

Indian Constitutional Law and Philosophy

Book Review: Kalpana Kannabiran, “Tools of Justice”

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POSTED BY GAUTAM BHATIA IN BOOK REVIEWS, TOOLS OF JUSTICE

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Tools of Justice: Non-Discrimination and the Indian Constitution, Routledge 2012, available for purchase here.

This is a densely-argued, interdisciplinary work, focusing on non-discrimination under the Indian Constitution. The overall framework of the book centres upon Articles 15 and 21, and the link between discrimination and the deprivation of liberty. The materials that Kannabiran works with are historical, sociological, anecdotal and legal. Discrimination is examined from the perspective of numerous constituencies: disability, caste, sex, ways of life (adivasis/tribals), religion, and sexual orientation.

Clocking in at 450 pages, an overall survey in a brief review is close to impossible. What I will focus upon is a few of the key, important themes that emerge out of the text.

(i) *Norm and Nature*: Throughout the course of the book, Kannabiran demonstrates how the Indian judiciary, when examining discrimination cases, operates with a set of political and ideological norms, which it considers as *natural*. A claim of discrimination will succeed if the Court perceives that the differential treatment violates this norm, and it will fail if the Court is of the opinion that it coheres with the norm. The starkest examples are present in cases involving sex-determination. Kannabiran shows how the Court’s judgments are repeatedly driven by a set of ideas about the role that men and women do – and ought – to play in society, as well as their aptitudes and talents: women’s primary role lies in the domestic sphere, as carers, while the role of men is to actively participate in the exchange economy. Therefore, for example, where workplace regulations attach disabilities (loss of job, downpayment etc.) to *pregnancy*, they have been upheld by the Courts (as reinforcing the norm of the separate spheres occupied by men and women).

In other realms, it is more difficult to isolate the norm, as well as its political foundations, perhaps because the norm has become more deeply ingrained in our consciousness as *natural*. For instance, in the case of caste-based reservations, the Supreme Court has justified reservations on the ground that they fulfill a vision of *substantive equality* as opposed to mere formal equality (*N.M. Thomas*), and has then sought to balance the demands of substantive equality with the goal of maintaining

efficiency in the civil services (Article 335 of the Constitution). The unarticulated major premise underlying this set of cases is that “efficiency”, as a normatively desirable goal, has certain requirements, which are best fulfilled through “merit-based” selection procedures. Kannabiran skilfully interrogates the assumptions that ground this idea of merit; in this way, what comes out is the fact that understanding reservations as a *departure* from the basic requirement of efficiency-through-merit, which must *then* be justified by the principle of substantive equality (and thereby putting limits on the quantum of reservations), is simply one, consciously-chosen framework that automatically defines and restricts the manner of arguments that can be made. This comes out with particular clarity in the *Balaji* decision, where Kannabiran points out that despite studies showing that reservations had no discernible impact on efficiency, the Court was so firmly in the grip of this belief, that it simply dismissed the findings, and created a legal fiction to the effect that reservations were simply *bound to* have an effect on efficiency, whatever the studies actually said.

Similarly, in disability law in the workplace, the norm is that of the “able-bodied worker”; the Courts never challenge that assumption that links the actual needs of the workplace (and associated concepts of efficiency, profit-making etc.) and the requirement of being able-bodied, and therefore miss the fact that (quoting Minae Inahara) “[the] binary categorical system which defines disability in opposition to an able-bodied norm and suggest[s] that the disabled body is a multiplicity of excess which undermines this able-bodied norm... the complexity of disabled ability does not fit into able-bodied notions of ability.”

(ii) The Transformative Constitution: A crucial point that Kannabiran makes at the beginning of her work, and returns to repeatedly, is that the interpretation of constitutional provisions cannot be untethered from its historical context, and the goals and values that the framers were seeking to achieve. Previously on this blog, we have discussed extensively the interpretive issues that arise in the case of a “transformative Constitution” – i.e., a Constitution that is written with the express goal of transforming the political institutions or values of a society. Kannabiran points out that the purpose of the Constitution was to create “*an order that displaces the unfreedoms internal to the society as well as the unfreedom of colonization... the constituent assembly, in recognition of the fact that the constitution was being introduced in an unequal and discriminatory society, debated and drafted the constitution with the explicit purpose of dislodging the status quo.*”

This has important interpretive implications for the interpretation of colonial-era statutes, as well as questions of clashes between fundamental rights and a claimed public morality (where the argument is to restrict or narrow the scope of fundamental rights so that they cohere with public morality – an argument made in *Naz Foundation*). For instance, it is questionable whether colonial-era statutes, based upon an entirely different set of values, should enjoy the presumption of constitutionality; and, as Kannabiran points out, it becomes rather problematic when the Court, in some of its judgments, invokes the authority of Manu as a “lawgiver”, given that, arguably, one of the goals of the Constitution was to reverse the hierarchical and stratified nature of society, which, in theological imagination, is believed to owe its existence to the edicts of Manu.

This issue, however, requires far more historical excavation than is provided in the book. It is trite wisdom that no period, however revolutionary, marks a complete break with the past. Every Constitution has transformative as well as conservative elements. For instance, in the recent Tax Tribunals judgment, the Court was probably right when it held that the “Westminster model of governance”, in the specific context of judicial independence and the separation of powers, was a

continuation from colonial times – and that therefore, the interpretation of constitutional provisions setting out the structures of governance would be enriched by turning to common law. Thus, we must be wary of too facile an invocation of the “transformative Constitution”: each interpretive claim must be backed up by rigorous historical reasoning.

(iii) Historical retrieval: The most interesting aspect of this book (for me) is Kannabiran’s challenge to the dogma that concepts of equality, anti-casteism, women’s rights, and so on, are imported Western concepts, and that in interpreting the Constitution, due regard must be paid to indigenous ideas of nature and society. There are two ways of responding to this claim, both of which were invoked by critics of the Supreme Court’s *Koushal* judgment last year. One is to argue that these “traditions” ought to play no role in constitutional interpretation; the constitution has explicitly committed itself to political liberalism through its bill of rights, judicial review and other such substantive, as well as structural, provisions. The other is to take the claim from tradition head on, and argue that it rests upon a narrow and cribbed reading of Indian history, religion and philosophy. In *Tools of Justice*, Kannabiran takes the latter tack. She argues that throughout Indian history, there have been powerful, dissenting *Indian* voices against the caste system, inequality, sexual subordination, and so on. Drawing upon the Bhakti movement, Kabirdas, Periyar, and many others, she argues that if, indeed, we are going to take into account Indian history, religion and philosophy when we interpret the meaning of our Constitutional guarantees, then *this* particular history has as much a claim to our attention as its opposite, dominant strand.

In his six modalities of constitutional interpretation, the legal scholar Philip Bobbitt lists tradition as one of them. In American constitutional jurisprudence, the Supreme Court treats as suspect any legislation that impinges upon rights that are “*deeply rooted in American history and tradition*” (e.g., the right to jury trial). Insofar as tradition is – and has been – a tool of interpretation invoked by the Indian Courts, Kannabiran argues for a radical re-reading of that very tradition.

These three themes, I think, make *Tools of Justice* stand out as a highly important and relevant work of recent times. I do feel, however, that often the book falls short of the goals that it lays out in its theoretical and methodological framework. It presents detailed sociological and historical analyses of caste and sex discrimination, for instance, but does not tell us – or at least, does not adequately tell us – the implications that would have for constitutional interpretation, or how it would change the outcome in specific cases. The idea of weaving in sociology and history into constitutional interpretation is a laudable one; but there must also be a distinct, legal peg on which to hang them. Or, in other words, there should be legal, interpretive tools – tools within the *legal* tradition that can justify and create a space for sociology and history to enter into our analysis of constitutional provisions and cases. It is in this respect – that is, in linking sociology, history and law into one, coherent interpretive scheme that is *legally* defensible – that *Tools of Justice* sometimes falls short. But for all that, it is a book that repays close study, and is highly recommended.

