

INTRODUCTION

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Law and Gender in India

The developments in India since the new millennium have shown that the law addressing gender (in)equality is in constant flux. In the last two decades, the Indian parliament has passed key legislation on domestic violence, sexual harassment in the workplace, maternity benefits, surrogacy and HIV/Aids prevention, and brought about reforms to the criminal provisions regarding sexual violence, criminal procedural law and religion-based family laws, addressing matters related to divorce and inheritance. The Indian Supreme Court has delivered landmark judgments dealing with online sexual harassment, acid attacks against women and abortion rights. It has banned the practice of Muslim divorce by triple *talaq*, decriminalised consensual sexual intercourse between adult men, strengthened the rights of transgender people, decriminalised adultery, granted women a right to enter the Sabarimala temple and given women equal rights in the army.

In India, like elsewhere, the drivers of legal change often emerge from beyond the traditional institutions of law-making and jurisprudence, that is, the parliaments and the courts. Over the past decades, multiple state and non-state actors have pushed for change or pushed back against it and thereby shaped the outcomes of legal reform processes. These actors include not only state organs such as the Law Commission of India and the National Commission for Women, non-state fora like *nari adalats* (women's courts), *khap panchayats* (community courts) and *sharia*

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courts and civil society actors such as women's non-governmental organisations (NGOs) and LGBTIQ¹ groups, but also religious groups, nationalist organisations and men's rights groups, and individuals like cause lawyers, petitioners, writers, bloggers, journalists, scholars and activists.

This book engages with recent developments in the area of law and gender in India. Our focus lies in addressing the idea of (in)equality and, with it, related questions of opportunities, access, representation and freedom. We seek to elaborate where *systems of inequality* persist in Indian society and its laws and how these sustain hierarchies of power. We look at landmark moments of legal change and portray how, through different *battles for equality*, these structures of inequality are challenged by various actors, who push for grand law reforms. And we assess how legal changes translate into social change and how closely they are related to the everyday struggles that individuals seek when *realising equality* on the ground.

The book strives to look at the issue of gender (in)equality in India from multiple angles and seeks to include a range of different voices. It engages with both the law 'in the books' (that is, the constitutional and statutory norms as created, administered and adjudicated by state institutions) and the feminist and queer critique thereof as well as with the law as practised 'on the ground' (that is, the multitude of normativities as shaped by religion, culture and custom) and people's questioning and reinterpretation of laws in everyday life. The book provides for both insider and outsider perspectives on Indian law, politics and society from scholars who live and work in India as well as outside. As a trans-disciplinary project, it links the views of scholars from different fields, including law, gender studies, history, political sciences and anthropology. And lastly, the book includes the voices of both practitioners, such as practising lawyers and activists, as well as academics.

As a result of the varied nature of the projects in this collection, the book does not prescribe one particular methodology across the chapters. It offers reflections that are doctrinal in nature and that work with the legal canon, but it also includes ethnographic accounts of gender (in)equalities. The authors contributing to this volume have worked with a variety of different data, ranging from engagement with legal statutes, case law and official state documents, to analyses of media discourses and the use of interviews. The chapters draw on normative as well as descriptive approaches and range from providing micro perspectives of specific case studies to engaging more abstractly with macro-level developments. The book thus provides for diverse viewpoints on the issue of gender (in)equalities.

¹ The abbreviation LGBTIQ stands for lesbian, gay, bisexual, transgender, intersex and queer.

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In titling this collection *Mutinies for Equality*, we would like to engage with the element of contestation of, and opposition against, the legal and societal status quo, the multiple approaches to change as well as the processes of transformation in law and society. We seek to signal how legal change is often the result of a combination of several factors and takes place at the level of formal laws, policies, judgments and people's mindsets. Each 'mutiny' on its own may not cause lasting or deep developments; however, the multiplicity of mutinies at various levels may well inspire and provoke the desired change on the legal and the societal level. *Mutinies for Equality* is, therefore, a recognition of 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.

In the ensuing sections, we have systematised these contestations of the legal and societal status quo and some of the many mutinies for equality under three rubrics showcasing *systems of inequality*, naming and amplifying *battles for equality* and identifying and evaluating barriers in the process of *realising equality*.

Systems of Inequality

The Indian Constitution enshrines the right to equality and the principle of non-discrimination in articles 14 to 18. The Constitution not only provides for formal equality—the treating of likes alike—but (at least to some degree) also for substantive equality,² whereby it allows for special (preferential) treatment for women and children in article 15(3). The Constitution also grants a right to equality and non-discrimination not only against the state, but also against certain private parties (article 15[2]). It further abolishes untouchability (article 17) and does away with titles (article 18). The Indian Constitution departs from the colonial past, which was defined by hierarchies and domination, and demands that the state take an active role in the country's social transformation and the bringing about of social justice and equality. Scholars have, therefore, termed it a transformative constitution.³

² Substantive equality theory has developed as a complementation to the concept of formal equality. It is based on the premise that inequality is related to historical hierarchies and social subordination. In the words of Catharine A. MacKinnon, 'the opposite of equality is not difference but hierarchy. Equality thus requires promoting equality of status for historically subordinated groups, dismantling group hierarchy'; see C. A. MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws"', *International Journal of Constitutional Law* 4, no. 2 (2006), 181–202, 186.

³ G. Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Noida: Harper Collins Publishers, 2019); O. Vilhena Vieira, U. Baxi and F. Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013).

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Notwithstanding the constitutional right to equality, gender inequalities regarding political and economic participation, personal freedom, sexual autonomy, education and health remain. In the gender inequality index developed by the United Nations Development Programme, India is ranked a dismal 131 out of 189 as of 2020.⁴ It continues to languish on key indicators related to gender. Maternal mortality, for example, still continues to be a challenge with 133 deaths per 100,000 live births in India, whereas in Brazil and Sri Lanka, for example, this number lies at 60 and 36 respectively.⁵ Furthermore, while according to the recent Lok Sabha data women occupy the highest ever number of seats in history in the lower house of India's parliament, they still account for only 14 per cent of the total seats.⁶ Women also continue to be under-represented in Indian courts. Only 73 out of 670 judges at the various high courts across the country and only 3 out of 30 Supreme Court judges are women.⁷ A recent report by Oxfam shows that women on an average receive 34 per cent less income than men for the same work and that the education levels of girls continue to be lower than those of boys of the same age.⁸ Another study shows that every year 23 million girls leave school when they start menstruating because of a lack of proper sanitation facilities.⁹ Furthermore, data from the National Crime Record Bureau shows that instances of rape of Dalit women—who face multiple discrimination on the grounds of gender and caste—doubled between 2007 and 2017.¹⁰ And while the Supreme Court recently decriminalised gay sex in India,¹¹

⁴ UNDP, 'Gender Inequality Index' (2018), available at <http://hdr.undp.org/en/composite/GII>, accessed 22 October 2019.

⁵ Ibid.

⁶ P. Khanna, 'At 14%, 17th Lok Sabha Has Highest Number of Women MPs', *Live Mint*, 24 May 2019, available at <https://www.livemint.com/elections/lok-sabha-elections/at-14-17th-lok-sabha-has-highest-number-of-women-mps-1558699824177.html>, accessed 20 July 2020.

⁷ PTI, 'Only 73 Women Judges in High Courts: Govt. Tells Parliamentary Panel', 13 January 2019, available at <https://www.livelaw.in/top-stories/-73-women-judges-high-courts-govt-parliamentary-panel-142079>, accessed 22 October 2019.

⁸ A. Bhattacharya, 'India's Inequality Crisis Hurts Girls and Women the Most', World Economic Forum, 6 February 2019, available at <https://www.weforum.org/agenda/2019/02/india-s-inequality-crisis-hurts-girls-and-women-the-most/>, accessed 22 October 2019.

⁹ S. Dutta, '23 Million Women Drop Out of School Every Year When They Start Menstruating in India', NDTV-Dettol Banega Swasth Swachh India, 28 May, 2018, available at <https://swachhindia.ndtv.com/23-million-women-drop-out-of-school-every-year-when-they-start-menstruating-in-india-17838/>, accessed 20 July 2020.

¹⁰ R. Sengupta, '2017 Timeline of Atrocities against Dalits: UP, Rajasthan Top the List', *The Citizen*, 29 November 2017, available at <https://www.thecitizen.in/index.php/en/newsdetail/index/2/12381/2017-timeline-of-atrocities-against-dalits-up-rajasthan-top-the-list>, accessed 22 October 2019.

¹¹ *Navtej Singh Johar v. Union of India*, Supreme Court of India, (2018) 10 SCC 1.

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the Naz Foundation shows that 35 per cent of the members of the LGBTIQ community continue to suffer intimidation, including from the police.¹²

While rankings and data have their own challenges and often simplify complex social and cultural experiences and processes, this array of illustrations provides an insight into how inequality is multi-locational and multi-dimensional in India. Inequalities persist among institutions of political representation, in the labour market and at the level of families and communities. Inequalities not only manifest between men and women, between cis- and transgender people, and between heterosexual and homosexual people, but oppression and discrimination is often based on interconnected or 'intersecting' aspects of class, caste, sexuality, (dis)ability, age and religion, to name but a few.

We attempt to understand where and how these inequalities continue to persist in India by looking at three distinct locales in which inequalities play out: normative orders, institutions and communities.

Looking at normative orders, established through legislation or judicial case law, we find a number of examples where particular groups of people, such as women, gay people or trans people, are directly or indirectly discriminated against. Religion-based personal laws, for instance, still grant women lesser rights than men, be it with regard to divorce, the guardianship of children or inheritance. Laws also contain what Kapur and Cossman called a 'familial ideology',¹³ which means that they draw on or foster an understanding that perceives women primarily as wives and mothers, that views partnership as heterosexual and that defines family as a unit comprising a heterosexual couple and their biological children. Laws also make strong statements about morality, thereby denying many people from living a flourishing life. This is the case when laws criminalise non-marital sex or sexual intercourse between two men or when they tie women's economic rights to their sexual conduct, for instance by denying post-divorce maintenance rights to women who enter into a new relationship. Laws are frequently based on and perpetuate stereotypes against certain groups of people, for instance when they perceive that women are weak, (economically) dependent and in need of protection or when they draw linkages between a woman's 'character' and the assumption that she might lie in a rape trial.¹⁴

¹² H.V. Nair, 'Section 377: The Challenges after Landmark Supreme Court Verdict', *India Today*, 7 September 2018, available at <https://www.indiatoday.in/mail-today/story/even-as-lgbtq-celebrate-landmark-supreme-court-verdict-social-challenges-may-stay-1334101-2018-09-07>, accessed 22 October 2019.

¹³ R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage, 1996).

¹⁴ The former section 155(4) of the Indian Evidence Act, 1872, stated that when a man was prosecuted for rape or an attempt to rape, the 'credit of a witness may be impeached' by showing 'that the prosecutrix was of generally immoral character'.

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A second locale where inequalities manifest is institutions. Legislative bodies and courts in India serve as telling examples not only of the lack of women's participation, but also as institutions that base their decisions on and thereby perpetuate problematic gender stereotypes. Even in cases where legislation contained obvious gender discrimination, the Indian higher judiciary has often been reluctant to strike down discriminatory provisions and the Indian parliament has refrained from interfering too. Two areas in which the state's systemic apathy has prominently manifested are the religion-based personal law system¹⁵ and the issue of marital rape.¹⁶ Gender stereotypes also continue to impact judicial decision-making and sentencing, as shown by scholars such as Pratiksha Baxi¹⁷ and Mrinal Satish¹⁸ with regard to rape trials.

A third locale of manifest inequalities is that of communities, which is understood here to refer to small units, such as families and kin groups, that influence how people live by moral norms, as well as larger units, such as religious or caste groups, which govern their members by customary and non-state laws and use non-state justice systems to enforce these rules. Such community norms can have devastating impacts on the freedom of individuals. In some parts of India, couples have been harassed and even killed—so as to 'protect the family honour'—when they married or began a relationship with someone whom their parents or the wider community disapproved of, be it because the partner belonged to the 'wrong' caste or religion or because this was a same-sex relationship. Honour killings in some instances have been sanctioned by the decisions of *khap panchayats* and there is a lack of political will to challenge these authorities.¹⁹ Social pressure on members of the LGBTIQ community that prevents people from living freely illustrates how, in

¹⁵ T. Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court' *Verfassung und Recht in Übersee*, 49, no. 2 (2016), 148–74; T. Herklotz, 'Walking a Tightrope: Balancing Law, Religion and Gender Equality in the Aftermath of the Indian Supreme Court's Triple Talaq Ban', *Zeitschrift für Recht und Islam* 9 (2017), 179–204.

¹⁶ S. Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory', *Feminist Studies* 37, no. 1 (2011), 185–211. As recently as July 2019, the Supreme Court refused to entertain a public interest litigation seeking to make marital rape a ground for divorce, *The Tribune*, 'SC Refuses to Entertain PIL Seeking Law against Marital Rape', 1 July 2019, available at <https://www.tribuneindia.com/news/archive/nation/sc-refuses-to-entertain-pil-on-marital-rape-795567>, accessed 22 October 2019.

¹⁷ P. Baxi, *Public Secrets of Law: Rape Trials in India* (New Delhi: Oxford University Press, 2014).

¹⁸ M. Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge: Cambridge University Press, 2016).

¹⁹ S. P. de Souza, 'India's Parallel Justice Systems: Engaging with Lok Adalats, Gram Nyayalayas, Nari Adalats and Khap Panchayats through Human Rights', in S. Juss (ed.), *Human Rights in India* (Abingdon: Routledge, 2019), 80–102.

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intimate and personal settings, systemic oppression continues to persist. A recent example of such social pressure is the case of the leading Indian runner Dutee Chand, who came out as gay, but also articulated a fear that any information about her relationship would put her partner and the couple's families at risk.²⁰

The chapters in the first part of the book engage with the current flaws of the Indian legal and socio-political systems with regard to gender equality. Looking at the status quo through a gendered lens, the authors in this part of the book point to discrimination that manifests in legislation and case law as well as biases and stereotypes that are present among the Indian parliament, the judiciary, the media and society at large. The chapters in this part of the book address notions of culture, religion, honour and decency, and the correlation between one or more of these to point to the complexity of the persisting inequalities. They speak to each other through their focus on showcasing different forms of arbitrariness, in action and complicity by institutions in perpetuating or reinforcing structures of gender bias. Additionally, these chapters demonstrate how the situation is particularly problematic for people who are burdened in multiple ways due to the intersection of different grounds of discrimination, such as gender, sexual orientation, religion, caste or class.

Krithika Ashok provides a historical assessment of case law and shows that gender stereotypes and biases against women have continued to feature in court decisions from the colonial period up until today. Looking at the example of property transfer, she shows how courts before and after independence have discriminated against women. They have tended to interpret voluntary instruments such as wills, trusts and gift deeds in a manner that restricts women's access to and control over property, thereby regularly relying on gender stereotypes and patriarchal assumptions about the role of women within the family.

Siddharth Peter de Souza and Medha Srivastava-Kehrer look at the Indian Supreme Court as well as other courts and analyse the process of judicial appointments. The authors point to the significant lack of women judges and look at how gender identities are imagined in the appointment process. They point to the implications of the lack of women on the bench and suggest a reform of the judicial appointments mechanism that includes an intersectional approach so as to enhance greater diversity in courts.

Jayna Kothari engages with the Supreme Court's recent jurisprudence with regard to gender questions. She points out that in some cases the Court has been extremely forward looking, for instance when it recognised the right to

²⁰ A. Dhillon, 'It's Humiliating for Us': Village Disowns Dutee Chand, India's First Openly Gay Athlete', *The Guardian*, 5 June 2019, available at <https://www.theguardian.com/world/2019/jun/05/dutee-chand-india-athlete-coming-out>, accessed 22 October 2019.

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self-identify one's gender identity in 2014.²¹ In other cases, however, the Court has been rather conservative, such as in the *Shayara Bano* case,²² where the Court—despite striking down the discriminatory practice of triple *talaq* divorces—refrained from a detailed discussion of the gendered dimension of *talaq*. In contrasting these different issues, the author showcases and criticises how the Supreme Court 'cherry-picks' its gender battles.

Katharina Wommelsdorff looks in detail at the *Shayara Bano* case²³ from 2017 and places the Supreme Court's decision in the broader context of the discourse around Muslim women in India. She engages with the conflicts between religious norms and secularism, the essentialisation of Muslim women, particularly in the context of Hindu nationalist politics, and dimensions of intersectionality with regard to religion and gender. She further elaborates a point that Jayna Kothari's chapter touches upon: the fact that the Supreme Court in *Shayara Bano*, though ultimately deciding in favour of the claimant, failed to see the gendered dimension of the case.

Fritzi-Marie Titzmann deals with the concept of 'obscenity' in the legal and popular discourse. By looking at the developments after and the discourse around two particular incidents that occurred in 2015—a temporary 'porn ban' and a raid in a hotel on Aksa Beach in Mumbai—she shows not only how the construction of the concept of 'obscenity' is used to perpetuate inequalities between men and women, but also how the concept is linked to a discourse of (anti-)nationalism: labelling a certain behaviour as obscene and constructing it as 'anti-family' and thus 'anti-national' is part of a nationalist agenda to prohibit socially deviant behaviour and to implement conservative moral rules.

Battles for Equality

The systemic inequalities that persist in Indian society and in its laws have not gone unchallenged. In fact, different actors on various levels have led multiple battles against inequalities and discrimination and have achieved success as well as failures in doing so. The second part of the book looks at some of these battles for legal change and the actors who have led them. The battles we talk about have been fought on the streets, in the courts, in parliament and in universities. It has been social movements, cause lawyers, women's and LGBTIQ groups, individual

²¹ *National Legal Service Authority v. Union of India and Ors*, Supreme Court of India, (2014) 5 SCC 438.

²² *Shayara Bano v. Union of India and Ors*, Supreme Court of India, (2017) 9 SCC 1.

²³ *Ibid.*

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claimants, activists and scholars who have fought them, using a variety of means, ranging from demonstrations to public interest litigation.

The chapters compiled in this part of the book speak about some of these battles and their legal outcomes in terms of central legislation or landmark judgments. They address key moments in the fight for gender equality that divide the history of law and gender into a ‘before’ and ‘after’. But they also critically assess whether these landmark legislations and signpost judgments are really as spectacular as they are sometimes claimed to be.

Today’s campaigns for legal and social change can build on a long history of activism. Civil rights groups, women’s organisations and LGBTIQ activists have vocally campaigned over several decades for a broadening of rights for groups who face discrimination, thereby often tying in with the campaigns of earlier movements and building on the achievements gained before and after India’s independence. Individual activists, small autonomous groups, mass member organisations, cause lawyers, activist scholars, journalists, NGOs and think-tanks have spoken up against inequalities and discrimination. Often it has been key events that have sparked public outrage and triggered these campaigns for change. The dowry murder of Tarvinder Kaur in 1978 and the Supreme Court’s decision in the *Mathura* case²⁴ in the same year are two early examples here. More recently, the violent gang rape of a young woman in Delhi in 2012 led to severe public protests in Delhi,²⁵ which prompted the national government to show a speedy response to the protests by establishing the Justice Verma Committee and bringing about amendments to the criminal law on matters related to violence against women. Another example of an event that triggered public protest is the Supreme Court’s decision in *Suresh Kumar Koushal*,²⁶ in which a two-judge bench overturned the Delhi High Court decision in *Naz Foundation v. Govt. of NCT of Delhi* and thereby re-criminalised gay sex, provoking public outrage, which arguably led to a decision to have the case re-heard.

The actors involved in these battles for change have drawn on a number of different tools, ranging from organising street protests and writing pamphlets to calling for law reforms, hosting seminars, workshops and conferences, publishing newspaper articles and blog posts to directly approaching lawmakers, filing public interest litigation cases in the courts and initiating creative academic

²⁴ *Tuka Ram and Anr. v. State of Maharashtra*, Supreme Court of India, (1979) 2 SCC 143.

²⁵ For a detailed engagement with the protests, debates and media coverage following this case, see N. C. Schneider and F. M. Titzmann (eds), *Studying Youth, Media and Gender in Post-Liberalisation India: Focus on and beyond the ‘Delhi Gang Rape’* (Berlin: Frank & Timme, 2015).

²⁶ *Suresh Kumar Koushal v. NAZ Foundation and Ors*, Supreme Court of India, (2014) 1 SCC 1.

projects, such as the feminist judgments project.²⁷ Their calls for legal change have frequently referred to the principle of equality in the Indian Constitution, but might also have mentioned other sources of authority, be it the Quran or international human rights law.

During the course of the last decades, civil rights groups, women's rights organisations and LGBTIQ activists have been able to bring about major reforms in the form of key legislation and landmark judgments. Individual activists and groups concerned with gender equality have played an active role in the drafting of key legislation. The Lawyer's Collective Women's Rights Initiative's role in the making of the Protection of Women from Domestic Violence Act (PWDVA), 2005, is a prime example here. Activists and groups have also used public interest litigation cases or supported petitioners in court in order to bring about change via the judiciary. Landmark judgments include the *Vishaka* judgment from 1997, in which the Supreme Court developed a set of guidelines on sexual harassment in the workplace,²⁸ the Supreme Court's banning of triple *talaaq*,²⁹ the Supreme Court's ruling that the right to self-identify one's gender identity was an integral part of the right to life, dignity and autonomy,³⁰ and many more.

In their striving for gender equality, movements, groups and activists have, however, also experienced failures and setbacks. Despite decades-long activism, certain demands—for instance to criminalise marital rape or abolish the provision on restitution of conjugal rights in Hindu personal law (section 9 of the Hindu Marriage Act)—never materialised into law reforms. Where activists managed to bring about legal reforms, their suggestions were often watered down in the long process of law-making. In other cases, stereotypical notions of gender and marriage found their way into generally progressive laws. Section 4(4)(a) in the Family Court's Act, 1984, which stresses 'the need to protect and preserve the institution of marriage', and section 14 of the PWDVA, which provides for joint counselling of the parties, are such examples. Shortcomings also exist at the level of the application of new laws on the ground.

Petitioners who have sought to challenge discriminatory laws in court have experienced losses too. The failures in *Ahmedabad Women's Action Group*,³¹ where

²⁷ Feminist judgments projects around the world have attempted to rewrite controversial judgments in a feminist manner to indicate how key cases could have been decided differently if aspects of gender equality had been taken seriously. For the Indian feminist judgments project, see <https://fjpindia.wixsite.com/fjpi>, accessed 20 July 2020.

²⁸ *Vishaka & Ors v. State of Rajasthan & Ors*, Supreme Court of India, (1997) 6 SCC 241.

²⁹ *Shayara Bano v. Union Of India and Ors*.

³⁰ *Navtej Singh Johar v. Union of India*.

³¹ *Ahmedabad Women's Action Group v. Union of India*, Supreme Court of India, AIR (1997) 3 SCC 573.