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RIGHT AGAINST DISCRIMINATION UNDER THE CONSTITUTION OF INDIA- AN ANALYSIS

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Abstract

This paper undertakes a comprehensive examination of the right against discrimination within the constitutional framework of India. Discrimination, a pervasive issue in societies worldwide, finds particular resonance in India's complex socio-cultural landscape. The Constitution of India, as the supreme law of the land, serves as a beacon for upholding fundamental rights, including the right to equality and non-discrimination. This analysis delves into the historical, philosophical, and legal dimensions of this crucial right, aiming to elucidate its significance and implications in contemporary Indian society.

The historical context provides a backdrop for understanding the genesis of anti-discrimination principles in India. From the colonial legacy of discrimination to the struggle for independence and the subsequent framing of the Constitution, the trajectory of India's journey towards equality is marked by both progress and challenges. The philosophical underpinnings of equality, rooted in the principles of justice, fairness, and dignity, form the moral foundation upon which legal provisions are constructed.

Central to this analysis are the constitutional provisions explicitly addressing equality and the right against discrimination. Articles 14, 15, and 16, among others, serve as bulwarks against arbitrary discrimination by the state and individuals alike. Through an examination of judicial interpretations and landmark cases, the evolving jurisprudence surrounding these provisions is elucidated, shedding light on the complexities of applying abstract constitutional principles to concrete situations.

Moreover, the paper explores the contemporary relevance of the right against discrimination in India's rapidly changing social, economic, and political landscape. It interrogates persistent forms of discrimination based on caste, gender, religion, ethnicity, and other intersecting identities, emphasizing the need for targeted interventions and systemic reforms. Additionally, comparative

insights from legal systems worldwide offer valuable perspectives on effective strategies for combating discrimination and promoting inclusivity.

In conclusion, this analysis underscores the imperative of upholding the right against discrimination as a cornerstone of Indian democracy and social justice. By unpacking its historical roots, philosophical foundations, legal provisions, and contemporary challenges, this paper seeks to contribute to ongoing discourse and efforts aimed at realizing the constitutional promise of equality for all citizens of India.

Keywords: Right Against Discrimination, Constitution of India, Equality, Legal Provisions, Contemporary Relevance

“As long as poverty, injustice and gross inequality persist in the world, none of us can truly rest” – Nelson Mandela

Introduction

Discrimination is a word that we have been studying for many years. Discrimination means unjust or preferential treatment on the grounds of caste class gender religion country etc. The rights and interests of a person are violated due to discrimination. It occurs when a person is deprived of their common rights. Discrimination is treating a person or group of people differently and not in a good way. It means to consider a group of communities as inferior. Discrimination always occurs with different minorities (gender, class, etc.). So many forms of discrimination exist in this world. The people belonging to the different communities are treated so harshly and in a very bad way. Some so-called majority social groups decide opportunities for them. Discrimination can also be aimed at people of various cultural, linguistic, or religious backgrounds. People may also face discrimination based on their sexual orientation or preferences. Despite the progress made in many countries, gender discrimination is still prevalent. Women's rights to represent matrimonial property, the ability to inherit on an equal footing with men, and the freedom to work and travel without their husbands' permission are still denied by law. Women are also more vulnerable to violent and abusive practices, which persist unabated in many countries, and they frequently face double discrimination as a result of their race or ethnicity as well as their gender. These situations may push individuals to migrate, and they have aided in the rise in human trafficking, particularly among women and children, who are routinely subjected to physical restraint, assault, and intimidation. Equality ensures that all people are born free and equal. Equality presupposes that all people have the same rights and deserve the same respect. Everyone

has the right to be treated equally. This means that the laws, policies and programs must not be discriminatory and that government agencies must not apply or enforce the laws, policies and programs in a discriminatory or arbitrary manner. There are two types of discrimination.

Direct Discrimination

Direct discrimination means that a person or groups of people are treated in an unfair way or a prejudiced way. It is the system of restricting an individual or group of individuals from using the services available to society or not providing them enough opportunities based on the fact that they belong to different religions, caste, classes, or gender. It occurs when the opportunities are available for everyone in the society but a person belonging to a different caste or gender is neglected even though they are capable enough of that opportunity and have qualified all the criteria required.

Indirect Discrimination

Indirect discrimination stipulates that when there are some rules and regulations that apply to every person living in the society but it creates some problems and disadvantages for specific individuals or groups of individuals based on the fact they are different in a certain way. Indirect discrimination is unlawful if it comes under the criteria where the person is treated unfairly on the attributes like caste, sex, gender, race, nationalism, etc. for example- In a company, where promotion is to be held for the position of general manager and for this position one male and a female employee were considered as their qualities fulfil the requirements. The female employee had more experience in the field. The male employee got the promotion and the head of the company when asked for the reason for the disqualification of the female employee said that we needed a person who can work full time and can travel whenever the company requires. This case is nothing but a typical example of indirect discrimination that females face in their careers because they are considered less than men and also sometimes the company assumes her family won't let her do this much work.¹

There is no comprehensive anti-discrimination law covering the entire country. The constitutional provisions generally view discrimination from a state citizen perspective. But this approach does not take into account the discriminatory actions of private individuals. Also, the existing legal framework falls short of ensuring justice to the survivors of discrimination as seen during the Covid 19 pandemic. In mid-2021, many state governments brought draft anti-discriminatory bills

¹ Shikha Pokhriyal, A critical analysis of discrimination and various forms of discrimination - iPleaders (2021), <https://blog.iplayers.in/critical-analysis-discrimination-various-forms-discrimination/>

to deal with the problems of discrimination faced by people. In this context, the write-up analyses the need for pan-Indian anti-discriminatory legislation.

Concept of Equality: Meaning and Definition

When we talk about India, even after so many years of independence, it still cannot be called completely independent in many aspects. Evils such as discrimination, inequality and untouchability are still prevailing in our country. The same was felt by the makers of the Indian constitution. Such evils prevailed then also and are even more prevalent today. There are a large number of places even today where people are not treated equally and face discrimination on the basis of gender, religion, caste, race, sex etc.

In order to improve this scenario, Article 14 was added in Part III of the Constitution of India as a Fundamental Right, by the drafting committee of the Constitution. This right is available to every person, be it a citizen or non-citizen of India. Article 14 states that every person should be treated equally without any discrimination. The State shall not deny equality before law and equal protection of laws to any person within the territory of India. Article 14 ensures the basic requirement of citizens that is to be treated equally and as liberty is directly connected to equality, Article 14 ensures liberty as well as equality to citizens.²

Article 14 to 18 of the Constitution provides for equality among the people. They were inserted by the constitution makers as an effort to scrap off discrimination from our country. In the case of **National Legal Services Authority v. Union of India**³ Supreme Court held that article 14 does not restrict the word 'person' and its application only to male or female and Hijras/transgender persons who are neither male nor female fall within the expression 'person'. They are entitled to legal protection of laws in all spheres of state activity including employment, healthcare, education as well as equal civil citizenship rights, as enjoyed by any other citizen of this country.

Evolution of the Concept of Equality

The concept of equality has an ancient history. Aristotle analysing the concept of justice emphasised the close relationship between justice and equality. Accordingly, he divided justice

² Aditi Singh, Right to Equality under the Indian Constitution, IPLEADERS (September 13, 2022, 11:30 PM) blog.ipleaders.in

³ AIR 2014 SC 1863

into two parts, namely, general justice and particular justice. In the general sense, it meant equality. He made a further division of particular justice into two, namely, corrective justice and distributive justice. While corrective justice aims at redressing an equality which has been interfered with, distributive justice, on the other hand, aims at an equal distribution of the social good among persons equal before the law.⁴ Prof. C.G. Weeramanthry states that despite the 23 centuries that have elapsed since Aristotle wrote his *Nicomachean Ethics*, his formulation still remains, perhaps the most influential single piece of writing on the concept of justice, which strongly emphasises the close relationship between justice and the concept of equality.⁵ How equality is determined is a matter for which philosophical speculation can give no answer by itself.⁶ Rousseau⁶ is a key proponent who discussed the nature-convention distinction with regard to rights. Engels viewed the modern demand for equality as something different from its ancient idea: that is all men as men have something in common and to the extent are also equal.⁷ As Engels emphasised "the equality of nations is just as essential as the equality of individual".⁹ Laski⁸ emphasizes that equality does not mean identity of treatment. This is because there can be no identity of treatment as long as people are different in words and capacity and need. He viewed equality as having two aspects, namely, the absence of privilege and adequate opportunities are opened to all. He noted inequalities of wealth as a source of inequality. He further added that without virtual economic equality, the attainment of freedom is impossible and political equality is never real.

Marx and Engels⁹ considered that inequality is the result of class divisions which are unjust but historically necessary. They are finally alterable in a classless society. According to them, the idea of equality is a historical product as much as inequality was historically necessary. Marx saw class equalization as "impracticable nonsense" and called for abolition of classes to achieve social equality.¹⁰

⁴ Aristotle: *The Nicomachean Ethics*, H.Rackham (trans), Loeb Classical Library Harvard. UP; William Heinemann Ltd., (revised ed) 1934 pp 253,295,315

⁵ Weeramanthry C.G. *An Invitation to the Law* (Lawman (India) Pvt. Ltd. New Delhi 1988) p 121

⁶ *Ibid* p 125

⁶ Rousseau J.J. *Discussion on Equality* (New York: St. Martin's Press 1946) p 101

⁷ Engels Frederick. *Anti - Duhring* (Peking: Foreign Languages Press. 1976) p 130

⁹ *Ibid*

⁸ Laski H J A *Grammar of Politics* (5th edn George Allen and Unwin Ltd., London. 1948) p 157

⁹ Marx - Engels. *Works* Vol. 16 (Berlin Dietz Verlag. 1968) p 349

¹⁰ Marx K. and Engles F. *works* (Works Dietz Verlag Berlin. 1968), Vol.16, 34

Provisions Related to Equality and Right against Discrimination

The Indian Constitution forbids the practice of discrimination through its various fundamental rights:-

- **Article 14**¹¹ of the Indian Constitution states that every individual shall not be denied equality before the law regardless of belonging to any community. The said Article is clearly in two parts – while it commands the State not to deny to any person ‘equality before law’, it also commands the State not to deny the ‘equal protection of the laws’. Equality before law prohibits discrimination. It is a negative concept. The concept of ‘equal protection of the laws’ requires the State to give special treatment to persons in different situations in order to establish equality amongst all. It is positive in character. Therefore, the necessary corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally.
- **Article 15**¹² of the Indian Constitution prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth. This article states that no individual shall be prevented from using any public place, like shops, restaurants, etc. It further states that no one should be restricted to use the public services created for the welfare of all the society like wells, tanks, etc. The state governments are allowed to make special law provisions in the favour of women and children.
- **Article 16**¹³ of the Indian Constitution promotes giving equal opportunities to all the people in the area of public employment. “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.” This Article also provides the autonomy to the State to grant special provisions for the backward classes, under-represented States,

¹¹ Legislative.gov.in (2022), https://legislative.gov.in/sites/default/files/COI_English.pdf (last visited Sep 13, 2022)

¹² Ibid

¹³ Supra Note,13

SC & ST for posts under the State. Local candidates may also be given preference in certain posts. Reservation of posts for people of a certain religion or denomination in a religious or denominational institution will not be deemed illegal.

- Articles 14, 15 and 16 form part of a scheme of the Constitutional Right to Equality. Article 15 and 16 are incidents of guarantees of Equality, and give effect to Article 14. However, initially, Articles 15(4) and 16(4) were considered exceptions to Articles 15(1) and 16(1).

The Hon'ble Supreme Court, in **G.M. Southern Railways v. Rangachari**¹⁴, held Article 15(4) of the Constitution of India to be an exception to Article 15(1). The relevant portion is reproduced hereunder:

“Article 15(4) which provides, inter alia, for an exception to the prohibition of discrimination on grounds specified in Article 15(1) lays down that nothing contained in the said Article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes” In **M.R. Balaji v. State of Mysore**¹⁵, this view was followed, and it was held that: “Thus, there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2).”

This view, that Articles 15(4) and 16(4) were exceptions to Articles 15(1) and 16(1), was again reiterated in **Triloki Nath v. State of Jammu and Kashmir**¹⁶, and in **State of A.P. v. U.S.V. Balram**¹⁷.

The majority of a 7-Judge Bench of the Hon'ble Supreme Court, in **State of Kerala v. N.M. Thomas**,¹⁸ introduced a change in the concept of equality. It held that Articles 14, 15, and 16 are all equality rights, and that the scheme of equality sought to achieve real equality. It was held that Articles 15(4) and Article 16(4) are not exceptions to Articles 15(1) and 16(1) respectively. The relevant portions of the majority judgments are reproduced hereunder:- **Ray, C.J.**

37. Article 16(4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16(2) and is legitimate for the purposes of Article 16(1). If preference shall be

¹⁴ AIR 1962 SC 36

¹⁵ AIR 1963 SC 649

¹⁶ AIR 1969 SC 1

¹⁷ (1972) 1 SCC 660

¹⁸ (1976) 2 SCC 310

given to a particular underrepresented community other than a backward class or underrepresented State in an all-India service such a rule will contravene Article 16(2). A similar rule giving preference to an under-represented backward community is valid and will not contravene Articles 14, 16(1) and 16(2). Article 16(4) removes any doubt in this respect.

Mathew, J

78. I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualised in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation. **Krishna Iyer, J**

“136. The next hurdle in the appellant’s path relates to Article 16(4). To my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to... **Fazal Ali, J**

184. ... Clause (4) of Article 16 of the Constitution cannot be read in isolation but has to be read as part and parcel of Article 16(1) and (2). ...

That is to say clause (4) of Article 16 is not an exception to Article 14 in the sense that whatever classification can be made can be done only through clause (4) of Article 16. Clause (4) of Article 16, however, is an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification.

It is true that there are some authorities of this Court that clause (4) is an exception to Article 16(1) but with due respect I am not in a position to subscribe to this view for the reasons that I shall give hereafter.

A 9-Judge Bench of the Hon’ble Supreme Court settled this issue in **Indra Sawhney v. Union of India**,¹⁹ where the majority upheld the principle laid down in Thomas’ case that Articles 15(4) and 16(4) were not exceptions to Articles 15(1) and 16(1), but were an emphatic statement of equality.

¹⁹ 1992 (Supp) 3 SCC 217

Therefore, equality, as guaranteed in our Constitution, not only conceives of providing formal equality but also to provide for real and absolute equality. Articles 14 and 15(1) enable and contemplate classification to achieve the

Constitutional Objective of real equality. Articles 15(4) and 16(4) flow out of

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Constitutional Objective of real equality. Articles 15(4) and 16(4) flow out of Articles 15(1) and 16(1) respectively, and can never be considered as exceptions to Article 15(1) and Article 16(1).

In **Thomas' case**, it was held that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. In **Indira Sawhney's case**, **Sawant, J** concurring with the majority observed that to bring about equality between the unequals, it was necessary to adopt positive measures to abolish inequality. The equalising measures would have to use the same tools by which inequality was introduced and perpetuated. Otherwise, equalisation will not be of the unequals. These equalising measures would be validated by Article 14 which guarantees equality before law.

Articles 15 and 16 prohibit discriminatory treatment, but not preferential treatment of women, which is a positive measure in their favour. Affirmative action including by way of reservation is enabled by the equality clause in the Constitution.

- **Article 17²⁰** Abolition of Untouchability.—“Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law. This is a self-operating Article, and read with Article 39(a) (ii), it becomes clear that untouchability has been abolished and its practice forbidden. This Article is levelled more against private conduct, than against conduct of the State. The chances of the State promoting or supporting untouchability is rare.

²⁰ Ibid

- **Article 21**²¹ of the Constitution states that no person shall be deprived of their life and they will have the personal liberty to live their life on their terms. When someone faces discrimination the first right that is taken away from the people is this right. Discrimination forces a person or the community to live their life according to the people belonging to the majority groups.

From the wording of the Article, it is obvious that the language is negative. However, Article 21 confers on every person the fundamental right to life and personal liberty. It is the most fundamental of human rights, and recognises the sanctity of human life.

- **Article 46**²² of the Constitution helps to promote the education and economic interest of the people belonging to the Scheduled Caste, Scheduled Tribes, and the Other Backward Classes. To protect them from social injustice.
- **Article 330**- Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People Need of Anti-discriminatory law

Not only has the Indian Constitution protected the rights against discrimination rather there are various other legislations also that protects the rights of the people against discrimination-

1. **Indian Penal Code, 1860 (Section 153 A)**²³ - Criminalises the use of language that promotes discrimination or violence against people on the basis of race, caste, sex, place of birth, religion, gender identity, sexual orientation or any other category.
2. **The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act**, of 1989 also protects the rights of the SC and ST against discrimination.
3. **The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act**, 2013 also protects the rights of the women at the workplace.

Legislations of Other Legal System

Article 24 of ICCPR²⁴ 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

²¹ Legislative.gov.in (2022), https://legislative.gov.in/sites/default/files/COI_English.pdf (last visited Sep 14, 2022)

²² Ibid

²³ Indian Penal Code, 1860

²⁴ ICCPR of 1966

2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 26 of ICCPR²⁵- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In USA also there are various legislations that provides rights against discrimination-

- **The Civil Rights Act 1964-**

It is a landmark piece of legislation for civil rights and labor laws in the US. It prohibits discrimination based on race, color, religion, sex, or national origin. Additionally, it also prohibits unequal application of voter registration requirements, and racial segregation in schools, employment, and public accommodations. However, this act was further amended in the year 1991 and expanded the remedies available to victims of discrimination.

- **Voting Rights Act of 1965-**

The Voting Rights Act is another landmark piece of federal legislation that prohibits racial discrimination in voting. Notably, the Civil Rights Act, 1964 and the Voting Rights Act, 1965 together removed barriers to black enfranchisement in the South, banning poll taxes, literacy tests, and other measures that prevented African Americans from casting their votes.

- **Fair Housing Act of 1968-**

This Act prohibits discrimination in the buying, selling, renting, advertising or financing of housing based on race, skin color, sex, nationality, religion, disability, and children or any other characteristics from a protected class. The enforcement of this act, especially, helps limit discriminatory practices related to landlords, tenants, and housing.

- **Americans with Disabilities Act of 1990-**

ADA is a civil rights law that prohibits discrimination based on disability. Naturally, it has similar protections to citizens as included in the Civil Rights Act, 1964 that prohibits discrimination

²⁵ Ibid

based on race, color, religion, sex, or national origin. However, the Act includes both mental and physical medical conditions. The Act recognises the following physical conditions as disability:

- Deafness
- Blindness
- An intellectual disability
- Partially or completely missing limbs
- Mobility impairments that require the use of a wheelchair
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy

In United Kingdom also there is a legislation to protect the rights of the people against discrimination-

1. Equality Act of 2010-

It prohibits conduct and creates duties in relation to 'protected characteristics'. There are nine protected characteristics, listed in section 4 of the Act, ranging from age through to sexual orientation. The Act prohibits direct and indirect discrimination, and harassment and victimisation. It also prohibits discrimination in relation to something arising from a person's disability, and creates a duty to make reasonable adjustments for disabled people. The Act applies in various scenarios, including at work, in education and in relation to services and public functions.²⁶

Conclusion and Suggestion

India is unique among democracies in that a constitutional right to equality is not backed by comprehensive legislation. Presently, there is no comprehensive anti-discrimination legislation in India. There are some scattered laws which protect the citizens, but those are only available

²⁶ Pyper, D., 2022. *A Short Introduction to Equality Law* [online] Available at: <<https://commonslibrary.parliament.uk/research-briefings/cbp-9448/>>

against the state and not private organisations or individuals. The constitution of India also does not have any specific provision and remains silent on this issue. The **Sachar Committee, in 2006, recognised** the need for an anti-discrimination law. This was further reiterated by the **Expert Group on Equal opportunity Commission** by Prof. N.R Madhava Menon, but no conclusive solution has been arrived yet. Equality of opportunity given in the Constitution remains a myth despite 70 years of independence. This is the context of demand for an anti-discrimination law. There are committee and commission reports as also growing public demands for the same. The Parliament and the executive need to seriously consider enacting a comprehensive anti-discrimination law to further substantive equality and also to give concrete shape to its international commitments.

▪ **Suggestions**

- i. Set up an Equal Opportunity Commission to look into grievances of deprived groups like minorities.
- ii. Create a nomination procedure to increase participation of minorities in public bodies.
- iii. Union government can learn from the states how they have made draft bill for anti-discrimination laws. The Centre can take a leaf out of this and make a comprehensive law and establish an Equal Opportunity Commission.
- iv. A comprehensive socio-economic caste census needs to be conducted as it would provide an empirical basis for lawmaking as there exists a strong link between caste, discrimination, and privilege in Indian society.
- v. The apex court needs to nudge or persuade the representative institutions through “judicial dialogue” to facilitate the process of ending discrimination either overt or covert.

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