

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

[www.ijlra.com](http://www.ijlra.com)

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## Avinash Kumar



*learning.*

*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and*

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# **Revisiting Article 15 Through An Intersectional Lens**

Authored By: Shreya  
Research Scholar,  
Dr. Ram Manohar Lohia National Law University

## **Abstract**

Experiences of discrimination are a subjective concept. Discrimination can be faced due to a multitude of factors. A man and woman might experience discrimination differently; A dalit man might experience discrimination solely on basis of his caste while a dalit woman might experience it on basis of her caste and her gender, acting together. Queer dalit women might face triple discrimination, due to first her caste, then her gender and then due to her sexual orientation. Experiencing discrimination can induce trauma and helplessness irrespective of the placement of an individual in the social position in our society. 'Equality' and 'non-discrimination' are one of the goals of our Constitution. While our Constitution prohibits discrimination on certain grounds mentioned in Articles 15(1) and 16(2), the judicial interpretations fail to suffice non-discrimination when two or more grounds interact with each other. The narrow interpretation of Article 15, especially the phrase 'only on ground of' rejects the concept of Intersectionality. This paper is an attempt to examine Article 15 and argue that reading provisions with an intersectional perspective is the need of the hour.

## Introduction

We as a nation take immense pride in our ‘diversity’ and peaceful coexistence of people among all sorts of differences. Article 15 prohibits discrimination ‘only’ on grounds of religion, race, caste, sex, place of birth. This paper seeks to examine how the interpretation of a non-discrimination clause has narrowed down its application to single points of discrimination thus rejecting the very real problem of discrimination due to overlapping circumstances. The aim is to examine the jurisprudence relating to the interpretation of clause (1), especially the phrase “*on grounds only* of religion, race, caste, sex, place of birth or any of them”.

Professor Kimberly Crenshaw<sup>1</sup> is attributed the credit for coining the term ‘Intersectionality.’ She argues that oppression can emanate from interaction of multiple socio-economic factors; that the American law protected black men from racial discrimination and it protected white women from gender discrimination, however, black women stood at the intersection of these two kinds of discrimination. The experiences of black women can neither be defined by race nor gender alone but by both operating simultaneously.

Crenshaw defines Intersectionality as a form of “oppression which arises out of combination of various kinds of oppression which together produce something unique and distinct from any one of discrimination standing alone” Ben Smith<sup>2</sup> argues that a single axis approach to violence and discrimination renders, minority groups within broader groups, invisible since it formulates identity as “totemic” and “homogenous”. Nitya Iyer<sup>3</sup> argues that a law based on a single axis model forces claimants to ignore the reality being faced by them and forces them to fit into the pre-fabricated, rigid categories. This would weaken their claim as they won’t always be able to simplify their story in accordance with the dominant understanding of how discrimination on basis of a given characteristic occurs.

Understanding Intersectionality in the Indian context is the need of the hour. This concept can be applied to understand and finds solutions to the plights of men and women who face discrimination due to overlapping of caste, sexual orientation, gender, place of birth or other grounds with each other. In order to understand how a narrowed interpretation of Article 15 in

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<sup>1</sup>K. Crenshaw, Demarginalizing The Intersection of Race And Sex: A Black Feminist Critique of AntiDiscrimination Doctrine, Feminist Theory, And Anti-Racist Policies, University of Chicago Legal Forum, Vol. 4 (1989) 149 (“Crenshaw, Demarginalizing Intersection of Race and Sex”).

<sup>2</sup>Ben Smith, Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, The Equal Rights Review, Vol. 16 (2016) 74 (“Smith, Intersectional Discrimination”).

<sup>3</sup> Nitya Iyer, Categorical Denials: Equality Rights and the Shaping of Social Identity, Queen's Law Journal, Vol. 19 (1993-1994) 179.

various judgements has rejected the idea of Intersectionality, this paper delves into two inquiries: first, the previously made interpretations of Article 15(1) by various Courts have rejected to recognise intersectional discrimination; and secondly, how Article 15(1) can be reimagined to accommodate and address intersectional discrimination.

## **Analysis Of Article 15(1) In Light Of Intersectionality**

Securing equality is an important goal of our constitution. Honourable Justice D. Y. Chandrachud says that “The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals”<sup>4</sup>.

Article 14 of the Indian Constitution contains the genus of Right to Equality, species of which are followed in Article 15 (non-discrimination clause), Article 16 (equality of opportunity in matters of employment), Article 17 (abolition of untouchability) and Article 18 (abolition of titles). Clause (1) of Article 15(1) lays down:

*“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”*

That discrimination based ONLY on either of the grounds mentioned above will amount to violation of Article 15. If the discrimination is due to say race + x(which can be any factor), then such a discriminatory law will not be violative of Article 15. This interpretation was upheld by the Supreme Court in **Air India v. Nergesh Mirza**<sup>5</sup>. Several regulations were challenged on ground of causing disparity between pay and promotional opportunities of male and female in-flight cabin crew. Retirement age for men was 58 whereas for women it was 35 or marriage (within 4 years of service) or pregnancy, whichever is earlier. Even though this difference was on basis of gender, these regulations were upheld in part and the court opined that the non-discrimination clauses of the Constitution i.e Article 15(1) and Article 16(2) prohibit discrimination solely on the grounds mentioned, in this case, sex. It further held that the Constitution does not prohibit State from causing discrimination on ground of sex coupled with any other consideration. This interpretation strips Article 15 of its essential content. It not only limits the ambit of Article 15 but also rejects the possibility of interpreting discrimination

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<sup>4</sup> Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors. (28.09.2018 - SC)

<sup>5</sup> ( 1981 ) 4 SCC 335

as Intersectional. Such a formalistic and narrow interpretation of Article 15 (1) renders the constitutional guarantee against discrimination meaningless and stands as a rejection of intersectional discrimination.

This view was rejected in 2018 in **Navtej Singh Johar and Ors. vs. Union of India**<sup>6</sup>, where the court opined that such an interpretation “*fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a Rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics*”.

The Honourable Court relied upon its previous judgement of Anuj Garg v. Hotel Association of India<sup>7</sup> to overrule *Nergesh Mirza*. In Anuj Garg, constitutional validity of section 30 of Punjab excise act, 1914 was challenged on ground that it is violative of Article 14 and Article 15. The said provision prohibited employment of any man below 25 years of age and any woman where liquor or intoxicating substances were served in public.

In **Patan Jamal Vali v. State of Andhra Pradesh**<sup>8</sup>, In this case a Blind Dalit woman had been raped. The Supreme Court has opined that assault is a result of interlocking of different relationships of powerplay at work. Justice D.Y. Chandrachud says that “*When the identity of a woman intersects with, inter alia, her caste, class, religion, disability and sexual orientation; she may face violence and discrimination due to two or more grounds. Transwomen may face violence on account of their heterodox gender identity. In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman*”

This indicates a clear judicial approval for incorporation of theory of Intersectionality into reading of provisions.

Justice J.S Verma committee report was appointed to make recommendations to The Indian

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<sup>6</sup> (2018) 10 SCC 1

<sup>7</sup> (2008) 3 SCC 1

<sup>8</sup> 2021 SCC Online SC 343

Criminal Law after the Nirbhaya Rape Case. It has several references to Intersectionality. In Appendix 3/Part 3/Clause 16(9), the committee recommends that “no woman shall be unfairly discriminated on grounds of gender including discrimination by virtue of a woman belonging to a sub-sect of caste, religion, region or race.”

The Committee observed that for a society to be based on gender equality, along with ensuring non-discrimination on basis of gender, emphasis must also be placed to ensure non-discrimination due to any other factors like caste or religion along with gender.

Shreya Atreya has proposed a model of ‘Intersectional Integrity’ to deal with the problem of violence against women from intersectional backgrounds. She points out that *“a failure to consider violence perpetrated based on multiple identities results in an inaccurate portrayal of the violence at issue which may impact the ability to obtain relief. On the other hand, a comprehensive appraisal of the intersectional nature of the violence can translate into an appropriate legal response.”*

The above analysis stresses a need for the courts to read and recognise the theory of Intersectionality into the provisions of the constitution; Thus unpacking the impact and addressing the discrimination, violence, or disadvantage faced by them due to their placement in the societal structure.

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