying a feminist lens to questions of evidence, the rewritten judgement explores how judicial narratives build upon rape myths and gender stereotypes to police women's behaviours and make their rights contingent upon gender conformity.

The theme of laws' espousal and entrenchment of gender and sexual stereotypes also runs through Shreya Atrey and Gauri Pillai's re-writing of *Air India v Nergesh Meerza*,¹⁰ and Douglas McDonald-Norman and Anindita Pattanayak's rewriting of *State of Uttar Pradesh v Kaushaliya*.¹¹ Atrey and Pillai re-write *Nergesh Meerza* to undo the Court's attenuated understanding of equality and non-discrimination that does not account for discrimination based on gender stereotypes, and forecloses the possibility of protection against intersectional discrimination. *Kaushaliya* involved the assertion of the fundamental rights by sex workers against officials who sought to remove them from the

⁶*Ojaswa Pathak v Union of India* WP(C) 250/2019.

⁷*Kantaru Rajeevaru v Indian Young Lawyers' Association* 2019 SCC OnLine SC 1461.

⁸AIR 1993 Ker 42.

⁹(2016) 10 SCC 506.

¹⁰AIR 1981 SC 1829.

¹¹AIR 1964 SC 416.

locality where they lived and worked. In dissenting from the original judgement, McDonald-Norman and Pattanayak take issue with the gendered assumptions regarding sexual behaviour and work that undergird the Court's reasoning.

Feminist legal analysis is not only about centring women and their lived experiences in legal discourse, but also about uncovering and querying how laws manifest and distribute power in society, thereby producing or entrenching power differentials that further marginalization and oppression. As such, facially neutral rules that do not at first glance appear to touch upon "women's issues" can benefit from feminist engagement with discourses on power. Sannoy Das and Ananyaa Mazumdar's rewriting of *Charan Lal Sahu v Union of India*,¹² builds on this insight. In this case, the Supreme Court grappled with the aftermath of the Bhopal Gas Leak Tragedy. Dissenting from the original judgement, Das and Mazumdar provide a feminist critique of the judicial methods deployed in the original judgement, as well as of the doctrinal formulations, such as the *parens patriae* doctrine, upon which the original judgement was based.

The IFJP is a collaborative enterprise between all the contributors to this project. As such, all the contributions in this volume have benefitted from extensive and generous feedback during two workshops – one on feminist methodologies and another a writer's workshop – conducted in 2018 as part of this project.

¹²(1990) 1 SCC 613.