

BOOK REVIEW

WHO IS EQUAL: THE EQUALITY CODE OF THE CONSTITUTION (2024). By Saurabh Kirpal, Vintage Books (Penguin Random House), Haryana. Pp. 304, Price INR 699/-.

IN MANY constitutional democracies, the promise of equality stands as a foundational ideal, yet it remains paradoxically elusive. India's Constitution provides a vivid stage for the tension between egalitarian ideals and entrenched inequalities. Saurabh Kirpal's *'Who is Equal? The Equality Code of the Constitution'* attempts to map this fraught territory, providing both a doctrinal and moral inquiry into what equality has meant, currently means, and ought to point in the world's largest democracy. Kirpal, a Senior Advocate of the Supreme Court of India and an advocate for LGBTQIA+ rights bring a nuanced and intersectional perspective to the fore. His background, coupled with an accessible prose style, positions this book to serve a broad readership: from laypersons seeking to understand the constitutional basis of their rights, to scholars interested in a critical appraisal of India's evolving jurisprudence on equality. Yet, his work also invites vital reflection, especially regarding his emphasis on judicial remedies, the limited discussion of systemic economic injustices, and the complexity of translating lofty principles into concrete policy.

Kirpal begins by revisiting, the rather brief yet constitutionally weighty, article 14 of the Indian constitution which promises equality before the law and the equal protection of the laws. In doing so, it exerts a gravitational pull on the rest of the fundamental rights chapter. Kirpal traces this principle back to the Constituent Assembly debates, showing that the egalitarian vision was never a consensus starting point. The framers, most of whom were upper-caste, privileged men, grappled with reconciling high ideals with the deeply hierarchical social order they were born into. Although progressive voices like B.R. Ambedkar fought ardently for substantive equality, the resultant text remained a compromise, enshrining broad egalitarian aspirations but leaving their practical realisation to the vagaries of judicial interpretation and legislative will.

This historical excavation matters. It explains why equality, though prominently placed, has never been self-executing. The task of operationalising

article 14 and related provisions (articles 15 to 35) fell to a judiciary that Kirpal describes as “polyvocal”—a chorus of voices that does not always harmonise. Courts have produced judgments that alternately expand or constrict the reach of equality, sometimes courageously confronting entrenched hierarchies, at other times retreating into formalism.

Kirpal’s classification of equality into formal, substantive, and procedural is one of his book’s conceptual highlights. This triad helps the reader navigate a jurisprudential landscape where the meaning of equality is contested. He examines formal equality as a model that treats all persons identically, presuming that identical treatment is the essence of fairness. Kirpal demonstrates that this approach, while seemingly fair, fails to account for historical and structural disadvantages. It can perpetuate injustice by ignoring that people do not start from the same baseline. Judicial reasoning that relies solely on formal equality often protects the status quo.

In contrast, substantive equality looks beyond appearances to address systemic injustices. By recognising that different groups face distinct structural barriers, it justifies affirmative action, reservations, and other remedial measures designed to achieve genuinely fair outcomes rather than token formal parity. Kirpal draws on landmark cases like *Navtej Singh Johar v. Union of India*¹—where the Supreme Court decriminalised homosexuality—to illustrate how a substantive understanding of equality unshackles marginal groups from oppressive social norms. This approach embodies the Constitution’s transformative purpose: to challenge existing hierarchies rather than simply inscribe them into legal language.

Procedural equality, on the other hand, underlines the importance of fair processes—impartial adjudication, reasoned decisions, and an accessible legal system. Kirpal argues that while due process is vital, it can also serve as a pretext for judicial timidity. Courts can hide behind procedural technicalities instead of confronting underlying inequalities.

Kirpal’s emphasis on these three dimensions clarifies how India’s constitutional order grapples with the tension between the ideal of equality and

¹ (2018) 10 SCC 1.

the reality of disadvantage, showing how each dimension can be co-opted or diluted. For example, a court might proclaim substantive equality as a principle but shy away from its full implications when examining issues like marital rape, caste-based discrimination, or marriage equality for LGBTQIA+ persons.

One of the book's central critiques concerns the "intelligible differentia" standard—the "reasonable classification" doctrine. Indian courts have long held that laws can treat different classes of persons differently if the differentiation is based on a rational criterion. While this doctrine permits beneficial forms of affirmative action, Kirpal shows that it has also justified regressive measures. Analysing cases from land-tax disputes to religion-based personal laws, he shows inconsistent applications—sometimes progressive, other times rigidly formalist, ignoring systemic inequalities.

The "intelligible differentia" principle, Kirpal argues, needs a substantive equality infusion.² Courts should ask not only whether a classification is rational but whether it perpetuates or dismantles entrenched hierarchies. The *Navtej Johar* judgment exemplifies a moment when the Court looked beyond surface-level distinctions—homosexual versus heterosexual conduct—to recognise the structural oppression suffered by LGBTQIA+ communities. However, in other domains, such as marital rape or caste-based exclusion, the judiciary often retreats, upholding majoritarian and patriarchal norms.

Kirpal excels in illustrating intersectionality—how caste, gender, religion, class, and sexuality interlock to create complex forms of disadvantage. He discusses, for instance, the case of a Dalit woman, Yashica Dutt, who felt compelled to hide her caste to avoid discrimination³. Such stories serve as a sobering reminder that caste oppression, patriarchy, and class privilege operate simultaneously. Understanding equality in India requires not only looking at caste or gender separately but also examining how overlapping identities amplify disadvantages. Kirpal's intersectional lens enhances the reader's appreciation for the complexity of achieving substantive equality in a society layered with multiple hierarchies.

² Neera Chandhoke, "Equality of What and For What?" *The Wire*, Sept. 15, 2024.

³ Bhumika Popli, "I had to say I didn't know my caste as if I was upper caste: Yashica Dutt on coming out as Dalit" *The Caravan*, Aug. 04, 2019.

He further explores how marriage laws and family structures often reflect and reinforce intersectional inequalities. For instance, an upper-caste woman who marries a Scheduled Caste man may not automatically gain the benefits of reservation policies, whereas the children may. These legal conundrums show that simple formal criteria fail to capture the embedded nature of discrimination. Kirpal's attention to such nuances enriches the discourse, pushing beyond a one-size-fits-all model of equality.

Kirpal organises the book thematically, moving through domains where equality claims repeatedly surface: education, employment, democracy, business, and marriage. This thematic approach situates legal debates in concrete social arenas, demonstrating how jurisprudential principles shape—and are shaped by—real-world conditions.

Debates around reservations in educational institutions focus on balancing meritocracy with addressing historical deprivation. Kirpal examines how reservations aim to level the playing field for *dalits*, *adivasis*, and Other Backward Classes (OBCs) while grappling with the contentious issue of defining 'backwardness.' He questions whether economic prosperity within traditionally disadvantaged castes should negate the need for reservations and emphasizes that educational equality involves not just identical admission criteria but systemic upliftment and ensuring equal life chances. By discussing the concept of the 'creamy layer,' Kirpal explores whether reservations should be based on poverty or caste and raises critical points, such as why reservations do not include poor individuals from upper castes if wealth is the determining factor within a caste.

In the public sector, job quotas have opened doors for marginalised communities. Yet glaring disparities remain, especially at higher echelons of power. The *Bhanwari Devi* case⁴, where a lower-caste social worker was gang-raped by upper-caste men for opposing child marriage, highlights the intersection of caste and gender violence. The trial court's dismissal of the charges, citing it as "inconceivable" for upper-caste men to assault a lower-caste woman, exposes the deep-rooted biases in both societal and legal systems that fail to protect marginalized groups. Kirpal uses this example and points out that even well-

⁴ Geeta Pandey, "Bhanwari Devi: The rape that led to India's sexual harassment law" *BBC*, Mar. 17, 2017.

intentioned policies can flounder if not backed by robust anti-discrimination statutes. Despite constitutional guarantees of equal pay for equal work, gender wage gaps persist due to entrenched patriarchal norms and weak enforcement. Additionally, a lack of institutional support, such as insufficient childcare facilities and biased professional evaluations, further hinders women from having a comfortable and equitable professional experience.

Kirpal highlights the judiciary's role in ensuring equality in economic policies referencing *Tata Cellular v. Union of India*⁵, the Supreme Court scrutinised the fairness of government tender processes, emphasizing that equality principles must guide public contracts to prevent favoritism. Kirpal also discusses the contentious issue of reservations in private enterprises, questioning how far affirmative action policies should extend to address systemic inequalities.

Kirpal's critique extends to India's first-past-the-post (FPTP) electoral system. He questions whether FPTP truly embodies equality if large portions of the electorate end up unrepresented or underrepresented. He stops short of prescribing a specific electoral reform but implies that more proportional forms of representation might better reflect India's pluralism⁶. This gesture expands the conversation beyond individual rights to include the design of political institutions themselves.

In the last chapter, Kirpal's passion and personal stake are evident through his critique of India's persistent refusal to recognise marriage equality for LGBTQIA+ citizens and the courts' reluctance⁷ to criminalise marital rape. In a society where marriage often determines access to a host of rights—inheritance, citizenship, and more—excluding same-sex couples amounts to a denial of full citizenship. Kirpal's stance is unapologetically transformational, insisting that no claim to equality can hold if marriage remains a heteronormative preserve.

Kirpal's approach to the judiciary is neither hero worship nor blanket condemnation. He acknowledges that at various historical moments, the Supreme Court has protected and expanded rights. The decriminalisation of homosexuality

⁵ (1994) 6 SCC 651.

⁶ Satish Mishra, "The shift to proportional representation: Is it time for India?" *Observer Research Foundation*, Aug. 20, 2023.

⁷ *RIT Foundation v. UOI* (2022) SCC OnLine Del 1404.

and the recognition of privacy as a fundamental right represent high-water marks. But the Court is also susceptible to conservative impulses. By highlighting this duality, Kirpal resists simplistic narratives.

However, this balanced view also opens him to critique. He sometimes relies heavily on the judiciary as the vehicle of progress, potentially overestimating the courts' ability to effect structural change. While the judiciary can interpret laws in egalitarian ways, it often acts within constraints.⁸ Without proactive legislation and sustained social movements, judicial pronouncements have limited reach. Kirpal notes this limitation, but more explicit engagement with critical legal theories might have sharpened his understanding of the judiciary's role in perpetuating or challenging status quo power relations.

While Kirpal excels at diagnosing legal inconsistencies and spotlighting missed opportunities, his prescriptions for improvement remain somewhat vague. For instance, he calls for a comprehensive anti-discrimination law but does not explore how such legislation might be structured to tackle intersectional inequalities. Additionally, although he references philosophical frameworks—from Dr. Ambedkar's writings to John Rawls's theory of justice—he could have engaged more deeply with critical legal studies, feminist legal theory, or critical race theory. Such a move would situate his analysis in a richer theoretical matrix and perhaps yield more pointed proposals.

When discussing personal laws and family structures, Kirpal notes that entrenched patriarchal norms persist even under the cover of religious freedom. However, the tension between respecting cultural pluralism and ensuring equality is not fully resolved. How can lawmakers and judges enact transformative changes that secure women's and LGBTQIA+ individuals' rights without alienating religious communities and risking backlash? Kirpal's analysis illuminates this dilemma but does not offer a sustained blueprint for how legal reforms might navigate these sensitivities.

The question "*Who is Equal?*" remains unresolved in India's constitutional democracy, animated by moral urgency. Kirpal's book underscores that equality

⁸ Luc B. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" 3 *International Journal of Constitutional Law* 617–648 (2005).

is a horizon we must continually strive towards. The law can help, but alone it cannot dissolve centuries of stratification. Courts can catalyse change, but they cannot substitute for legislative action or social transformation. Equality, as Kirpal reminds us, is not a static end-state; it is an ongoing project that demands vigilance, imagination, and activism. In bringing forth complex case law, historical contexts, and philosophical debates, Kirpal encourages readers to take equality seriously, not just as a pious constitutional slogan but as a transformative aspiration. He sets the stage for a richer, more critical engagement with the law's capacity to redress social hierarchies. The result is a book that not only maps the terrain of equality jurisprudence but also illuminates the path forward—if only we have the political will and collective moral courage to walk it.

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