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A Continuing Constitutional Conversation: Locating Nitisha

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Case Commentary

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A continuing constitutional conversation: Locating Nitisha

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Abstract

In April 2021, the Supreme Court of India decided *Nitisha v Union of India*, holding that the gender neutral hiring procedure adopted by the Indian Army indirectly discriminated against women officers by disproportionately excluding them from promotion. This effect was experienced due to systemic discrimination against women built into the appointment criteria. To redress systemic discrimination, the State was required not only to abstain from direct or indirect discrimination but also to positively act to bring in structural change. *Nitisha* makes significant contributions to developing the constitutional understanding of non-discrimination. It identifies the essential nature of discrimination as systemic rather than individualistic and sets out how systemic discrimination operates and can be proved. In recognising indirect discrimination, it lays down a two-stage test to establish it. Crucially, it affirmatively holds, for the first time, that the non-discrimination guarantee can compel State action in redressing systemic discrimination. *Nitisha* leaves certain questions unanswered: the test for justifying indirect discrimination, the doctrinal reading of the non-discrimination guarantee and the legitimacy of using comparative law. However, seeing *Nitisha* as one chapter of a constitutional conversation allows us to appreciate its contributions while holding the space open for future judicial efforts at constitutional meaning-making.

Keywords

non-discrimination, India, systemic discrimination, indirect discrimination, positive duties, comparativism

Introduction

Nitisha v Union of India[1] broke new ground within India's constitutional jurisprudence on non-discrimination by endorsing a systemic understanding of discrimination, recognising

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indirect discrimination and compelling state action in redressing discrimination. It is the latest chapter in the judicial efforts[2] to revive and revitalise the constitutional guarantee of equality and non-discrimination, the potential of which has been artificially suppressed through the use of ill-defined and inadequate principles of reasonableness[3] and non-arbitrariness[4] to define violations of equality and non-discrimination.

India is unusual in that it does not have a specific anti-discrimination legislation, despite recent efforts to introduce one.[5] As a result, constitutional jurisprudence on non-discrimination becomes determinative in defining the extent of anti-discrimination protection in India. There are five main constitutional provisions at play. Article 14 guarantees equality before the law and equal protection of the laws. Article 15 records a general prohibition on discrimination, while Article 16 prohibits discrimination specifically within public employment. Both Articles 15 and 16 clarify that their guarantees of non-discrimination do not prevent the State from making 'special provisions', including through affirmative action, for the advancement of certain identified groups.[6] Articles 17 and 18 prohibit particular forms of discrimination: the former untouchability[7] and the latter the granting of titles. Together, these provisions form the 'equality code' of the Constitution of India.[8]

Nitisha concerned criteria for assigning permanent positions in the Indian Army to women, who had previously been confined to short service positions only. Although these criteria appeared to be gender neutral, they in fact continued to disproportionately exclude women. The petitioners argued that this breached their constitutional right to non-discrimination. In a major breakthrough for Indian jurisprudence, the Supreme Court upheld their claim, offering new interpretations of the equality code generally, and the non-discrimination guarantee more specifically. In this Case Note, I first set out the facts of the case, outline the main legal issues raised and briefly discuss the findings of the Court. I then examine the Court's holding in detail, drawing out the contributions of *Nitisha* to the constitutional jurisprudence on non-discrimination and acknowledging where it falls short, thus highlighting areas for future development.

Facts and legal issues

Permanent Commissions are typically awarded in the 5th or 10th year of an officer's service in the Indian Army. The Army denied promotion to women officers from Short Service Commission ('SSC') to Permanent Commission ('PC'), which the Supreme Court, in *Babita Punya*,[9] held as unconstitutional for being premised on stereotypes about women's roles. In response, the Union Government extended 'existing policy regarding grant of permanent commission…***applied uniformly to all SSC officers***',[10] to assess 615 eligible women officers for PC. The policy allocated each officer a score, based on certain evaluation criteria. Following this procedure, an 'abysmally low' number of women SSCs were granted PC.[11] In *Nitisha*, the petitioners challenged the selection criteria for being arbitrary, irrational, and crucially for the purposes of this Case Note, discriminatory.

The first requirement to be challenged was the benchmarking of women SSCs to male officers. In addition to obtaining the cut-off grade of 60%, the score obtained by aspirant women SSCs would be benchmarked against that of the male officer with lowest score

awarded PC in her corresponding course[12] to maintain the 'integrity of competitive merit' in grant of PC.[13] As seen below, women officers could not easily match the scores obtained by male officers on account of systemic discrimination against them built into the selection criteria. Benchmarking thus reduced the number of women SSCs eligible for PC.

The second challenge was directed against the reliance placed on Annual Confidential Reports ('ACRs') written yearly about each officer. As women SSCs were only recently made eligible for PC, ACRs written in the 5th or 10th years of their service were filled in a 'casual manner',[14] and 'good grades were not awarded'.[15] Further, several sections of these ACRs – including recommendations by the reporting officer and comments on medical fitness – were left blank.[16] Finally, considering ACRs from the 5th or 10th year of service for male officers was justified as they were awarded PC in those years. However, applying the same standard to women officers, who were belatedly being granted PC, meant that several years of their service, beyond the 5th or 10th year, were ignored.[17]

The third selection requirement subject to challenge was the officers' participation in performance courses, allocated 10 marks within the evaluation scheme. As women SSCs were not previously eligible for PC, these courses were not essential for their career progression. They therefore enrolled in a fewer of these courses,[18] and thus scored lesser than male officers on this index.

The fourth impugned criterion was the requirement that all officers meet the SHAPE-1 medical criteria to be granted PC, unless exempted for specific reasons. This meant that women officers, who were at an advanced stage of their career and fell within the age bracket of 40–50 years, had to conform to health standards of a male officer at 25–30 years. This was despite women officers undergoing medical assessment as per the SHAPE criteria in the 5th and 10th year of their service, and male officers not being subject to repeated medical scrutiny once granted PC in the 5th or 10th year (Equality Challenge Unit, 2014; Young, 2012).[19]

Thus, the evaluation scheme applied the same standards for selection to men and women SSCs, ignoring that women SSCs were, till 2019, excluded from grant of PC. Some standards – such as the benchmarking requirement – were set directly based on the experiences of male officers, while others – such as the ACRs or the SHAPE-1 criteria – appeared facially neutral. As a result, the evaluation scheme, *cumulatively*, had the effect, even if not the intention, of denying PC to women officers, with each individual component of the scheme interacting with other components to create, over time, de facto obstacles to women's entry.

Set against this factual matrix, the Court identified three questions of law. Was systemic discrimination against women officers built into the appointment scheme? Did the appointment criteria discriminate against women officers indirectly by having a disproportionate adverse effect on them? If the two previous questions are answered affirmatively, what is the nature of obligations that exist on the State? Looking closely at the appointment scheme and the impact it had on the grant of PC to women SSCs, the Court held that in light of prevailing systemic discrimination against women officers within the Army, the appointment criteria had disproportionate effect on them by 're-inforcing, perpetuating or exacerbating' their disadvantage through their exclusion from

PC. The Court also held that in light of the systemic nature of discrimination, State obligations to redress discrimination could not be confined to duties of non-interference. Rather, the State was obligated to bring in structural changes through positive action. In the next section, I discuss these legal issues in detail, charting carefully where the Court's holdings take India's non-discrimination jurisprudence forward.

Strengths: Conceptual and doctrinal advances

Developing systemic discrimination

The Supreme Court in *Nitisha* viewed the essential nature of discrimination as systemic rather than individualistic. Previous decisions of the Supreme Court sowed the seeds for this understanding. In *Joseph Shine*, Chandrachud J in his concurring opinion saw the non-discrimination guarantee as being directed at 'eliminating individual, ***institutional and systemic discrimination against disadvantaged groups***' which effectively undermines their full and equal social, economic, political and cultural participation in society.[20] Similarly, in *Sabarimala*, Chandrachud J in his concurring opinion emphasised that the non-discrimination guarantee focuses on '***structures of oppression and domination*** which exclude [certain groups] from participation in an equal life'.[21] Thus, discrimination was identified as targeting not just individual acts of differential treatment, but also the very structure of social systems. While providing a helpful starting point, these decisions are silent on how systemic discrimination operates in practice, how it can be proved within discrimination law and its role in shaping the scope of the constitutional guarantee of non-discrimination. In *Nitisha*, the Supreme Court began to answer these questions. Without clear responses, courts' acknowledgement of the systemic nature of discrimination might remain merely at the level of rhetoric.

The shift towards understanding discrimination as systemic is premised on the recognition that discrimination extends far beyond individual acts of prejudice: 'such prejudices are frequently embedded in the ***structure*** of society' (Fredman, 2016a: 733). In other words, '***its causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following those rules***': the 'everyday practices of a well-intentioned society', beyond the conscious coercive actions of a 'tyrannical power' alone (Young, 2012: 5–6). In *Nitisha*, the Supreme Court made several references to 'patterns' of discrimination, marginalisation and disadvantage that women are subject to.[22] Crucially, the Court identified that these seemingly 'harmless structures', which assume norm status, are in fact reflections of the 'insidious patriarchal system', and have been made by men for men.[23] Citing Mercat-Bruns (Mercat-Bruns, 2018: 5–6) and the Supreme Court of Canada, the Court understood systemic discrimination as being built into 'workplace dynamics'. It emerges from the 'simple operation of established procedures of recruitment, hiring, promotion, none of which [are] necessarily designed to promote discrimination',[24] and thus goes beyond an 'identifiable actor's isolated state of mind'.[25] Systemic discrimination on account of gender, the Court held, thus 'encapsulates the patriarchal disadvantage that permeates all aspects of [a woman's] being from the outset, including reproduction, sexuality and

private choices ***which operate within an unjust structure***'.[26] At the same time, these everyday procedures, often being based on the practices of the hegemonic norm, exclude members of disadvantaged groups. This, in turn, perpetuates discrimination by prompting the conclusion, both within the disadvantaged group and outside, that the group is 'naturally' unfit for a given task.[27]

Thus, *Nitisha* developed the constitutional understanding of systemic discrimination by setting out how it operates through daily practices built on the hegemonic norm. Through this, *Nitisha* located discrimination law in India in opposition to recent critiques of systemic discrimination arguing that it is unscientific, vacuous and places unjustified emphasis on the standpoint of marginalised groups (Pluckrose and Lindsay, 2020: 111-34). In going beyond the intention of the discriminator to identifying the impact of well-intentioned everyday rules on disadvantaged groups, *Nitisha* instead reinstated the marginalised group at the centre of the non-discrimination guarantee. This reading aligns with the constitutional function of the non-discrimination guarantee under Article 15, which focuses on removing 'age-long disabilities and sufferings'[28] of 'those citizens who had suffered historical disadvantage'.[29] It is also reinforced by the placement of Article 15 within the equality code, the 'genius' of which lies not in 'literal equality' but in the 'progressive elimination of pronounced inequality'.[30] Article 16 achieves this by permitting the State to treat members of disadvantaged groups differently through affirmative action, transforming 'formal equality' into 'real equality'.[31] Article 17 abolishes untouchability to free Dalits from 'perpetual subjugation and despair',[32] 'social inequity, social stigma and social disabilities'.[33] And, Article 18 prohibits Indian citizens from accepting titles in order to dismantle social hierarchy arising from the superiority of some over the other, a consequence of holding titles. In other words, the equality code generally, and Article 15 specifically, centres the disadvantaged group, a reading confirmed by *Nitisha*.

Beyond developing systemic discrimination conceptually, *Nitisha* offers helpful insights into how systemic discrimination, which might appear amorphous and all-pervading, can be proved within discrimination law. Drawing on comparative jurisprudence, the Court identified that systemic discrimination in the workplace can be established by conducting a 'holistic analysis of the organisation' relying on both statistics and employee testimonies.[34] The Court saw anecdotal evidence, through testimonies, as bringing to life the 'cold numbers' of the statistics, revealing that discrimination is part of the company's 'standard operating procedure' rather than an 'isolated, accidental or sporadic' incident.[35] In detailing how systemic discrimination can be proved, *Nitisha* responds to critics of this conception of discrimination who argue that it is a catch-all concept, borne out of mere idealism rather than evidence (Commission on Race and Ethnic Disparities, 2021: 27). The Court's holding is also in line with academic scholarship on proving systemic discrimination. While statistical evidence is helpful in summarising information across a range of factors, allowing generalisations and predictions to be drawn (Blackham, 2019: 20), anecdotal evidence is valuable because it is 'sensitive to social context' (Blackham, 2019: 27) and provides 'fuller, richer information' by taking into account people's thoughts and experiences (Equality Challenge Unit, 2014: 3). Both forms of evidence have been critiqued within the literature, the

former for not being sufficiently fine-grained to capture the complexity of discrimination (Equality Challenge Unit, 2014: 4) and the latter for its inherent subjectivity (Quraishi and Philburn, 2015: 61; Hanson, 2003: 1469). However, using them in combination to corroborate one another (Hanson, 2003: 1488), it is argued, produces a more nuanced understanding of discrimination (Blackham, 2019: 35) and presents a viable evidentiary model to lay bare its systemic nature.

Applying this evidentiary standard, the Supreme Court in *Nitisha* analysed the Army's hiring procedure,[36] referred to statistics on the number of women not granted PC,[37] and examined individual cases of exceptional women officers denied PC.[38] The Court concluded that 'systemic discrimination pervaded the structures of the Army'.[39] Excluding women officers from PC meant that their ACRs were not filled appropriately.[40] As PC was not open to them, women officers were also not incentivised to attend performance courses and did not have the career enhancement opportunities available to their male counterparts. Women SSCs' decision not to attend these courses, the Court identified, was thus not a 'vacuous "exercise of choice" but a consequence of a discriminatory incentive structure'.[41] Further, the Court recognised that the (male) norm of assessing both the ACR and compliance with SHAPE fitness at the 5th or 10th year of service placed women SSCs at a disadvantage when PC was granted to them belatedly. In this manner, the Court set out the 'gendered roadblock' women face within the Army,[42] built into each stage of the hiring process. Crucially, the Court also recognised that career progression within the Army was rendered infinitely more difficult for women because they unilaterally bore responsibilities of domestic labour and childcare.[43] The Court thus tied together the role of the Army, as an institution, in perpetuating discrimination through its hiring practices and how sex discrimination in structured socially: through the allocation of gender-specific roles. I now turn to how this understanding of discrimination as systemic was used by the Court to redefine the scope of the constitutional non-discrimination guarantee, extending its reach to indirect discrimination and compelling state action in redressing discrimination.

Building the architecture of indirect discrimination

Indirect discrimination entered constitutional jurisprudence in India through the decisions of the Delhi High Court in *Naz Foundation*[44] and the Supreme Court in *Navtej*. Both courts held that facially neutral laws which, in their operation, had the 'import and effect' of 'unfairly targeting a particular community' or 'disproportionately impacting' persons of a certain class on the basis of their protected characteristics, were indirectly discriminatory.[45] Along similar lines, the Supreme Court in *Nitisha* defined indirect discrimination as the *effect* caused by a facially neutral provision, criteria or practice on one section of society.[46] The Court drew on the conceptual framework on systemic discrimination, developed above, to constitutionally ground indirect discrimination:

> the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/

> implicit biases or an inability to recognize how ***existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust*** status quo.[47]

In other words, seemingly neutral acts can have discriminatory effects on disadvantaged groups, and thus discriminate against them indirectly, *because of* 'structural inequalities between [groups]'.[48]

Indirect discrimination therefore deems irrelevant the intention of the discriminator, and the reasons for their actions: 'even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons'.[49] Further, requiring proof of intent, in practice, places an 'insuperable barrier' in the way of a complainant,[50] necessitating a shift away from intention as a requirement under discrimination law in India.

Going beyond *Naz* and *Navtej*, and drawing on the Canadian Supreme Court's recent decision in *Fraser*,[51] *Nitisha* also laid down a two-pronged test to establish and prove indirect discrimination. At the first stage, the Court enquires whether the rule 'disproportionately affects' a particular group. To establish this, statistical evidence showing that membership in the claimant group is associated with particular characteristics that disadvantage members of the group may be used.[52] The Court was careful to emphasise that there is no quantitative threshold of statistical disparity that has to be met for 'disproportionate impact' to be proved. The Court also acknowledged the reality that there may often be a lack of statistical evidence, and thus held that 'evidence generated by the claimant group' – such as testimonies – may be used, once again drawing on both statistical and anecdotal evidence. Further, the Court pointed out that in certain cases – such as pregnancy and gender – the association between the rule and the impact on group would be 'apparent and obvious', sans evidence. At the second stage, the Court looks at whether the rule has the impact of 'reinforcing, perpetuating or exacerbating disadvantage' of that group. Such disadvantage is to be understood multidimensionally – economic, social or political exclusion, psychological harms – and ought to be viewed in light of any 'systemic or historical disadvantage' the group faces.[53] Thus, a focus on impact of the rule is built into both stages of the test: *first* to determine whether the rule draws a distinction, facially or in effect, on the basis of a protected ground, and *second* to assess whether the said distinction perpetuates disadvantage and is thus discriminatory. This test, the Court observed, lays down a 'well-structured' framework of analysis, 'fore-grounding the ills indirect discrimination seeks to remedy'.[54]

Applying the test to the facts of the case, the Court distilled out the facially neutral standard applied by the Army to both women SSCs and their male counterparts: reliance on ACRs from the 5th or 10th year of service, participation in performance courses, compliance with SHAPE-1 medical criteria at the stage of grant of PC, and the cut-off threshold of 60%. The absence of 'pre-planning' or intent to exclude women from PC, the Court held, was irrelevant to indirect discrimination. Instead, the Court looked to the fact that 'the pattern of evaluation [would] ***in effect*** lead to women being excluded from the grant of PC' to confirm a finding of indirect discrimination:[55]

> This disproportionate impact is attributable to the structural discrimination against women, by dint of which the facially neutral criteria…to secure PC disproportionately impacts them vis-a-vis their male counterparts…This discrimination has caused an economic and psychological harm and an affront to their dignity.[56]

In other words, the Court noted the disproportionate impact of the evaluation standard on women SSCs (first stage), identified that the effect of the rule was to perpetuate their disadvantage by excluding them from PC, thus causing economic and psychological harm and affront to dignity (second stage), and tied the occurrence of this impact to systemic discrimination experienced by women within the Army. Instead of constituting an independently actionable claim, systemic discrimination was thus drawn upon by the Court to understand *why* the hiring practices discriminated against women indirectly. In light of this finding, the Court held that a scheme of evaluation to compensate women officers for the 'harsh reality' of systemic discrimination be put in place. The Court clarified that such a scheme would not constitute 'special or unjustified treatment', but only set the 'pathway for the attainment of substantive equality'.[57] In concrete terms, the Court required that the retrospective application of the seemingly uniform standards for grant of PC be modified to compensate for the harm that had arisen over their belated application.[58]

Thus, the Court ordered that the benchmarking criterion be removed, though this was due to a finding that benchmarking was 'irrational and arbitrary'[59] rather than discriminatory. More relevantly for the purposes of this Case Note, the Court held that the threshold of 60% and the method of evaluation of the ACRs be reviewed every 2 years to ensure that the requirements were not disproportionally excluding women SSCs from PC.[60] Similarly, the Court held that while the SHAPE-1 criteria were not in themselves 'manifestly arbitrary',[61] the timing of application of the criteria made them indirectly discriminatory. Applying the criteria at the stage of grant of PC meant two different things for men and women: for the former, it implied being assessed at the 5th or 10th year of service, for the latter it implied assessment at an advanced stage of their career. In the spirit of 'true equality' the Court ordered that women SSCs be granted PC based on their recorded medical fitness in the 5th or 10th year of their service.[62]

It should be noted that the disproportionate impact of certain selection criteria – such as the reliance on ACRs, the timing of SHAPE-1 assessment, and the requirement for performance courses – is temporary, in that it disadvantages only those batches of women SSCs who were previously not eligible for PC. These criteria would not put recently hired women officers at a disadvantage as PC is open to them from the start of their SSC. However, some criteria, like the 60% cut-off or the mandatory SHAPE-1 fitness, *might* disproportionately exclude even newly selected women SSCs from PC, due to their history of disadvantage manifesting in lower degrees of educational attainment and physical fitness. However, at this point, whether these criteria will have such impact remains speculative. The Court's suggestion that the 60% threshold be reviewed after 2 years to assess if it continues to disproportionately exclude women from PC is prudent.

Nitisha thus makes several contributions to building the architecture of indirect discrimination in India. It grounds the recognition of indirect discrimination as an inevitable response to understanding discrimination as systemic. Through this, there is an explicit shift

away from locating the wrongness of discrimination within the prejudicial intention of the discriminator alone. *Nitisha* also lays down a two-stage test to establish indirect discrimination, with the impact of the rule factoring into the assessment at both stages. *Nitisha* further identifies the forms of impact relevant to assessing a claim of indirect discrimination, and the nature of evidence required to prove such impact. It thus offers future litigants and courts helpful tools in bringing and finding a claim of indirect discrimination.

Transforming permissive asymmetricity: Compelling state action

Asymmetricity, within discrimination law, implies both a focus on the group which has suffered disadvantage (Fredman, 2011: 26) and a distinction between forms of differential treatment which perpetuate disadvantage of disadvantaged groups and measures adopted to redress their disadvantage. Under an asymmetric understanding, the former is discriminatory while the latter is not (Fredman, 2016b: 747).

Early instantiations of an asymmetric reading of the non-discrimination guarantee exist within India's affirmative action jurisprudence where constitutional clauses permitting special provisions for disadvantaged groups were not seen as exceptions to the non-discrimination guarantee, but rather 'emphatic statements' of it.[63] Had they been recognised as exceptions, the implication would have been that though they are forms of constitutionally prohibited discrimination, they are permitted due to their role in redressing disadvantage. In contrast, recognising them as part of the non-discrimination guarantee implies that they do not, even at the threshold, constitute forms of prohibited discrimination, hinting at an asymmetric understanding of discrimination.

Aligning with this reasoning, the Supreme Court in *Nitisha* affirmed the asymmetric nature of the non-discrimination guarantee: 'to adopt a symmetrical concept of equality is to empty the anti-discrimination guarantee under Article 15 of all meaning'.[64] The Court rejected the contention of the Army that the petitioners contradicted their claim for equality by, on the one hand, seeking equal treatment with the male officers, but on the other demanding 'special and unjustified treatment' in selection.[65] The Court instead recognised that barriers which prevent members of disadvantaged groups from enjoying 'full and equal citizenship' ought to be dismantled rather than relied on to 'validate unjust status quo'.[66] The Court therefore refused to see differential treatment through special provisions as 'concessions' doled out to members of certain groups, but instead saw them as remedying 'wrongs' by obliterating 'years of suppression of opportunities which should have been granted to [these groups]'.[67]

In reading the non-discrimination guarantee as asymmetric, *Nitisha* thus confirmed a central – but so far unsaid – implication of India's affirmative action jurisprudence, which allows the State to introduce forms of preferential treatment for disadvantaged groups. However, courts have, till now, interpreted the Constitution's affirmative action provisions as merely enabling – rather than requiring – affirmative action,[68] a stance critiqued by commentators (Bhatia, 2019: 106). More broadly, courts have shied away from reading the equality code as imposing an obligation on the State to positively act to redress discrimination through differential treatment of disadvantaged groups. Recent Supreme Court decisions on disability discrimination appear to reverse this trend:

> Equality not only implies preventing discrimination…but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means ***embracing the notion of positive rights***.[69]

> The principle of reasonable accommodation captures the ***positive obligation of the State*** and private parties to provide additional support to persons with disabilities to facilitate their full and effective participation in society…for a person with disability, ***the constitutionally guaranteed fundamental right to equality…will ring hollow if they are not given this additional support that helps make these rights real and meaningful for them***.[70]

However, it is important to note that these obligations were sourced primarily from international human rights law[71] and the Rights of Persons with Disabilities Act2016[72] rather than the constitutional guarantees of equality and non-discrimination, though *Vikash Kumar* makes a facial reference to the latter.

In *Nitisha*, the Court took the necessary next step by identifying that *if* discrimination is understood as systemic, *then* reading the constitutional non-discrimination guarantee to impose only duties of non-intervention on the State – through prohibiting direct and indirect discrimination – is insufficient in redressing discrimination as 'structures of discrimination [would remain] unaddressed'.[73] This is because confronting systemic discrimination calls for more than just inaction or non-intervention: it requires 'structural changes for groups at different levels ***through positive action***'. At the same time, remedying direct and indirect discrimination does not necessarily require 'positive action as a sanction', apart from individual instances of reasonable accommodation (Mercat-Burns, 2018:7). The Court thus observed:

> a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, ***would account for not just unjust action but also inaction***. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-to-day interaction and decision-making. The duty of constitutional courts, when confronted with such a scheme of things, ***would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social re-distribution by providing for positive entitlements that aim to negate the scope of future harm***.[74]

This observation is enormously significant, as it states, in no uncertain terms, that courts can use the non-discrimination guarantee to compel state action in redressing systemic discrimination. The specific nature of judicial remedies this would entail, and how these would interact with the appropriate scope of the judicial role and concerns of separation of powers, remains to be developed through future jurisprudence. It should be noted that the Court relied on the general non-discrimination provision in Article 15(1), rather than the affirmative action provisions in Articles 15(3)-(5) and 16(3)-(4), to arrive at this conclusion. This could be because the constitutional affirmative action provisions are, in their wording, permissive rather than mandatory. Though forms of positive action to remedy systemic discrimination ideally ought to extend to affirmative action, the Court

did not take this step. As a result, affirmative action, post *Nitisha*, continues to remain subject to State discretion rather than judicial order.

Weaknesses: Questions unanswered

While *Nitisha* takes the constitutional jurisprudence on the non-discrimination guarantee forward in three central ways, gaps continue to remain on the scope of the guarantee, the doctrinal reading of the text of the guarantee, and the methodology used by the Court to arrive at its conclusions. The first concerns whether discriminatory impact can be justified, and if so, the applicable standard of justification. In *Naz*, the Delhi High Court used proportionality as the test to determine whether discrimination can be justified under Article 15,[75] while in *Navtej* the Supreme Court remained silent on the standard of justification under the provision. In *Nitisha* the Court remarked that indirect discrimination can be justified if the rule is 'necessary' for 'successful job performance', requiring the Court to examine whether it is possible to replace the rule with less discriminatory alternatives. While the employer is offered some deference in choosing employment criteria, generalisations will not be accepted in the garb of deference, and will be subject to 'close scrutiny'.[76] Tracing the trajectory across *Naz*, *Navtej* and *Nitisha*, is necessity the standard of justification for indirect discrimination, requiring the absence of less discriminatory alternatives? If so, does the petitioner bear the burden of pointing to less discriminatory alternatives, or is the State (or the employer) required to prove that no such alternatives exist? In the absence of an intelligible standard of justification, the extent of protection offered by the non-discrimination guarantee remains unclear.

In *Nitisha*, the Supreme Court also missed a chance to develop the doctrinal reading of Articles 15 and 16. Doctrinally, the non-discrimination guarantee – which prohibits the State from discriminating against any citizen 'on grounds ***only*** of religion, race, caste, sex, place of birth or any of them' – has struggled to recognise indirect discrimination due to its misplaced reliance on the word 'only'. The Supreme Court, in the now infamous *Nergesh Meerza*,[77] held that that discrimination should not be made '***only and only*** on the ground of sex' but could be made 'on the ground of sex coupled with ***other considerations***'. Applying this test, facially neutral rules having an adverse effect on women have been held to be based on 'other considerations' alongside sex, and thus outside the ambit of the prohibition on sex discrimination.[78] In *Navtej*, Chandrachud J, in his concurring opinion, recognised the limitations of the *Nergesh Meerza* reading of Article 15. It was identified as an 'incorrect' and 'formalistic view of the prohibition' in Article 15 (1), failing to identify the 'true operation' of sex discrimination[79] and rendering the non-discrimination guarantee 'meaningless'.[80] However, his was a concurring opinion; the majority in *Navtej* remaining silent on the doctrinal test in *Nergesh Meerza,* which therefore continues to hold the fray. While *Nitisha* recognised indirect discrimination as falling within the scope of Article 15, it failed to set *Nergesh Meerza* aside and offer an alternate doctrinal reading of the provision – how should the word 'only' in Article 15 be interpreted? – to undergird, and thus constitutionally anchor, such recognition.

Finally, in arriving at its conclusions, the Supreme Court in *Nitisha* referred to legal materials from the European Union, Canada, United Kingdom and the United States.

Comparativism offers a valuable source of 'inspiration, information and confirmation' and contributes to the deliberative process of judicial reasoning (Fredman, 2015: 638–641; Khosla, 2011: 930). However, comparativism has been critiqued for both blindly transplanting legal models indigenous to specific jurisdictions and cherry-picking jurisdictions which support the Court's conclusion (Fredman, 2015: 648-9; Khosla, 2011: 928). These concerns can be allayed, and the potential of comparativism can be harnessed, as long as courts are clear about why they refer to a certain jurisdiction and respond to the relevant textual, institutional, doctrinal and cultural differences (Fredman, 2015: 642). In its reliance on comparative legal material, *Nitisha* fails to engage with these questions and develop a principled approach to the use of comparative law. This does not imply that the conclusions arrived at are constitutionally unsound, but suggests that *methodologically*, the approach of the Court is questionable.

Conclusion

In one sense, *Nitisha* echoes a strand of the existing constitutional conversation on the scope and reach of the non-discrimination guarantee. It affirms the understanding of discrimination as systemic and asymmetric and recognises indirect discrimination. In another sense, however, *Nitisha* takes the conversation forward, adding facets that were previously absent. It develops the concept of systemic discrimination – identifying how it operates and can be proved – uses it to constitutionally ground the prohibition of indirect discrimination, sets out a two-stage test to establish and prove indirect discrimination, and recognises that both State action and inaction violate the constitutional guarantee of non-discrimination. Doctrinal questions however continue to remain unanswered post-*Nitisha*: the justification standard for indirect discrimination, the status of the *Nergesh Meerza* test under Article 15 and the approach to comparative law. But, seeing *Nitisha* as one chapter of a constitutional conversation, rather than a singular attempt to set in stone the conception of non-discrimination, allows us to appreciate its contributions while holding the space open for future judicial efforts at constitutional meaning-making.

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Notes

1. *Lt Col Nitisha v. Union of India* WP(C) No 1109/2020 (Supreme Court, 25 March 2021) ('*Nitisha*').
2. Other judicial decisions performing a similar task include the following: *Anuj Garg v. Hotel Association* (2008) three SCC one; *Navtej Johar v Union of India* (2018) 10 SCC one; *Joseph Shine v Union of India* (2018) two SCC 189; *Indian Young Lawyers Association v State of Kerala* 2018 SCC OnLine SC 1690.
3. *Chiranjit Lal Chowdhuri v. Union of India* AIR 1951 SC 41.
4. *EP Royappa v. State of Tamil Nadu* AIR 1974 SC 555.
5. The Equality (Prohibition of Discrimination) Bill (Centre for Law and Policy Research, 2021).
6. Constitution of India 1950, arts 15(3)–(4), 16(3)–(4).
7. Untouchability may be understood as the practice where certain groups are treated as ritually unclean and as a source of pollution (Galanter, 1969).
8. *State of Kerala v. NM Thomas* AIR 1976 SC 490.
9. *The Secretary, Ministry of Defense v. Babita Punya* CA Nos 9367-9369/2011 (Supreme Court, 17 February 2020) ('*Babita Punya*').
10. *Nitisha* para 6.
11. para 86.
12. para 81(vii).
13. para 88.
14. para 90.
15. para 36(ixv).
16. paras 90, 36(xii).
17. para 93(v).
18. para 92.
19. para 36(1)-(vii).
20. *Joseph Shine* para 38 (Chandrachud J).
21. *Indian Young Lawyers* para 117 (Chandrachud J).
22. *Nitisha* paras 44–45.
23. para 100.
24. para 74 citing *Action Travail des Femmes v. Canadian National Railway Company* (1987) one SCR 1114.
25. para 72
26. para 77.
27. para 74 citing *Action Travail*.
28. Statement by S Nagappa, Constituent Assembly of India Debates (Proceedings)-Volume VII (29 November 1948).
29. *Navtej* para 15 (Malhotra J).
30. *NM Thomas* para 167 (Krishna Iyer J).
31. *Indra Sawhney v. Union of India* AIR 1993 SC 477 para 627 (Sahai J).
32. Statement by Monomohan Das, Constituent Assembly of India Debates (Proceedings)-Volume VII (29 November 1948).

33. Statement by Santanu Kumar Das, Constituent Assembly of India Debates (Proceedings)-Volume VII (29 November 1948).
34. para 74 citing *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* 1997 28 C.H.R.R.D/179
35. para 75 citing *International Brotherhood of Teamsters v. United States* 431 U.S. 324 (1977).
36. paras 79–118.
37. Paras 85–87.
38. para 93(vii).
39. paras 96, 119.
40. para 95.
41. para 96.
42. para 111.
43. para 111.
44. *Naz Foundation v. NCT Delhi* (2009) 111 DRJ 1.
45. *Naz* paras 94, 97, 113; *Navtej* para 136 (Chandrachud J) and para 14.3 (Malhotra J).
46. *Nitisha* paras 47, 48.
47. para 66.
48. para 47, citing *Inspector Mahila (Ravina) v. Union of India* WP(C) 4525/2014 (Delhi High Court, 6 August 2015).
49. para 52 citing *Coleman v. Attridge Law* [2008] IRLR 722.
50. para 67, citing *Ontario Human Rights Commission v. Simpson-Sears* [1985] two SCR 53.
51. *Fraser v. Canada* 2020 SCC 28.
52. Using statistics to prove 'disproportionate' effect raises the question of what proportion of a group must be excluded, and relative to whom, for indirect discrimination to be established, answered differently in various comparative jurisdictions (Fredman 2011: 183–89).
53. para 65.
54. *Nitisha* para 69.
55. para 99.
56. para 119.
57. para 101.
58. para 112.
59. para 93(ii).
60. paras 101, 120(viii).
61. para 105.
62. para 112.
63. *NM Thomas* para 161 (Krishna Iyer J) and para 46 (Ray CJ); *Indra Sawhney* para 56 (Jeevan Reddy J).
64. para 101.
65. para 98.
66. para 45.
67. para 100.
68. *Indra Sawhney* para 628 (Sahai J).
69. *Jeeja Ghosh v. Union of India* (2016) seven SCC 761 para 40 (Sikri J).
70. *Vikash Kumar v. UPSC* 2021(1)SCT647(SC) para 35.

71. *Jeeja Ghosh* para 40 (Sikri J), citing the Report of United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability (2001).
72. *Vikash Kumar* para 43.
73. *Nitisha* para 71.
74. para 73.
75. *Naz* para 92 (*Naz*, as discussed above, was a case of indirect discrimination).
76. *Nitisha* para 70; For an overview of comparative standards for justifying indirect discrimination, see Fredman 2011: 191–96.
77. *Air India v. Nergesh Meerza* AIR 1981 SC 1829 para 70.
78. *Indian Hotel and Restaurants Association v. State of Maharashtra* 2006 (3) BomCR 705.
79. *Navtej Johar* para 36 (Chandrachud J).
80. para 38 (Chandrachud J).

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