SYMPOSIUM: INDIAN FEMINIST JUDGMENTS PROJECT

Righting Together: An Introduction to the Indian Feminist Judgments Project

By *Aparna Chandra*,* *Jhuma Sen*,** and *Rachna Chaudhary****

A. Introduction: Judging while Feminist

The figure of the judge looms large in legal theories of the common law world, with Ronald Dworkin's 'Hercules' being perhaps the best-known example.[1] Formal,[2] positive,[3] realist,[4] process-oriented,[5] or critical[6] - theories of law that share divergent and even opposing views on the nature of law and the legal system are nonetheless concerned with what the judge does, how, why, and with what consequences, in thinking about the law and legal methods. So also, in thinking about the nature of law, and its application to concrete cases, law students and scholars often embody the perspective of a hypothetical ideal judge

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1 *Ronald Dworkin,* Taking Rights Seriously, Cambridge 1977, ch. 4. For a feminist critique of the Herculean judge see, *Erika Rackley*, Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor, Legal Studies 22 (2002), p. 602.

2 See e.g., *Thomas Grey*, Langdell's Orthodoxy, University of Pittsburgh Law Review 45 (1983), p. 1; *Frederick Schauer*, Formalism, Yale Law Journal 97 (1988), p. 509.

3 See e.g., *HLA Hart*, Concept of Law, Oxford 2012, ch. 7.

4 See e.g., *Karl N. Llewellyn*, Jurisprudence: Realism in Theory and Practice, Chicago 1962; *Jerome Frank*, Are Judges Human?, University of Pennsylvania Law Review 80 (1931), p. 17; *Max Radin*, The Theory of Judicial Decision: Or How Judges Think, American Bar Association Journal 11 (1925), p. 357; *Benjamin N. Cardozo*, The Nature of the Judicial Process, New Haven Press 1921.

5 See e.g., *Henry Hart jr. et al.*, The Legal Process: Basic Problems in the Making and Application of Law, Westbury 1994.

6 See e.g., *Duncan Kennedy*, A Critique of Adjudication, Cambridge 1997; *Alan C. Hutchinson (ed.)*, Critical Legal Studies, Lanham 1989.

tasked with adjudicating disputes. Learning to 'think like a lawyer' thus often requires law students to learn to think like (the ideal) judge.[7]

How should feminist legal theories (re-) imagine the figure and role of the judge, and therefore of the nature of the legal enterprise itself? Would a feminist judge inhabit the same role, the same "disinterested, disengaged, and distant" attitude towards adjudication as a conventional judge?[8] Or do feminist legal theories require constructing alternative approaches to judging?[9] This is the central question animating the Indian Feminist Judgments Project.

B. The Indian Feminist Judgments Project (IFJP): Occupying Judging, Reclaiming Law

The Indian Feminist Judgments Project (IFJP) investigates the question of feminist judging by imagining ourselves as missing feminist judges on benches that have delivered judgments in the past. We ask: how might a feminist judge have adjudicated the matter? This requires further investigation into the role of the judge, judicial methods and processes, and the procedural and substantive rules applicable to a case. Our missing judges are temporally located within the legal worlds (but not the worldviews) inhabited by the original judges and are bound by the existing law available to judges on the original bench. This location allows us to understand the discretion that was available to the original judges and how this discretion was exercised in the service of upholding gendered power relations. We thus aim to look beyond the "mystification of choice, controversy, and ideology in adjudication,"[10] and "question the objectivity and neutrality claimed by and for the judicial process."[11]

Beyond the judicial process, the project also allows us to excavate the gendered assumptions and effects of apparently rational, neutral, and objective legal rules and decisions. Our project is thus located within the tradition of critical feminist theories of law, which understand law (and adjudication) to be political, contingent, non-objective,

7 *Kennedy*, note 6, pp. 365-367 (discussing how law students are socialized into "thinking like a lawyer" by thinking that there are neutral, non-ideological, right answers to every legal problem, which can be discovered by the application of autonomous and rational legal principles regardless of the personal or political convictions of the decision maker).

8 *Brenda Hale*, Maccabaean Lecture in Jurisprudence: A Minority Opinion?, Proceedings of the British Academy 154 (2008), p. 320.

9 See e.g., *Rosemary Hunter*, Can *Feminist* Judges Make a Difference? *International Journal of the Legal Profession 15* (2008), p. 7.

10 *Kennedy*, note 6, p. 4.

11 *Aparna Chandra / Jhuma Sen / Rachna Chaudhary*, Introduction: The Indian Feminist Judgements Project Indian Law Review 5 (2021), p. 261.

non-neutral, and deployed in the service of maintaining the status quo of gendered power relations.[12]

Occupying the position of a missing feminist judge also enables us to bridge the theory and practice of law and "critically examine judicial archives using feminist tools."[13] Following Ann Stoler, we view this judicial archive not only as a source of information about legal and juridical practices. Rather, we adopt the lens of 'archive-as-subject,'[14] as a 'repository of codified beliefs,'[15] that produces specific forms of knowledge about the law and about social relations, and justifies and legitimates forms of state and social power. We examine what constitutes this archive, what is absent, *who* are absent (or present but invisible), and how it produces knowledge that codifies and constitutes the "common sense" of the law,[16] in ways that reinforces the "exclusion of women from legal subjectivity."[17]

The project also "aspires to be a blueprint for an alternate feminist future of juridical practices and critical lawyering."[18] Thus, we aim not only to critique but also to occupy and reshape the law through a project of "purposive reconstruction"[19] by injecting feminist

12 See generally, *Sandra Harding*, Introduction: Is There a Feminist Method?, in: Sandra Harding (ed.), Feminism and Methodology, Bloomington 1988; *Katherine Bartlett*, Feminist Legal Methods, Harvard Law Review 103 (1990), p. 829. On Critical Feminist Legal theories, see *Frances Olsen*, The Family and the Market: A Study of Ideology and Legal Reform, Harvard Law Review 96 (1983), p. 1497; *Janet Rifkin*, Toward A Theory of Law and Patriarchy, Harvard Women´s Law Journal 3 (1980), p. 83; *Lucinda M. Finley*, Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate, Columbia Law Review 86 (1986), p. 1118; *Ann Freedman*, Sex Equality, Sex Differences, and the Supreme Court, Yale Law Journal 92 (1983), p. 913; *Chris Littleton*, Reconstructing Sexual Equality, California Law Review 75 (1987), p. 1267; *Catharine MacKinnon*, Feminism, Marxism and the State: An Agenda for Theory, Signs 7 (1982), p. 515; *Catharine MacKinnon*, Feminism, Marxism, Method and the State: Toward Jurisprudence, Signs 8 (1983), p. 635; *Frances Olsen*, Statutory Rape: A Feminist Critique of Rights Analysis, Texas Law Review 63 (1984), p. 387; *Ann Scales*, The Emergence of Jurisprudence: An Essay, Yale Law Journal 95 (1986), p. 1373; *Nadine Taub / Elizabeth Schneider*, Perspectives on Women's Subordination and the Role of Law, in: David Kairys (ed.), The Politics of Law: A Progressive Critique, New York 1982, p. 117.

13 *Chandra et al*., note 11, p. 261.

14 *Ann Laura Stoler*, Colonial Archives and the Arts of Governance, Archival Science 2 (2002), p. 87.

15 Ibid.

16 *Patricia Cochran*, Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice,McGill-Queen's University 2017. For a critique of perhaps the most used common sensical device in common law - the reasonable man - see *Usha Ramanathan*, Images (1920-1950): Reasonable Man, Reasonable Woman and Reasonable Expectations, in: Archana Parasher / Amita Dhanda (eds.), Essays in Honour of Lotika Sarkar, Lucknow 2007, pp. 33-70.

17 *Rosemary C. Hunter/ Clare McGlynn/ Erika Rackley*, Feminist Judgments: An Introduction, in: Rosemary C Hunter/ Clare McGlynn/ Erika Rackley (eds.), Feminist Judgments: From Theory to Practice, United Kingdom 2010, p. 8.

18 *Chandra et al.*, note 11, p. 261.

19 *Ann Scales*, Feminist Legal Method: Not So Scary, UCLA Women's Law Journal 2 (1992),p. 4.

consciousness into the law.[20] In common with 'outsider jurisprudence,' we adopt an attitude towards the law which is

> *"not necessarily nihilist. It accepts the standard teaching of street wisdom: law is essentially political. It accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence. ....[I]t is jurisprudence recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity."*[21]

Consistent with this goal, one ambition of the project is therefore explicitly pedagogical: to demonstrate by example the contingent and underdetermined nature of legal rules and juridical methods, and therefore the possibility of feminist praxis within the bounds of existing legal and judicial practice. This ambition has shaped many design choices behind the project. We have chosen to locate our missing judges within the same legal and judicial limitations that were applicable to the judges on the original benches. They are expected to operate within the constraints of the legal rules and accepted norms of judicial practice as prevalent at the time of the original decision. Our authors do not take any singular view of feminism. Each rewritten judgment has an accompanying commentary that locates the original judgment in its socio-political and legal context, describes the consequences and subsequent trajectory of the case and its dicta, and highlights and analyzes the particularities of the feminist imaginations of the rewritten judgment.

C. IFJP as Feminist Praxis: Subversion or Submission?

Our design choices of course place serious limitations on feminist possibilities in and through the law. Feminist scholars have had divergent perspectives on the value of engaging with the law. While they all recognize the law as a site of embedded patriarchy,[22] some reject the possibility of subverting the law for feminist purposes, and make the case for exploring feminist futures outside the framework of the law.[23] Others see the possibility of law as a "subversive site" which retains at least some space for negotiating feminist outcomes.[24] The framing of our project necessarily aligns itself with the latter view. Even within this approach, however, the choice of working within existing rules and legal/juridical cultures, and centring the authoritative figure of the judge, blunts the radical

20 *Pearl Green*, The Feminist Consciousness, Sociological Quarterly 20(3) (1979), p. 359.

21 *Mari J. Matsuda*, Public Response to Racist Speech: Considering the Victim's Story, Michigan Law Review 87 (1989), p. 2324.

22 See e.g., *Kalpana Kannabiran*, Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India, Economic and Political Weekly 44 (2009), pp. 88–98.

23 See e.g., *Carol Smart*, Feminism and the Power of Law, London 1989.; *Nivedita Menon*, Recovering Subversion: Feminist Politics Beyond the Law, Illinois 2004.

24 See e.g., *Ratna Kapur/ Brenda Cossman*, Subversive Sites: Feminist Engagements with Law in India, Calfornia 1996.

possibilities of feminist legal theories.[25] Consistent with the aims and ambitions of this project, ours is then an incrementalist, rather than radical approach to engaging with the law, which "irritates" rather than fundamentally disrupts legal norms and premises.[26]

However, albeit limited, subversive possibilities remain available even within our approach, since, as similar projects elsewhere have recognized, "[b]y appropriating judgment - writing for feminist purposes the judgment writers engage in a form of parodic – and hence subversive – performance. … [feminists] dressed up as judges powerfully denaturalise existing judicial and doctrinal norms, exposing them as contingent, and as themselves (the product of) performances."[27]

D. IFJP in a Comparative Perspective: Same, Same but Different

The Indian Feminist Judgments Project is inspired by, and has been in conversation with, similar projects in other jurisdictions that use rewriting judgments as a method of undertaking feminist critique(s) of the law and its workings.[28] Like many of our sister projects, IFJP also brings together legal practitioners, activists, as well as scholars from diverse disciplinary backgrounds to rewrite judgments from feminist perspectives.

Our interdisciplinary approach to judgment writing is consistent with our understanding that legal narratives, processes, and institutions are constructions of the larger social context and hence reflect existing biases, stereotypes, and social hierarchies in their functioning.

25 See, *Hunter et al*., note 17, p. 9. (grappling with similar concerns).

26 *Máiréad Enright*/ *Julie McCandless*/ *Aoife O'Donoghue* (eds.), Northern/Irish Feminist Judgements: Judges' Troubles and the Gendered Politics of Identity, United Kingdom 2017, p. 7.

27 *Hunter et al*., note 17, p. 8.

28 *Diana Majury*, Introducing the Women's Court of Canada Canadian Journal of Women and the Law 18(1) (2006), p. 1;. *Hunter et al*., note 17; *Heather Douglas*/ *Francesca Bartlett*/ *Trish Luker*/ *Rosemary Hunter* (eds.), Australian Feminist Judgments: Righting and Rewriting Law, United Kingdom 2014; *Kathryn Stanchi*/ *Linda Berger*/ *Bridget Crawford* (eds.), Feminist Judgments: Rewritten Opinions of the United States Supreme Court, Cambridge 2016; *Enright et al*., note 26; *Elisabeth McDonald*/ *Rhonda Powell*/ *Mamari Stephens*/ *Rosemary Hunter* (eds.), Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope, United Kingdom 2017; *Sharon Cowan*/ *Chloë Kennedy*/ *Vanessa E Munro* (eds.), Scottish Feminist Judgments: (Re)Creating Law from the Outside In, United Kingdom 2019; *Loveday Hodson*/ *Troy Lavers* (eds.), Feminist Judgments in International Law, United Kingdom 2019; *Deborah S. Gordon*/ *Browne C. Lewis*/ *Carla Spivack* (eds.), Feminist Judgments: Rewritten Trusts and Estates Opinions, Cambridge 2020; *Martha Chamallas*/ *Lucinda M. Finley* (eds.), Feminist Judgments: Rewritten Tort Opinions, Cambridge 2020; Bennett Capers/, Sarah Deer/ Corey Rayburn Yung (eds.), Feminist Judgments: Rewritten Criminal Law Opinions, Cambridge 2022; *Kimberly Mutcherson* (ed.), Feminist Judgments: Reproductive Justice Rewritten, Cambridge 2020; *Rachel Rebouché* (ed.), Feminist Judgments: Family Law Opinions Rewritten, Cambridge 2020; Ann C. McGinley/ Nicole Buonocore Porter (eds.), Feminist Judgments: Rewritten Employment Discrimination Opinions, Cambridge 2020; Eloisa C. Rodriguez-Dod/ Elena Maria Marty-Nelson (eds.), Feminist Judgments: Rewritten Property Opinions, Cambridge 2021; Seema Mohapatra/ Lindsay F. Wiley (eds.), Feminist Judgments: Health Law Rewritten, Cambridge 2022; Anne M. Choike/ Usha R. Rodrigues/ Kelli Alces Williams (eds.), Feminist Judgments: Corporate Law Rewritten, Cambridge 2023.

We have therefore made a conscious effort to make space within the project for diverse social science disciplines to speak to each other in the judgments and commentary. This form of collaboration is a critical aspect of our project—the aspirational part about 'righting together' that the Indian project tries to articulate. Consistent with our collaborative and interdisciplinary approach, we have retained the format used by some other projects of pairing each rewritten judgment with a commentary that locates the original judgment in its larger social context, explains the doctrinal significance of the judgment, and analyses the different approaches, methods, and choices made in the feminist judgment.[29]

While our broad aims and approaches align with other feminist judgment projects around the world, we are also distinct in certain ways. While some projects have included a few fictitious appeals,[30] or reviews before fictional Tribunals,[31] we have limited ourselves to writing as fictional judges on the original bench of actual cases since this aligns better with our purpose of examining feminist alternatives that were possible at the time when the original judgment was written.

Some projects have experimented with different textualities and formats of critical engagements such as the Scottish Feminist Judgments Project which collaborated with artists to create non-textual and non-academic imagery of the legal and juridical processes.[32] The IFJP has so far limited itself to the format of written engagement adhering to the format of a judgment.[33]

The first feminist judgment rewriting project, the Women's Court of Canada, focused on cases under Section 15 of the Canadian Charter of Rights and Freedoms.[34] Subsequently,

29 See e.g., *Hunter et al*., note 17.

30 *Hunter et al*., note 17.

31 *Enright et al.,* note 26.

32 The University of Edinburgh, Scottish Feminist Judgments Project, https://www.sfjp.law.ed.ac.uk/artists/ (last accessed on 17 April 2023).

33 Though we have not yet taken a creative plunge in our outputs, we have tried to mark the contribution of the struggles and experiences of those who created the conditions for projects like these to be taken up, by organizing an exhibition during the two writing workshops that were held to create a support network for the contributors. The exhibition displayed photographs of select women lawyers, judges, and teachers who were pioneers in their field, as well as archival material around Tukaram v. State of Maharashtra, AIR 1979 SC 185, an infamous case of sexual violence that generated a huge public outcry but also resulted in feminist mobilisation during the late 1970s and 80s and led to some progressive changes in the then existing penal provisions related to the offence of rape. We also exhibited photographs from select events and protests from various women's movements in India, mostly around struggles for legal reforms. Through such conscious acknowledgment of our feminist histories, we hoped to recognize the connection of the project with the histories of women's mobilization for justice, and to take forward the tradition of intertwining feminist theory and praxis in re-envisioning law in the Indian context.

34 *Majury*, note 28, p. 1.

a few other such projects have rewritten judgments in specific areas of law.[35] On the other hand, the Australian project has successfully covered a broad range of subject matters by rewriting judgments pertaining to environmental concerns, taxation, immigration, indigeneity, and sovereignty.[36] The IFJP has also followed the practice of engaging with diverse substantive areas in Indian law. While many of our cases do revolve around traditionally 'gendered' areas of law like family law and sexual violence, we have a few judgments from what often appear to be facially neutral laws like tax law, contract, and civil remedies. For example, this volume features a rewritten tax case, *CIT v. Indira Balakrishna,*[37] on how to define a tax unit. On its face, this bland question of tax law has little to do with the general preoccupations of feminist legal theory. However, central to the doctrinal formulation for determining what constitutes a tax unit are questions of volition, agency, and (invisible) labour - central concerns of feminist praxis. Feminist theory can therefore meaningfully intervene in deciding this question. While we aspire to cover more underrepresented areas of feminist legal engagement in India such as intersectional issues of indigeneity, land rights, or a feminist critique of 'state' through examining anti-terror laws and extra-judicial killings, our work in these areas remains at a nascent stage.

The rewritten judgments in the Indian Feminist Judgments Project pertain to appellate court cases, since we did not have access to judgments and case files from trial courts. We would have liked to engage with such case files, since an important element of feminist judging is to reframe the narrative of the case by bringing feminist consciousness to bear on appreciating the evidence, and on deciding which facts are (ir)relevant and which are (im)material.[38] Without access to trial court records, we are constrained in our ability to reframe the narrative, and have to rely only on the facts as presented in the original appellate judgment. Relying only on the final written judgment also flattens out what is a layered judicial process, and limits the possibility of feminist reimagination of court procedures.[39] In this volume, Hadiya's case (*Asokan KM v. Superintendent of Police)*[40] highlights these concerns. Since this case originated in the High Court of Kerala, the authors were able to access interim orders issued in the case. They have interrogated these orders in their rewritten judgment. As the accompanying commentary notes, in the Supreme Court too, while the final judgment spoke the language of rights, the court process leading up to the final judgment continued to deny Hadiya's agency and capacity to be intentional about her own life. These nuances would have been absent if the case records were not available. By

35 See e.g., *Bridget J. Crawford /Anthony C. Infanti* (eds.), Feminist Judgments: Rewritten Tax Opinions, Cambridge 2017; *Hodson / Lavers*, note 28; *Gordon et al.,* note 28.; *Chamallas/Finley*, note 28; *Capers et al*., note 28; *Mutcherson*, note 28; *Rebouché*, note 28; *McGinley/ Porter*, note 28/; *Elena/ Nelson*, note 28; *Mohapatra/Wiley*, note 28 *Choike et al*., note 28.

36 *Douglas et al*., note 28.

37 CIT v. Indira Balakrishna, AIR 1960 SC 1172.

38 *Hunter*, note 9.

39 Our thanks to Mayur Suresh for making this point at one of our writers' workshops.

40 Asokan KM v. Superintendent of Police, (2017) 2 KLJ 974.

and large however, our contributors have relied only on final judgments of the appellate court as the source of information about the case.[41]

Beyond their immediate aspirations, feminist judgment projects are also windows into the legal cultures of the polities in which they are located. By legal cultures we mean the:

> *"professional sensibilities, habits of mind, and intellectual reflexes…the characteristic rhetorical strategies deployed by participants in a given legal setting… their repertoire of recurring argumentative moves… [their understanding of] [w]hat counts as a persuasive legal argument…[the] types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), [that] are deemed outside the professional discourse of lawyers … [the] enduring political and ethical commitments [that] influence professional discourse…. [the] understandings of and assumptions about politics, social life and justice … [the] inarticulate premises, [that] are culturally and historically ingrained in the professional discourse and outlook."*[42]

That feminist judgment projects may be archives of their legal cultures was brought home to us in our interactions with participants from feminist judgment projects in other jurisdictions, where we noted that similar feminist ideals and concerns were articulated differently in the other jurisdictions.[43] These differences reflected distinct approaches to thinking about the law, about the value of substance and process, and about the role of the judiciary, even the different styles of judgment writing, which were consistent with ingrained habits, practices, attitudes, expectations, behaviours, and ways of doing and thinking, that are internalized within the legal profession.

This insight into the specificity of legal cultures raises a range of challenges for feminist judgment projects. To the extent that the conceit of our project is that we are temporally bound by the location of the original judgment, how do we inhabit the legal culture of that

41 An exception is the rewritten judgment in Raja v. State of Karnataka, (2016) 10 SCC 506, where the authors were able to locate the trial court files of the case. See *Preeti Pratishruti Dash* / *Rohini Thyagarajan*/ *Tejasvini Puri*, That's what she said": centring women's testimony in rape trials - re-writing Raja and Ors. v. State of Karnataka (2016) 10 SCC 506, *Indian Law Review* 5(3) (2021),p. 310.

42 *Karl E Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), p. 146.

43 For example, Prof. Rosemary Hunter who has been closely involved in many feminist judgment projects participated in one of our workshops. Our editors have also participated in various conferences around the world on feminist judgments including a workshop titled 'Intersections of Feminist Judgments: The Indian, African and Scottish FJP Workshop' held at the Edinburgh Law School, University of Edinburgh from the 25th to the 26th of July 2019; roundtable titled 'Feminist Judgments Projects in Progress: What's Coming' at the Global Meeting of the Law and Society Association, July 13-16, 2022 at the ISCTE University Institute of Lisbon in Lisbon, Portugal; workshop on 'Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice' held at the International Institute for the Sociology of Law (Oñati, Spain) in May, 2017; and an International Research Collaborative on 'Feminist Judgments Projects' at the Law and Society Association's Annual Conference, 2018.

time, especially when it is far removed from us? To what extent *should* our judgments mirror these often intangible legal cultural norms which may exercise significant constraints on judges' reasonings and judicial outcomes? Should we instead seek to transcend and shift established ways of doing law towards feminist ideals (and if so how do we achieve this when our own socialization into law may be shaped by the legal culture we inhabit?), and could we then claim fidelity to the existing law while exploring feminist outcomes?

While we do not have conclusive answers to these questions, comparative engagements have allowed us to surface cultural assumptions about the law and judging that we may otherwise have taken for granted.[44] At the same time, interdisciplinary collaborations have de-normalized and particularised inarticulate premises about the law that our disciplinary trainings often obfuscate.

Since judicial and academic legal cultures may also vary, as editors of this project, we have also constantly questioned whether the authors of rewritten judgments are sufficiently interrogating their own hypothetical position as wielders of judicial power, which as a form of public power should also be questioned, possibly contained, and at the very least intentionally channelled into feminist directions.

E. What is 'Indian' about the Indian Feminist Judgments Project?

The legal culture within which the IFJP operates is shaped by its geo-political location. We are conscious that we are one of the first feminist judgment projects in the global south. In this sense, within the expanse of feminist judgments projects, we are outliers if not entirely outsiders. This location shapes our project in myriad ways, and has influenced how we interrogate the nature of state, of law, judicial practice, and the specific configurations of state and social power.

In particular, the histories of deployment of state power to further the cause of colonialism, as well as anti-colonial mobilizations against the state and law have shaped our shared understandings of the emancipatory possibilities (and limitations) of state power. In this volume, the rewritten judgment and commentary in *State of West Bengal v. Anwar Ali Sarkar*[45] speak most directly to feminist imaginations for an anti-colonial jurisprudence, which understands coloniality not as a temporal phenomenon, but as methods of deployment of state power in ways that mimic the logic of a colonial state. The rewritten judgment questions what the experience of anti-colonial mobilizations can reveal for how judges should understand their own role in adjudicating rights.

Further, it is trite to say that law shapes, and is shaped by its social context. In response, the specificities of Indian social contexts also frame our understanding of feminist

44 See generally, *William B Ewald*, Comparative Jurisprudence (I): What Was it Like to Try a Rat?, University of Pennsylvania Law Review 143 (1995), p. 1889; (talking about the distinct element of "law in the mind" as an element of comparative jurisprudence, in addition to law in books and law in action).

45 State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

praxis, and how it must navigate the distinct axes of marginalization and the particular entanglements between law and social power in India. For far too long, dominant strands of feminist engagements with the law in India have understood feminism as a reckoning with a single axis of social power – gender.[46] However, this idea of a universal shared experience of gender has come under serious criticism from women who face oppression also along other markers of identity including caste, class, race, religion, sexual orientation, and gender identity.[47] They rightly demand that if feminist praxis is to live up to its ideals it must centre the overlapping and intersectional nature of dominance-subordination produced in and through the law. Therefore, asking the "woman's question" in law requires an intersectional feminist interrogation that understands the entanglement of gender with other forms of (dis-) empowerment, dominance, and subordination.

This form of inquiry has been missing in dominant Indian feminist legal thinking for far too long.[48] In this volume, the rewritten judgment and commentary in *Asokan KM v. Superintendent of Police*[49] highlight the ways in which overlapping identities (in this case as a Muslim woman, and not only as a Muslim or a woman disjunctively) shape the deployment and experience of state and social power. In *Uday v. State of Karnataka*,[50] the prosecutrix's oppressed caste identity as much as her gender identity is central to her experience of sexual abuse as well as to the Court's decision. In such a case, examining questions of consent in sexual offences along the single axis of gendered power relations hides the ways in which the law reproduces societal marginalization of women from oppressed castes. By excavating these multiple axes of marginalization contextualized to the societal divisions in India, an intersectional feminist approach allows for a deeper interrogation and reimagination of the law's emancipatory potential and direction.

F. The Symposium

This symposium is part of the larger project and brings together a set of four judgments and commentaries (re-)written by historians, lawyers, political scientists, and sociologists. While they deal with disparate areas –defining tax units for charging income tax (*Indira Balakrishna*); understanding consent in sexual offences (*Uday*); the scope of the habeas corpus power (*Asokan KM*); and the test for adjudicating constitutional equality claims

46 *Sharmila Rege*, Dalit Women Talk Differently: A Critique of 'Difference' and Towards a Dalit Feminist Standpoint Position, Economic and Political Weekly 33(44) (1998), p. 39.

47 *Abhishek Shah*, Is 'Intersectionality' a Useful Analytical Framework for Feminists in India?, https://www.epw.in/engage/discussion/intersectionality-useful-analytical-framework (last accessed on 17 April 2023) (curating a collection of writings on questions of intersectional feminism in India).

48 *Shreya Atrey*, Intersectional Discrimination, Oxford 2019.

49 Asokan KM v. Superintendent of Police, note 40.

50 Uday v. State of Karnataka, (2003) 4 SCC 46.

(*Anwar Ali Sarkar*) - underlying all the cases are similar concerns with the construction and maintenance of gendered power relations in and through the law.

Uday, *Indira Balakrishna*, and *Asokan* all deal with questions of consent and choice – how should the law understand women's agency and volition? *Uday v. State of Karnataka*[51] is a 'promise to marry' case, where a woman alleged that the accused had sex with her by misleading her about his intention to subsequently marry her. The original judgment in this case illustrates Leigh Gilmore's argument that women's testimony in cases of sexual violence is often discredited/delegitimized/tainted through multiple strategies "to contaminate by doubt, stigmatize through association with gender and race, and dishonor through shame."[52] In the rewritten judgment and the commentary, Nikita Sonawane and Rukmini Sen question the decontextualized approach to consent adopted in the original judgment, that fails to situate the woman's experience in the context of a caste ridden patriarchal society which shapes the interaction between the complainant and accused, as well as their encounter with the law.

Volition and agency are also at the heart of *CIT v. Indira Balakrishna*.[53] The question of law in this judgment relates to the test for determining what constitutes an 'association of persons' for purposes of imposing income tax liability. Indira Balakrishna and two other women are widows of a common husband who have, through the operation of law, become co-heirs with limited estate, in the property once owned by their husband. Do they count as an association of persons if they were brought together not by their volition, but because of the operation of law? Can they be counted as an association of persons, if the law, by providing them limited rights in the estate, restricts their ability to disassociate? Should the law view them as active agents exercising control, volition, and management over their limited property or should it view them as passive recipients of this property, negating any labour they may perform with respect to the property? These questions, which form the inarticulate premise of original judgment, are explored and determined in the rewritten judgment and commentary by Maithreyi Mulupuru and Shreya Rao respectively.

The passivity, lack of intentionality, and volition attributed to Indira Balakrishna and her co-heirs, is also mirrored in *Asokan KM v. Superintendent of Police*[54] which deals with Hadiya's struggle for autonomy in deciding her religion and her choice of spouse. Caught between forces of patriarchy and religious extremism, between her birth family, the judiciary, and national politics, Hadiya's struggle became the flashpoint for a manufactured debate on *love-jihad* – the threat of Muslim men waging war upon Hindu society by seducing Hindu women. The judiciary legitimated these concerns by adopting a paternalistic approach that privileged the rights of Hadiya's birth family to take decisions on her behalf.

51 Ibid.

52 *Leigh Gilmore*, Tainted Witness: Why We Doubt What Women Say About Their Lives, Columbia 2017, p. 2.

53 CIT v. Indira Balakrishna, note 37.

54 Asokan KM v. Superintendent of Police, note 40.

The rewritten judgment by Sandhya P.R. and Urmila Pullat and commentary by Kanika Sharma situate the case within the context of increasing islamophobia in Indian society as well as the entrenched patriarchal and paternalistic assumptions about women's lack of agency. They instead centre Hadiya's rights as an autonomous agent with the capacity to exercise volition and control over her own life.

Hadiya's case also highlights how judicial power can be pressed into service to construct legal doctrine in ways that legitimate the state's attempts to subordinate individuals and their rights to the state's interests and its perceived exigencies. A similar concern animates Tarunabh Khaitan's rewritten opinion in *State of West Bengal v. Anwar Ali Sarkar*.[55] If fundamental rights are accountability mechanisms that require the state to provide justifications for its actions, then how judges determine the scope, content, and permissible limitations on these rights will place substantial limits on how state power can be deployed, and to what ends. As Rohit De's commentary in this case highlights, the Indian Supreme Court's understanding of the scope of the right to equality has placed very few limits on the capacity of the state to treat individuals in invidious ways. In contrast, the rewritten judgment locates the doctrinal approach to this right in light of legacies of anti-colonial struggles that sought to redress the balance of powers between the citizen and the state. The judgment deploys a feminist *ethos* to question the allocations of state power and the role of judges in disrupting the replication of colonial modes of governance within the democratic framework.

These rewritten judgments and commentaries are heuristic devices to interrogate the gendered assumptions, articulations, and consequences that hide behind apparently neutral judicial decisions, and to dissent from the often unquestioning deployment of judicial power to uphold unequal distributions of power. Just as "[a] dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed,"[56] we hope that these fictional dissents will guide future judges in *righting* the betrayals of the law.

55 State of West Bengal v. Anwar Ali Sarkar, note 45.

56 *Charles Evans Hughes,* The Supreme Court of the United States, New York 1936, p. 68.