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Gendered Conundrums of Law

Kalpana Kannabiran

MUTINIES FOR EQUALITY: CONTEMPORARY DEVELOPMENTS IN LAW AND GENDER IN INDIA by Tanja Herklotz, Siddharth Peter de Souza Cambridge University Press, New Delhi, 2021, 295 pp., 1195.00

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Mutinies for Equality: Contemporary Developments in Law and Gender in India edited by Tanja Herklotz and Siddharth Peter de Souza is an attempt to examine gender inequality in India on the basis of doctrinal and empirical research in multiple sites. Titling the volume 'Mutinies for Equality', the editors argue, is a 'recognition of



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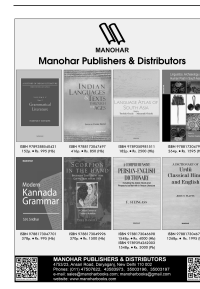
the many battles that have been and continue to be fought to bring out greater gender equality in India and their implications for wider systemic transformations’ (p. 3). They examine ‘mutinies’ under three ‘rubrics’— (a) ‘Systems of Inequality’, (b) ‘Battles for Equality’ and (c) ‘Realising Equality’ (p. 3).

The first section on ‘Systems of Inequality’ consists of five chapters. Krithika Ashok, in her chapter titled ‘Family Matters, Gender Matters: Courts on the Rule against Restraints on Alienation’ looks at property ownership and its gendered inflections through the prism of market transactions through a reading of case law, stepping away from the common preoccupation with family laws as the site of analysis. Arguing that the women in these transactions are often treated as ‘passive (often undeserving) recipients of the benevolence of the family patriarch’, she suggests that this perception is tied to the undervaluation of women’s labour within the family-household. What needs revisiting, however, is Ashok’s observation—in looking at cases from 1882 to the present—that she does not consider any analytical break between case law in colonial and Independent India. While courts may cite precedents seamlessly in various realms of colonial law in operation in Independent India, the adoption of the Constitution in 1950 provides an opportunity for an insurgent analysis that ruptures this seamless reading in scholarship on these laws—precisely because the principle of substantive and enduring equality provides a heuristic separation, whether or not courts understand that.

In the chapter titled ‘The Lack of Women in the Indian Judiciary,’ Siddharth Peter de Souza and Medha Srivastava Kehrer look at the lack of representation in the judiciary, a point that is also raised in the introduction by the editors. The authors refer to the dismal representation of women in the judiciary, an important point, and look at the processes, practices and conundrums of judicial appointments.

There is by now a large corpus of feminist writing over the past several years on the systems of inequality that are deeply embedded and actively obstruct women’s effective participation—in legislative processes, in the justice system, and in government. The Committee on the Elimination of All Forms of Discrimination Against Women, in its Concluding Comments as early as 2007, and again in 2014, observed that the state party had paid inadequate attention to its concern that India must increase the participation of women in the Judiciary.^[1] It is also important to historicize international deliberations on this question initiated by feminist groups across the country.

Jayna Kothari in ‘Is the Supreme Court Cherry-Picking its Gender Battles?’ looks at a selection of recent cases around the expansive interpretation of Article 15 that was inaugurated by Naz Foundation, focusing on the Supreme Court—the judgments in *Puttaswamy* (privacy), *Navtej Johar* (LGBTQI+ rights), *NALSA* (transgender persons’ rights), *Shafin Jahan* (Hadiya) (minority rights and freedom of choice and religion), *Shayara Bano* (minority rights and challenge



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to triple talaq), *Independent Thought* (criminalization of marital rape of minor wives) and *Harsora* (domestic violence). This is a broad sweep and stretches from the challenge to heteronormativity to the right to integrity, dignity and bodily autonomy within marriage and family. Underscoring the unevenness of the Supreme court's approach in these cases to the question of rights of women and gender non-conforming persons, she attributes it partly to individual judges constituting benches, partly to the court's self-imposed circumspection on the question of women's rights within marriage, and the refusal (or reluctance) of the court to enter into the realm of rights of women within religious communities—particularly the rights of women from religious minorities.

'Juxtaposing Equality? Muslim Women's Rights in the New Normative Realm of Secularism and Personal Law in India' by Katharina Wommelsdorff discusses the rights of Muslim women as articulated within the normative realms of 'secularism' and 'personal law'. Focusing on the decision of the Supreme Court in the case of *Shayara Bano*, she complicates our understanding of this decision as being both—one that 'pierces through the veil of community rights' and foregoes the opportunity to situate the discussion within a broader framework of gender equality within the Constitution, by locating it within religious community.

Fritzi-Marie Titzmann in 'Is Sexuality Anti-Indian? Reflections on Obscenity in Contemporary Indian Popular Discourse' focuses on obscenity in contemporary political discourse in India through two case studies: the Temporary Porn Ban, 2015 and the Aksa Beach Hotel Raid, 2015. The author looks at the entanglements of discourses of nationalism and obscenity in India. Rather than focusing on the legal discourse on obscenity, the author looks at new media and opens out the ways in which popular discourse presents departures from legal discourse and how the invocation of nationalism and cultural arguments provide a common ground for different sides of popular discourse.

The second section titled 'Battles for Equality' consists of six chapters.

'Armed with the Constitution: Feminist Litigation in Indian Family Law' by Tanya Herklotz examines feminist litigation focused on family law in India highlighting three cases, one each on Christian (*Mary Roy*), Hindu (*Githa Hariharan*) and Muslim (*Shayara Bano*) law. All three cases have been discussed at length in extant feminist scholarship on women's right to equality and non-discrimination in India. This chapter does not provide any new insights either on feminist litigation or on women's agency in pushing for rights within communities.

Saumya Saxena's chapter on 'Nikah Halala: The Petition, the Promise and the Politics of Personal Law' discusses the issue of Nikah Halala, i.e., the marriage practice under Muslim law whereby a divorced couple remarries after divorce. She examines six petitions filed against the practice of Nikah Halala and draws out substantive

distinctions between the petitions filed by three women and the remaining petitions filed by men, suggesting a departure from looking at justice claims in a homogenous, gender-neutral manner. The agentic figure of the Muslim woman recovers ground in the religious community through petitioning against what in her experience is a practice of manifest inequality.

In 'The Politics of Erotic Labour: A Case Study of Mumbai Bar Dancers', Samina Dalwai reflects on her earlier work on Mumbai's bar dancers, drawing out general observations on gender, caste and labour as expressed through the work and struggles of bar dancers. Her account extends from the ban on bar dancing to the petition in the Supreme Court, unpacking the discursive specificities of each site this issue travelled through.

Mandira Kala in 'Reactionary Executive vs. Deliberative Legislature: The Case of how the Legislature Championed Compensation for Reproductive Labour while Regulating Surrogacy', examines official and legislative discourse on reproductive labour and the regulation of surrogacy, and underscores the ways in which the process of legislative engagement led to a 'broadening of the discourse by... suggesting a new model of compensated surrogacy that protects both the rights of parents intending to undergo surrogacy and surrogate mothers from exploitation' (p. 184).

'Interrogating the Freedoms of Queer Liberation in India' by Jason Keith Fernandes looks at moves for queer liberation in India and argues, in the light of the decision of the Supreme Court in the *Navtej Johar* case, that rather than 'merely ...affirming the right to engage in non-heterosexual practices,' the judgment represents 'a continuation of the project of Hindu law reform' because the responsibility for homophobic violence in the discourse in and around the judgment 'has been pinned squarely on Victorian and Christian values and the subtext...suggests that Indian (that is, Hindu) values would be allowed to surface once the manifestation of colonial violence on the Indian psyche has been dealt with' (p. 189). So, was *Johar* a mutiny that wasn't one, is the question that begs deep engagement.

Saptarshi Mandal in 'Conditions of Possibility: Law, Patriarchy and Single Motherhood in India' looks at single mothers and 'examines situations that led mothers to challenge the normalization of the patriarchal family model by the state...' (p. 207). Among others, he examines the *Githa Hariharan* case in some detail.

The third section titled 'Realising Equality' has three chapters. 'The Politics of Regulating Adult Sexuality through the Institution of Marriage: Reflections of Queer Experiences in India' by Sourav Mandal uses queer methodology to critique the dominant (heteronormative) kinship structure that informs public (including judicial) discourse in India. Through a close engagement with participant narratives, he discusses queer stories of forced/arranged marriages and of resisting or subverting marriage, and concludes that heteronormative publics, notwithstanding the Supreme Court's stated commitment to recognizing vulnerabilities, erodes on the

fundamental rights of queer persons. How might equality be realized in this context is the question he asks.

Kalindi Kokal in 'Turning to the State: Between Processing Disputes and Protecting Autonomy' presents the findings of her study on dispute resolution and community mediation among the urban poor in Pune city, through a centre that dealt with matrimonial disputes established by the All India Democratic Women's Association (AIDWA). Importantly, she looks at the interconnections and mutual dependence between litigants, NGOs and state fora in the resolution of disputes and legitimacy/recognition.

In 'Towards an Egalitarian Workplace: Developments in Anti-Sexual Harassment Law', Poornima Hatti and Aparna Ravi trace developments in the law governing workplace relations—with specific reference to sexual harassment at workplace. The recapitulation begins with the case of *Rupan Bajaj*, through *Vishakha* and finally till the modalities and mechanisms set out under Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013.

The essays in the volume cover ground that has already been substantially covered with respect to the cases and concerns discussed. The trope of 'mutiny', while compelling in its possibilities, is somewhat hazy and un(der)explored, an absent presence through the individual essays and the volume as a whole. The focus is largely on specific cases and outcomes. The threading together to present the idea of mutinies is unrealized. Some were even mutinies that weren't. The book is an account of gendered conundrums of law in India across several sites.

Kalpana Kannabiran is Distinguished Professor, Council for Social Development, India, and is based in Hyderabad.

^[1]United Nations. 2007. *Concluding comments of the Committee on the Elimination of Discrimination against Women: India*, Thirty-seventh session 15 January-2 February. CEDAW/C/IND/CO/3. Para 8. United Nations 2014. *Concluding observations on the combined fourth and fifth periodic reports of India*. 1219th and 1220th meetings on 2 July 2014. 18 July. CEDAW/C/IND/CO/4-5. Paras 18-19.

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