



Himachal Pradesh National Law University, Shimla (India)

HPNLU
Law Journal

Volume IV

ISSN: 2582-8533

April 2023-March 2024

Volume IV (2023)

**ANTI-DISCRIMINATION LAWS IN INDIA: Political Illusions and
Legal Myths**

Santosh Kumar Sharma

This article can be downloaded from: <https://www.hpnlu.ac.in/journal-level-3.aspx?ref-id=45>

Recommended Citation:

Santosh Kumar Sharma, *Anti-Discrimination Laws in India: Political Illusions and Legal Myths* IV HPNLU. L. J. 68 (2023).

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact lawjournal.editor@hpnlu.ac.in

Contents

Volume IV	ISSN: 2582-8533	April 2023-March 2024
-----------	-----------------	-----------------------

Articles	Page
1. LAW AS SOCIAL RULES: A Descriptive Evaluation of Hart's <i>Concept of Law</i> for Contemporary Teaching <i>Chanchal Kumar Singh, Mritunjay Kumar</i>	1
2. FROM WHANGANUI TO GANGA: A Study on Environmental Personhood <i>Naman Kumar Sharma & Priyesh Pathak</i>	36
3. ONLINE MARKETPLACE LIABILITY: Safe Harbour and Fallback Liability in India <i>Ashreet Acharya</i>	50
4. ANTI-DISCRIMINATION LAWS IN INDIA: Political Illusions and Legal Myths <i>Santosh Kumar Sharma</i>	68
5. ASPECTS OF SECULARISM UNDER INDIAN CONSTITUTION: A Critical Perspective <i>Harsha Sharma & Srikant Singh</i>	85
Notes & Comments	
6. THE RESTRICTIVE-LIBERAL DILEMMA: A Comment on <i>XYZ v. The Dean of B.J. Government Medical College</i> <i>Parul Bhalla</i>	101
7. CRYPTO-TECHNOLOGY MEETS REAL ESTATE: Navigating Legal Frontiers of Real Estate Tokenization in India <i>Srijan Tripathi</i>	118
8. ARBITER OF RESILIENCE: The Crossroads of Global Insolvency <i>Megha Bhartiya & Sneha Bharti</i>	134
9. DHARMOPRUDENCE, NATURE OF LAW & MORALITY <i>Aastha Naresh Kohli & Dhananjay Singh</i>	147
10. THE GLOBAL SHIFT: How Cross-Cultural Mediation is Transforming Conflict Resolution <i>Anisha Sharma</i>	164
11. PROMOTING 'AI' INCLUSIVITY IN INDIA: A Progressive Legal Model to Mitigate Bias <i>Titiksha Narkhede</i>	193

ANTI-DISCRIMINATION LAWS IN INDIA: Political Illusions and Legal Myths

*Santosh Kumar Sharma**

[Abstract: The Article proposes to investigate the several ways in which the proposals/ Legislative Bills for antitermination law,¹ and the report containing such Bills, tempers with Constitutional concepts of rights to equality, equal opportunity, the concept of 'state' and 'freedom of contract'. The paper will also show that such governmental exercises are integral to governmental hegemonic and legalization exercises as part of slogans of democracy. Finally, attempt will be made to evaluate functioning of Constitutional, statutory provisions, and non-statutory commissions which all are intended to secure Constitutionally granted anti-discrimination protection to the people].

I

Introduction

Rights are claims to entitlements that individual (and perhaps groups) can justifiably make on other people and organizations. Its evolution, in modern form, is generally traced to social contractarian and natural law theories of 17th and 18th Century.²

* The author is Associate Professor of Law at Himachal Pradesh National Law University, Shimla. Contact. Email: santoshsharma@hpnlul.ac.in

¹ The notification constituting the expert group "Equal Opportunity Commission" (Hereinafter referred as 'the Bill/Report') was issued on 14 December, 2006 by the Ministry of Minority affairs, Govt. of India. It refers to recommendations of Sachar committee.

² In Jurisprudence it means an interest protected by law; Black's Law Dictionary defines 'rights' as a power, privilege, faculty, or demand, inherent in one person and incident upon another. "Rights" are defined generally as "powers of free action". And the primal rights pertaining to men are undoubtedly enjoyed by human beings purely as such, being grounded in personality and existing antecedently to their recognition by positive law. But leaving the abstract moral sphere, and giving to the term a juristic content, a "right" is well defined as "a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of other." Indian Supreme Court in *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 has observed - "in a strict sense rights are co-

Contd...

Subsequently, it came to define the basic principle for organizing relationships between the state and individual(s), in western liberal Constitutionalism. The Indian Constitution and democratic practice are not an exception to this dominant tradition. But neither the nation of rights nor its practice, in democratic systems, is unproblematic. On one side critiques say, rights have not always served progressive purpose and it represents 'egoism', 'legalism', 'dogmatism' and 'elitism',³ rights are trumps.⁴ On the other, social theorist like prof. Upendra Baxi talks in terms of politics *of* and *for* (human) rights correspondingly translating into, utilization of, nation of rights as a means *of* domination and *for* resistance and existence of human rights markets⁵ at national and international plane.

In India, the 'discourse of rights' pre-dates Constitution making in the constituent assembly. Perhaps the first explicit demand of rights appeared in 1895 in the *Constitution of India Bill* followed by *commonwealth of India Bill* 1925 of Mrs. Anni Besant and *Nehru Report of 1929*. Till this time, the socio-economic conditions and social situations obtaining in India had not factored well in the discourses of rights. The context of the demands of rights were national verses imperial and consequently negative political inhibitions were sought to be imposed on colonial state, pertinent to the desire of the class of national leaders as evident in acceptance of dominion status of political system. Once the desire for self-government, however, transformed itself into the goal of complete independence, contradictions of social situation could no longer be ignored.⁶ The Indian National Congress session held at Karachi, 1931, adopted the resolution on 'Fundamental Rights and Economic and social Change which was both a declaration of rights and in the jargon of political left, a socialist manifesto. In the constituent Assembly, the objective resolution proclaimed all powers and authority of the sovereign independent India are derived from the people and the Constitution

relative of legal duties and are defined as interests which the law protects by imposing corresponding duties on others. But in generic sense, the word 'right' is used to mean immunity from the legal power of another. Immunity is exemption from the power of another in the same way as liberty is exemption from the right (claim) of another. Immunity, in short, is no subjection".

³ Tom Campbell, RIGHTS: A CRITICAL INTRODUCTION 11(2006).

⁴ Ronald Dworkin TAKING RIGHTS SERIOUSLY 293 (1977); (If someone has a right to something then it is wrong for the government to deny it to him even though it would be in the general interest to do so).

⁵ Upendra Baxi THE FUTURE OF HUMAN RIGHTS xii-xv (2006); (Those who supports the 'proposed Bill, which forms subject matter of this paper, can be seen, as Prof Baxi makes a distinction, as *speaking for suffering people and not speaking with suffering people*- as is explained below).

⁶ As my reading of India's modern past informs me. See generally, B. Shiva Rao, THE FRAMING OF INDIA'S CONSTITUTION (SELECT DOCUMENT), Vol. I, (1967); Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, Chapter III (1966); Arthur B. Keith, CONSTITUTIONAL HISTORY OF INDIA 1600-1935 (1937).

shall guarantee and secure 'justice-social political and economic', 'equality of status and opportunity before law', freedom of thought, expression, belief, faith, worship..., to all the people of India.⁷ Speaking on the resolution, Nehru asserted that 'we stand for democracy. It will be for the house to determine what shape is to be given to the democracy- the fullest democracy, I hope!⁸

When it came to writing of rights, the Assembly, following *Sapru Report* of 1945,⁹ divided it' into 'fundamental' (enforceable) and 'Directive' (unenforceable). This was the result of classic dilemma of finding of solution between 'individual rights' and 'social/public good' of which "state" is the ultimate custodian. The 'right of equality' and equality of opportunity got transformed into an amphibian character finding resonance in both the types of rights.¹⁰ The members of constituent Assembly (as is generally believed)¹¹ had no option but to 'constitutionlise' this classic dilemma. With the inauguration of the Indian Constitution, the 'right text' of the Constitution, with all its features of ambivalence, has had to contend with the dynamics of democratic 'practicalities'.¹² This 'interaction' of rights and contingencies of democratic practices, in India, is more marked now than ever before, in the age of liberalization, privatization

⁷ B. Shiva Rao, *THE FRAMING OF INDIA'S CONSTITUTION (SELECT DOCUMENT)*, Vol. I, 3 (1967).

⁸ *Id.*

⁹ Originally the distinction between positive (enforceable) and negative (unenforceable) right were made by Prof. Oppenheim in his *INTERNATIONAL BILL OF RIGHTS OF MEN* (1944).

¹⁰ In part IV the right to equality and equal opportunity is expressed in Articles 38, 39, and 39-A.

¹¹ Upendra Baxi *The Little Done, the Vast Undone: Some Reflections on Reading Granville's the Indian Constitution* 9 JILI 370 (1967).

¹² The Indian Constitution came into being as a result of the collective indefatigable efforts of a large number of dedicated men. These men were primarily dedicated to the attainment of a politically free India- an ideal that evoked transcendent loyalty during the long years of struggle. And Freedom, while important in itself, was more important as an instrumentality of social reconstruction. Political independence and written Constitution were for them but the first steps towards a journey a thousand miles. Paradoxically, while the need and expectation for such dedication continue, despite theoretical change of context from freedom-fighting to nation-building, the very institutionalization of democracy has the opposite effect of ushering in, what I call, the "professionalization of politics and leadership". The latter means, among other things, a new orientation towards power-relationships and power-maximization, this in turn fostering a new "political culture". New power bargaining processes arise as a direct result of the importance of and the increase in the number and activities of interest-groups. Group loyalties, and the resulting conflicts of loyalties, are exploited. Demands of political self-preservation take precedence over, and dictate a denial of, power-sacrifices involved in transcendent loyalty to national interest and developmental tasks.... Thus, in board sense, the promulgation of a new Constitutionally desired social order brought about a transition from, what may be called "dedication to professionalism in politics and leadership". And this transition is more marked now. *Id.*, at 330.

and globalization, and the changed socio- economic power equations in Indian national life. This Paper proposes to show, in several ways, how the Equal Opportunity Commission Bill,¹³ and the report containing the Bill, tempers with Constitutional concepts of rights to equality, equal opportunity, the concept of 'state' and 'freedom of contract'; the paper will also show that such governmental exercises are integral to governmental hegemonic and legalization exercises as part of slogans of democracy. Finally, attempt will be made to evaluate functioning of Constitutional, statutory, and non-statutory commissions which all are intended to secure Constitutionally granted rights to the people.

II

Constitutional Framework Against Discrimination

The framers of the Constitution thought of equality in both way, what can be described as 'progressively' and regressively'. The 'former', is primarily, represented by a set of equality provisions, such as Articles 14, 15 (3) to (5), 16 (4) to (4B), 17, 18, 25, 38 and 39 along with other provisions of part IV and some of the preambular promises. This set of provisions, largely involves limitation on the government and simultaneously obliges the state to create, positively, material and social conditions in which the right can become meaningful to large sections of the disadvantage masses. It has something to do with the social and economic structure of the Indian society and promulgation of a "new social order".¹⁴

¹³ The notification constituting the *expert group* "Equal Opportunity Commission" (Hereinafter referred as 'the Bill/Report') was issued on 14 December, 2006 by the Ministry of Minority affairs, Govt. of India. It refers to recommendations of *Sachar committee*.

¹⁴ Whereas Article 14 is the foundation of Rule of Law in India, while Articles 14 to 18 form the code of equality. Article 38 of the Constitution is part of directive principles of state policy, it prescribes, 'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'. Preamble to the Constitution lays down the principles of justice; social, economic and political. In this sequence, achieving political justice is comparatively easier. Whole part III of the Constitution is dominated by primarily political freedoms, however, in course of time, through the legislations on most of aspects of Part-IV and courts interpretation, aspect of social and economic justice, which are dominantly found in part-IV have become essential element of part-III as well. To locate socio-economic justice, Article 38 and 39 are crucial. Article 39 lays down some basic norm to achieve economic justice, it prescribes; "The State shall, in particular, direct its policy towards securing— (a) that the citizens,

Contd...

The 'latter' directly relates to the subject matter of our discussion under this section; 'anti-discrimination'. The prominent provisions may be referred, such as Articles 15(1) and (2), 16(1) and (2), 29(2), 30(2), 325, and 326. This set of provisions has different character from the first set of provisions. It is a positive inhibition to the state from 'discriminating' against any citizen. In case of Article 15(2), and to some extent 29(2), the inhibitions against 'discrimination', go beyond 'state'. But the Constitution does not define 'discrimination'. What actions of individuals and state constitute discrimination has to be determined with reference to 'other words' occurring in the similar set of provisions. The 'word' 'discrimination' in 15(1) and 16(2) involves an element of unfavorable bias. However, 'words' 'disability', 'liability', 'restriction' or 'condition' occurring in 15(2), the terms "be ineligible for" in 16(2), and "no citizen shall be denied" in 29(2) make clear the full import of the framework of constitutional prohibition against 'discrimination'.

It implies privileged treatment of an individual or class picked up arbitrarily, from a group of persons, similarly circumstanced without finding reasonable distinction.¹⁵ Thus discrimination has to be understood in terms of arbitrariness in legislative or executive actions and reasonableness of the 'distinction' shout to be made. Inevitably, therefore, the concept of discrimination borings in all considerations which go to provide content to right contend in Article 14 of the constitution. Throwing light upon this relationship, the Supreme Court in *M. Nagraj case* ¹⁶ observed:

'Equality of opportunity' has two different and distinct concepts. There is conceptual distinction between a non-discrimination principle and affirmative action under which the state is obliged to provide level playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute equality of opportunity. It is the equality "In fact" which has to be decided looking at the ground realities'.¹⁷

men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".

¹⁵ See, BLACK'S LAW DICTIONARY (9th Ed.).

¹⁶ 2006 AIR SC 71 at 87, paras 47 & 48; (2006) 8 SCC 212.

¹⁷ *M. Nagraj and Other v. Union of India and others*.

III

State, Freedom of Contract, and the Equal Opportunity Commission Bill

The 'theory of fiction' which in modern terminology is styled as 'semantics' is, as relevant under this heading, as the propositions of social and critical theories of law. The Bill advises the UPA Government, in its Para-3, clause (I) that there is "no need for a separate anti-discrimination law to afford equal opportunity to citizens against the state or state sanctioned private enterprises". Clause (vi)¹⁸ provides, what private autonomous enterprises shall be deemed to be 'state'. Para-22 of the Bill confers on the proposed 'commission', jurisdiction, extending to all 'deprived groups' who have been denied or who claim to have been 'denied equal opportunities' by the Government, public or private bodies' with respect to (specified) access to employment and education and in respect to other areas to be specified by the appropriate government.

The experiences of existing constitutional commissions (National Commissions for Scheduled Caste, Scheduled Tribes, minority, and Other Backward Classes, and other statutory Commissions for women, and Human Rights, etc., may be assessed contextually. They seem to be relevant if seen from a particular policy, which may be very much driven by political vision, or if strictly seen, as have to come-up to comply with certain directives mandated by the legal framework or issued by the court. These Commissions have submitted reports as per their mandate, which are in public domain, if you know how figurative they have been so far. But it is impossible to determine the performance of these Commissions by analyzing these reports. What were and are the status of enjoyment of rights, opportunities and entitlements by the people under jurisdictions of respective commissions, cannot be assessed from such reports. Similarly observed by the Sachar Committee:

"It is a well-accepted maxim in law that not only must justice be done but it must appear to be done. It is in that context that the Committee recommends that an Equal Opportunity Commission (EOC) should be *constituted* by the Government to look into the grievances of a deprived groups".¹⁹

¹⁸ The Bill, Para 3, Clause (vi) prescribes: "Private and autonomous enterprises which could not have carried on the activity concerned excepting through delegation, license or authorization by state under the law in force, shall be deemed to be 'state' for the purpose of anti-discrimination and equal opportunity laws and the commission will have jurisdiction over them".

¹⁹ On 9 March 2005, the PMO had issued the Notification for constitution of the High-Level Committee for preparation of Report on the Social, Economic and Educational Status of the Muslim Community of India. The committee was headed by Justice Rajender Sachar. There were five other members. Committee submitted its report in 2006. The report may

Contd...

To fulfill the gap recommendations by the Sachar committee have been considered and up to an extent they are said to be implemented but with a remark that recommendation(s) is continuous in nature, therefore, it is under observation.²⁰ As observed above, when it comes to deal with the issues of equal treatment and discouraging any discriminatory action from the ground level functionaries thereof, relief available is very hectic and dogged with procedural barriers. Keeping in mind the existing scenario one expert group²¹ under the chairpersonship of Prof. N.R. Madhava Menon was constituted.

The expert group recommended that an equal opportunity commission (EOC) is need of the time and it should be constituted without any delay. Expert group observed that despite equality being foundational values of our Constitution, prevalent inequalities are stark realities of social life in India. Expert group came up with a draft bill as well. EOC was supposed to evolve its own innovative and pragmatic approach to deal with the disputes of discrimination. It was noted by the group that one set of equality rights deal with equality before the law and non-discrimination based on religion, race, sex, caste or place of birth. The proposed bill contained ten chapters and forty-nine sections. Proposed bill was to promote equality of opportunities to all citizens and particularly the deprived sections of the society. Bill defined the equality of opportunity in an enabling sense²² and denial of opportunity in an obligatory manner on part of the person authority of person bestowed with.²³ The Commission, as proposed in the bill, was a three-member body and there were provisions to establish region commissions as well. Since the proposed bill was prior to that Act of Victorian Act of 2010 in Australia and England, and if seen today in a comparative manner, it appears to be flooded with procedural tantrum rather than focusing on the effective

be accessed at: https://www.minorityaffairs.gov.in/show_content.php?lang=1&level=0&ls_id=14&lid=14 (last visited Jul. 14, 2023).

²⁰ *Id.*

²¹ Ministry of Minority Affairs constituted one expert group in 2008 to determine and examine the structure and functioning of Equal opportunity commission. The committee was headed by Prof. (Dr.) N.R. Madhava Menon. Other members of the group were Prof. Javeed Alam, Prof. Satish Deshpande Prof. Yogendra Yadav and Prof. Gopal Guru. Mr. R. Venkatramani and Prof. Kalpana Kannabiran were co-opted by the chairperson.

²² As defined in the proposed Bill, "Equality of opportunity means existence of conditions which would enable the disadvantaged to overcome the disabilities in accessing rights and entitlements whether similarly placed or not".

²³ It defined the denial of opportunity as "any action, conduct or measures resulting in or is likely to result in discrimination or deprivation and includes any action taking away in any manner existing opportunities for livelihood, vocation, occupation or employment or any other livelihood rights and entitlements".

provisions to achieve the proposed objective. However, to the reasons best known to the government, the Bill could not see the light of the day.²⁴

The preamble of the Bill recites the preambular of the Constitution promise of equality of status and of opportunity and draws attention to the directives of Articles 38(2), 41, 46 and 39(A) of Part IV of the Constitution and Articles 15(4) and 16(4). But it altogether omits any reference to Article 14 of the Constitution. But under Para- 3(i), it utilizes the judicially evolved concept of 'arbitrariness', as part of Article 14, for expanding the scope of "State" to include "all private autonomous enterprises".²⁵ The Report, in its paragraph 4.11²⁶ prompts the government to enact the legislation as it (parliament) has the competency, with analogies to Protection of Human Rights Act 1993,²⁷ and obligations under several articles in part IV of the Constitution. Further, the

²⁴ The report of the expert group along with proposed bill may be accessed at: www.minorityaffairs.gov.in/WriteReadData/RTF1984/1658385481.pdf (last visited Jul. 14, 2023).

²⁵ The Bill, Para-3, Clause (i) prescribes, "Discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth is expressly forbidden by the Constitution itself. Arbitrariness is against the spirit of equal opportunity. There is therefore no need for a separate anti-discrimination law to afford equal opportunity to citizens against the state or state-sanctioned private enterprises".

²⁶ Para 4.11 of the Report provides, "Parliament has the requisite power to legislate on the proposed EOC on the same premise on which it exercised its power to enact the Protection of Human Rights Act 1993. It is part of the functions of the administration of justice, labour welfare, education as well as economic and social planning (Items 11A, 20, 24 and 25 of List III of the Seventh Schedule of the Constitution), and part of the wider obligations of the State under Part III and Part IV of the Constitution. The proposed legislation providing for the establishment of the Equal Opportunity Commission has to be seen as an important measure being under taken by the State, to act in furtherance of and in discharge of the obligations under Article 38 of the Constitution. The functions that may be discharged by the Commission relate to various other obligations under Articles 39, 41, 42, 45, 46, and 47 of the Constitution. Under Article 248(1) the Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List. The entries in List III of the 7th Schedule are not powers of legislature but only fields of legislation. They are of an enabling character. They neither impose any implied restrictions on the legislative power conferred by Article 246, nor impose any other limitation. The few entries in the Concurrent List set out above are such fields or areas which may necessarily involve undertaking of measures for advancement or the realization of the Directive Principles of State Policy. The said entries can be said to collectively relate to several principles set out in the part IV of the Constitution. Thus, by a conjoined reading of Articles 245, 246 and 248, it can be safely stated that Parliament is competent to enact a legislation falling in the domain of "Equal Opportunities" in the various walks of life.

²⁷ Even this analogy is misplaced. The Act of 1993 creates HRC to overseeing the protection & implementation of, primarily, civil and political rights and it hardly involves

report employs Articles 245, 246, and 248 read with several entries in the VII schedule. But what the committee misses in doing so (perhaps purposively) is, it misses completely the distinction between obligation under the Constitution and competency, power, and incompetency under the Constitution of different organs of state involving fraud on Constitution and fraud on power.

A combined reading of definitions of “*Denial of Equal Opportunity, Discrimination and Equality of Opportunity*” in the Bill results in an inescapable conclusion that ‘equality of opportunity’ is distinct and separate from above all other concepts. It disjoins equality of opportunity from larger concepts. It disjoins equality of opportunity from the larger concept of equality ‘in fact’. The motive for making such disjunction is clear from Para-2(i) of the Bill (the definition of ‘Denial of Equal Opportunity’), which talks about “taking away in any manner existing opportunities of livelihood or vocation, etc. The definitions of “Discrimination”²⁸ and “state”²⁹ also foreclose any private initiative for achieving the larger goal of “egalitarian or substantive equality”, following positive discrimination. Because such a discrimination by ‘private bodies’ cannot be said to be taken under their Constitutional obligations.

The person who *suffers* from such positive discrimination will become entitled, under the Bill, to make a claim against the body, before the proposed Commission. This prospect of *foreclosure* assumes greater importance in the age of globalization when there is strong exhortation for voluntary positive action by private enterprises under the concept ‘corporate social responsibility’. A further complication is created by the definition of “Discrimination” in the Bill which incorporates the principle of criminal jurisprudence, i.e., *Mens Rea*, in the form of direct (intentional) and indirect (non-intentional) discrimination³⁰. Such state’s exercises of establishing, running Commissions and re-interpreting the Constitution reminds me of Roland Barthe’s

tempering with the concept of ‘state’. This is clear from the definition of “Human Rights” given in Section 2(d) of the Act.

²⁸ As any distinction, exclusion or restriction made on mentioned grounds which results in less favourable treatment which is unjustified or has the effect of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity, but does not include favourable treatment given in fulfillment of Constitutional obligations towards Scheduled Castes, Scheduled Tribes, Backward Classes, women and children.

²⁹ Para- 3 (vi) of the Bill Provides, “Private and autonomous enterprises which could not have carried on the activity concerned excepting through delegation, license or authorization by State under the laws in force, shall be deemed to be ‘State’ for the purposes of anti-discrimination and equal opportunity laws and the Commission will have jurisdiction over them”.

³⁰ The distinction between ‘direct’ and ‘indirect’ discrimination seems to have been borrowed by the Commission from Section-9 of the Bill of Rights of African Constitution. A brief reference to ‘equality’ and ‘discrimination’ in African Constitution and Law will be made below.

proposition that “Constitutions are never ‘writerly’ but ‘readerly’ texts. Readerly to the point that “the birth of the reader necessarily entails the death of the author”.³¹

As my reading of the Indian Constitution and the Bill suggests, that these provisions have the effect of obliterating the public-private (read state-non-state) distinction. This amounts to unsettling the settled core of constitutional concept of 'state', which is already surrounded by an unsettled periphery. Surely, neither it can be said that such tempering with the concept of state is motivated and moved by the great ideals of equality and equality of opportunity (this issue would be examined in the section below).

Writing down rights in the Constitution simultaneously involves regulating rights. This regulation has many facets. Firstly, which rights are justiciable? Against whom is it available? What restrictions can be placed on the enjoyment of particular rights? Who can place such restrictions? If the regulations are not sufficiently determinate, the situation would be, for anyone to imagine, a 'chaos in the community'. The act of defining, 'state' and 'law' in very first two articles³² of the Part III of the Constitution undoubtedly is one of the aspects of regulating rights. Article 36 defines 'state' for the Part IV of the Constitution, and the definition given in Article 12 applies *mutatis mutandis* in part IV. Article 37 obliges the state to apply principles enunciated in the part IV in law making and policy implementation. Now the question arises can private bodies be made liable to carry out 'state' obligation contained under part IV. In other words, can state (read UPA Govt. and then present Parliament) shift its Constitutional duties to private individuals, bodies or enterprises, as the proposed Bill essentially does, by including private bodies into concept of "state" for its misconceived 'Equality of opportunity'.

It is not practical /viable to miss the point that Article 12 defines "*the state*" to include the govt. and parliament of India and the govt. and the legislatures of the states. This definition emphasizes the close relation between legislative and executive power.³³ The judicial enunciation of the third category – other authorities", has never missed the

³¹ Upendra Baxi, *Constitutionalism as a Site for State Formative Practices* 21 CARDOZO L REV. 1183 (2000); (Prof. Upendra Baxi propounds his theory of "Three Cs" in respect of interpretation and working of the Constitution respectively represented by three domains of 'government', 'court' and 'civil society').

³² Article 12 provides, "In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". Article 13(3), Sub-clause (a) defines "law"; In this article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

³³ H.M. Seervai, CONSTITUTIONAL LAW OF INDIA 350 (1991).

interaction between these two types of powers and their direction toward specific social & economic objectives. This would be clear to any reader from the case of *Ajay Hasia* and recent pronouncement in *Balco case*.³⁴

In this light it is relevant to note that, the report says that the parliament has requisite power³⁵ to legislate on the proposed EOC and cites items- 11A, 20, 24 and 25 of list III³⁶ of VII schedules in view of obligations under Article 38 of the Constitution. However, item 11A relates to 'administration of justice and constitution of courts, etc...' obviously, the report does not propose the EOC to be a court. Entry 20 provides for 'Economic and social planning', which can not involve an exercise that has the effect of subordinating fundamental rights to the Directives of part IV. Item 24 relates to the subject; 'welfare of labor including conditions of work. It is paradoxical that when under 2nd and 3rd generation reform of Indian economy, "Labour laws reforms"³⁷ are high on the agenda under the pressure of Globalization, dominant domestic, and foreign private enterprises of the government, the entry was employed by the committee for this purpose. It can not be accepted that the committee was ignorant of the present government's policy of economic reforms. This fact, particularly, smacks politics in the name of rights (equality rights) on disadvantaged or "deprived groups". This is what Prof. Baxi calls, speaking *for* suffering people and not speaking *with* suffering people.³⁸ The exercise of the government through the committee amounts to be motivated by and contingent on democratic practices in India. As far as the question of utilization of Art. 248(1) is concerned, it is misconceived because when the implied and explicit limitation on legislative powers applies to all the subjects mentioned in VII Schedule, it also applies to residuary power.

³⁴ *Ajay Hasia v. Khalid Mujib* AIR 1981 SC 487; (1981) 1 SCC 722; *Balco Employees Union (Regd.) v. Union of India* (2002) 2 SCC 333.

³⁵ *Id.*

³⁶ Entries of List III, VII Schedule of the Constitution provide, "11A. Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts; 20. Economic and social planning; 24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits; 25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour".

³⁷ Judicial interpretations of existing laws for the protection of working classes have already started confirming to the governmental agenda, See Judgments in *Bharat Forge Co. Ltd v. Uttam Manohar Nakate*, 2005 LLR 210; *Mahindra and Mahindra Ltd. v. N. B. Naravade*, 2005 LLR 360; *Municipal Corporation Faridabad v. Durga Prasad*, this judgment was delivered on 14th March 2008, where the burden of proof has been cast on the worker in cases involving employer- employee relationships.

³⁸ *Id.*

The private persons/ bodies, who are going to be affected by the 'new definition of state' in the Bill and affected by the jurisdiction of the Commission, too have got certain freedoms/rights. Articles 14, 19, and 21 form the golden triangle and integral to the Basic Structure of Indian Constitution. The freedom of profession, occupation, trade and business can only be restricted on grounds mentioned in clause 6 of Article 19. Any restriction, other than those mentioned grounds, would be struck down by the very doctrine of non- arbitrariness.³⁹ This shows that the Committee had a little understanding of the fact that, though regulated, the rights in Part III is essentially based on western liberal philosophy of freedom of contract. Due to common law jurisprudence and judicial processes and techniques, the Bill, if passed, is bound to be challenged before the Constitutional Courts in India.

IV

A Comparative Analysis of Selected Legislations relating to Equal Opportunity and Anti-Discrimination

Whereas in India there have been few efforts to make a law to enforce the equal opportunity to the people and discard any act of discrimination. Before analyzing the Indian efforts, it would be proper to look into such efforts undertaken by some other countries.

Victorian Equal Opportunity Act, 2010

The Equal Opportunity Act, 2010, by the parliament of Victoria is an effort to ensure re-enact and extent the equal opportunity and protection against discrimination. This law however is not confined to equal opportunity with respect to public offices but equally discourage any practice which result into discrimination in sexual harassment and victimization. Therefore, the scope of the Act is very wide. Author in this paper is confined only with respect to equal opportunity, that may be public office, and other day to day affairs, in terms of discharging constitutional obligations. This Act set the objectives to achieve as to eliminate discrimination, to promote charter of human rights and responsibilities, to encourage the identification of discrimination and to eliminate the same, if any. Another pragmatic approach is to promote and facilitate the

³⁹ Starting with *R. C. Cooper*, the judicial enunciation of fundamental rights in *Maneka Gandhi* has established that rights in the Part III of the Constitution are not mutually exclusive and therefore, the requirement of reasonableness is implicit in all articles of the golden triangle, See M.P. Singh, *The Constitutional Principle of Reasonableness* 31 (1987) 3 SCC (JOUR); *M. Nagraj and Others v. Union of India and others* (2006) 8 SCC 212.

progressive realization of equality. It is further highlighted that doing so is very basic so that social and economic disadvantage, uniformity in application of rules.

Act furthers that 'equals must be treated equally' to lay down as Constitutional mandate is easy but to fructify the underlying objective is tough and can only be achieved objectively by identifying un-equals through the application of rules. Any such law must be tested how clearly it lays down the parameters to apply a given government policy related to appointment to public offices, extensions of government schemes etc. to the people and is able to identify people entitled for or must be excluded. The moment differently situated persons are treated identically, the purposed equal treatment is desuetude. The Act underlines the same, therefore, undertakes as an objective of the Act as, 'equal application of a rule to different groups can have unequal outcomes'.

Act is encompassing in fourteen parts; out of which part two is most important, which delineates different forms of discriminations. Under section 6 of this part there are twenty-one attributes, i.e., age, gender identity, sexual orientation etc. Section seven stipulates what amounts which is twofold, either the discrimination, on the basis of attributes mentioned, which may be direct or indirect and the violations of the sections mentioned therein. Whereas discrimination on the basis of an attribute includes issues whether a person has an attribute or not at the time of discrimination.⁴⁰ When a person is treated unfavorably because of a particular attribute, it shall amount as direct discrimination.⁴¹ It will be irrelevant for the purpose whether person was aware of such attribute or not and it was the solely reason of dispute or clubbed with.⁴² If a person is imposed with a purpose, requirement or condition, which may have the effect of disadvantage to a person with that attribute shall amount as the indirect discrimination.⁴³ State has been obligated to take some positive measures to make substantiate equality realizable and shall promote at all levels.⁴⁴

⁴⁰ Section 7 provides that discrimination on the basis of an attribute includes discrimination on the basis; (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination; (b) of a characteristic that a person with that attribute generally has; (c) of a characteristic that is generally imputed to a person with that attribute; (d) that a person is presumed to have that attribute or to have had it at any time. (3) For the purposes of subsection (2), if a person with a disability is accompanied by or possesses an assistance aid, being accompanied by or the possession of that assistance aid is taken to be a characteristic that a person with that attribute generally has.

⁴¹ Section 8(1) which reads as, 'Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavorably because of that attribute.

⁴² Section 8(2) of the Act.

⁴³ Section 9 of the Act prescribes certain parameters which may amount as indirect discrimination.

⁴⁴ Section 12 of the Act, which delineates, positive measures among group of particular

Part-IV of the Act is crucial. It highlights that dominant areas of governance where equal opportunities are supposed to be maintained. It furthers main areas into eight divisions. Division one and two concerned with prohibition of discrimination in employment and employment related areas, discrimination in education, goods and services, discrimination in accommodations, clubs and sports.⁴⁵ To make the Act successful, it lays down the procedural safeguards. Whoever disputes any act or behavior that falls within the meaning of discrimination, there are authorities who have to investigate and decide the matter in expeditious manner.⁴⁶

Equality Act 2010

The Equality Act, of Britain, primarily covers the issues relating to socio-economic inequalities. It obligates the authorities who are responsible to implement the policies, to ensure that they shall take regard of all such policies which are resulting into socio-economic inequalities.⁴⁷ Part two of the Act deals with key concepts of equality and for that it is necessary to find out what are the principal characteristics which must be protected to done away discriminatory policies and to ensure implement equal opportunities. Key characteristics may be taken as bases of policy framing and implementation. It delineates age, gender, marriage, race, religion, sexual orientation, pregnancy, maternity etc. are the key factors which must be considered while framing policy. On the basis of them nobody should be discriminated.⁴⁸ Act prohibits any behavior or decision which result into direct or indirect discrimination.⁴⁹ Act takes into account all walks of life, from public employment, contracts, day to day dealing with the people. It is expected that all stakeholders shall take all positive steps which makes it possible to fructify the purpose laid down in the Act.⁵⁰ Any dispute related to discriminations for all the matters given in the Act, are supposed to be taken speedily.

attributes and to achieve the purpose set out in the Act to done away discrimination.

⁴⁵ Part IV of the Act, from section 16 to 74 all areas along with exceptions have been highlighted.

⁴⁶ Part VIII, IX and X are dealing with the issues of disputes and its dispensation under the Act, there is provision to decide the matter through tribunal to make it time bound. Also, the liability has been fixed on vicariously.

⁴⁷ Part-I of the Victorian Act 2010 deals with socio-economic inequalities, which is concerned with public sector duty. It has detailed list of authorities who shall take into considerations the parameters to done away discriminatory policies.

⁴⁸ Part two of the Act deals with key characteristics, which reads as, "the following characteristics are protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation".

⁴⁹ Section 13 and 19 lays down the foundations framework to prohibit the discrimination which may be direct or indirect.

⁵⁰ Part 11 deals with advancement of equality and under chapter one of the part deals with public sector equality duty and chapter two of the same deals with positive actions.

For the timely and speedy disposal of issues arising out of violation of the Act different fora have been established. These disposals have been expected to be disposed in a time bound manner.

The General Equal Treatment Act, 2006

The German law to prohibit discriminatory practices, was primarily passed to implement the European Union equal treatment directive. Act is also known as German Anti-discrimination Act. Act prohibits discrimination on the basis of age, sex, religion, belief, disability, sexual orientation etc. Act applies in the field of employment, self-employment, supply of essentials in terms of goods and services. However, Act carves out certain exception as well, where the general principles laid down in the Act are not applicable. The Act supposed to take some positive actions to make the Act successful.⁵¹ The Act provides for damages in case of discrimination against the provisions mentioned in the Act.

Other than the above highlighted legislations there are laws related to probation of discrimination and to implement equal opportunities in Canada, in form of employment equity Act 1995 and in American Civil Rights Act and the Age Discrimination Employment Act.

V

Recent Developments in India

Whereas, the efforts made in 2008 could not be fructified, while thereafter the, which could not be fructified, it is pertinent to mention that whereas the holistic approach of Equal opportunity Act of Victoria is concerned other than the equal opportunities in public service and affairs of the day-to-day life, there have been some specific legislation in India, which must be considered as scheme of code of equality holistically.⁵²

⁵¹ Section 4 of the Act, which reads as, “Notwithstanding the grounds referred to under Sections 8 to 10 and 20, unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on any of the grounds referred to under Section 1”.

⁵² Some of the prominent laws in this regard, which are basically taking up the matter of prohibition of discrimination on the basis of certain characteristics, are: The Protection of Civil Rights Act, 1955, The Bonded Labour System (Abolition) Act, 1976, The Equal Remuneration Act, 1976, The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 the Rights of Persons with Disabilities Act 2016, The Transgender Persons (Protection of Rights) Act, 2019, The Sexual Harassment of Women (Prevention,

Contd...

In another effort a private member Bill was tabled in the House as 'Anti-discrimination and Equality Bill 2016'.⁵³ The proposed Bill had certain identical features as that of Victorian Equality Act of 2010.⁵⁴ Chapter two of the Act contained protected characteristics, prohibited acts and positive obligations. Objective of the Bill was to 'to ensure equality to every citizen of the country by providing protection against all forms of social discrimination'. Protected characteristics mentioned were very wide and inclusive, beyond the grounds mentioned under Article 15(1) of the Constitution.⁵⁵ Protected group shall include any group of persons defined by "a protected characteristic including group of persons who are, or are likely to become pregnant or group of persons living with disability or a sub-group thereof".⁵⁶ Section 5 of the Bill provided eighteen groups, who were termed as disadvantaged groups. The details are very comprehensive and seems to cover most of the issues having being faced in India. It highlighted the instances, which may be considered for direct and indirect discriminations.⁵⁷ The Bill provided consideration and statutory remedy for Indian-specific issues of segregation, diversification, discriminatory violence like striped parade and victimization. Part four of the Bill provided the remedies in case of discrimination. Section 33 detailed the remedies, which may be said to be comprehensive and contextual.

Whereas the Equal opportunity commission was confined to the old boundaries and was a kind of 'mere addition' to other commissions, while the Bill proposed by Mr. Shashi Tharoor was quite relevantly drafted. Considerable takeaways of the Bill were, it was nicely covering all those Constitutional issues of equality, which look, philosophically speaking, have well settled in India and as India we may boast of, but

Prohibition and Redressal) Act, 2013.

⁵³ Anti-Discrimination and Equality Bill was tabled by a Member of Parliament, Mr. Shashi Tharoor, a Congress leader.

⁵⁴ Bill was divided into five chapters and a total of 46 sections. The Bill can be accessed at: https://orinam.net/wp-content/uploads/2017/03/SHASHI_THAROOR_BILL.pdf (last visited at Dec., 10, 2023).

⁵⁵ Article 15(1) prohibits discrimination on the ground of religion, race, sex, caste or place of birth or any of them while the definition provided under Section 3 of the Act encompassed other forms, which reads as, "caste, race, ethnicity, descent, sex, gender identity, pregnancy, sexual orientation, religion and belief, tribe, disability, linguistic identity, HIV status, nationality, marital status, food preference, skin tone, place of residence, place of birth or age; or (ii) any other personal characteristic which, — (a) is either outside a person's effective control, or constitutes a fundamental choice, or both; and (b) defines at least one group that suffers or is in danger of suffering widespread and substantial disadvantage, when compared with other groups defined by the same characteristic; or (iii) a combination of any of the above".

⁵⁶ *Id.*

⁵⁷ Sections 5 to 8 of the Bill.

practically, day to day suffering of poor and downtrodden, if they are clubbed with any other characteristics, is very dismal and disheartening.

VI

Conclusion

The question arises why the need of preventing discrimination and promoting equality is strongly being felt today? But the larger question is what changes, in law is required and what sort of legal devices can be developed within the existing constitutional provision? Does the constitution permit and affords an occasion for inventing effective institutional mechanism, or does its provisions and principles require modification and addition?

The fact of increasing inequalities can hardly be questioned. Nor can it be denied that free economic policies, and corresponding emulating production of state laws has contributed towards inequality. Further, when private corporations dominate economy, the incidence and chances of discrimination are higher in private sector rather than by state agencies. These would imply a major change in certain constitutional concept, including the state and devising effective enforcement mechanism in the form of civil and criminal courts. This would not only call for modifying Constitutional phrases but how effectively preambular objectives becomes part of life of the common people. An effective law in the line of Right to Information (RTI) is required. As the right to information is fundamental right and prior to the enactment of RTI considered to be sufficient enough but there can be no denial that RTI has changed a lot in terms of temperament of authorities and day to day functioning of public offices. The equality before the law and equal protection of the laws are also fundamental rights, if a law in the line of above Bill is passed, it will definitely bring the change in day-to-day life.