

# Feminist Constitutional Activism in India

By *Tanja Herklotz*\*

**Abstract:** This paper assesses feminist constitutional activism in India, i.e. feminist engagements with the Constitution with the aim of broadening women's rights. To this end, the paper looks at several generations of feminist activists. It shows how feminists impacted the process of constitution-making and how they realised women's constitutional rights by holding the legislature accountable to the Constitution and demanding that the judiciary declare laws unconstitutional if they violated women's fundamental rights. The paper places a particular focus on the constitutionally enshrined conflict between religious freedom and women's rights—a conflict that plays out in a specific way in many countries of the Global South and that confronts feminist activists with challenges that their counterparts in the Global North might not face in the same way.

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## A. Introduction

A central conflict between Global South constitutionalism and gendered constitutionalism is that between religious freedom and women's rights. Constitutionalism in the Global South tends to grant religion a vital role in law and society. Several Global South Constitutions and constitutional courts foster the strong position of religion by establishing state religions, making constitutional and statutory law abide by religious principles, setting up religious courts or granting religious communities a great deal of autonomy as a part of their religious freedom, including the right to govern their community members with religious laws. Granting religion such a vital role often means tolerating some level of discrimination against women and sexual minorities.

Gendered constitutionalism, on the other hand—especially if articulated from a Western point of view—often has a critical stand on giving broad powers to religious communities precisely because of the gender discrimination this entails. From a feminist perspective, "the constitutional recognition or nonrecognition of religious law should be measured (among other things) by its legal impact on women," states Helen Irving.<sup>1</sup> Furthermore,

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1 Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge 2008, p. 246.

"Cultural/religious rights or laws may be constitutionally protected, but only as long as they do not breach or undermine equality rights".<sup>2</sup>

In this paper, I address the conflict between Southern and gendered constitutionalism—and between religious freedom and women's rights—by examining feminist constitutional activism in India. By feminist constitutional activism, I mean feminist engagements with the Constitution intending to broaden women's rights. I rely on what Helen Irving refers to as constitutional agency: "the ways in which women have assessed their country's Constitution, both during its formation and in its operation, specifically from the perspective of women's interests."<sup>3</sup>

I show how feminists impacted the process of constitution-making and how they realised women's constitutional rights by holding the legislature accountable to the Constitution and demanding that the judiciary declare laws unconstitutional if they violated women's fundamental rights. I thereby focus on feminists' attempts to navigate the conflict between religious freedom and women's rights, especially in the area of religion-based family law. I draw on primary sources, such as constituent assembly debates, publications by women's groups, and interviews conducted with women's rights activists.

The paper is divided into five main parts. I begin by looking back to the late 19<sup>th</sup> and early 20<sup>th</sup> centuries to the predecessors of feminist constitutional activism: endeavours to broaden women's rights as a part of social reform and the formation of women's groups in a time when India was still ruled by the British. Secondly, I look at feminist activism around and during the constitution-making process after independence. Thirdly, I describe the new wave of feminist activism that emerged in the late 1970s out of disillusion with the constitutional reality. I then look at the means that activists use to hold the state accountable to the constitutional promise of equality, most importantly, legislative lobbying and strategic litigation. Lastly, I demonstrate how feminist actors work "on the ground" to make equality a reality for women.

## **B. Laying the Foundations: Feminist Activism before Constitution-Making**

Two movements that aimed at broadening women's rights preceded the making of the Indian Constitution: the social reform movement of the 19<sup>th</sup> century and the feminist activism of the early 20<sup>th</sup> century.

### *1. Social Reforms and Women's "Uplift"*

The social reform movement in the 19<sup>th</sup> century aimed for women's societal "uplift", primarily through the abolition of certain practices that were prevalent among the Hindu community and through women's education. The practices that the movement attempted

2 Ibid, p. 248.

3 Ibid, p. 1.

to do away with included *sati* (the immolation of Hindu widows on the funeral pyre of their deceased husbands), child marriage, and the restriction of remarriage for widows. Two aspects are especially remarkable about the social reform movement. Firstly, while a few women's associations were established at the end of the 19<sup>th</sup> century,<sup>4</sup> the social reform movement, by and large, was initiated and carried out by men. Secondly, in its attempt to end societal evils or "primitive" practices, it was closely linked to the civilising mission of the British colonisers.

The reform processes took place at the level of legislation with the passing of such acts as the Widow Remarriage Act of 1856, the Age of Consent Act of 1891, and the Child Marriage Restraint Act of 1929. These acts bettered the situation for girls and women to a limited extent (the age of consent to sexual intercourse for girls, for instance, was raised from 10 to 12) but were far from providing formal (let alone substantive) equality. Instead, the reform attempts had a paternalistic and protectionist approach and were oriented towards "progress" rather than gender equality.<sup>5</sup> The reforms aimed to achieve a "world where women would be educated and free from some of the worst customs of the society" but in which the "new women" would still be devoted to the home and the family.<sup>6</sup>

The social reform movement nevertheless somewhat changed the societal structures. It expanded the "appropriate activities" for women and the "appropriate arena" in which women could move.<sup>7</sup> By the end of the 19<sup>th</sup> century, several educated, articulate, mobile "new women" were increasingly involved in public activities.<sup>8</sup>

## II. Political Participation

This broadening of women's possibilities led to a second phase of women's rights activism that emerged in the early 20<sup>th</sup> century. Women (mostly the better-situated ones) formed women's organisations to critically debate women's legal and societal situations. In 1917, women in Madras established the Women's India Association (WIA). In 1926, the National Council of Indian Women was founded, followed a year later by the All India Women's Conference (AIWC). Together, these groups served as networks of communication, mobilisation, and protest.<sup>9</sup> They challenged the exclusion of women from the public sphere and redefined women as equal to men. Key demands were women's education, a reform of Hin-

4 Aparna Basu, *Feminism and Nationalism in India, 1917-1947*, *Journal of Women's History* 7 (1995).

5 Geraldine Forbes, *Women in Modern India*, Cambridge 1996, p. 30; Ratna Kapur, *Subversive Sites: Feminist Engagements with the Law in India*, in: Mala Khullar (ed.), *Writing the Women's Movement: A Reader*, New Delhi 2005, p. 157.

6 Forbes, note 5, pp. 27-28.

7 Ibid, p. 28.

8 Ibid.

9 Christine Keating, *Decolonizing Democracy: Transforming the Social Contract in India*, Pennsylvania 2011.

du law and the right to vote for women.<sup>10</sup> Muslim women founded the All-India Muslim Women's Conference in 1907, the Anjuman-e-Khwateen-Deccan in 1919 and numerous smaller groups that served as fora for critical discussion.<sup>11</sup>

In stark contrast to the social reform movement, which had focused mainly on protective legislation, this second phase of activism concentrated on equal rights for women.<sup>12</sup> The earlier discourse on women's "uplift" was replaced by an increasing reliance on the discourse of formal equality, not only in the so-called "public" sphere of women's suffrage and constitutional rights but also in the "private" sphere of the family.<sup>13</sup>

As a result of the campaigns by these groups, Madras and Bombay granted women voting rights in 1920 and 1921, respectively. Other provinces followed, and, in 1947, after its independence from the United Kingdom, the Indian state granted "universal" suffrage to adult women and men.

The government also reacted to the feminist demands to reform Hindu family and inheritance law. Throughout the 1930s, the AIWC had passed a series of resolutions that demanded a right to divorce for Hindu women and women's equal rights to property and inheritance and that condemned polygamy and marriages between older men and minor girls.<sup>14</sup> As a reaction to this agitation, in 1941, the government appointed the Hindu Law Committee to examine Hindu family law from a gendered perspective.<sup>15</sup> The actual legal reforms were, however, only carried out much later, in the mid-1950s, with the passing of four different codes on Hindu family law and a Special Marriage Act providing for civil marriage.

### *III. Women in the Independence Movement*

Indian women also participated in the movements related to the Indian nation-building process—the non-cooperation movement of 1920-21, the civil disobedience movement of 1930-31, and the quit India movement of 1942. Though the main feature of these movements was the anti-colonial struggle and not women's rights, through their participation, women generated a sense of power and realised their strength.<sup>16</sup> Furthermore, their activism contributed significantly to drawing women out of the "private" realm of the home and

10 Mary E. John, *Feminism, Poverty, and the Emergent Social Order*, in: Raka Ray / Mary Fainsod Katzenstein (eds.), *Social Movements in India: Poverty, Power and Politics*, Lanham 2005, p. 108; Rukmini Sen, *Mapping Women's Activism in India: Resistances, Reforms and (Re)-Creation*, in: Leela Fernandes (ed.), *Routledge Handbook of Gender in South Asia*, Abingdon 2014, p. 520.

11 Keating, note 9.

12 Kapur, note 5, p. 157.

13 Ibid.

14 Aparna Basu / Bharati Ray, *Women's Struggle: A History of the All India Women's Conference 1927-1990*, New Delhi 1990, pp. 46-47.

15 Ibid, p. 49.

16 Basu, note 4.

provided them with opportunities to participate in public events.<sup>17</sup> In addition, some leaders of the women's movement engaged actively in the national movement and used their direct access to the male leadership to press for feminist claims.<sup>18</sup> Nationalism and women's rights were also linked in the debates around topics such as the Uniform Civil Code (UCC), as I will show later. The struggle for independence terminated successfully when, on 15 August 1947, India was declared a sovereign and democratic nation-state.

### C. Drafting the Constitution

#### I. *Women in the Constituent Assembly*

To set up a Constitution for the independent nation, a Constituent Assembly was set up and met from 1946 to 1949. It contained 299 members, 15 of whom were women.<sup>19</sup> However, the fact that women were strongly underrepresented in the Assembly did not mean that their voices were not heard. Irving shows that women's constitutional demands may be recorded in multiple ways in constituent assemblies: through statements by individual women, submissions by women's groups, women's petitions to constitutional conventions or drafting committees and in feminist criticisms of draft constitutions.<sup>20</sup>

In the Indian case, several of the women members of the Constituent Assembly were affiliated with the WIA or the AIWC<sup>21</sup> and used their position in the Assembly strategically to point to women's discrimination and make feminist demands.<sup>22</sup> Hansa Mehta, for instance, held in one of the debates that "[t]he average woman in this country has suffered now for centuries from inequalities heaped upon her by laws, customs and practices [...]. There are thousands of women today who are denied the ordinary human rights".<sup>23</sup> Stressing a firm trust in the transformative potential of the Constitution, Begum Aizaz Rasul stated:

*"[T]he women of India are happy to step into their rightful heritage of complete equality with men in all spheres of life and activity. [...] This Constitution affirms*

17 Neera Desai, *Feminism as Experience: Thoughts and Narratives*, Mumbai 2006.

18 Alisha Dhingra, Gender Discourses and the Making of the Indian Constitution, *Indian Journal of Gender Studies*, 29(1) (2022), p. 36.

19 On the lives of the 15 women and their work in the Constituent Assembly see also the blog Women Architects of the Indian Republic, <https://15fortherepublic.wordpress.com/> (last accessed on 24 September 2022).

20 Irving, note 1, p. 4.

21 Annie Devenish, *Debating Women's Citizenship in India, 1930-1960*, New Delhi 2019.

22 See also Rajesh Kumar, Equality for Women: The Constituent Assembly Debates and the Making of Equality Jurisprudence by and for Women, *Social Change*, 52(3) (2022).

23 Hansa Mehta, Constituent Assembly Debates (Proceedings), Volume I, 19 December 1946, <https://loksabha.nic.in/writereaddata/cadebatefiles/C19121946.html> (last accessed on 20 September 2022).

*that ideal and gives the solemn assurance that the rights of women in law will be wholly honoured in the Indian Republic.*<sup>24</sup>

As the official representative of the AIWC in the Assembly, Hansa Mehta also rearticulated some of the demands of the organisation, calling for "social justice, economic justice, and political justice" and "equality which can alone be the basis of mutual respect and understanding and without which real co-operation is not possible between man and woman."<sup>25</sup> At the same time, the women members of the Constituent Assembly made it clear that they "have never asked for privileges," such as reserved seats, quotas, or separate electorates.<sup>26</sup> Instead, their focus lay on formal equality and an idea of a "sexless citizen".<sup>27</sup>

Women's organisations also used the constitution-making process to make public statements on women's equality. In 1945, the AIWC drafted an "Indian Woman's Charter of Rights and Duties"—a document meant to educate women, raise awareness and impact the constitution-making process by focusing on women's rights.<sup>28</sup> In 1946, the organisation sent the Charter to the interim Indian government and the provincial governments.<sup>29</sup> By claiming equal rights and opportunities for women and challenging the constructed division between the public and the private, the Charter, along with other documents,<sup>30</sup> sought to "rewrite the social contract for a democratic and independent India".<sup>31</sup>

## II. Religion vs Women's Rights

A controversial topic in the debates of the Constituent Assembly regarded balancing the right to religious freedom and (gender) equality. Rajkumari Amrit Kaur, for instance, argued (unsuccessfully) in favour of defining religious freedom in a narrow sense as granting freedom to "worship" rather than freedom to "practise" religion.<sup>32</sup> In her opinion, a right to "practise" religion would be stacked against women and Dalits, because the infringement of women's and Dalits' rights was part of the practice of several religions in India.<sup>33</sup>

24 *Begum Aizaz Rasul*, Constituent Assembly Debates (Proceedings), Volume XI, 22 November 1949, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C22111949.html> (last accessed on 24 September 2022).

25 *Mehta*, note 23.

26 *Ibid.*

27 *Devenish*, note 21.

28 *Ibid.*

29 *Ibid.*

30 The Karachi Resolution of 1931 and the 1939 Report of the Sub-Committee on Women's Role in Planned Economy.

31 *Devenish*, note 21.

32 *Shefali Jha*, Rights versus Representation: Defending Minority Interests in the Constituent Assembly, in: Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution*, New Delhi 2008, p. 340.

33 *Ibid.*

Hansa Mehta called for the "abolition of purdah" (the seclusion of women from public observation through a requirement that women wear concealing clothing). Acknowledging that she might "hurt the religious susceptibilities of some people", she held that purdah was "an inhuman custom" and that "[a]ny evil practiced in the name of religion cannot be guaranteed by the Constitution."<sup>34</sup>

Women members of the Constituent Assembly also stressed the gender-discriminatory character of other religious practices but hoped that these would vanish even without constitutional regulation. Shrimati G. Durgabai, for example, held that a provision prohibiting the practice of *devdasi* (the dedication of lower caste women to temples for sexual exploitation) was not necessary. While calling *devdasi* an "evil" and a "bad practice [...] in the name of religion", she held:

*"I do not think [...] that this amendment is necessary. Madras [where the practice was particularly prominent] has already prohibited this practice under a law passed a few years ago. It is no more in vogue there. Though some relics of that system still exist, these, I am sure, will disappear in course of time".<sup>35</sup>*

A central debate concerned religion-based family law. For many members of religious communities the so called "personal laws" of Hindus, Muslims, Christians and Parsis were an essential aspect of religious identity and thus worthy of protection (especially after the inter-religious violence that occurred during partition). At the same time, the personal laws of all religious communities discriminated against women.

Yet, the women members of the Assembly did not frame their demand for a Uniform Civil Code (a feminist demand that had been articulated since the early 20<sup>th</sup> century) in terms of gender equality but rather in terms of national identity. Hansa Mehta, for example, held: "We have too many personal laws in this country and these personal laws are dividing the nation today. It is therefore very essential if we want to build up one nation to have one Civil Code." Yet, in their demand for a UCC, the women stressed that the Code should provide for "progressive" law, i.e. law that would provide for greater gender equality. Hansa Mehta held that "the Civil Code that we wish to have must be on a par with, or in advance of, the most progressive of the personal laws in the country. Otherwise, it will be a retrograde step and it will not be acceptable to all."<sup>36</sup>

Shrimati Renuka Ray called (also unsuccessfully) for a constitutional clause explicitly stating that religious family and inheritance laws must not discriminate on the grounds of sex. She held:

34 *Hansa Mehta*, Constituent Assembly Debates (Proceedings), Volume XI, 22 November 1949, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C22111949.html> (last accessed on 24 September 2022).

35 *Shrimati G. Durgabai*, Constituent Assembly Debates (Proceedings), Volume VII, 3 December 1948, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C03121948.html> (last accessed on 24 September 2022).

36 *Mehta*, note 34.

*"I think it is necessary to have an explicit provision that social laws of marriage and inheritance of the different communities shall not also have any disabilities attached to them on grounds of caste or sex. It is, of course, true that the right of equality includes this but there may be different interpretations and much confusion, and I therefore appeal to the House to have a proviso to explain this."*<sup>37</sup>

In the final constitutional document, these demands to curtail religion were only included to a minimal extent, as the next section will show.

### *III. Passing the Constitution*

The Indian Constitution was adopted in November 1949 and came into effect on 26 January 1950. In articles 14 and 15, it provides for equality before the law and non-discrimination. Article 15(2) stipulates that the non-discrimination provision also places an obligation on certain private actors, such as shops, restaurants and hotels. Article 15(3) allows the legislature to take measures of positive discrimination for women and children. Article 39, a non-binding directive principle, urges the state to secure for men and women alike an adequate means of livelihood and equal pay for equal work. Article 51A(e) makes it a fundamental duty of every citizen "to renounce practices derogatory to the dignity of women." Article 42 directs the state to make provisions for maternity relief.

Religious freedom, or more precisely "the right freely to profess, practice and propagate religion", is protected in Article 25(1). This right is, however, subject to "public order, morality and health" and other fundamental rights. Article 44, a non-binding directive principle, urges the state to implement a Uniform Civil Code in the area of family and inheritance law.

The drafters of the Constitution could have gone further in providing for gender equality.<sup>38</sup> For instance, while granting the legislator freedom to provide for measures of positive discrimination, the Constitution generally draws on an understanding of formal, not substantive, equality. Provisions such as the one on maternity leave recognise that women bear the burden of reproductive labour but might at the same time foster conservative gender roles. Furthermore, the word "only" in Article 15's prohibition of discrimination has led to case law that ironically did not see discrimination in cases where the law discriminated against women on the grounds of sex as well as other grounds, thereby

37 *Shrimati Renuka Ray*, Constituent Assembly Debates (Proceedings), Volume VII, 9 November 1948, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C15111948.pdf> (last accessed on 24 September 2022).

38 Dhingra, for example, holds that while "the final text contains gender progressive provisions", it does not contain "provisions that would have challenged the roots of patriarchal structures", *Dhingra*, note 18, p. 33.



ignoring the phenomenon of intersectional discrimination.<sup>39</sup> The Constitution also uses the generic masculine and terms such as "fraternity" and "brotherhood". Furthermore, while making religious freedom subject to other fundamental rights, it does not curtail the rights of religious groups more explicitly to prevent discrimination against women.

Nevertheless, in 1950, when it came into force, the Constitution seemed a progressive and transformative document that would mark the beginning of a new societal order. With a right to equality being established by the Constitution, the reform of Hindu Law on its way, the UCC as a declared constitutional goal and the setup of various administrative bodies for the creation of women's opportunities, feminists in the early 1950s could proudly look at their achievements and be hopeful for women's futures. The pre-constitutional feminist activism thus somewhat came to an end. Many old women's organisations, such as the AIWC, reoriented themselves as primarily social organisations, running schools and hostels or providing work opportunities.<sup>40</sup> Vina Mazumdar, a member of the First Committee on the Status of Women, recalls this optimistic spirit of the time:

*"The first generation beneficiaries of the equality clauses of the Constitution which included people like us who walked into jobs, whether in the Government or in academia, never felt discriminated against or unwelcome or unequal. We were too snooty to participate in organizations of women because we were having a high old time being accepted as equal by men".<sup>41</sup>*

#### D. A New Wave of Feminist Activism

By the mid-1960s, the optimistic mood articulated by Vina Mazumdar had turned into discontent. The transformative potential of the Constitution seemed to not translate into

39 For example, in *Air India v. Nergesh Meerza* (1981) the Supreme Court upheld a regulation requiring female flight attendants of a government-owned airline to retire if they got married within four years of being employed, while the condition was not imposed on their male counterparts. The judgment concluded that article 15 prohibited a discrimination "only" on the ground of sex, but did not prohibit a discrimination "on the ground of sex coupled with other considerations" and therefore saw no violation of that provision. On this issue see *Avani Mehta Sood*, Gender Justice through Public Interest Litigation: Case Studies from India, *Vanderbilt Journal of Transnational Law* 41 (2008), p. 853; *Indira Jaising*, Gender Justice and the Supreme Court, in: B.N. Kirpal et al (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, New Delhi 2000, p. 294; *Ratna Kapur*, Gender Equality, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution*, New Delhi 2016, p. 750.

40 *Ilina Sen*, Women's Politics in India, in: Raka Ray (ed.), *Handbook of Gender*, New Delhi 2012, p. 523.

41 *Shirin Rai*, Emerging State Feminism in India: A Conversation with Vina Mazumdar, Member Secretary to the First Committee on the Status of Women in India, *International Feminist Journal of Politics* 9 (2007), p. 106.

reality. A "new wave of nationwide unrest"<sup>42</sup> emerged and many women were part of the new agitations.

### *1. Constitutional Discontent*

High unemployment, poverty, land disputes, caste-based tensions, and ecological degradation made many people feel that the state had "failed to deliver".<sup>43</sup> "New social movements" mushroomed in multiple forms to demand the protection of the constitutional rights of vulnerable groups.<sup>44</sup> It was against this backdrop that a new wave of feminism emerged. Initially, it was not so much feminist topics that triggered women's engagement but other issues, like social inequality, the caste system and a struggle for workers' and peasants' rights. Women's groups that formed in these years often grew out of, and overlapped with, other movements or organisations, such as university-based formations, trade unions and splinter groups of political parties.<sup>45</sup>

Three events then fuelled this emerging activism and made women focus more on feminist topics. The first incident was the publication of the report of the Committee on the Status of Women in India in 1974, which showed that middle-class women's entry into education had expanded after independence, but that the condition of the vast majority of women had not improved, but rather deteriorated since the 1950s.<sup>46</sup> The second trigger for feminist activism was the mass atrocities against women committed during the state of emergency (1975-77), including mass sterilisations and custodial violence, that came to light after the emergency was lifted.<sup>47</sup> The third event that significantly contributed to making the topic of gender (in)equality more salient was the United Nation's proclamation of the international women's year in 1975 following the World Conference on Women in Mexico City.

42 Sen, note 40, p. 524.

43 Ibid, p. 522.

44 Neera Chandhoke, *Civil Society in India*, in: Michael Edwards (ed.), *The Oxford Handbook of Civil Society*, Oxford 2011.

45 Indu Agnihotri, *Re-Reading Histories*, Seminar 505, September 2001, <https://www.india-seminar.com/2001/505/505%20indu%20agnihotri.htm#top> (last accessed on 27 February 2023); Radha Kumar, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800-1990*, New Delhi 1993, p. 104; Vibhuti Patel / Radhika Khajuria, *Political Feminism in India: An Analysis of Actors, Debates and Strategies*, New Delhi 2016.

46 *Committee on the Status of Women in India*, *Towards Equality: Report of the Committee on the Status of Women in India*, New Delhi 1974.

47 Kalpana Kannabiran, *Feminist Deliberative Politics in India*, in: Amrita Basu (ed.), *Women's Movements in the Global Era: The Power of Local Feminisms*, Boulder 2010; Patel / Khajuria, note 45.

## II. Second Wave Feminism

By the late 1970s and early 1980s, women's rights groups had emerged in various parts of the country. This new wave of feminism pointed out that Indian women had still not achieved formal equality in a wide range of areas of life, particularly in family law. The Uniform Civil Code, which the Constitution envisioned, had not been passed. The reform of Hindu personal law had turned out to be cumbersome. Progressive reform suggestions had met with heavy opposition, among others, by the then President, Rajendra Prasad. Eventually, the reforms were passed in a watered-down version, which, despite ameliorating the situation for women, did not achieve many of the feminist goals.<sup>48</sup> Furthermore, Christian, Muslim and Parsi law, which also discriminated against women, were undergoing no reform. In addition, it was extremely difficult to challenge discriminatory personal law provisions in the courts. The Bombay High Court in 1952 had even given a judgement<sup>49</sup> that was commonly interpreted as stating that personal laws could not be tested against the Constitution.<sup>50</sup> After all, Shrimati Renuka Ray had been correct with her anxiety that the constitutional right to equality would not suffice to have courts declare discriminatory provisions and practices among religious personal law unconstitutional.

Other than their predecessors of the pre-independence days, the new feminism also articulated demands for substantive equality, addressing women's subordination and oppression in a patriarchal system and the misogynist behaviour of state institutions.<sup>51</sup> One of the primary triggers for feminist protests and the formation of women's groups, for instance, was the Supreme Court's decision in the *Mathura* case of 1978.<sup>52</sup> The Court had acquitted two police officers accused of having raped a minor girl on the compound of a police station, arguing that since there were no visible marks of injury on the girl's body and no signs of struggle, no rape had occurred. The case led to country-wide protests. While the protestors' demands to reopen the case were unsuccessful, the women's groups did succeed in their call for a rape law reform. The Criminal Law Amendment Act of 1983 made some of the feminist demands a legal reality.

Women's rights activism took different forms of organisation. A defining feature of the new women's movement was the autonomous groups that formed in the late 1970s and early 1980s. These groups declared themselves independent from party affiliation, rejected hierarchies and attempted to build a decentralised structure with a collective

48 Kumar, note 45, p. 97.

49 *State of Bombay v. Narasu Appa Mali*, Bombay High Court, 18 November 1952.

50 Read in context, the paragraph where the Court holds that personal laws were not "laws in force" within the purview of Article 13 of the Constitution, leads to the assumption that the Court meant only uncodified personal laws. Later the Supreme Court held that personal laws "must be consistent with the Constitution lest they become void under Article 13 if they violated fundamental rights"; see *C. Masilamani Mudaliar and Ors v. The Idol of Sri Swaminathaswami Thirukoli*, Supreme Court of India, 30 January 1996.

51 Kumar, note 45, p. 105-106; Kapur, note 5, p. 158.

52 *Tuka Ram and Anr v. State of Maharashtra*, Supreme Court of India, 15 September 1978.

responsibility for leadership.<sup>53</sup> Part of the groups' work was to provide support structures and counselling for women who had experienced violence or sought a divorce.<sup>54</sup> Demands for legal change—mainly addressing the legislator and not the courts—played a crucial role for these groups. They organised street campaigns and demonstrations to call for law reforms regarding dowry, domestic and sexual violence, female infanticide, trafficking and the commodification of women, the personal law system and women's health.<sup>55</sup> The groups conducted discussions, workshops, and conferences on these topics, produced leaflets, and spread their messages through street play performances.

Apart from the autonomous groups, party-affiliated mass-membership women's organisations, which campaigned for women's rights as a part of their broader political aims, emerged in the 1980s. For instance, the All India Democratic Women's Association, the women's wing of the Communist Party of India (Marxist), was set up "to remove all discrimination between man and woman, to fight for democracy, equal rights and emancipation of women, in a society free from exploitation" and "[t]o struggle for the implementation of all legal and constitutional rights for women".<sup>56</sup>

Complementing women's activism "on the ground", women's studies centres provided "[t]he other arm of the women's movement".<sup>57</sup> The first such centre was the Research Unit on Women's Studies, initiated by the SNDT Women's University Bombay in 1974.<sup>58</sup> Other independent or university-based centres followed, also as a reaction to the "Towards Equality" report by the CSWI.<sup>59</sup>

To dissipate feminist ideas, women also created feminist journals and magazines. One of the early magazines was *Manushi: A Journal about Women and Society*, founded by Madhu Kishwar and Ruth Vanita in 1978. The journal, among other aspects, reported cases of the Indian higher judiciary concerning women's rights and demanded legal change in several areas of law. Feminists also used the journal *Economic and Political Weekly (EPW)* as a forum to articulate their thoughts and demands. EPW's section "Review of Women's Studies" served as a space where feminist authors regularly wrote on issues concerning women, often regarding developments in the legal sphere. In 1988, the Centre for Women's

53 *Nandita Gandhi / Nandita Shah*, *The Issues at Stake: Theory and Practice in the Women's Movement in India*, New Delhi 1992.

54 *Kumar*, note 45, p. 143; *Urvashi Butalia*, *Confrontation and Negotiation: The Women's Movement's Responses to Violence Against Women*, in: Mala Khullar (ed.), *Writing the Women's Movement*, New Delhi 2005, p. 340.

55 *Mary Fainsod Katzenstein*, *Organizing Against Violence: Strategies of the Indian Women's Movement*, *Pacific Affairs* 62 (1989); *Kumar*, note 45; *Sen*, note 10.

56 *All India Democratic Women's Association*, *About Us*, <https://www.aidwaonline.org/about-us> (last accessed on 24 September 2022).

57 *Desai*, note 17, p. 68.

58 *Ibid.*

59 *Pooja Juyal*, Introduction, in: Pooja Juyal (ed.), *Women's Studies in India: Some Contemporary Contours*, Seoul 2005, p. 19; *Ritu Menon*, Introduction, in: Ritu Menon (ed.), *Making a Difference: Memoirs from the Women's Movement in India*, New Delhi 2011, p. xx.

Development Studies brought out the first women's studies journal in India, *Samya Shakti* (later renamed *The Indian Journal of Gender Studies*), which occasionally featured papers on gender and law.

Today, feminist blogs and websites have, to some extent, replaced feminist magazines. Some of them also engage specifically with legal issues. They provide information on the existing laws on violence against women and engage with recent legal developments regarding women's rights. They explain how rape, sexual harassment and stalking are defined by the law and what legal means there are for women who have experienced such an assault<sup>60</sup> or attempt to "decode" the laws that are relevant for women and the LGBTIQ community.<sup>61</sup>

### *III. Engaging with Law and Religion*

Over the years, feminist activism has become more diversified and more specialised sub-groups emerged. Two forms of such specialisation are of particular importance for the context of this paper: Firstly, the emergence of religious women's groups that placed a focus on the reform of family law, and secondly, the emergence of women's legal organisations.

#### *1. Religious Women's Groups*

From the mid-1980s onwards, feminist scholars and women's rights activists began to criticise the fact that the early Indian women's movement was predominantly led by urban middle- or upper-class Hindu women, while poor women or women belonging to minorities (like Muslim, Dalit or tribal women) were not adequately represented, and their interests fell somewhat outside of the visual range. Demands were made for a more intersectional Indian feminism, which—unlike in the writings of Kimberlé Crenshaw—would not focus primarily on the intersections of gender and race, but gender and religion and (later) gender and caste.<sup>62</sup>

The dominance of Hindu women in the women's movement often brought minority women into a situation where they had to choose between the conflicting political agendas of the women's movement and their community. Most prominently, this dilemma played

60 *She Says*, Offences, <http://www.shesays.in/law/offences> (accessed 25 September 2022).

61 *Feminism in India*, Law & Policy, <https://feminisminindia.com/section/society/legal-rights/> (accessed 25 September 2022).

62 *Flavia Agnes*, For Better or for Worse—Till Death Do Us Part: Christian Women Speak Out Against Oppressive Divorce Laws, *WomeNews* 3 (1986). Flavia Agnes, herself a Christian, for instance, modified a slogan that had earlier been used by US-American Black feminists—"All women are White, All Blacks are Men, But some of Us are Brave"—and held: "This statement is applicable to Minority women in India as well. We could very well rephrase the slogan and say: 'All Women are Hindus, All Minorities are Men, But ... Some of us are Brave'", *Flavia Agnes*, From Shah Bano to Kausar Bano: Contextualizing the 'Muslim Woman' within a Communalized Polity, in: Ania Loomba / Ritty A. Lukose (eds.), *South Asian Feminisms*, Durham 2012, p. 36.

out in the *Shah Bano* case from 1985,<sup>63</sup> in which the Indian Supreme Court decided to grant a Muslim woman, Shah Bano, maintenance under a secular legal provision, even though traditional Muslim family law does not recognise post-divorce maintenance rights. The judgement led to an outcry among the Muslim community, and Shah Bano came under so much pressure that she eventually gave up the maintenance the Court had approved for her.<sup>64</sup>

In the aftermath of this case, activists founded new groups to address intersectional discrimination.<sup>65</sup> Muslim feminists, for instance, founded organisations to speak up for the rights of Muslim women, to provide counselling, and to suggest reforms to Muslim family law.<sup>66</sup> One such organisation was the Mumbai-based Awaaz-e-Niswaan ("voice of women"), founded in 1987. Later, other organisations followed, such as the Bharatiya Muslim Mahila Andolan ("Indian Muslim women's movement", BMMA), founded in 2007. In their call for gender equality, Muslim women's organisations draw on different sources, including the Quran, the Indian Constitution and international human rights law. BMMA, for instance, stresses its belief in equality, human rights and justice as "enshrined in the Holy Quran as well as the Constitution of India".<sup>67</sup>

A central goal of these organisations was (and still is) the reform of religion-based personal laws. Throughout the 1990s, feminist activism regarding the personal law system made an interesting shift. In the 1980s and early 1990s, many women's groups favoured the introduction of a UCC, often positioning themselves firmly in opposition to religion. The organisation Saheli ("friend"), for instance, stated in 1986 in a text titled "Towards a UCC": "most religions are products of a less developed society, and to implement religious codes of conduct which might have been appropriate at some point of time would be to negate all growth and development and would be regressive".<sup>68</sup> This confrontative strategy was not successful. Later reform attempts, therefore, asked for more subtle changes within each of the different sets of personal laws and tried to get the religious clergy on board to bring about these changes. I will engage with examples of these reform attempts further below.

63 *Mohd. Ahmed Khan v. Shah Bano Begum*, Supreme Court of India, 23 April 1985.

64 *Geetanjali Gangoli*, *Indian Feminisms: Law, Patriarchies and Violence in India*, Aldershot 2007, p. 41; *Nivedita Menon*, *Seeing Like a Feminist*, New Delhi 2012, p. 153.

65 *Vrinda Narain*, *Reclaiming the Nation: Muslim Women and the Law in India*, Toronto 2008; *Aloysius Irudayam*, / *Jayshree P. Mangubhai* / *Joel G. Lee*, *Dalit Women Speak Out: Caste, Class and Gender Violence in India*, New Delhi 2011.

66 *Sylvia Vatuk*, *Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law*, *Modern Asian Studies* 42 (2008); *Nadja Christina Schneider*, *Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement—or Vice Versa?* *Journal of International Women's Studies* 11 (2009), *Mengia Hong Tschalaer*, *Muslim Women's Quest for Justice: Gender, Law and Activism in India*, Cambridge 2017.

67 *Bharatiya Muslim Mahila Andolan*, *Muslim Family Law*, Belgaum 2015.

68 *Saheli*, *Towards a Uniform Civil Code*, 1986, <https://sites.google.com/site/saheliorgsite/communalism/personal-laws-debate/towards-a-uniform-civil-code> (accessed 25 September 2022).

## 2. Feminist Lawyers

A second type of groups that emerged in the 1990s was women's legal organisations. These were groups of trained lawyers engaged in pushing for gender equality using the tools of the law: bringing cases before courts, suggesting concrete law reforms and making sound legal arguments in their publications. Women's legal organisations stress their "belief that law is an instrument of social change and can be used in different ways to further the constitutional and human rights for women".<sup>69</sup>

The Mumbai-based Majlis Legal Centre (hereinafter Majlis ("association")), an all women-team of lawyers and social activists, for instance, was set up in 1991 by Flavia Agnes. It seeks to ensure that "the rights of individual women are protected by providing legal counseling, legal representation and innovative legal strategies".<sup>70</sup> The organisation Women's Action Research and Legal Action for Women (WARLAW), founded in 1994 by Rani Jethmalani, was focused on international law and was set up to force the government to take action on its CEDAW commitments. The Lawyers Collective Women's Rights Initiative (hereinafter Lawyer's Collective) is one branch of the Delhi-based Lawyer's Collective. It was founded in 1998 to provide "legal inputs to the women's movement"<sup>71</sup> and is headed by Indira Jaising, who worked as a cause lawyer to foster women's rights throughout the 1980s and 1990s. 1998 was also the founding year of Partners for Law and Development, "a legal resource group pursuing the realisation of social justice and equality for women", which began its work by conducting legal research and doing community work and today focuses primarily on monitoring the implementation of laws and identifying gaps in the justice system.<sup>72</sup> Except for WARLAW, these organisations remain active today.

Legal organisations work through different avenues. They pursue "policy level interventions", seeking to "ensure that no discriminatory laws against women are passed"<sup>73</sup> and fight for law reforms where statutory law contains gender discriminatory provisions. They may also pursue litigation, either by way of individual representation in the lower courts or through public interest litigation at the level of high courts and the Supreme Court. Some organisations offer training programmes for students, law enforcement agencies, policymakers or local communities or publish books and brochures on matters of law and gender. Via newsletters or magazines, they inform a larger audience about developments in national and international human rights law and report on important case law.

69 *Lawyers Collective*, Women's Rights Initiative, <https://www.lawyerscollective.org/wri> (accessed 25 September 2022).

70 *Majlis*, Transforming Victims into Survivors: Annual Report of Activities April 2019 - March 2020, <https://majlislaw.com/reports/> (accessed 25 September 2022), p. 2.

71 *Lawyers Collective*, note 69.

72 *Partners for Law in Development*, About Us, <https://pldindia.org/about-us/> (accessed 25 September 2022).

73 *Majlis*, note 70, p. 2.

Besides those women's organisations, the scholarship plays a central role in advancing feminist legal activism. Women's studies centres, feminist conferences and academic journals engaging with women's rights issues are important places of knowledge production and often link scholarship and activism. Feminist legal scholarship also takes place at law schools—although, in general, these remain "very male spaces", where feminist viewpoints are marginalised.<sup>74</sup> The Indian Feminist Judgement Project, for example, writes alternative judgements for landmark cases, thereby revealing "how cases could (and should) have been decided from a feminist perspective".<sup>75</sup> "The project aspires to be a blueprint for alternative feminist futures of juridical practices and critical lawyering"<sup>76</sup> and understands itself as "not only a form of scholarship but a political, socio-legal movement".<sup>77</sup> Feminist legal scholarship also takes place outside the Indian law schools. It is pursued by academics who teach, research, and publish in departments other than law or in foreign universities, or by independent researchers without a formal university affiliation.<sup>78</sup>

## E. Claiming Women's Constitutional Rights

Now, how exactly do women's groups and feminist lawyers activate the law in their campaigns? And how do they make use of the Indian Constitution in pushing for reforms? Let us look at two strategies: Campaigns for law reforms via the legislator and strategic litigation in the courts.

### I. Campaigns for Law Reform

One method of feminist constitutional activism lies in approaching the legislator to replace discriminatory laws with the argument that these laws violate the Constitution, most prominently the constitutional equality provisions in Articles 14 and 15. Such legislative lobbying essentially happens through protests, awareness raising or public statements criticising the provisions in question. It may also occur through attempts to directly influence government or legislature members or active participation in the legislative process.

Indian activists and women's groups have used a variety of different tactics. They have coordinated campaigns or demonstrations demanding the abolition of discriminatory laws. They have organised seminars and conferences to discuss the need for law reform. They have made their claims public via print and online publications, TV, and social media.

74 Swethaa S. Ballakrishnen / Rupali Samuel, India's Women Legal Academics: Who They Are and Where You Might Find Them, in: Ulrike Schultz et al (eds.), *Gender and Careers in the Legal Academy*, Oxford 2021, p. 128.

75 Aparna Chandra / Jhuma Sen / Rachna Chaudhary, Introduction: The Indian Feminist Judgements Project, *Indian Law Review* 5 (2021), p. 262.

76 Ibid, p. 261.

77 Ibid, p. 262.

78 Ballakrishnen / Samuel, note 74.



They have developed legislative draft bills and submitted these to the Government, the Law Ministry, the Ministry of Women and Child Development, and parliamentarians. They have served as experts on parliamentary standing committees or in consultations with the National Commission for Women or the Law Commission of India.

For instance, Christian divorce law is one area in which women's organisations actively campaigned for a change in the laws. Divorce for Indian Christians was regulated in the Indian Divorce Act of 1869 (IDA). Section 10 IDA stated that while a Christian husband could get a divorce only on the grounds of the wife's adultery, a Christian wife had to prove other circumstances in addition to her husband's adultery, such as cruelty or desertion. This rule thus granted men more expansive rights than women and therefore violated Article 14 of the Constitution.

From the early 1980s onwards, feminists and women's groups—most prominently the Joint Women's Programme, headed by Jyotsna Chatterji—critiqued this discrimination and demanded legal change. Chatterji suggested that section 10 IDA, which "casts a heavy burden on Christian women as compared to men", "should be struck down", and that the grounds for divorce should be made the same for women and men.<sup>79</sup> The Joint Women's Programme involved the Christian clergy in its campaign and, together with churches and community representatives, developed draft bills containing gender-just divorce regulations. The organisation not only sent these draft bills to the Prime Minister<sup>80</sup> but also "telephone[d] the Law Ministry once every month ever since February 1994 and request[ed] the Joint Secretary to place the matter before the Law Minister".<sup>81</sup> The legislator reacted in 2001 with the passing of the Indian Divorce (Amendment) Act, which among other significant changes, made adultery and desertion independent grounds for divorce and introduced the remedy of mutual consent divorce.

## II. *Strategic Litigation*

A second avenue of feminist constitutional activism is strategic litigation. Herein feminists approach the courts, arguing that a particular law violates fundamental rights of the Constitution—most prominently Article 14—and must therefore be struck down.

One form of litigation is filing cases in the public interest. Women's groups, feminist lawyers or activists thereby benefit from the Indian Supreme Court's relaxation of the rules on standing—a development that we witness in several constitutions of Global South

79 Jyotsna Chatterji, Introduction, in: Joint Women's Programme (ed.), *Changes in Christian Personal Law*, New Delhi 1984, pp. 10–11.

80 Jyotsna Chatterji, Letter to the Law Minister, 12 December 1995, <http://feministlawarchives.pldindia.org/wp-content/uploads/32.pdf> (last accessed on 25 September 2022).

81 Jyotsna Chatterji, *Changes in Christian Personal Laws: A Brief Account of the Advocacy Process* (no date).

countries.<sup>82</sup> For instance, in the famous *Vishaka* case,<sup>83</sup> the women's organisation Vishaka along with other groups, successfully filed a public interest litigation to have the Supreme Court oblige the state to prevent sexual harassment of women and to install remedies for women who had experienced sexual harassment. Another form in which women's groups, feminist lawyers or activists engage in litigation is by supporting individual women who have filed a case in their name.

For feminist activists and women's groups, the goal of strategic litigation, either by filing their own cases or by supporting others' cases, is to establish precedents on "issues that are of importance to the women's movement".<sup>84</sup> Such litigation is based on a view of the judiciary as a vehicle to bring about legal (and social) change and a perception of the feminist lawyers or women's groups as a driving force to get this vehicle set in motion. Indira Jaising, for instance, holds that activist lawyers like herself can "influence the outcome of decisions" and may thereby participate in "the process of rewriting the history of the court".<sup>85</sup>

Litigation often accompanies campaigns for law reform. In the campaign mentioned above for reform of Christian divorce law, women also approached the courts to have section 10 IDA declared unconstitutional and achieved significant successes at the high court level, which then again fuelled the reforms at the level of the legislature.<sup>86</sup> While over the years, women's groups, feminist lawyers and activists have obtained some significant successes with litigation, overall, it has been challenging for them to obtain victories in the area of personal laws, and they have had to deal with significant setbacks. For example, regarding the practice of triple *talaq* divorces, which is prevalent in Muslim family law, several feminist attempts to challenge the practice via public interest litigation were unsuccessful,<sup>87</sup> before the Supreme Court finally declared the practice unlawful in 2017.<sup>88</sup>

Even in cases where the women claimants have "won", the judiciary has often refused to test the provisions in question against the doctrine of equality. For instance, in *Mary*

82 Elizabeth A. O'Loughlin, Decolonising Jurisprudence: Public Interest Standing in New Constitutional Orders, in: Mark Elliot / Jason NE Varuhas / Shona Wilson Stark (eds.), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Oxford 2017.

83 *Vishaka & Ors v. State Of Rajasthan & Ors*, Supreme Court of India, 13 August 1997.

84 Activist at Lawyers Collective, interview with the author on 14 October 2014.

85 Indira Jaising, *An Outsider, Inside*, in: Ritu Menon (ed.), *Making a Difference: Memoirs from the Women's Movement in India*, New Delhi 2011, p. 355.

86 *Mary Sonia Zachariah*, Kerala High Court, 24 February 1995.

87 The public interest litigation cases filed by Shahnaz Sheikh, founder of the organisation Awaaz-e-Niswaan, and the Ahmedabad Women's Action Group challenging the constitutionality of discriminatory personal law provisions remained unsuccessful. Sheikh's case was not decided, and in the Ahmedabad Women's Action Group case, the Supreme Court held that the topic was "to be dealt with by the legislature" and dismissed the petition. See *Ahmedabad Women's Action Group (AWAG) and Ors v. Union of India*, Supreme Court of India, 24 February 1997.

88 *Shayara Bano v. Union Of India*, Supreme Court of India, 22 August 2017.

Roy,<sup>89</sup> the discriminatory provision in the Travancore Christian Succession Act was struck down on a technicality. In *Madhu Kishwar v. State of Bihar* and in *Githa Hariharan*,<sup>90</sup> the Court "read down" the discriminatory provisions rather than declaring them unconstitutional. And while the *Shayara Bano* judgement of 2017 was indeed a landmark judgement in that the Supreme Court banned the Muslim divorce practice of triple *talaq*, here, too, the Court refrained from using a language that drew explicitly on gender equality.

## F. Securing Rights on the Ground

Legislative lobbying and strategic litigation are only two forms of legal activism in which women's groups, feminist lawyers and activists engage. Both strategies have limitations and they can only bear fruits if they are implemented on the ground.

### 1. *The Limits of Law Reforms and Case Law*

Even if feminists obtain victories at the level of the legislature or the judiciary, reformed laws and case law do not necessarily lead to a change in behaviour patterns among people working in state institutions, such as the police, or among society at large. One activist at the women's group Vimochana ("liberation"), for instance, stated: "law cannot bring about change as such. [...] No matter what law you bring, changing the mindsets of people here is extremely difficult".<sup>91</sup>

Access to the law is another problem, especially for less privileged parts of society. An activist at Saheli, for instance, held: "law is not accessible in a country like India, which is basically a rural country, which has a large population of poor, rural, tribal women, who have no access to this law, which we are fighting for".<sup>92</sup> "But", she continued—and this is why for her, it was still worth fighting for law reforms—"law also makes a statement. It makes a statement on [the] gender question; it may be making a statement on [the] Dalit question, it will be making a statement on human rights. So that statement has to be there, that recognition of an issue, of a problem".<sup>93</sup>

Feminist activists also stress that judges at the level of the lower courts do not necessarily follow the progressive case law that has been passed in the high court or the Supreme Court. "No landmark case shakes the world" because there is no guarantee that other judges will necessarily follow these landmark cases, said one activist at Majlis.<sup>94</sup> A judge dealing with a particular case "may not [even] refer to a judgment that just came a month

89 *Mrs Mary Roy & Ors v State of Kerala & Ors*, Supreme Court of India, 24 February 1986.

90 *Ms Githa Hariharan & Anr v Reserve Bank of India & Anr*, Supreme Court of India, 17 February 1999.

91 Activist at Vimochana, interview with the author on 1 March 2016.

92 Activist at Saheli, interview with the author on 29 September 2014.

93 Ibid.

94 Activist at Majlis, interview with the author on 29 December 2015.

before, and [instead] give his own judgment", she continued.<sup>95</sup> To some extent, this is because judges and lawyers—especially at the lower level of the judiciary—are not aware of the latest case law.<sup>96</sup> But judges might also be "indifferent" and might not "see value in strengthening the rights of vulnerable groups".<sup>97</sup> A favourable judgment by the higher judiciary, as the activist at Majlis put it, can only have an effect if "you take it down" to the level of lower courts and "[l]et this judgment come every day".<sup>98</sup> It is for these reasons that a large part of feminist activism also takes place in the lower courts.

## II. *Everyday Litigation*

Despite its limits, many activists understand legal change via legislative reforms or case law by the higher judiciary as "an introductory gambit"<sup>99</sup> to advance women's societal situation. If law reforms are to be successful, they must be adequately implemented. The Joint Women's Programme, for instance, holds: "We believe that merely having the necessary laws in place is not sufficient, [but] extensive preparations have to be made at the level of the implementing mechanisms, as well as the grassroots level to make the laws effective for all".<sup>100</sup> In a similar vein, Partners for Law and Development state: "We believe that the pursuit of human rights and social transformation through the law are possible only when combined with mobilisation, rights education and empowerment carried out in collaboration with other social justice actors".<sup>101</sup> In the words of an activist at Majlis: "It's that ground level hard work that one needs to do rather than saying: 'It's very difficult to do this so let's just change the law and believe that it'll trickle down later'".<sup>102</sup>

One form of this important "ground level work" that some women's groups pursue is representing women in the lower courts. I speak about "everyday litigation" in this context, a form of litigation that accompanies the above-mentioned strategic litigation. Everyday litigation happens in the district and sub-district courts and in specialised courts, like family courts, where women's organisations seek to "secure the rights of individual women" and to introduce "a culture of women's rights within the precincts of courtrooms".<sup>103</sup>

95 Ibid.

96 Ibid.

97 Independent activist, interview with the author on 14 April 2015.

98 Activist at Majlis, interview with the author on 29 December 2015.

99 *Srimati Basu, The Trouble with Marriage: Feminists Confront Law and Violence in India*, Oakland 2015, p. 19.

100 *Joint Women's Programme, Action Against Violence*, <http://jwpindia.org/action-against-violence/> (last accessed on 25 September 2022).

101 Partners for Law in Development, About PLD, <https://pldindia.org/about-us/about-pld/> (last accessed on 12 April 2019).

102 Activist at Majlis, interview with the author on 19 March 2015.

103 *Flavia Agnes, Making Laws Work for Women: The Potential of Existing Laws against Domestic Violence*, Manushi 156 (2006), p. 25.

Women's organisations that offer litigation at the lower and family court level are usually approached directly by individual women who seek help and who may know about the organisations' work through referrals from former clients, media, community-based organisations, or the police.<sup>104</sup> The members of the organisation then discuss the case at hand with the client and decide on how to proceed with it. One activist explained this procedure as follows: "We try to judge whether it's worth it for her or not to go to court".<sup>105</sup> In maintenance cases, for instance, there may be circumstances where the lawyers might suggest not filing a court case: "If the husband is missing or if he is not earning anything, then there is no sense in filing a maintenance application. So then she may very well be wasting her time."<sup>106</sup> If the organisation together with the client decides that a court case makes no sense, the members of the organisation may still offer legal consultation or social support. From April 2019 to March 2020, Majlis, for instance, provided legal consultation to 1021 women, of whom only 100 opted to approach the courts.<sup>107</sup>

If the women's organisations and their clients decide to approach the courts, the organisations assist the women by "walking the legal journey with them".<sup>108</sup> This may include various steps from helping the client file a first information report at the police station, to preparing her for recording statements with the police and the cross-examination in court, arguing in her favour at the hearings, cross-examining the perpetrator and supporting the client in appeal cases if the outcome of the judgment is unsatisfactory.<sup>109</sup> This work seems to pay out. Majlis prides itself on the fact that while before its interventions, the conviction rate in sexual violence cases in Mumbai lay at around 12 to 15 %, the organisation achieves convictions in over 60 % of the cases it supports.<sup>110</sup>

The outcome aspired to in these cases is a victory for the client, and not so much a precedent to help other women. Some activists, however, stressed that progressive judgments in lower and family courts may be just as much a "landmark case" as those judgements that the higher judiciary produces. As one lawyer at Majlis explained: "In every case that we represent, we are stretching the boundary of law. [...] [F]or example, the first time that we represented a sister against her brother under the Domestic Violence Act, it was a landmark case because the judges had never heard of something like that".<sup>111</sup> "Other lawyers learn from it", she continued, "They ask you: How are you doing this? Can you help us? And that's how you introduce concepts".<sup>112</sup>

104 *Majlis*, note 70, p. 7.

105 Activist at Lawyers Collective, interview with the author on 14 October 2014.

106 *Ibid.*

107 *Majlis*, note 70, p. 8.

108 *Ibid.*, p. 7.

109 *Ibid.*, pp. 8-9; Lawyers Collective, note 69.

110 30 out of 50 cases in the time span from April 2019 till March 2020, see *Majlis*, note 70, p. 13.

111 Activist at Majlis, interview with the author on 19 March 2015.

112 *Ibid.*

## G. Conclusion

We look back at a century of feminist legal activism in India, in which feminist activists, lawyers and women's groups have worked continuously to better the legal and societal situation for women. While they began by focusing on legislation as a tool to bring about gender justice, more recently, the courts have become an important arena to make feminist demands. Women's groups use both strategic litigation at the higher judiciary and everyday litigation in the lower courts to articulate feminist ideals and push for change.

The conflict between religious freedom and gender equality has created specific obstacles for feminists. Bringing about changes in the area of religion-based family law was, and remains, a cumbersome process. This is due to the strong opposition by religious groups to any infringement of "their" personal laws, but also due to the state's unwillingness to interfere too much in the personal law system to avoid conflicts with religious communities. The strong role of religious women's groups has proven valuable in this context. Basing their demands both on constitutional law and on religious scripts, these groups are a defining feature of feminist activism in the Global South.

While advancing women's legal rights has never been easy, today, feminist activists, especially those representing minority women, face several new challenges. In 2015 Prime Minister Narendra Modi warned the judiciary to be cautious about giving in to the demands of activists and delivering perception-driven verdicts.<sup>113</sup> In 2017, several civil society organisations lost their licences to receive international funding because they were deemed to be pursuing "anti-national" activities or failed to meet the legal requirements under the Foreign Contribution Regulation Act.<sup>114</sup> In 2019, the University Grants Commission decided to cut the funding for women's studies centres.<sup>115</sup> The COVID-19 pandemic and the lockdowns created additional hurdles for civil society, among them women's groups, to articulate their critique through gatherings and public protests. Against these odds, however, feminists continue to fight for gender equality, as they have done for over a century. Today's activists thereby stand on the metaphorical shoulders of those who claimed broader women's rights before them and build on their successes.



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- 113 *Krishnadas Rajagopal*, Guard Against 5-Star Activists: Narendra Modi, *The Hindu*, 5 April 2015, <http://www.thehindu.com/news/national/modi-chief-justices-conference-judiciary/article7070485.ece> (last accessed on 25 September 2022).
- 114 *Rohini Mohan*, Narendra Modi's Crackdown on Civil Society in India, *The New York Times*, 9 January 2017, [https://www.nytimes.com/2017/01/09/opinion/narendra-modis-crackdown-on-civil-society-in-india.html?\\_r=0](https://www.nytimes.com/2017/01/09/opinion/narendra-modis-crackdown-on-civil-society-in-india.html?_r=0) (last accessed on 25 September 2022).
- 115 *Varsha Singh*, New UGC Guidelines Cuts Funding for Women Studies' Centres, *Media India Group*, 20 March 2019, <https://mediaindia.eu/society/new-ugc-guidelines-cuts-funding-for-women-studies-centres/> (last accessed on 25 September 2022).