Indian Law Review

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rilw20

The development of indirect discrimination law in India: Slow, uncertain, and unsteady

Vandita Khanna

To cite this article: Vandita Khanna (2024) The development of indirect discrimination law in India: Slow, uncertain, and unsteady, Indian Law Review, 8:3, 306-330, DOI: 10.1080/24730580.2024.2412898

To link to this article: https://doi.org/10.1080/24730580.2024.2412898

Published online: 16 Oct 2024.

INDIAN LAW REVIEW
2024, VOL. 8, NO. 3, 306–330
https://doi.org/10.1080/24730580.2024.2412898

Routledge
Taylor & Francis Group

RESEARCH ARTICLE

OPEN ACCESS Check for updates

The development of indirect discrimination law in India: Slow, uncertain, and unsteady

Vandita Khanna

Sidney Sussex College, University of Cambridge

ABSTRACT

On 25 March 2021, the Supreme Court of India formally recognized the legal concept of indirect discrimination in *Lt Col Nitisha v Union of India*. This article uses *Nitisha* as a point of inflexion to study the development of Indian indirect discrimination law and *Nitisha's* contribution to this development. It shows that indirect discrimination law is more complex and contested than it appears when focusing solely on *Nitisha*. By zooming out and considering what *Nitisha* adds to pre-existing law and how it has been received in subsequent judgments, the article argues for a measured view of *Nitisha's* contribution and, in turn, of the state of Indian indirect discrimination law. Importantly, judicial recognition of indirect discrimination remains slow, uncertain, and unsteady. Even in the few cases where it has been recognized, the concept of indirect discrimination remains abstract and indeterminate, and questions on its adjudication remain far from resolved.

ARTICLE HISTORY
Received 5 February 2024
Revised 26 June 2024
Accepted 26 June 2024

KEYWORDS
Indirect discrimination; formal equality; Indian constitutional law; discrimination law; substantive equality

1. Introduction

To identify and address inequalities, the legal concept of indirect discrimination holds tremendous promise. For long, however, there was some ambiguity about whether indirect discrimination was recognized in Indian constitutional law. Scholars observed that Indian courts had failed to analyse the "potentially disparate impact"[1] of laws or recognize "indirect discrimination as discrimination at all"[2] and had been "slow to update their doctrine" in this regard.[3] This perception changed on 25 March 2021 when the Supreme Court of India (the "Supreme Court" or "Court, as the context may require), in *Lt Col Nitisha v Union of India* ("*Nitisha*"), held that indirect discrimination was prohibited under the Constitution of India 1950 (the "Constitution").[4]

CONTACT Vandita Khanna vk347@cam.ac.uk Sidney Sussex College, University of Cambridge, Cambridge CB2 3HU, UK

[1]Ratna Kapur and Brenda Cossman, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism' (2022) 16(1) National Law School Journal 1, 17.

[2]Gautam Bhatia, 'Case Comment: *Navtej Singh Johar v Union of India*: The Indian Supreme Court's Decriminalization of Same-Sex Relations' (2019) 22 Max Planck Yearbook of United Nations Law 218, fn 43.

[3]Tarunabh Khaitan, 'Equality: legislative review under Article 14' in Sujit Choudhry and others (eds), *Oxford Handbook of the Indian Constitution* (2016) 705.

[4]*Lt Col Nitisha v Union of India* 2021 SCC OnLine SC 261. See text to nn 7–10 below on how the judgment has been received.

Indirect discrimination encompasses situations where facially neutral norms have an unjustified disparate and disadvantageous impact on groups sharing protected characteristics (e.g. gender).[5] Since indirect discrimination is considered "one of the most powerful legal measures available to disadvantaged groups in society to assert their claims to justice",[6] scholars have enthusiastically welcomed its recognition in *Nitisha*. For example, as a declaration from the Supreme Court, it allays concerns about ambiguity in this regard. According to Fredman, *Nitisha* affirms the role of indirect discrimination within Indian jurisprudence, while Khaitan asserts that the judgment puts it "completely beyond doubt that indirect discrimination is part of Indian jurisprudence".[7] Beyond welcoming the affirmation and certainty that *Nitisha* lends to the Indian legal landscape, the judgment has also been celebrated for breaking "new ground"[8] as a "transformative tipping point"[9] and an "epochal moment for gender equality".[10]

In this article, I study *Nitisha's* contribution to the development of Indian indirect discrimination law. Instead of viewing *Nitisha* in isolation, I consider it as a point of inflexion and situate it within the trajectory of indirect discrimination law that both precedes and succeeds it. By contextualizing the judgment, I analyse (i) what *Nitisha* adds to pre-existing indirect discrimination law and (ii) how subsequent judgments have received *Nitisha* when adjudicating indirect discrimination claims.

Historically, indirect discrimination was largely obscured by a predominant focus on formal equality—a commitment to treating likes alike—in Indian equality and non-discrimination jurisprudence. Given this context, *Nitisha* can be seen to advance pre-existing jurisprudence by linking indirect discrimination to substantive equality and establishing a clear test for indirect discrimination adjudication. However, these advances remain unrealized as the Supreme Court in *Nitisha* retains traces of formal equality, distorting its understanding of indirect discrimination and falling short of operationalizing the test it proposes. Further, judicial recognition of indirect discrimination since *Nitisha* remains slow and uncertain, partly because of the distortion caused by an exclusive focus on formal equality. In the few instances since *Nitisha* where courts have recognized the concept of indirect discrimination, they have avoided applying the test established in *Nitisha*—or any test—for indirect discrimination adjudication. As a result, indirect discrimination law remains indeterminate, and its judicial trajectory remains unsteady. By systematizing this area of law, the article thus invites a measured view of *Nitisha* and facilitates an understanding of this unsteady state of Indian indirect discrimination jurisprudence.

[5]Tarunabh Khaitan, 'Indirect Discrimination' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (2017) 30. The article uses the term "norms" broadly to cover a range of laws, by-laws, policies, practices, and criteria.

[6]Hugh Collins and Tarunabh Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (2018) 30.

[7]Sandra Fredman, *Discrimination Law* (2023) 284; Junior Faculty Forum for South Asian Law Teachers (2022) JFF 17th Research Paper Workshop at 36:36 <https://www.youtube.com/watch?v=1Il5GmWUlds> accessed 10 November 2023.

[8]Gauri Pillai, 'A continuing constitutional conversation: Locating Nitisha' (2022) 22(1) International Journal of Discrimination and the Law 87, 87.

[9]Sarthak Gupta and Pruthvirajsinh Zala, 'Locating "Indirect Discrimination" under the Indian Constitution: Parity in the Indian Army' (*Berkeley Center on Comparative Equality & Anti-Discrimination Law Blog*, 2022) <https://www.comparativeequality.com/blog/a4sr6yimuokjec1v1zj3h866o46igd> accessed 10 November 2023.

[10]Unnati Ghia, 'With women officers in armed forces, SC recognises systemic biases' *The Indian Express* (30 March 2021).

There is much to be gained from systematizing Indian indirect discrimination law. First, the Constitution does not explicitly mention indirect discrimination and India lacks a comprehensive anti-discrimination statute. Consequently, the concept of indirect discrimination will likely develop in a bottom-up and incremental fashion by the judiciary within the broader context of common law adjudication. If such developments are incremental, it is important to consider the longer trajectory of indirect discrimination law before and after *Nitisha* instead of focusing solely on a single decision. Second, in the context of Indian constitutional adjudication, courts are often criticized for failing to provide clear, cogent, and coherent reasoning in their judgments, which results in a disconnect between the final outcome and the substantive reasoning leading to that outcome.[11] This issue is compounded by an ever-increasing caseload and the fact that judges do not sit *en-banc*, leading to inconsistencies across judgments.[12] Bearing in mind these challenges of incoherence *within* a single judgment and inconsistencies *across* judgments, the goal of systematization in this article is to spotlight these incoherencies and inconsistencies rather than resolve them. In pursuing this systematization, I examine whether and how *Nitisha* matters in judgments of the Supreme Court and High Courts and, to a limited extent,[13] in legal submissions, although *Nitisha* has also become a regular feature of speeches delivered by its author, Justice Chandrachud, outside the courtroom.[14] I examine judicial *reasoning* within judgments to highlight the uneven development of indirect discrimination law. Given that judges and courts are held to account based on the quality, extent, and rigour of reasoning and deliberation that underlie their judgments,[15] I join a body of scholarship concerned with such substantive reasoning and judicial observations rather than just the outcomes or *ratio decidendi*.[16]

To this end, the article is divided into three sections. Section 2 surveys Indian constitutional jurisprudence on equality and non-discrimination before *Nitisha*, discussing formal equality's distorting implications for indirect discrimination law and the incremental yet incomplete steps towards recognizing the concept of indirect discrimination. Section 3 of the article evaluates the advances made by the Supreme Court in *Nitisha* and the limits of its reasoning. Section 4 then maps the patchwork of post-*Nitisha* jurisprudence, analysing cases of indirect discrimination where *Nitisha* was not

[11]Chintan Chandrachud, 'Constitutional Interpretation' in Choudhry and others (n 3) 86–87.
[12]Nick Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload' (2013) 10 Journal of Empirical Legal Studies 570, 580–82.
[13]My reliance on lawyers' arguments is limited to judgment transcripts and, where available online, written submissions.
[14]See for example, Justice DY Chandrachud, 'Conceptualising Marginalisation: Agency, Assertion, and Personhood', 13th BR Ambedkar Memorial Lecture (6 December 2021) <https://journals.sagepub.com/doi/full/10.1177/23944811221104289> accessed 7 May 2024; Justice DY Chandrachud, 'Protecting Human Rights and Preserving Civil Liberties: Role of Courts in a Democracy', Kings College London [11] (20 June 2022) <https://www.kcl.ac.uk/law/assets/justice-chandrachud-protecting-human-rights-and-preserving-civil-liberties-the-role-of-courts.pdf> accessed 7 May 2024.
[15]See, for example, Gautam Bhatia, 'Justice must be open, not opaque' *Hindustan Times* (19 October 2018) <https://www.hindustantimes.com/analysis/justice-must-be-open-not-opaque/story-uOlfNMAKfX0sijzmkAETnM.html> accessed 7 May 2024; more generally, see Lon Fuller and Kenneth Winston, 'The Form and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353.
[16]See, for example, Gautam Bhatia and Shreya Atrey, 'In Search of Principle: 70 Years of Gender Jurisprudence in India' in Wen-Chen Chang and others (eds), *Gender, Sexuality and Constitutionalism in Asia* (2023); Tarunabh Khaitan, 'Koushal v Naz: The Legislative Court' (*UK Constitutional Law Association Blog*, 22 December 2013) <https://ukconstitutionallaw.org/2013/12/22/tarunabh-khaitan-koushal-v-naz-the-legislative-court/> accessed 7 May 2024 ("the academy simply cannot keep up with the judicial assembly line . . . In the Indian context, academics are forced to focus on the outcome of the cases alone . . . This reinforces the judicial belief that all they need to do is to make the outcome generally palatable; all else will probably be ignored").

referenced as well as cases where the recognition and application of *Nitisha* in indirect discrimination claims remained inconsistent and unsteady. The article thus shows the extent of this unsteadiness in understanding the work that remains to be done if indirect discrimination law and substantive equality are to be firmly established as part of Indian constitutional jurisprudence.

2. Indian discrimination law prior to *Nitisha*

2.1. The dominance of formal equality

For almost six decades, formal equality has been the dominant paradigm in Indian constitutional law.[17] This dominance can be seen in how the fundamental rights to equality and non-discrimination generally enshrined in Articles 14 and 15(1) of the Constitution have been interpreted by Indian constitutional courts, namely the Supreme Court and High Courts. These Articles read as follows:

> **Article 14**. 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)**. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.[18]

At the outset, formal equality is a remarkable achievement in Indian constitutional law: it promises equal treatment and makes headway in tackling individual acts of prejudice and patently discriminatory laws. However, a sole focus on formal equality also has a distorting effect on indirect discrimination law—at its core, it skews courts' ability to recognize indirect discrimination. This section focuses on three ways in which this distortion manifests.

First, Indian courts have largely endorsed the idea of equality as equal (i.e. same or consistent) treatment. The "equality-as-sameness" pattern requires that laws "operate alike on all persons under like circumstances"[19] or those who are "similarly situated".[20] Such a formal conception reduces equality to a mathematical exercise of treating likes alike without specifying any criteria for identifying the "likes" or "unalikes". This conflation of equality with sameness distorts the recognition of indirect discrimination. Kapur highlights that the "equal treatment or sameness approach … preclude[s] any analysis of the potentially disparate impact of … neutral legislation".[21] This approach is illustrated in the case of *PP John v Zonal Manager*, where a member of the Worldwide Church of God argued before the Andhra Pradesh High Court that his fundamental rights to religious freedom and equality had been violated because his employer had refused to grant him leave to

[17] See Gautam Bhatia, 'Equal moral membership: *Naz Foundation* and the refashioning of equality under a transformative constitution' (2017) 1(2) Indian Law Review 115, 116; Kapur and Cossman (n 1); Catharine MacKinnon, 'Sex equality under the Constitution of India: Problems, prospects, and "personal laws"' (2006) 4(2) International Journal of Constitutional Law 181.

[18] Constitution of India 1950, arts 14 and 15(1).

[19] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [8]; *State of Gujarat v Ambica Mills Ltd* AIR 1974 SC 1300 [53]; *In Re: The Special Courts Bill* AIR 1979 SC 478 [74].

[20] *Lachhman Das v State of Punjab* AIR 1963 SC 222 [62]; *Ramesh Prasad Singh v State of Bihar* AIR 1978 SC 327 [6]; *Air India v Nergesh Meerza* AIR 1981 SC 1829 [27]; *Government of Andhra Pradesh v Maharshi Publishers* AIR 2003 SC 296 [7].

[21] Ratna Kapur, "Gender Equality" in Choudhry and others (n 3) 748.

observe the Sabbath on Saturdays.[22] The High Court, however, responded that it was committed to "give equal treatment to all persons",[23] and the accommodation of the employee's religious practice of observing the Sabbath would be a "special favour" that was constitutionally prohibited.[24] Thus, in equating equality with consistency, the High Court failed to acknowledge the discriminatory effect of consistent treatment on those unable to work on Saturdays on grounds of their religion.

Second, formal equality has been accompanied by legal formalism. Article 15(1), which prohibits discrimination "on grounds only of", has been interpreted as prohibiting discrimination "only on the ground of" religion, race, caste, sex, or place of birth.[25] This interpretation has limited the recognition of discrimination under Article 15(1) to only one of the five grounds *listed* in the Constitution. The case of *Indian Hotel and Restaurants Association v State of Maharashtra* is a good example of how indirect discrimination does not align with this requirement for outward distinctions.[26] In this case, the issue of indirect discrimination arose concerning a norm that prohibited dance performances in certain establishments. The claimants argued that, although the prohibition was "couched in facially neutral language", it had a "disproportionate impact on women on the basis of their sex" as women constituted an "overwhelming majority of bar dancers".[27] However, as Kapur and Cossman note, when a court is "only concerned with formal equality – that is, with whether women and men were treated as formally equal under the law . . . [t]here is no consideration of the impact of the law, nor in turn, whether there is a disparate impact of the law on women".[28] Thus, the Bombay High Court concluded that the norm was "not traceable to banning dance performances by women" since it prohibited all dance performances by men as well,[29] and since the law made "no such distinction" between men and women,[30] Article 15(1) was not violated. This requirement for facial distinctions distorts the Court's view of indirect discrimination, given that its "indirect nature is identified by the existence of a measure that does not obviously rely on a prohibited discriminatory ground".[31]

In addition, courts have interpreted Article 15(1) to mean that discrimination must be based "solely"[32] or "only and only"[33] on the ground of religion, race, caste, sex, or place of birth and on "no other ground".[34] Interpreted like this, discrimination based on

[22] *PP John v Zonal Manager* 1995 (8) SLR 190. The employee was found in breach of the Life Insurance Corporation of India (Staff) Regulations 1960, Regs 21 and 30(1).
[23] ibid [28].
[24] ibid [22], [24].
[25] Constitution of India 1950, art 15(1).
[26] *Indian Hotel and Restaurants Association v State of Maharashtra* 2006 (3) Bom CR 705. The norm under challenge was the Bombay Police Act 1951, s 33A.
[27] ibid [5].
[28] Kapur and Cossman (n 1) 51.
[29] *Indian Hotel and Restaurants Association v State of Maharashtra* (n 26) [24].
[30] ibid. On appeal, the appellants did not raise the art 15(1) argument before the Supreme Court in *State of Maharashtra v Indian Hotel and Restaurants Association* AIR 2013 SC 2582.
[31] Jonnette Watson Hamilton and Jennifer Koshan, 'Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*' (2015) 19(2) Review of Constitutional Studies 191, 196.
[32] *Anjali Roy v State of West Bengal* AIR 1952 Cal 822 [16]; *Pujari Narasappa v Shaik Hazrat* AIR 1960 Kant 59 [16]; *Shamsher Singh v Punjab* AIR 1970 P&H 372 [17]; *Leela v State of Kerala* ILR 2004 (1) Kerala 508 [25].
[33] *Air India v Nergesh Meerza* AIR 1981 SC 1829 [69]; *Raghubans Singh v State of Punjab* AIR 1972 PH 117 [14]; *Charan Singh v Union of India* (1979) IILLJ 123 Del [16].
[34] *Mahadeb Jiew v BB Sen* AIR 1951 Cal 563 [28].

a combination of a listed ground and "other considerations" is not unconstitutional.[35] Over the years, this interpretation has required claimants to prove that any disparate impact is *caused* by the listed ground instead of recognizing that indirect discrimination is usually a product of multiple contributing factors, including the facially neutral norm.[36]

Third, a commitment to formal equality has led to the use of lenient standards of review, namely reasonable classification and non-arbitrariness.[37] According to the reasonable classification standard, while the state has the power to classify individuals into groups, the classification must be based on an intelligible differentia, and the differentia must have a rational relation to the objective sought to be achieved.[38] By emphasizing the "prima facie formulation of the rule, and [ignoring] its real-world impact",[39] the first prong of the reasonable classification standard mirrors and validates an "unequal status quo".[40] So long as individuals are divided into two classes, they are considered differently situated and can be treated differently. The facially neutral basis for this differential treatment is uncritically accepted as a given, leaving intact the indirect discrimination underlying facial neutrality.[41] Equally, the second prong of the reasonable classification standard does not examine the legitimacy of the objective but merely affirms the suitability of the norm to further the objective.[42]

Manifest arbitrariness, as the second standard of review,[43] is defined as "something done by the legislature capriciously, irrationally and/or without adequate determining principle [and] also when something is . . . excessive and disproportionate".[44] Laws are manifestly arbitrary when they are "not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment".[45] However, manifest arbitrariness also includes norms that are "not reasonable" and thus retains a formalistic reasonableness standard.[46] Moreover, factors such as caprice, bias, and favouritism require courts to turn to the apparent attitude of the defendant,[47] thereby risking a focus on discriminatory intent in indirect discrimination adjudication.

Overall, this first phase of Indian discrimination jurisprudence reflects a predominant commitment to formal equality, which makes it challenging for courts to identify when equal (i.e. similar) treatment leads to disparate or disproportionate impact. The

[35] *Dattatraya Motiram More v State of Bombay* AIR 1953 Bom 31 [7].
[36] Shreya Atrey and Gauri Pillai, 'A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)' (2021) 5(3) Indian Law Review 338, 341. This interpretation was followed in, for example, *Sudarshna Devi v Union of India* ILR 1978 HP 355 [43].
[37] See generally, Jahnavi Sindhu and Vikram Aditya Narayan, 'Equality under the Indian Constitution: Moving away from Reasonable Classification' (*SSRN*, 29 November 2022) <https://ssrn.com/abstract=4288394> accessed 9 May 2024; Tarunabh Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement' (2008) 50(2) Journal of Indian Law Institute 177.
[38] *Kathi Raning Rawat v State of Saurashtra* AIR 1952 SC 123 [48]; *Budhan Choudhury v State of Bihar* AIR 1955 SC 191 [7]; *Lachmandas Kewalram Ahuja v State of Bombay* AIR 1963 SC 222 [7].
[39] Khaitan (n 3) 704.
[40] MacKinnon (n 17) 187.
[41] See, for example, *Javed v State of Haryana* AIR 2003 SC 3057 [8], [9], [11].
[42] Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Mordechai Kremnitzer and others (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (2020) 472.
[43] *Independent Thought v Union of India* AIR 2017 SC 4904 [169]–[173].
[44] *Shayara Bano v Union of India* AIR 2017 SC 4609 [282].
[45] ibid [278].
[46] *Janhit Manch v State of Maharashtra* AIR 2019 SC 986 [9].
[47] Farrah Ahmed, 'Arbitrariness, subordination and unequal citizenship' (2020) 4(2) Indian Law Review 121, 129–31.

distorting effect of aligning the rights to equality and non-discrimination with formal equality is apparent. A focus on formal equality hinders the recognition and redress of indirect discrimination. This is likely what Collins and Khaitan had in mind when they noted that the concept of indirect discrimination seeks "something more than formally equal treatment".[48]

2.2. Tentative steps towards indirect discrimination (2009–2018)

Since 2009, courts have incrementally recognized individual elements of indirect discrimination. The concept itself was first recognized in *Naz Foundation v Government of NCT of Delhi* ("*Naz*") in response to a constitutional challenge to section 377 of the Indian Penal Code 1860, which prohibited "carnal intercourse against the order of nature" and was widely used to criminalize adult consensual same-sex sexual intercourse.[49] A two-judge bench of the Delhi High Court recognized that while facially neutral, "in its operation", section 377 unfairly targeted homosexuals as a class.[50] Six years later, the concept of indirect discrimination was affirmed in *Inspector (Mahila) Ravina v Union of India* ("*Ravina*"), where a claimant was denied promotion and lost her seniority due to her "unwillingness" to complete a course at a stipulated time because she was pregnant. Writing for a two-judge bench of the Delhi High Court, Justice Bhat held that "seemingly neutral" norms may "act in a discriminatory manner" and impact the rights of constitutionally protected groups, such as women.[51] Since the claimant's "unwillingness to complete the course stemmed from her inability due to her pregnancy", the High Court directed her employers to restore her seniority.[52] In 2018, Justice Bhat extended this reasoning in *Madhu v Northern Railway* ("*Madhu*"), when a railway employee removed his wife and daughters' names from the category of "family" and disentitled them from free medical treatment.[53] When the wife and daughter challenged the railway's decision not to extend medical treatment to them, Justice Bhat—again writing for a two-judge bench of the Delhi High Court—held that since a "large majority of dependents are likely to be women and children", a norm that made free medical treatment contingent upon a declaration by the primary employee disproportionately impacted women and children.[54] In the same year, in his concurring opinion in the Supreme Court judgment in *Navtej Singh Johar v Union of India* ("*Navtej*"), Justice Chandrachud identified section 377 of the Indian Penal Code as indirectly discriminatory, noting that "facially neutral actions by the State ha[d] a disproportionate impact upon a particular class".[55]

These four judgments and opinions reflect a certain judicial appetite for recognizing indirect discrimination and moving beyond formal equality even before *Nitisha*.[56] In

[48]Collins and Khaitan (n 6) 4.
[49]*Naz Foundation v Government of NCT of Delhi* 160 (2009) DLT 277.
[50]ibid [94].
[51]*Inspector (Mahila) Ravina v Union of India* WP(C) 4525/2014.
[52]ibid.
[53]*Madhu v Northern Railway* 247 (2018) DLT 198.
[54]ibid [29]–[30]. The norm under challenge was the speaking order of the Northern Railways, which denied claimants medical services by making these benefits contingent upon a declaration by the railway employee.
[55]*Navtej Singh Johar v Union of India* AIR 2018 SC 4321 [395] (Concurring Opinion by Chandrachud J).
[56]See, for example, Tarunabh Khaitan, 'Reading *Swaraj* into Article 15: A New Deal for All Minorities' (2009) 2 NUJS Law Review 419, 430 ("This recognition of indirect discrimination and harassment is a move away from a formal guarantee of non-discrimination to a more substantive protection of personal autonomy").

Nitisha itself, Justice Chandrachud refers to each of these judgments to draw a line of jurisprudence preceding *Nitisha*.[57] However, four patterns within and across these judgments reveal doctrinal inconsistencies in this period.

First, although some judgments tried to move beyond formal equality and recognize elements of indirect discrimination, their reasoning retained a degree of formal equality and its accompanying distorting effects, as evident in *Ravina*. Although the Delhi High Court was willing to look beyond neutrality and identify discriminatory impact, it individualized the claim and focused on the lawfulness of the specific decision rather than that of the facially neutral norm. *Ravina* was adjudicated on the narrow issue of whether the decision to find the pregnant claimant to be "unwilling"—due to her pregnancy—violated the rights to equality and non-discrimination.[58] By focusing on the individual woman's choice to be pregnant and thus adopt or depart from the "normal" working condition,[59] the High Court no longer problematized the broader condition to complete the course at the stipulated time. The concept of indirect discrimination lifts the veil of neutrality and illuminates how dominant groups (e.g. male workers) are the reference point in drafting processes. However, in individualizing the claim, the High Court in *Ravina* left intact the underlying facially neutral norms and missed the opportunity to realize the potential of indirect discrimination.

Justice Chandrachud's concurring opinion in *Navtej* is celebrated for doing away with formal equality, particularly the "formalistic interpretation of Article 15".[60] However, a close reading indicates that he may have conflated indirect discrimination and intersectional discrimination. His opinion illustrates why Article 15(1) should not be interpreted as prohibiting discrimination based "only and only" on a single ground. It states:

> For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height.[61]

Although Justice Chandrachud's example is apt, he used it not to demonstrate the challenges of addressing indirect discrimination but rather to cast doubt on the ability of this "narrow view of Article 15" to "take into account the intersectional nature of sex discrimination".[62] The example, however, is not one of intersectional discrimination at all but of indirect sex discrimination alone. Thus, it continued to miss why formal equality is particularly problematic for addressing indirect discrimination.

Even if we were to read these judgments as moving beyond a formal conception of equality only and towards an incremental recognition of indirect discrimination, a second pattern to note is that this movement was neither straightforward nor linear. Despite the steps taken by the courts in *Naz, Ravina, Madhu*, and *Navtej*, we continued to see unsuccessful indirect discrimination claims because of an exclusive commitment to formal equality. A fitting example

[57] *Nitisha* (n 4) [46]–[47].
[58] *Ravina* (n 51) [12].
[59] ibid.
[60] *Navtej* (n 55) [387]–[389].
[61] ibid [387].
[62] ibid [388].

is the 2016 judgment in *Rajbala v State of Haryana*.[63] The claimants had argued that a minimum educational qualification requirement to contest village panchayat elections would "have the effect of disqualifying more than 50% of persons", of whom women and scheduled caste women would be worst hit.[64] In response, the Supreme Court found that the provision created two classes: "those who [were] qualified by virtue of their educational accomplishment to contest the elections ... and those who [were] not".[65] It focused on the form of the norm and accepted the classification as reasonable since educational requirements were relevant to the legitimate aim of better administration.[66]

Third, the incremental recognition of indirect discrimination in individual judgments remained abstract, as courts failed to establish a test for indirect discrimination adjudication. For example, in *Navtej*, although Justice Chandrachud's concurring opinion surveyed the concept of indirect discrimination in different jurisdictions, it did not arrive at one test for indirect discrimination adjudication. As Pillai observes, while the opinion might have "settled the speculation post *Naz* about the status of indirect discrimination within the constitutional jurisprudence in India, further clarity is required on the test to assess the same".[67]

Fourth, even when a court recognized indirect discrimination and drew on a definition or test for its adjudication, it stopped short of applying the test to the concrete facts of the case. This can be seen in *Naz*, where the Delhi High Court defined indirect discrimination by relying on the Declaration of Principles of Equality 2008 issued by the Equal Rights Trust in the United Kingdom,[68] thus giving the impression that it intended to apply this definition. However, in its actual analysis, the High Court did not incorporate any of the constitutive elements of this definition and, despite recognizing the case as one warranting "strict scrutiny",[69] declared section 377 of the Indian Penal Code to be invalid "under any standard of review".[70] Thus, strict scrutiny was not actually applied in *Naz*.

These patterns show how the steps towards recognizing indirect discrimination were, at best, tentative, and much more was required to embed indirect discrimination within Indian constitutional jurisprudence. It comes as little surprise then that in November 2018, in *Jacqueline Jacinta Dias v Union of India*, Justice Bhat, writing for a two-judge bench of the Delhi High Court, observed that "equality jurisprudence in India has not yet advanced as to indicate clear norms ... which guide the courts" in indirect discrimination adjudication.[71]

[63] *Rajbala v State of Haryana* AIR 2016 SC 33. The impugned norm was the Haryana Panchayati Raj Act 1994, s 175 (as amended by the Haryana Panchayati Raj (Amendment) Act 2015).
[64] ibid [74].
[65] ibid [85].
[66] ibid.
[67] Gauri Pillai, 'Naz to Navtej: Navigating Notions of Equality' (2019) 12 NUJS Law Review 2, 20.
[68] Which defined indirect discrimination as occurring when "a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless a legitimate aim objectively justifies that provision, criterion or practice, and the means of achieving that aim are appropriate and necessary".
[69] *Naz* (n 49) [111].
[70] ibid [113].
[71] *Jacqueline Jacinta Dias v Union of India* WP(C) 4116/2015 [34].

3. Situating *Nitisha*

3.1. Indirect discrimination and substantive equality

In light of the pre-existing jurisprudence, this section shows that *Nitisha* advanced Indian indirect discrimination law in two respects: first, it articulated the conceptual relationship between indirect discrimination and substantive equality, and second, it established a clear test for indirect discrimination adjudication.

The facts of *Nitisha* can be traced to a previous direct discrimination challenge regarding the complete ineligibility of women for permanent commission service in the Indian Army. In 2020, the Supreme Court declared that this ineligibility was tantamount to discrimination on the basis of sex under Article 15(1) of the Constitution. As a result, women who were previously ineligible for permanent commission service were now permitted to apply for it.[72] The resultant eligibility criteria for selecting officers for permanent commission, based on medical fitness and officer reports, were neutrally framed and applied equally to both men and women. In the case of *Nitisha*, however, women officers argued that the eligibility criteria excluded more women than men. They urged that the medical fitness requirements for male officers aged 25–30 were now being imposed on women officers aged 40–50 because they had been denied permanent commission service at a younger age. Regarding their officer reports, the women officers argued that their years without the possibility of permanent commission had deprived them of opportunities to improve their reports. Therefore, the facially neutral and equal treatment of men and women officers resulted in indirect discrimination against women.

The Union of India, as the respondent in *Nitisha*, argued that the eligibility criteria satisfied the right to equality because they were "applicable to men and women alike".[73] However, Justice Chandrachud, writing for a two-judge bench of the Supreme Court, rejected this "symmetrical concept of equality".[74] He highlighted that indirect discrimination goes further than formal equality, observing that:

> Under the formal and symmetric conception of anti-discrimination law, all that the law requires is that likes be treated alike. Equality, under this conception, has no substantive underpinnings. It is premised on the notion that fairness demands consistency in treatment. Under this analysis, the fact that some protected groups are disproportionately and adversely impacted by the operation of the concerned law or its practice makes no difference.[75]

Justice Chandrachud did not leave substantive equality undefined as a vacuous concept; instead, he drew upon Fredman's multidimensional conception of substantive equality that encompasses the overlapping aims of recognition, redistribution, transformation, and participation and held that "[t]his conception eschews the uncritical adoption of laws and practices that appear neutral but in fact help to validate and perpetuate an unjust status quo".[76] Therefore, the first advance in *Nitisha* was that it declared indirect discrimination to be "closely tied to the substantive conception of equality".[77]

[72] *Secretary, Ministry of Defence v Babita Puniya* (2020) 7 SCC 469.
[73] *Nitisha* (n 4) [40].
[74] ibid [101].
[75] ibid [43].
[76] Sandra Fredman 'Substantive Equality Revisited' (2016) 14(3) International Journal of Constitutional Law 712; *Nitisha* (n 4) [44].
[77] *Nitisha* (n 4) [45].

The second advance in *Nitisha* was that the Court established a clear test for indirect discrimination adjudication. To begin with, Justice Chandrachud reviewed debates and jurisprudence on indirect discrimination from the United States of America, the United Kingdom, South Africa, and Canada.[78] He then went beyond his concurring opinion in *Navtej* and, drawing from Canadian jurisprudence,[79] laid down a test for indirect discrimination adjudication under Indian constitutional law. This test required an assessment of:

(i) whether a norm disproportionately affected a particular group; and
(ii) whether this norm had the effect of "reinforcing, perpetuating, or exacerbating disadvantage" of that group, which includes economic, social, psychological, physical, and political disadvantage.[80]

Claimants would need to establish (i) and (ii) before the burden could be shifted to the respondent state to justify at stage (iii) that the norm was "necessary for successful job performance".[81] Notably, the Court avoided laying down a quantitative threshold for disproportionality under stage (i). It emphasized that statistical evidence could be "one of the ways" for claimants to prove indirect discrimination but its absence could not be the "sole ground" for dismissing such claims.[82] At the justification stage (iii), while "some amount of deference" was warranted in assessing the justification proffered by the state, "close scrutiny and exhibiting attentiveness to the possibility of alternatives" was crucial.[83] On the facts, the Supreme Court found that the eligibility criteria for permanent commission service in the Army disproportionately affected women "vis-à-vis their male counterparts", causing "an economic and psychological harm and an affront to their dignity",[84] and therefore violated Articles 14 and 15(1) of the Constitution.

3.2. A critical assessment of *Nitisha*

While *Nitisha* deserves to be celebrated for recognizing indirect discrimination and linking it with substantive equality, there remains scope for clarity and course correction on at least three fronts. First, although the Supreme Court in *Nitisha* advanced a substantive conception of equality, it positioned formal and substantive equality in opposition to each other. Note, for instance, Justice Chandrachud's statement:[85]

> At its heart, this case presents this Court with the opportunity to choose one of two competing visions of the anti-discrimination guarantee embodied in Articles 14 and 15(1) of the Constitution: *formal versus substantive equality*.[86]

[78] ibid [51]-[65].
[79] *Fraser v Canada (Attorney General)* 2020 SCC 28 (Canadian Supreme Court).
[80] *Nitisha* (n 4) [65].
[81] ibid [70].
[82] ibid [68].
[83] ibid [70].
[84] ibid [119].
[85] For a critique of pitting formal equality against substantive equality, see Elisa Holmes, "Anti-Discrimination Rights Without Equality" (2005) 68(2) Modern Law Review 175, 179.
[86] *Nitisha* (n 4) [42] (emphasis added).

Instead of conceiving formal and substantive equality as alternatives or "competing visions" of which only one can be chosen, the Court would have been better positioned to hold that the anti-discrimination guarantees in Articles 14 and 15(1) embody *complementary* visions of formal and substantive equality. This would have allowed it subsequently to show how prohibiting indirect discrimination aligns with a substantive conception of equality.

Second, although *Nitisha* pointed out a tension between formal equality and indirect discrimination and stated that indirect discrimination is closely tied to substantive equality, it retained elements of formal equality that risk distorting the Court's understanding of indirect discrimination. Glimmers of formal equality are evident in, for example, the Court's use of mirror comparators, which identify someone who does not share the relevant protected characteristic but is otherwise similarly situated.[87] In particular, the Supreme Court in *Nitisha* held that women officers did not need to meet the medical fitness criteria when "*similarly aged* male officers with permanent commission" were not required to do so.[88] This language implies a determination that women aged 40–50 were similar to men in that age bracket with permanent commission, and therefore they should be afforded the same treatment. As Pothier observes, mirror comparators reveal a "mindset focused on formal equality".[89] Importantly, they are inapt for indirect discrimination because they overlook the disproportionate impact on groups with protected characteristics, seek "direct parallels", and fail to consider "different needs and circumstances".[90] Admittedly, the Supreme Court did not consistently insist on mirror comparators throughout *Nitisha*: had it done so, the claim might have failed because all women officers would have been considered different from the men, who would have had different officer reports. But the fact that the language of mirror comparators finds *any* place in *Nitisha* serves as a reminder of the dominance of formal equality in Indian discrimination law generally. It is important to note such judicial observations, which "become part of the resource pool from which subsequent judges (and lawyers) draw to make new arguments", especially given that "Indian judicial practice routinely uses this pick-and-choose approach".[91]

Similarly, the distorting implications of formal equality for indirect discrimination law are evident in how *Nitisha* distinguishes between direct and indirect discrimination. In the Court's words:

> [a]s long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination.[92]

Again, it states that the "distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter

[87]The critique of *Nitisha* here is not that it considered a comparator but that it invoked the idea of a mirror comparator. See Shreya Atrey, 'Comparison in intersectional discrimination' (2018) 38 Legal Studies 379.
[88]*Nitisha* (n 4) (emphasis added).
[89]Dianne Pothier, 'Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?' (2006) 33 Supreme Court Law Review 135, 145.
[90]ibid.
[91]Aparna Chandra, 'A precious heritage? The construction of constitutional identity by Indian courts' (2023) 1(1) Comparative Constitutional Studies 140, fn 92.
[92]*Nitisha* (n 4) [53].

is based on effect".[93] In this respect, Justice Chandrachud departs from his concurring opinion in *Navtej*, where he had held that *all* Article 15(1) inquiries should be "assessed not by the objects of the state … but by the effect that the provision ha[d] on affected individuals", regardless of whether the grounds of discrimination were "direct or indirect".[94]

Beyond the inconsistencies in Justice Chandrachud's opinions in *Navtej* and *Nitisha*, the intent-effect divide makes intention a component of direct discrimination law.[95] However, the same norm can sometimes be framed as directly or indirectly discriminatory. For example, recall *PP John v Zonal Manager*, where an employer denied leave to a member of the Worldwide Church of God to observe the Sabbath on Saturdays.[96] On the one hand, the norm under challenge could simply be the refusal of leave on grounds of the employee's religion, which would make this a case of direct discrimination. On the other hand, the norm could also be framed as the facially neutral requirement for all employees to work on Saturdays, thereby disproportionately impacting employees who cannot work on Saturdays on grounds of their religion. Since the lines between direct and indirect discrimination are not always clear and depend on how litigants and the court frame the issue, there is a risk that the intent-effect divide between direct and indirect discrimination might introduce intent—a component of direct discrimination—into the realm of *indirect* discrimination law, thereby shifting the focus towards individual behaviour and undermining the structural focus of indirect discrimination.[97]

Third, while the Supreme Court in *Nitisha* established a test for indirect discrimination adjudication, where justifications by the state were to be assessed against the "necessary for successful job performance" standard,[98] it did not apply this standard to the facts of the case. Most Indian jurisprudence has reduced equality and non-discrimination adjudication to reasonable classification or non-arbitrariness without considering substantive concepts of subordination, stigma, vulnerability, disadvantage, marginalization, dignity, or autonomy.[99] At first glance, the new justification defence introduced in *Nitisha* gives the impression that the Supreme Court embraced a proportionality standard in indirect discrimination adjudication.[100] A core strength of the proportionality standard is that it imposes a structured and disciplined framework for courts to review justifications along distinct limbs of legitimacy, suitability, necessity, and balancing.[101] Absent such a structured assessment, *Nitisha* merely pays lip service to

[93] ibid [67].
[94] *Navtej* (n 55) [393].
[95] Critiqued in Dhruva Gandhi, 'Nitisha v. Union of India: Furthering a Discussion on Discriminatory Intent' (2021) 14 NUJS Law Review 1.
[96] *PP John v Zonal Manager* (n 22).
[97] Vandita Khanna, 'Indirect discrimination and substantive equality in *Nitisha*: Easier said than done under Indian constitutional jurisprudence' (2022) 22(1) International Journal of Discrimination and the Law 74, 79–80.
[98] *Nitisha* (n 4) [70].
[99] For a range of positions, see generally Ahmed (n 47); Khaitan (n 56); Bhatia (n 17); MacKinnon (n 17); Aparna Chandra, 'A Life of Contradictions: Group Inequality and Socio-economic Rights in the Indian Constitution' in Shreya Atrey and Sandra Fredman (eds), *Exponential Inequalities: Equality Law in Times of Crisis* (2023); Martha C Nussbaum, 'Disgust or Equality? Sexual Orientation and Indian Law' in Zoya Hasan and others (eds), *The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US* (2018); Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) Oslo Law Review 133; Denise Réaume, "Discrimination and Dignity" (2003) 63 Louisiana Law Review 645.
[100] Fredman, *Discrimination Law* (n 7) 295.
[101] Anna Nilson, 'Same, Same but Different: Proportionality Assessments and Equality Norms' (2020) 7(3) Oslo Law Review 126, 142–44.

proportionality.[102] In fact, in reviewing the justification, Justice Chandrachud declared 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 organisation".[103] He eventually found the eligibility criteria to be "arbitrary and irrational",[104] confirming that pre-existing standards of reasonable classification and non-arbitrariness persist in indirect discrimination adjudication.

In sum, *Nitisha* is certainly a high point in Indian indirect discrimination jurisprudence for illuminating the relationship between indirect discrimination and substantive equality and providing "a roadmap for understanding and operationalizing indirect discrimination in Indian anti-discrimination law".[105] However, it also serves as a reminder to remain vigilant about how formal equality can distort judicial understandings of indirect discrimination. It further highlights that animating substantive equality and applying tests for indirect discrimination adjudication are far more difficult than making judicial declarations to that effect.

4. Searching for indirect discrimination post-2021

A day after the Supreme Court delivered its judgment in *Nitisha*, Bhatia stated, "[t]he proof of the pudding is, of course, in the eating".[106] This section accordingly examines the uptake of the legal concept of indirect discrimination and *Nitisha* in Indian constitutional jurisprudence since March 2021. Two key patterns can be discerned. First, despite the conceptual advances in *Nitisha*, courts fail to recognize indirect discrimination in relevant claims, regardless of the outcome. This failing is partly attributable to a judicial focus on formal equality only. Second, while some judgments have started to reference *Nitisha* and recognize indirect discrimination, this recognition remains abstract and indeterminate. Practical questions on litigating and adjudicating indirect discrimination claims remain unresolved.

4.1. Measuring the loss

The first pattern of note is that despite *Nitisha* and its move towards recognizing indirect discrimination and substantive equality, courts appear slow to follow suit. Indirect discrimination law languishes in two kinds of cases: first, cases where courts have not recognized indirect discrimination and have upheld the constitutional validity of norms that create such discrimination, and, second, cases where courts have held norms to be unconstitutional but on grounds other than that of indirect discrimination and have thus not used the opportunity to holistically grasp the nature and extent of the constitutional violation by drawing on the concept of indirect discrimination. Thus, regardless of the final outcome—favourable or unfavourable to the claimants—the concept of indirect

[102] See Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 U OxHRH J 55.
[103] *Nitisha* (n 4) [105].
[104] ibid [120(i)].
[105] ibid [49].
[106] Gautam Bhatia, 'Lt Col Nitisha v Union of India: The Supreme Court Recognises Indirect Discrimination' (*Indian Constitutional Law and Philosophy Blog*, 26 March 2021) <https://indconlawphil.wordpress.com/2021/03/26/lt-col-nitisha-vs-union-of-india-the-supreme-court-recognises-indirect-discrimination/> accessed 22 April 2024.

discrimination fell away. I will take these two types of cases in turn, because a different set of reasons might explain each.

To begin with, resistance to recognizing indirect discrimination emerges in cases where the court is committed to a formal conception of equality, of treating likes alike. For example, *Resham v State of Karnataka* ("*Resham*") stems from an order by the Karnataka State government that required students to wear "clothes that do not threaten equality, unity, and public order".[107] While the order appears neutral, its background is crucial to note. A few weeks before the order, female Muslim students were prevented from entering a college for wearing hijabs. Subsequently, schools and educational institutions in Karnataka relied on this order to require that female Muslim students remove their hijab and burqa to attend classes and/or take examinations. If assessed according to the test established in *Nitisha*, the law—as interpreted and applied[108]—would be deemed to constitute *prima facie* indirect discrimination for disproportionately impacting female Muslim students on the grounds of religion and sex.[109] The burden would then have shifted to the State government to justify its order. However, the Karnataka High Court hastily dismissed the discrimination challenge, holding that the dress code was "equally applicable to all the students, regardless of religion, language, gender or the like".[110] This holding reflects the High Court's reluctance to interrogate facially neutral norms. On appeal to the Supreme Court, the appellants explicitly contended that although the "order seems to be facially religious-neutral, it targets a particular community in effect".[111] However, a two-judge bench of the Supreme Court issued a split verdict, and, at the time of writing, the case remains pending a decision by an appropriate bench. Crucially, Justice Gupta upheld the constitutionality of the norm by demonstrating his commitment to "treating all religions equally", thus reducing equality to sameness where reasonable accommodation meant "different treatment".[112] An exclusive commitment to formal equality thus continues to prevent courts from recognizing indirect discrimination.

Similarly, in *Dadakalandar v Karnataka Power Transmission Corporation Ltd* ("*Dadakalandar*"), the theme of deference to the state reflects a degree of legal formalism. The claimants challenged job application rules that excluded certificates of educational qualifications issued by Open Schools and Open Universities before the Karnataka High Court.[113] As members of scheduled caste communities, they had satisfied the grade requirement but had received certificates from Open Schools. They thus argued that the rules were discriminatory. The refusal to accept certifications from Open Schools and Universities disproportionately and adversely affected socio-economically

[107] *Resham and Ors v State of Karnataka and Ors* AIR 2022 Kant 81.
[108] Other religious clothing could have also violated the order, but in practice, it was primarily applied against female Muslim students wearing hijabs, see Faiza Rahman, 'Divided we stand: the Supreme Court's judgment in the hijab ban case' (2024) 8(1) Indian Law Review 104, 114.
[109] Farrah Ahmed and others, 'Prohibiting Hijab in Educational Institutions: A Constitutional Assessment' (2022) 19–24 <https://www.livelaw.in/prohibiting-hijab-in-educational-institutions-a-constitutional-assessment> accessed 8 May 2024.
[110] *Resham* (n 107) [XIV (iv)].
[111] *Aishat Shifa v State of Karnataka*, Civil Appeal 7095 of 2022 [31].
[112] ibid [13], [185] (Opinion by Gupta J). Notably, Dhulia J, who found the norm to be an affront to privacy, dignity and secular education, did not consider it necessary to examine the claim under the rights to equality and non-discrimination, thereby missing an opportunity to operationalize indirect discrimination, ibid [83] (Opinion of Dhulia J).
[113] *Dadakalandar vKarnataka Power Transmission Corporation Ltd* MANU/KA/1130/2022.

disadvantaged, rural, and scheduled caste learners.[114] The Karnataka High Court, however, simply declared that the "prescription of education qualification was within the exclusive domain of the employer. [. . .] The employer would be best suited to decide requirements considering the nature of work".[115] Without mentioning indirect discrimination or applying the justification standard outlined in *Nitisha* (that norms must be "necessary for successful job performance"), the High Court deferred to the defendant and refused to weigh in on the potential disparate impact of the rules.

That indirect discrimination remains unrecognized may partly be because of courts' commitment to formal equality only and reluctance to embrace substantive equality as well. At the very least, the judgments above indicate that even post-*Nitisha* the judicial recognition of indirect discrimination is not a foregone conclusion. Adjudication is, of course, not just about outcomes but about the reasoning that underpins those outcomes. I will now turn to the second set of cases, which identified constitutional violations but failed to recognize the indirectly discriminatory impact of the norms under challenge. Highlighting these judgments—even though they are "successful" constitutional challenges—is crucial to show how indirect discrimination is not found in judicial reasoning.

One case that illustrates this pattern is *Maniben Maganbhai Bhariya and others v DDO* ("*Maniben*"), which revolved around a challenge to the exclusion of Anganwadi workers from receiving social security benefits under legislation that required employers to provide such benefits to employees who had been in service for five years or more.[116] The claimants—all Adivasi women[117]—had not received social security benefits because they were classified as part-time voluntary workers and not employees. A two-judge bench of the Supreme Court delivered a favourable outcome for the claimants by directing the state to extend social security benefits to all Anganwadi workers. However, it did not invoke the concept of indirect discrimination to interrogate the facially neutral category of "Anganwadis" and, as a result, glossed over the fact that all Anganwadi workers were, by definition, women.[118] The Court's reasoning was a lost opportunity to learn how, applying Fredman's substantive conception of equality, non-payment of social security benefits to women workers exacerbates economic disadvantages, reinforces stereotypes about women in care work, and excludes women workers from participation in economic and political life. This analysis matters because *Nitisha* had left the nature of the connection between indirect discrimination and substantive equality unexplained.

In the second case of *Hotel Priya v State of Maharashtra* ("*Hotel Priya*"), a two-judge bench of the Supreme Court assessed the constitutionality of an order issued by a State police commissioner that limited the number of artists on stage in an Orchestra Bar to only four male and four female artists at any given time.[119] Writing for the bench, Justice

[114]See, for example, Indira Gandhi National Open University: Profile 2022 <http://ignou.ac.in/userfiles/Profile-English-2022.pdf> accessed 10 November 2023.
[115]*Dadakalandar* (n 113) [25].
[116]*Maniben Maganbhai Bhariya and others v DDO* 2022 SCC OnLine SC 507.
[117]Namita Bhandare, 'The Big Story: How five Adivasi women and a Gandhian activist scored a huge win for Anganwadi workers' *Hindustan Times* (1 May 2022) <www.hindustantimes.com/ht-newsletter/htmindthegap01052022.html> accessed 4 May 2024.
[118]Letter to the Government of India, Instructions Regarding Selection of Anganwadi Workers under the ICDS Scheme (2007) <https://wcd.nic.in/sites/default/files/Honoray%20Workers%20and%20Selection%20of%20AWWs.pdf> accessed 10 November 2023.
[119]*Hotel Priya v State of Maharashtra*, SLP (C) 13764 of 2012.

Bhat stated that the overall limit of eight performers on stage was reasonable, but the gender-specific cap, i.e. the number of women who could perform at any point, violated Article 15(1) of the Constitution. According to him, the cap on the number of women was based on a stereotypical assumption that women working outside the house were of "low societal status", and thus it "*directly* transgresse[d] Article 15(1)" based on gender.[120] It is, however, unclear how this amounts to direct discrimination as the order meted out equal treatment (i.e. a cap of four) to both men and women. The judgment missed that the issue was one of indirect, as opposed to direct, discrimination because a disproportionate number of performers at Orchestra Bars are women.[121] The case thus reflects how consistent and equal treatment of men and women can have a disproportionate and disadvantageous impact on women. The Supreme Court, however, failed to correctly identify indirect discrimination or apply the intent-effect based distinction between direct and indirect discrimination outlined in *Nitisha*. Fundamentally, the Court's finding of direct discrimination sets a shaky precedent for future courts to narrowly frame claims and address only the direct effects of facially neutral norms while leaving the underlying norm intact. This continued attachment to the direct effects of a norm reflects the difficulties in moving beyond individualized notions of liability and risks digressing from the structural appeal of recognizing indirect discrimination.

The discussion so far suggests that despite the advances in *Nitisha*, courts have yet to embrace the concept of indirect discrimination. In some cases, an exclusive focus on formal, not substantive, equality distorts courts' understanding of indirect discrimination and leads them to resist recognizing that seemingly equal treatment might have an adverse impact on different groups. In other cases, courts omit reasoning regarding indirect discrimination despite finding constitutional violations on other grounds. It is important to note that, barring the hijab ban cases,[122] lawyers seem not to have raised arguments regarding indirect discrimination across both types of cases. The concept of indirect discrimination has arguably yet to make headway with both the Bar and the bench. In addition, the recognition of indirect discrimination remains wanting, regardless of whether the ground of discrimination is religion (as in *Resham*), caste (as in *Dadakalandar*), or sex/gender (as in *Maniben* and *Hotel Priya*) and both in cases where the impact of the indirect discrimination is disproportionate (as in *Hotel Priya*) and in cases where the impact is exclusively on the group sharing the protected characteristic (as in *Maniben*). While *Nitisha*, when read singularly, may convey a sense of certainty that indirect discrimination has become a part of Indian constitutional jurisprudence, instances where courts have failed to draw on *Nitisha* since 2021 indicate that the concept of indirect discrimination remains uncertain despite *Nitisha*.

[120]ibid [47] (emphasis added).

[121]Gautam Bhatia, 'Direct and Indirect Discrimination: Conceptual Slippages in the Orchestra Bars Case' (*Indian Constitutional Law and Philosophy Blog*, 22 February 2022) <https://indconlawphil.wordpress.com/2022/02/22/direct-and-indirect-discrimination-conceptual-slippages-in-the-orchestra-bars-case/> accessed 4 May 2024.

[122]Before the Supreme Court ("Written Submissions on Behalf of the Petitioner Women's Voice" (*Centre for Law and Policy Research*) <https://clpr.org.in/wp-content/uploads/2022/10/Womens-Voice-Hijab-SLP-Written-Submissions.pdf> accessed 26 June 2024) and the Karnataka High Court ("Application for Impleadment/Intervention by Women's Voice" *(Centre for Law and Policy Research*) <https://drive.google.com/file/d/1Bac4W5-wdf6ZCQPL025a6d6PiaC2-nJU/view?pli=1> accessed 26 June 2024).

4.2. Finding *Nitisha*

What has been *Nitisha's* jurisprudential impact or influence since March 2021? Given the fragmented nature of Indian constitutional adjudication, even leading judgments such as *Nitisha* may be overlooked in subsequent decisions. Keeping this limitation in mind, this section tracks *Nitisha's* travels in Table 1, which chronologically lists 16 judgments where a court has cited *Nitisha* between March 2021 and December 2023.[123]

It is worth unpacking the findings from *Nitisha's* citations. In the 16 judgments where a court cited *Nitisha*, seven citations are from the Supreme Court and ten citations are from five different High Courts, namely those of Delhi, Gujarat, Jammu & Kashmir and Ladakh, Kerala, and Madras. Of the seven Supreme Court citations, four were by Justice Chandrachud (the author of *Nitisha*) in three judgments and a minority opinion, and three were authored by Justice Bhat (who had spearheaded the conceptualization of indirect discrimination before *Nitisha* in *Ravina* and *Madhu*) in a majority opinion, a concurring opinion, and a dissenting opinion. This suggests that the discursive impact or persuasive appeal of indirect discrimination law remains limited to two Supreme Court judges who are, in any event, convinced of the concept. Conversely, references to *Nitisha* in High Courts are far more dispersed, with different judges from the same court citing the case.[124]

Beyond counting how many times *Nitisha* has been cited and by whom, studying *how* *Nitisha* has been cited is more interesting. Several cases have cited *Nitisha* incidentally or peripherally. For example, Justice Bhat cited *Nitisha* in *Madras Bar Association v Union of India* to draw on a United States of America statute relevant to age discrimination.[125] Similarly, *Nitisha* was cited in *C Abdul Aziz v Chembukandy Saffiya* merely to show women's progress in the country,[126] and it played a minor role in *AU Tayyaba v Union of India* as one of many cases on Indian jurisprudence on permanent commission service.[127] Along with peripheral references, *Nitisha* has also been cited for its findings on indirect discrimination, but in cases that were squarely about direct discrimination. For example, in *M Sameeha Barvin v Joint Secretary, Ministry of Youth and Sports, Department of Sports, Government of India*, the Madras High Court reproduced nine paragraphs of *Nitisha* detailing the concept of indirect discrimination. However, this discussion had no bearing on the case, which involved the disqualification of a woman with a disability from participating in a sports competition because of gender and disability, as well as the "improper and non-cooperative attitude" of officials.[128]

[123] Table 1. excludes those cases where *Nitisha* was cited by a litigant but not by the court. These are: *S Gnanaseelan v Govt of Tamil Nadu* MANU/TN/2015/2022; *Resham and Ors v State of Karnataka and Ors* AIR 2022 Kant 81; *Kritika Sharma v Union of India* MANU/DEOR/80111/2022; *Amit Kumar Sharma v Union of India* 2023 2 AWC 1660 SC; *Zeeshan Qamar v State of NCT Delhi*, 2023/DHC/001361; *Shailesh Kumar Shukla v Union of India* 2023 (7) ADJ 565.

[124] See the different benches in the Gujarat High Court (*Gujarat Public Service Commission v Niketa Babulal Chaudhari* 2021 GLH (2) 751 (Vineet Kothari and Biren Vaishnav JJ) and *Vandana Khatri v Union of India* MANU/GJ/3388/2022 (SG Gokani and Hemant M Prachchhak JJ)), Delhi High Court (*Vandana Sharma and Ors v Union of India and Ors* MANU/DE/1961/2021 (Manmohan and Navin Chawla JJ) and *National Federation of the Blind v Kendriya Vidyalaya Sangathan* MANU/DE/7042/2023 (SC Sharma, CJ and Sanjeev Narula J)) and Kerala High Court (*Aishwarya Mohan v Union of India* MANU/KE/1783/2022 (VG Arun J); *C Abdul Aziz v Chembukandy Saffiya* 2022 (3) HLR 10 (PB Suresh Kumar and CS Sudha JJ); *NTPC Ltd v Aishwarya Mohan* 2022 (4) KLT 767 (AK Jayasankaran Nambiar and Mohammed Nias CP JJ); and *Athira P v State of Kerala and Ors and Arya G Krishnan v State of Kerala and Ors* ILR 2024 (1) Kerala 185 (A Muhamed Mustaque and Shoba Annamma Eapen JJ).

[125] *Madras Bar Association v Union of India* (2022) 12 SCC 455 [153].

[126] *C Abdul Aziz v Chembukandy Saffiya* 2022 (3) HLR 10 [22].

[127] *AU Tayyaba v Union of India* (2023) 5 SCC 688 [32].

[128] *M Sameeha Barvin v Joint Secretary, Ministry of Youth and Sports, Department of Sports, Government of India* (2022) 1 MLJ 466 [54].

Table 1. *Nitisha* citations (March 2021–December 2023).

Case Name	Court and Bench Size	Date of judgment	Issue	Role of *Nitisha*	Outcome
Gujarat Public Service Commission v Niketa Babulal Chaudhari 2021 GLH (2) 751	Gujarat High Court Two judge bench	31 March 2021	The method for selecting female candidates for the Gujarat Public Service Commission linked the qualifying marks for women to the lowest cut-off marks for men	At [31], to reiterate the concern for gender equality	A violation of Articles 15(3) and 16(1) of the Constitution
Madras Bar Association v Union of India (2022) 12 SCC 455	Supreme Court Three judge bench	14 July 2021	A challenge to an ordinance setting a minimum age qualification of 50 years	At [153], to reference the Age Discrimination in Employment Act 1967 (Justice Bhat's concurring opinion)	A violation of Article 14 of the Constitution
Vandana Sharma and Ors v Union of India and Ors MANU/DE/1961/2021	Delhi High Court Two judge bench	8 September 2021	A challenge to the discharge of women officers from the armed forces for not meeting the 60% mark cut-off	At [7], to dismiss arguments to lower the cut-off benchmark, citing that *Nitisha* fixed a 60% benchmark	Application dismissed
Ravinder Kumar Dhariwal v Union of India (2023) 2 SCC 209	Supreme Court Three judge bench	17 December 2021	A challenge to disciplinary proceedings against a person with a mental health disorder	At [98], to describe that indirect discrimination is tied to substantive equality	A violation of Rights of Persons with Disabilities Act 2016
M Sameeha Barvin v Joint Secretary, Ministry of Youth and Sports, Department of Sports, Government of India (2022) 1 MLJ 466	Madras High Court Single judge bench	20 December 2021	A challenge to the non-selection of a woman with a hearing disability for the World Deaf Athletics Championship as gender and disability discrimination	At [45]-[46], to refer to indirect discrimination	A violation of Article 15 of the Constitution because of direct discrimination
SK Naushad v Union of India AIR 2022 SC 1494	Supreme Court Two judge bench	10 March 2022	A challenge to the withdrawal of transfers, including spousal postings of officers	At [46]-[48], to refer to substantive equality and systemic discrimination	No violation
Aishwarya Mohan v Union of India MANU/KE/1783/2022	Kerala High Court Single judge bench	6 June 2022	A challenge to the job selection requirement for the Common Law Admissions Test ("CLAT")	At [10], to conclude that the requirement to appear for the exam was indirectly discriminatory	A violation of Article 16 of the Constitution
C Abdul Aziz v Chembukandy Saffiya 2022 (3) HLR 10	Kerala High Court Two judge bench	5 July 2022	A challenge to a prohibition on a Muslim mother from being the guardian of her minor child	At [22], to refer to the general outcome that women officers are now considered for permanent commission	No violation
NTPC Ltd v Aishwarya Mohan 2022 (4) KLT 767	Kerala High Court Two judge bench	25 July 2022	A challenge to the job selection requirement for CLAT	At [2], to refer to *Aishwarya Mohan v Union of India*	No violation (overturned *Aishwarya Mohan v Union of India*)

(*Continued*)

Table 1. (Continued).

Case Name	Court and Bench Size		Date of judgment	Issue	Role of *Nitisha*	Outcome
Vandana Khatri v Union of India MANU/GJ/3388/2022	Gujarat High Court	Two judge bench	7 October 2022	A challenge to transferring posts from one state to another while the officer was on maternity leave	At [11], to cite *SK Naushad v Union of India*	A violation of procedural regularity in the individual case
Janhit Abhiyan v Union of India (2023) 5 SCC 1	Supreme Court	Five judge bench	7 November 2022	A challenge to a constitutional amendment providing for reservations for economically weaker sections	At [367], in a footnote in Justice Bhat's dissenting opinion, it is noted: "Laws or executive actions that further discrimination, directly or indirectly, on proscribed grounds, have also been recognized as violative of the right to equality".	No violation (3:2)
AU Tayyaba and Ors v Union of India and Ors (2023) 5 SCC 688	Supreme Court	Three judge bench	16 November 2022	A challenge to the denial of permanent commission	At [32], to refer to a line of cases regarding permanent commission	A violation (based on the doctrine of legitimate expectations and Article 14 of the Constitution)
Afshana Anjum Baba v Union Territory of Jammu & Kashmir MANU/JK/1081/2023	Jammu & Kashmir High Court	Two judge bench	6 September 2023	A challenge to a same height requirement for male and female applicants in the selection process	At [157], to recognize the case as one of indirect discrimination	A violation of Articles 14, 15 and 16 of the Constitution
National Federation of the Blind v Kendriya Vidyalaya Sangathan MANU/DE/7042/2023	Delhi High Court	Two judge bench	16 October 2023	A challenge to Kendriya Vidyalaya Sangathan's advertisement for failing to implement reservations for persons with disabilities in the recruitment process	At [42], to interpret the term "effect" in the definition of "discrimination" (Rights of Persons with Disabilities Act 2016, Section 2(h)) to include indirect discrimination	A violation of the Rights of Persons with Disabilities Act 2016
Supriyo and others v Union of India 2023 INSC 920	Supreme Court	Five judge bench	17 October 2023	Recognition of non-heterosexual persons' fundamental right to marry	At [484], Justice Bhat's majority opinion states that recognizing the unions and cohabitation of heterosexual couples as marriage under various laws and regulations that confer benefits adversely impacts queer couples	No violation

(*Continued*)

Table 1. (Continued).

Case Name	Court and Bench Size	Date of judgment	Issue	Role of *Nitisha*	Outcome
				At [309] (footnote 216) and [323] (footnote 228), Justice Chandrachud's minority opinion states that adoption regulations and the CARA circular "disproportionately affect non-heterosexual couples".	
Athira P v State of Kerala and Ors and Arya G Krishnan v State of Kerala and Ors ILR 2024 (1) Kerala 185	Kerala High Court	Two judge bench	24 November 2023	A challenge to the ineligibility of two women doctors for employment because they did not complete a residency program by a stipulated date due to maternity leave	At [8], to "enunciate" principles of indirect discrimination	The order to deny the women doctors permission to apply was set aside

Nitisha reference by Justice Bhat

Nitisha reference by Justice Chandrachud

Amidst references unrelated to indirect discrimination, *Nitisha* has also been cited in a limited number of cases concerning indirect discrimination, where its reasoning could potentially make a difference. These judgments are promising in that they show that the concept of indirect discrimination has not escaped the Indian judiciary. However, they also reveal that the recognition of indirect discrimination remains at a general, abstract level, and courts have yet to apply the test established in *Nitisha*—or any test for that matter—for indirect discrimination adjudication.

In *Afshana Anjum Baba v Union Territory of Jammu & Kashmir* ("*Afshana*"), the Jammu & Kashmir and Ladakh High Court held that applying the same height requirement for men and women to qualify for employment as officers in the Forest Service was "discriminatory, unfair, unreasonable and unintelligible".[129] The High Court drew on *Nitisha*'s criticism of the "farce" of "a facially equal application of laws to unequal parties" and held that it too was "confronted with the case of indirect discrimination *ex-facie* pretending non-gender height prescription".[130] It "reckon[ed] that the height requirement in the present case constrains female candidates to think as a man",[131] reflecting the drafters' conviction that the post was "meant only for men".[132] The High Court thus showed an awareness of structurally embedded stereotypes behind facial neutrality and, in essence, recognized indirect discrimination. However, it did not draw on the test established in *Nitisha* to spell out *how* indirect discrimination was borne out in *Afshana*.

Similarly, in *Athira P v State of Kerala and Arya G Krishnan v State of Kerala* ("*Athira*"), where two female doctors could not complete their residency on time because they took maternity leave and were thus disqualified from the job, the Kerala High Court drew on *Nitisha*. It noted that "[n]on-consideration of disadvantages attributable to motherhood" may result in indirect discrimination.[133] However, the High Court's reasoning remained general without indicating whether and how it applied the three-pronged test established in *Nitisha*. The three-pronged test invites an assessment of (i) whether a norm disproportionately affected a particular group; (ii) whether this norm had the effect of "reinforcing, perpetuating, or exacerbating disadvantage" of that group, which includes economic, social, psychological, physical, and political harm; and (iii) whether the norm was "necessary for successful job performance". According to Justice Chandrachud, this test "offers a well-structured framework of analysis as it accounts for both the disproportionate impact of the impugned provision, criteria or practice on the relevant group, as well as the harm caused by such impact".[134] Such a structured analysis is essential to guide litigants and future courts on how indirect discrimination adjudication is to take place, especially as Indian indirect discrimination law remains at a nascent stage. Without engaging with this analysis, the reasoning in *Athira* recognizes some utility of indirect discrimination law but falls short of engaging with its doctrinal intricacies.

As a corollary to this lack of engagement with the structured framework, courts seem to pick and choose how they want to define indirect discrimination. In some cases, they

[129] *Afshana Anjum Baba v Union Territory of Jammu & Kashmir* MANU/JK/1081/2023 [161]. This norm was contained in Statutory Rule and Order no 359 of 1970, read with Statutory Rule and Order no 106 of 1992.
[130] ibid [157].
[131] ibid [158].
[132] ibid [153].
[133] *Athira P v State of Kerala and Ors and Arya G Krishnan v State of Kerala and Ors* ILR 2024 (1) Kerala 185 [18], [20].
[134] *Nitisha* (n 4) [69].

emphasize lawmakers' negligence as the crux of indirect discrimination.[135] For example, in *Athira*, the Kerala High Court cited *Nitisha* to define indirect discrimination as "caused by facially neutral criteria *by not taking into consideration* the underlying effects of a provision, practice or a criterion".[136] In other cases, courts focus on the impact of discrimination, as in *Supriyo v Union of India* ("*Supriyo*"), where in deciding on the issue of same-sex marriage equality Justice Bhat's majority opinion acknowledged that the non-recognition of non-heterosexual unions for benefits and entitlements in fields such as employment, credit, and compensation in the event of fatal accidents "has an adverse discriminatory impact" on queer couples.[137]

Additionally, there remains a degree of conceptual confusion on the difference between direct and indirect discrimination under Article 15 of the Constitution. On the one hand, in *Supriyo*, Justice Bhat asserted that the test for interpreting Article 15, and thus for assessing both direct and indirect discrimination, is "whether the law discriminates against persons in effect".[138] On the other hand, in *National Federation of the Blind v Kendriya Vidyalaya Sangathan*, the Delhi High Court retained the intent-effect distinction between direct and indirect discrimination (as established in *Nitisha*) and interpreted the reference to "effect" in the definition of "discrimination" under the Rights of Persons with Disabilities Act 2016 to mean that the Act guards against indirect discrimination.[139]

Finally, on an evidentiary level, given that none of the post-*Nitisha* judgments have applied the test laid down in *Nitisha* or any other test for indirect discrimination adjudication, proving discrete elements of indirect discrimination continues to pose challenges. This is particularly true when it comes to showing that a norm has a *disproportionate* impact on a group. Notably, *Nitisha* had expressly stated that (i) statistical evidence is not necessary to prove disproportionality and (ii) there is no specific threshold of disproportionality. In *Aishwarya Mohan v Union of India*, a single judge bench of the Kerala High Court concluded that the requirement to sit for the Common Law Admission Test ("CLAT", an entrance exam conducted by the consortium of national law universities in India) to be eligible for a job was discriminatory. Given the high tuition fees at national law universities, many candidates could not afford to study there and would thus not appear for CLAT in the first place, which would exclude them from the job post. The High Court implicitly found a disproportionate impact by stating that graduates from law colleges other than national law universities who appeared for CLAT "would only be a minuscule minority".[140] However, on appeal, a two-judge bench of the Kerala High Court set aside this judgment, holding *inter alia* that this specific finding on disproportionality was "rendered without any empirical data to support it".[141] Taken together, these judgments throw open the question of whether empirical data is necessary to support findings of disproportionality; if so, this would depart from the reasoning in *Nitisha*.

[135] See Sophia Moreau, 'The Moral Seriousness of Indirect Discrimination' in Collins and Khaitan (n 6).
[136] *Athira* (n 133) [8] (emphasis added).
[137] *Supriyo v Union of India* 2023 INSC 920 [114].
[138] ibid [312].
[139] *National Federation of the Blind v Kendriya Vidyalaya Sangathan* MANU/DE/7042/2023 [42].
[140] *Aishwarya Mohan v Union of India* MANU/KE/1783/2022 [10].
[141] *NTPC Ltd and Ors v Aishwarya Mohan and Ors* MANU/KE/2294/2022 [15].

In sum, the journey of *Nitisha* in indirect discrimination jurisprudence since March 2021 has been uneven at best. *Nitisha* was nowhere to be seen in some (actual or potential) claims of indirect discrimination (section 3.1) and yet was simultaneously cited in cases that had little to do with indirect discrimination substantially (section 3.2). This reflects a great deal of uncertainty around whether, when, and how *Nitisha* will contribute to the future of indirect discrimination law. When cited in relevant indirect discrimination cases, the jurisprudence suggests that while *Nitisha* has facilitated the recognition of the concept and vocabulary of indirect discrimination (albeit in no consistent fashion), courts have yet to apply the test established in *Nitisha* for indirect discrimination adjudication. The practice of Indian indirect discrimination law thus points towards the recognition of a somewhat floating concept of indirect discrimination at an abstract level, leaving litigants (both claimants and the state) and courts with little clarity on how to prove, disprove, and adjudicate indirect discrimination in the future.

5. Concluding reflections

This article shows that the sustenance of the legal concept of indirect discrimination cannot be taken as a given. Indirect discrimination law in India is complex, slow, uncertain, and unsteady. I set out to illustrate the extent of this complexity by situating the judgment in *Nitisha* within the trajectory of Indian indirect discrimination law. To begin with, Indian courts were long tied to a solely formal conception of equality and thus failed to grasp the concept of indirect discrimination. Tentative steps towards recognizing indirect discrimination from 2009 onwards were short-lived, often reflecting elements of formal equality and mediated by patterns of judicial reluctance to embrace indirect discrimination. Against this backdrop, *Nitisha* offered claimants a reason to celebrate by linking indirect discrimination and substantive equality and establishing a test for indirect discrimination adjudication. Despite these conceptual and doctrinal advances, however, *Nitisha* must be viewed cautiously for retaining the language of formal equality and for failing to apply the established test in full.

In addition, genuine uncertainty plagues indirect discrimination law post-*Nitisha*. Despite its powerful observations, including shifts towards substantive equality and clearly defined tests, *Nitisha* has been largely absent in relevant indirect discrimination cases since March 2021. This absence can be explained by various factors, including the distorting implications of focusing solely on formal equality and the apparent lack of legal arguments concerning indirect discrimination by lawyers. When *Nitisha* was cited by courts, it was largely in cases unrelated to indirect discrimination. Finally, even when *Nitisha* was cited in relevant cases, these citations remained at an abstract level without applying the test established in *Nitisha* or otherwise clarifying how indirect discrimination claims are to be adjudicated. This article thus detailed how, despite *Nitisha*, the state of Indian indirect discrimination law remains fragile and contested at both a conceptual and a doctrinal level.

Disclosure statement

No potential conflict of interest was reported by the author.

ORCID

Vandita Khanna http://orcid.org/0000-0002-0024-5513