

Indirect discrimination and substantive equality in *Nitisha*: Easier said than done under Indian constitutional jurisprudence

International Journal of
Discrimination and the Law
2022, Vol. 22(1) 74–86
© The Author(s) 2022



Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/13582291211062363
journals.sagepub.com/home/jdi



Vandita Khanna 

Abstract

This note analyses the recent landmark case of *Lt Col Nitisha v Union of India*, dated 25 March 2021, where the Supreme Court of India formally recognised the concept of indirect discrimination under Articles 14 and 15(1) of the Indian Constitution. Despite the favourable outcome and conceptual leaps in acknowledging that indirect discrimination is closely tied to substantive equality, the reasoning in the judgment does not fully cohere with these conceptual insights. This note critically examines how *Nitisha* poses barriers to addressing indirect discrimination with a substantive equality lens, particularly because of an intent-based divide between direct and indirect discrimination, a causal requirement between the norm and disparate impact, adoption of mirror comparators and the lack of clarity on justifications.

Keywords

Indirect discrimination, substantive equality, India, constitutional law, sex, discrimination law, Supreme Court of India

Introduction

The legal concept of indirect discrimination was first recognised by the US Supreme Court in *Griggs v Duke Power* in 1971.¹ The Court had held that practices ‘neutral on their

University of Cambridge, Cambridge, UK

Corresponding author:

Vandita Khanna, University of Cambridge, Flat 3, 28 Ferry Path, Cambridge CB4 1HB, UK.

Email: vk347@cam.ac.uk

face, and even neutral in terms of intent', that were 'discriminatory in operation' and could not be justified on the touchstone of 'business necessity' would trigger liability under discrimination law.² Since *Griggs*, the legal concept of indirect discrimination was transposed to different jurisdictions but remained curiously absent in Indian doctrine.³ A few judgments picked up on individual elements of indirect discrimination, such as the shift away from formal equality,⁴ irrelevance of intent,⁵ the idea of disproportionate impact⁶ and the harm of perpetuating historical disadvantage.⁷ However, no single case offered a complete conceptual account of indirect discrimination in Indian constitutional law.

Fifty years after *Griggs*, on 25 March 2021, a two-judge bench of the Supreme Court of India formally recognised indirect discrimination in *Lt Col Nitisha v Union of India*.⁸ The judgment is welcomed for conceptually foregrounding indirect discrimination as 'closely tied' to a substantive conception of equality in the Indian context. In adopting Sandra Fredman's multidimensional framework of substantive equality, the Court tied the freedom from indirect discrimination to the overlapping aims of: breaking the cycle of disadvantage ('redistribution'), redressing prejudice, stigma, stereotyping and violence based on protected grounds ('recognition'), facilitating political participation and social inclusion ('participation'), and accommodating differences and achieving structural change ('transformation').⁹

It is, however, one thing to state this close tie between indirect discrimination and substantive equality, and quite another to infuse indirect discrimination adjudication with a substantive equality lens. To this end, the note asks, to what extent did the Court in *Nitisha* give effect to the substantive conception of equality in addressing indirect discrimination? It is argued that the reasoning in *Nitisha*: introduces an intent-based divide between direct and indirect discrimination; requires the norm to be the 'cause' of the disproportionate impact; relies on formalistic mirror comparators; and leaves a shortfall in clarity at the justification stage. Taken cumulatively, *Nitisha* fails to harness the concept of indirect discrimination fully and risks diluting the stated commitment to substantive equality.

To appreciate the Court's reasoning, the note first discusses the facts, submissions and the judgment in *Nitisha*. It then considers the significance of addressing indirect discrimination in Indian society, as recognised by the Court. It subsequently unpacks how, despite acknowledging why indirect discrimination needs to be addressed, the legal tools and reasoning deployed in *Nitisha* are not fully in accord with the conceptual recognition of indirect discrimination that is animated by a substantive conception of equality.

The case

Factual background

The story of *Nitisha* begins with the ineligibility of women officers from seeking permanent commission ('PC') service in the Indian Army in the past. In response to a direct discrimination challenge on grounds of sex, in the case of *Secretary, Ministry of Defence v Babita Puniya*, the Supreme Court of India, in February 2020, had struck down the norm

that explicitly disqualified women from seeking PC. The Court had held that ‘all serving women officers on [short service commission] shall be considered for the grant of PC’.¹⁰ To implement the Court’s holding in that case, the Union Government decided to screen women officers on short service commission (‘SSC’) ‘based on existing policy ... applied uniformly to all SSC officers’.¹¹ To wit, SSC women officers would be considered ‘on the same terms and criterion as their male counterparts’.¹²

The selection criteria required officers to, *first*, satisfy a medical fitness standard; and, *secondly*, hold favourable annual confidential reports (‘ACRs’) on their performance. Besides extending these two criteria for selection, the Army had also fixed an annual cap of 250 officers who could be granted PC and a cut-off grade of 60 per cent that all successful candidates would need to meet.¹³ The grade of each woman SSC officer was ‘compared with the marks of the male officer with lowest merit granted PC’ in his year of entry.¹⁴ Based on this selection process, out of 615 women officers up for consideration, 277 were granted PC.¹⁵ The entire process of selecting women officers for PC formed the basis of the challenge in *Nitisha* under Articles 14 and 15(1) of the Indian Constitution that enshrine the fundamental rights to equality and non-discrimination, respectively.¹⁶ This note focuses on the medical fitness standard and the ACR requirement in appreciating the arguments and findings on indirect discrimination specifically.

Submissions

The petitioners – 86 women officers of the Indian Army, including Lt Col Nitisha – were in the age group of 40–50 years, having served as SSC officers for several years. The crux of their challenge was that their ‘male counterparts’ would typically have been considered for PC in the fifth or tenth year of their service at the age of 25–30 years.¹⁷ In affording equal treatment to these younger male officers and the newly eligible women officers who were much older, the selection criteria placed the latter at a disadvantage.

Before the Supreme Court,¹⁸ the petitioners highlighted, first, the ‘mechanical reproduction’ of the same medical fitness criterion for older women officers and younger male officers, without consideration of the fact that, due to physiological changes, at an older age women officers may not be able to satisfy the same medical fitness standards that younger men could be expected to satisfy.¹⁹ Further, male officers in the 40–50-year age group who had already been granted PC in their fifth or tenth year of service were no longer required to maintain their medical fitness level at an older age. The petitioners also urged that in light of the many years of denial of PC, ACRs of women officers were ‘filled out by the reporting officers casually, as compared to the ACRs of male officers’.²⁰ Over the years, women officers had been denied several opportunities to enhance their record in the ACRs. Since the ‘manner of judging and grading of ACRs for women officers was different from that of male officers, ... the two [could] not be placed on an equal footing’.²¹

The government’s submissions were wedded to the idea of formal equality, that is consistent treatment in the form of the law. They pressed that the medical criterion was ‘applicable to men and women alike’.²² The women officers in the present claim were unable to satisfy the medical criterion because of ‘physiological changes such as obesity and age [that were] independent of gender’.²³ It was argued that the petitioners could not

‘seek parity with their male counterparts’ and at the same time seek ‘special and unjustified treatment in the eligibility criteria for obtaining PC’.²⁴ Furthermore, according to the government, the ACRs were ‘merely one component of the evaluation for PC’ and thus should not be the sole basis to strike down the selection procedure altogether.²⁵

Judgment

Chandrachud J., writing for the two-judge bench of the Supreme Court, held the selection criteria to be indirectly discriminatory under Articles 14 and 15(1). It is noteworthy that even though the litigants did not raise a specific claim of ‘indirect discrimination’, the Court marshalled the idea, both conceptually and semantically. It defined indirect discrimination as ‘caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion’.²⁶ It extended its conceptual understanding of indirect discrimination by surveying the jurisprudence of the US,²⁷ UK,²⁸ South Africa,²⁹ Canada³⁰ and the European Court of Human Rights,³¹ to reveal a growing support for addressing indirect discrimination in comparative discrimination law.

Not only did the Court recognise indirect discrimination, but it also outlined a test to adjudicate indirect discrimination claims.³² The test comprises two stages. Two enquiries would feed into the first stage of the test, borrowed from the recent Canadian decision in *Fraser v Canada (Attorney General)*.³³ The Court would enquire, first, ‘whether the impugned rule disproportionately affects a particular group’, and second, ‘whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage’.³⁴ According to the Court, intent would not be required as an element to establish indirect discrimination because the concept ‘prohibits conduct, which though not intended to be discriminatory, has that effect’.³⁵ Statistical evidence could be ‘one of the ways’ to establish prima facie indirect discrimination.³⁶ But the Court deliberately decided to not lay down any quantitative threshold for the statistical disparity. Further, it declared that the ‘absence of any statistical evidence ... [could] not be the sole ground’ for dismissing indirect discrimination challenges.³⁷ At the second stage, the Court would need to assess ‘whether the narrow provision, criteria or practice [would be] necessary for successful job performance’.³⁸ Justifications proffered by the defendant would be subjected to ‘close scrutiny’ with ‘some amount of deference’.³⁹

Applying this two-stage test, the Court held that the selection criteria constituted indirect discrimination. First, it observed that the medical criterion was discriminatory because the women officers were being ‘subjected to a rigorous medical standard at an advanced stage of their careers ... unlike their male counterparts’ who did not have to maintain this level of medical fitness at the same age.⁴⁰ It assessed the application of the medical criteria to women vis-à-vis ‘similarly aged male officers with PC’ to arrive at its conclusion of discrimination.⁴¹

Secondly, the Court noted that women officers who were previously ineligible for PC did not receive career enhancement opportunities that had been made available to their male counterparts. As a result, the ‘writing of their ACRs was fundamentally influenced by the circumstance’ of previous ineligibility.⁴² That individual women officers did not voluntarily take up performance enhancing courses (that would improve their ACRs) was

not a ‘vacuous exercise of “choice”’ but a product of a ‘discriminatory incentive structure’ created in the Army.⁴³

The final holding confirmed that the pattern of evaluation disproportionately affected women officers ‘vis-à-vis their male counterparts’, and ‘this discrimination caused an economic and psychological harm and an affront to their dignity’.⁴⁴ The Court declared that all women officers receiving the cut-off grade would be entitled to PC and the medical criteria would be applied at the time of the fifth and tenth year of service (and not later).⁴⁵ As regards future applicants, the Court directed the government to examine the ‘disproportionate impact’ on women SSC officers who became eligible for PC in subsequent years of their service.⁴⁶

The analysis

Indirect discrimination closely tied to substantive equality

In reaching this favourable outcome, the Court underscored why indirect discrimination must be addressed. Simply put, indirect discrimination matters because it is ‘closely tied’ to substantive equality.⁴⁷ The Court in *Nitisha* explicitly adopted Fredman’s framework of substantive equality, that encompasses the dimensions of redistribution, recognition, participation and transformation.⁴⁸ Although the Court fell short of spelling out this close tie, the link is not hard to find.

First, indirect discrimination is imperative to address because, in the words of Chandrachud J., it aims to ‘remedy patterns of discrimination that are not as easily discernible’,⁴⁹ that contribute to the ‘subordination of a disadvantaged group’,⁵⁰ and ‘help to validate and perpetuate an unjust status quo’.⁵¹ *Nitisha* advances the redistributive dimension of substantive equality by placing disadvantage broadly defined as central to indirect discrimination. Notably, the Court recognised that ‘certain groups that have been subjected to patterns of discrimination and marginalisation’⁵² were the key victims of indirect discrimination. The reference to groups contextualises the relationship between the impact of the norm and the petitioner’s group membership and aligns with an asymmetric understanding of indirect discrimination that focuses on that group marked by a ground that has suffered historical disadvantage, that is, women and not men, Dalits and not upper-castes, homosexuals and not heterosexuals etc.⁵³

Secondly, the Court considered the significance of addressing indirect discrimination as regards the recognition dimension of substantive equality by conceiving disadvantage broadly to encompass economic, political and social exclusion, as well as physical and psychological harms.⁵⁴ It concluded that the selection criteria caused ‘economic and psychological harm and an affront to ... dignity’.⁵⁵

Thirdly, as regards the participative dimension, the Court brought social and political exclusion within the idea of disadvantage and practically enabled women officers to fully participate as economic actors in society instead of being alienated and excluded by way of complete ineligibility or other barriers.

Finally, the Court recognised the importance of indirect discrimination in uncovering the non-neutral interests behind facially neutral norms. It acknowledged that the

‘structures of our society have been created by males and for males’.⁵⁶ While they ‘may seem to be the “norm” and may appear to be harmless, [they] are a reflection of the insidious patriarchal system’.⁵⁷ Indirect discrimination must then be addressed to unmask when the ‘law is structured to cater to a male standpoint’.⁵⁸ As regards the transformational dimension, where indirect discrimination typically makes little headway,⁵⁹ the Court in *Nitisha* not only struck down the facially neutral barriers for women officers to receive PC. It also issued a direction that the method of evaluation for future batches must be reviewed ‘in order to examine for a disproportionate impact on [women officers] who became eligible for the grant of PC’.⁶⁰ Instead of the typical ex-post remedy that simply requires defendants to course-correct in response to a discrimination challenge, this remedial direction required the defendant to consider the impact of its evaluation methods behind the scenes to ‘negate the scope of future harm’.⁶¹

In sum, what comes through is a recognition that addressing indirect discrimination is integral to pursuing each of the dimensions of substantive equality in Indian society.

Barriers to addressing indirect discrimination: Untying substantive equality

Despite the conceptual recognition and favourable outcome in *Nitisha*, the reasoning fell short of giving effect to substantive equality in adjudicating the concrete indirect discrimination claim. Indeed, the qualitative reasoning mounted barriers to addressing indirect discrimination, including (i) an intent-based divide between direct and indirect discrimination, (ii) a causal requirement between norm and impact, (iii) use of mirror comparators and (iv) a lack of clarity on judicial review of justifications. Taken together, these elements demonstrate how indirect discrimination – and as a result, substantive equality – remain far from absorbed within Indian constitutional law.

Doctrinal divide between direct and indirect discrimination. First, *Nitisha* differentiated between direct and indirect discrimination ‘on the basis of the former being predicated on intent, while the latter [as] based on effect’.⁶² According to the Court, when the focus is on the ‘mental state underlying the impugned action ... we are in the territory of direct discrimination’.⁶³ However, ‘when the focus switches to the effects ... we enter the territory of indirect discrimination’.⁶⁴ This intent-based divide between direct and indirect discrimination confuses two ways of conceptually differentiating between forms of discrimination, namely intentional/unintentional and direct/indirect. Direct discrimination may well be unintentional, and discrimination may simultaneously be indirect and covert.⁶⁵

Further, this intent-based divide holds doctrinal implications for claimants, especially since the lines between direct and indirect discrimination are ‘famously blurred’.⁶⁶ The same norm may at times be framed as directly or indirectly discriminatory. As noted by the Canadian Supreme Court, a rule to work on Fridays may be framed as directly discriminatory ‘because it means that no workers whose religious beliefs preclude working on Fridays may be employed there’, or indirectly discriminatory ‘as a neutral rule that merely has an adverse effect on a few individuals ... whose religious beliefs prevent them from working on Fridays’.⁶⁷ Should such a claim be classified as one of direct

discrimination, the claimant would, per *Nitisha*, be required to prove intent. Proof of intent, as admitted by *Nitisha*, ‘puts an insuperable barrier in the way of a complainant seeking a remedy’.⁶⁸ However, in freezing intent as a requirement in direct discrimination claims, *Nitisha* makes it potentially difficult for indirect discrimination claimants to succeed in Indian constitutional law.

The close tie between indirect discrimination and substantive equality reveals that the concept of indirect discrimination is not about individual behaviour but about unveiling structures of disadvantage behind facially neutral norms.⁶⁹ The intent-based divide risks intent requirements creeping into indirect discrimination adjudication, shifts focus away from structures to individual prejudice and resists the redistributive dimension of substantive equality.

Search for causation. The second aspect of the reasoning in *Nitisha* that unties indirect discrimination from substantive equality is the search for a causal relation between facially neutral norms and the disparate impact of such norms.

In particular, the Court in *Nitisha* averred that the petitioners must establish ‘how the impugned provision, criteria or practice is the cause for the disproportionately disadvantageous outcome’.⁷⁰ This emphasis on ‘cause’ conflates the requirement of proving disproportionate and disadvantageous impact with showing a direct link, and not merely a correlation, between the norm and the impact. While the factual scenario in *Nitisha* was relatively clear-cut because women officers were completely barred from seeking PC in the past, it may not be possible to show such a neat causal relation in every indirect discrimination claim. This is because in the case of indirect discrimination, the link is typically mediated by pre-existing disadvantage of a group such that it is often not possible to show that the norm is the main, direct, or exclusive cause for the impact.⁷¹

In the UK context, Lady Hale aptly identified that the impugned provision, criteria or practice as well as the ‘reason for disadvantage are [both] “but for” causes of the disadvantage’ suffered by a group.⁷² Indirect discrimination, when infused with a substantive conception of equality, does not require claimants to find the cause for the disadvantageous outcome.⁷³ However, the search for a causal relation in *Nitisha* defies this conceptual underpinning and renders it difficult to address indirect discrimination meaningfully.

Use of mirror comparators. The third way in which *Nitisha* marks a retreat from substantive equality in addressing indirect discrimination is by using mirror comparators. A mirror comparator is one who does not share the relevant protected ground (eg sex) but is otherwise similarly situated (eg sharing the same age group and job circumstances).⁷⁴ The Court in *Nitisha* held that women officers did not need to meet the rigorous standards of medical fitness when ‘similarly aged male officers with PC’ were not required to do so.⁷⁵ It implied that since women aged 40–50 years were similar to men in that age bracket with PC, the former should be afforded the same treatment as the latter, thereby reviving the formulaic logic of ‘treating likes alike’.

The use of mirror comparators was successful in *Nitisha* because *none* of the men already with PC in the 40–50 age bracket were required to satisfy the medical criteria and,

at the same time, *all* the 40–50-year-old women who recently became eligible for PC were subjected to these requirements. However, the use of mirror comparators resists indirect discrimination and substantive equality.⁷⁶

To begin with, a mirror comparator approach conceptually fails to consider ‘different needs and circumstances’⁷⁷ and becomes a ‘search for sameness, rather than a search for disadvantage’.⁷⁸ In this manner, it remains wedded to the idea of equality as consistent treatment.⁷⁹ Second, the tool of mirror comparators may not transpose as easily onto all indirect discrimination claims. For example, indirect discrimination challenges mounted by pregnant women are liable to be defeated owing to the absence of a mirror comparator (ie pregnant men). Finally, a reliance on the mirror comparator approach misses the point of disproportionate impact, that is typical to most indirect discrimination claims. For example, a norm that imposes a minimum height requirement is equally applied to both women and their mirror comparator, men. Post-*Nitisha*, it may be argued that since both the claimant group (women) and the mirror comparator (men) are similarly treated, there is no case of discrimination. Despite noting the close tie between indirect discrimination and substantive equality, the retreat to mirror comparators in *Nitisha* leaves much wanting for a concrete rejection of formal equality and move towards substantive equality in Indian constitutional jurisprudence.

Scope for clarity in justification analysis. Finally, the Court in *Nitisha* failed to adopt the lens of substantive equality at the stage of reviewing justifications for *prima facie* indirect discrimination.

First, the Court remained unclear on the basis for reviewing justifications for indirect discrimination. On the one hand, it introduced a justification defence where the norm must be ‘necessary for successful job performance’.⁸⁰ On the other hand, in its actual analysis, it imposed a pre-condition that there could be ‘no judicial review of the standards adopted by the Army, unless they [were] manifestly arbitrary and [bore] no rational nexus to the objects of the organization’.⁸¹ Both standards of rational nexus and arbitrariness have been the subject of serious critique for being formalistic and vague.⁸² The introduction of these tests as pre-conditions to review justifications would increase the burden on claimants who would need to not only prove *prima facie* indirect discrimination but also show irrationality and manifest arbitrariness before the burden shifted onto the defendant.

Secondly, there is little guidance on what is precisely meant by ‘necessary for successful job performance’, particularly because the Court did not end up applying this justification analysis.⁸³ The lack of clarity is relevant because it could also allow defendants to argue that successful job performance should be measured along the lines of doing things in the way they have been done in the past. The dominant norm (eg of maleness) may creep in as the measure of successful job performance to justify indirect discrimination as is.

Thirdly, the standard of review for the justification defence remains unclear. Though *Nitisha* apparently adopted the necessity step of the proportionality standard by alerting future courts to explore ‘less discriminatory alternatives’,⁸⁴ it offered little guidance on the nature of this examination. For example, to meet the threshold, should no other alternative be available that could equally pursue the aim? Had a defendant found a less

discriminatory alternative, what considerations (eg cost, effectiveness, efficiency) could offset this choice?

These unresolved questions are related to, fourthly, the lack of clarity on who carried the burden to (a) show that the measure was necessary for successful job performance, (b) present other alternatives and (c) establish that no other alternative was viable. Placing the burden on defendants to show that they considered all possible alternatives would advance the transformational goal of substantive equality,⁸⁵ and create an incentive for defendants to ‘make decisions in a deliberative way even outside of the courtroom’.⁸⁶ A systematic engagement with these enquiries, however, remains wanting.

Finally, claimants remain unguided on what ‘close scrutiny’ with ‘some amount of deference’ means.⁸⁷ What does the degree of deference depend on: the kind of job, identity of the defendant, or other factors? Is the intensity of scrutiny premised on a sliding scale? For the reasoning to be truly informed by a normative commitment to substantive equality, justification defences need to be subjected to a high degree of scrutiny, as recognised by Fredman.⁸⁸ While *Nitisha* covers much conceptual ground in linking indirect discrimination with substantive equality, it falls short of doing the actual work of informing its adjudication of indirect discrimination claims with a substantive equality lens. Its reasoning thus reveals significant silences and dents in indirect discrimination adjudication.

Concluding Remarks

Why do these silences and dents matter if the petitioners in *Nitisha* ultimately succeeded? First, *Nitisha* is a formative judgment for adjudicating indirect discrimination claims in India. To wit, it is the first full-fledged conceptual account of indirect discrimination that holds the capacity to guide litigants and judges alike. It has been suggested that despite the simple facts in *Nitisha*, ‘Chandrachud J.’s formulation was detailed enough to address ... more complex cases when they do arise’.⁸⁹ However, as this note shows, Chandrachud J.’s formulation may in fact fail claimants in complex cases: where the lines between direct and indirect discrimination are malleable; where norms do not *cause* disadvantageous impact; where the heuristic of mirror comparators resists a finding of disparate impact; and where justifications are not subjected to searching scrutiny. It is thus particularly important to reflect on how the reasoning in *Nitisha* may be applied in future claims of indirect discrimination as experienced in Indian society, in all its complexities.

Secondly, the legal reasoning in *Nitisha* matters because of what it reveals about the role of substantive equality. Despite having stated a commitment to substantive equality, the Court appears to untie this stated commitment from the adjudication of the concrete claim at several steps. Such an approach risks diluting substantive equality and its overlapping aims to rhetorical flourish.⁹⁰

Finally, unpacking the reasoning in *Nitisha* allows us to appreciate that conceptual recognition is necessary, but by no means sufficient, to respond to indirect discrimination claims. Indeed, *Nitisha* illuminates that indirect discrimination adjudication is *easier said than done*. Each element in the adjudication of indirect discrimination needs to be

moulded such that it is genuinely capable of addressing indirect discrimination and, thus, pursuing substantive equality.

In future cases, Indian courts would do well to not only reaffirm that indirect discrimination is closely tied to substantive equality, but also give effect to this close tie in their legal reasoning. In doctrinal terms, this means avoiding different consequences for direct and indirect discrimination claims. This also means doing away with a causal relation between the norm and the impact in indirect discrimination challenges, as well as looking at a range of contextually relevant comparators to appreciate the nature of the comparative disparate impact. Finally, this entails clarifying the justification analysis in concrete cases, to embody a meaningful commitment to addressing indirect discrimination.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. 401 US 424 (1971).
2. *Ibid*, at 431.
3. This was despite excellent contributions noting the absence of indirect discrimination in Indian constitutional jurisprudence, see, R. Kapur and B. Cossman, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism', in N. Menon, ed. *Gender and Politics in India* (Oxford University Press, 1999), p. 217; T. Khaitan, 'Equality: legislative review under Article 14', in S. Choudhry, M. Khosla and P.B. Mehta, eds. *Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016), p. 705.
4. *Sumeet Enterprises v Union of India*, 2005(4)GLT227 [155].
5. *Navtej Singh Johar and Others v Union of India and Others*, Writ Petition (Criminal) 76/2016 [386] (concurring opinion of Chandrachud J.).
6. *Naz Foundation v Government of NCT of Delhi*, 160(2009)DLT277 [113]; *Madhu v Northern Railway*, 247(2018)DLT198 [29].
7. *Inspector (Mahila) Ravina v Union of India*, Writ Petition (Civil) 4525/2014 [12].
8. Writ Petition (Civil) No 1109/2020 (Decided 25 March 2021) (hereafter *Nitisha*).
9. S. Fredman, *Discrimination Law* (2nd edn, Oxford: Oxford University Press, 2011), p. 25.
10. (2020)7SCC469 [69].
11. *Nitisha* (n 8) [6].
12. *Ibid* [7].
13. *Ibid* [26]–[27].
14. *Ibid* [34].
15. *Ibid* [8].

16. Constitution of India, 1950. Article 14 reads, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' Article 15(1) guarantees, 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'
17. *Nitisha* (n 8) [22].
18. As the petitioners claimed that the judgment in *Babita Puniya* (n 10) was not implemented by the executive, the Court entertained the petition in *Nitisha* under Article 32 of the Constitution that contains various writs, including the writ of mandamus, to enforce fundamental rights.
19. *Nitisha* (n 8) [36].
20. *Ibid.*
21. *Ibid.*
22. *Ibid* [40].
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Ibid* [48].
27. *Ibid* [54]–[57].
28. *Ibid* [58]–[61].
29. *Ibid* [62]–[63].
30. *Ibid* [64]–[65].
31. *Ibid* [68].
32. Previous judgments that (implicitly or facially) recognised indirect discrimination failed to articulate a test for indirect discrimination adjudication, see, G. Pillai, 'Naz to Navtej: Navigating Notions of Equality', *NUJS Law Review* 12 (2019), p.20.
33. 2020 SCC 28.
34. *Nitisha* (n 8) [65], [69].
35. *Ibid* [67].
36. *Ibid* [68].
37. *Ibid.*
38. *Ibid* [70].
39. *Ibid.*
40. *Ibid* [106].
41. *Ibid* [109].
42. *Ibid* [95].
43. *Ibid* [96].
44. *Ibid* [119].
45. *Ibid* [120].
46. *Ibid.*
47. *Ibid* [45]. It is worth acknowledging that indirect discrimination, though necessary, is not sufficient to achieve substantive equality.
48. S. Fredman, *Discrimination Law* (n 9), p.25.
49. *Nitisha* (n 8) [53].
50. *Ibid* [46].
51. *Ibid* [44].

52. Ibid.
53. S. Fredman, 'Substantive Equality Revisited', *International Journal of Constitutional Law* 14 (2016), pp.728–729.
54. *Nitisha* (n 8) [65].
55. Ibid [119] (emphasis added).
56. Ibid [100].
57. Ibid.
58. Ibid (internal citations omitted).
59. S. Fredman, 'Substantive Equality Revisited' (n 53), pp.722–723.
60. *Nitisha* (n 8) [120].
61. Ibid [73].
62. Ibid [67].
63. Ibid [53].
64. Ibid.
65. T. Khaitan, 'Indirect Discrimination', in Kasper Lippert-Rasmussen, ed. *The Routledge Handbook of the Ethics of Discrimination* (New York: Routledge, 2018), pp.35–36.
66. Ibid, p.34.
67. *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 R.C.S. [24].
68. *Nitisha* (n 8) [67].
69. C.A. MacKinnon, 'Substantive Equality: A Perspective', *Minnesota Law Review* 96 (2011), p.8.
70. *Nitisha* (n 8) [68].
71. See, *Fraser* (n 33) [70]–[71].
72. *Essop and Others v Home Office (Border Agency)*, [2017] UKSC 27 [25]. Despite citing *Essop* in *Nitisha* (n 8) [60]–[61], the Indian Supreme Court fell short of actually applying it in its reasoning.
73. S. Fredman, 'The Reason Why: Unravelling Indirect Discrimination', *Industrial Law Journal* 45 (2016), p.242.
74. *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 SCR 357 [23].
75. *Nitisha* (n 8) [109].
76. See, e.g. *Fraser* (n 33) [94], [128].
77. D. Pothier, 'Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?' *Supreme Court Law Review* 33 (2006), p.145.
78. *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 [60].
79. See also, B. Baines, 'Comparing Women in Canada', *Feminist Legal Studies* 20 (2012).
80. *Nitisha* (n 8) [70].
81. Ibid [105].
82. T. Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement', *Journal of the Indian Law Institute* 50 (2008).
83. *Nitisha* (n 8) [70].
84. Ibid.
85. S. Fredman, *Discrimination Law* (n 9), p. 183.
86. S. Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008), p. 105.

87. *Nitisha* (n 8) [70].
88. S. Fredman, *Discrimination Law* (n 9), p.182.
89. G. Bhatia, 'Lt. Col. Nitisha vs Union of India: The Supreme Court Recognises Indirect Discrimination', in *Indian Constitutional Law and Philosophy Blog* (26 March 2021), available at: <https://indconlawphil.wordpress.com/2021/03/26/lt-col-nitisha-vs-union-of-india-the-supreme-court-recognises-indirect-discrimination/>(accessed 23 August 2021).
90. See, J. Koshan and J.W. Hamilton, 'Meaningless Mantra: Substantive Equality after *Withler*', *Review of Constitutional Studies* 16 (2011).