

Constitutional Law and Public Administration in India

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Rights Against Discrimination – I

The Constitution of India guarantees various rights to its citizens, including prohibition on discrimination on the account of religion, race, caste, or place of birth. These rights established by the Constitution are called fundamental rights because they are core values that the citizens of India through their constitution express themselves. The reason why such rights exist in a very negative context and is negatively expressed is because a person cannot be discriminated against on the grounds of religion, caste, race, sex, place of birth. The state should not be discriminating against you. It is a kind of protection against the negativity of the state. The word discrimination here is quite important. There should not be discrimination means that no adverse action or distinction shall be made. Anyone who uses religion, race, caste, sex, or place of birth as a criterion to give favor to or to give something more to one religion over the other, trying to give something more to one race over the other, that will amount to an infringement of Article 15. There is a prohibition against the activities of the state and the state shall not discriminate against religions, race, caste, sexes, male or female or it could be the LGBTQIA+ community as well. The LGBTQIA+ community are looking at their own sexual orientation as a consensual adult relationship. That kind of discrimination on the grounds of sex is something that the Supreme Court in 2018 said while it is a law of equality.

Regarding the aspects of place of birth, India is a huge country and there are 22 constitutionally recognized languages. These languages are only relevant for the way the central employment examinations are conducted or in the way the central government ought to give or notify legislation in certain kinds of languages. Though there are only 22 languages recognized by the Constitution, in India there are more than 1500 languages that are spoken of apart from Hindi or English which is the main language that is generally spoken about. Hindi is spoken by nearly 44% of the Indian population. It is a majority language in that sense. However, because of the diversity of languages in India there is diversity of culture, cuisines, and religion. Because of which, these diversities are divided in different kinds of states. Your place of birth can determine what language you speak, what culture you are, and to a larger extent what kind of activities you are going to

undertake. Hence any discrimination on the ground of place of birth is not acceptable under the Indian constitutional premise. So, place of birth also shall not be the source of any kind of governmental disparity, any kind of governmental distinction or any kind of government favors, the rule being laid down under Article 15 of the Constitution.

It is noticed that all societies have divisions, which may be on social basis, divisions based on educational basis and divisions based on the economic basis, division between illiterates and literates, highly educated versus basically educated divisions. The class of divide does exist in society. Such kinds of divides, though they exist in all forms and kinds of societies, or more so in India, because of the vastness of the country and the different geography or culture that exists in India, the state shall not discriminate. That is the rule and any kind of discrimination is unacceptable and violates the rule of equality as we turn to Articles 14 and 15 of the Constitution. In India, there are many anecdotes which bring out incidents wherein, only a certain caste of women is allowed to draw water from a particular kind of well. There were two wells in many villages, one for the upper caste, one for the lower caste. Coming to upper caste and lower caste, the Harijans or Dalits were called as the lower caste and other castes were given the upper caste status. Most of the caste discrimination in India existed based on what and who was in control of land and who were the working class. The working class were often exploited by the landlords or those who were able to occupy that land. This class distinction existed in so many other countries, which resulted in a lot of political revolutions across the world, including communism to empower the working class. In India, such kind of treatment is unacceptable and no longer tolerable.

Religion can be the basis of discrimination often. Temples may want to discriminate at times. But again, there is a distinction between public and private temples. Private temples can have certain kinds of restrictions, which are reasonable as per public policy, but they should not discriminate among the class of religion and class of religious faith. So that is a common basis for how the state must administer as well. What is protected by Article 15 are the rights and interests of citizens viz, the right to religion in one sense, the right to belief, right of language, right of culture and there is freedom to exercise all these rights without the fear of the state, which will discriminate you or treat you unfairly, just because you have decided to practice your religion, your faith, your language, your belief. The positive connotation of Article 15 is that while it says states shall not discriminate, the positive right that has been attempted to guarantee to the citizen is the right of religion, belief, language, and culture. The positive right that gets to be protected.

It is relevant to understand what religion means in this country, many often do not know the distinction between race and caste. They are not necessarily one and the same. Race is of an ethnic origin, and it could be ethnic origin within a community of religion. It could be an ethnic origin within a caste itself. There are so many races in India. When you compare mainland India to what is there with people from the northeast, we invariably use

the term race. As to caste, there are upper castes, lower castes, scheduled tribes, and so many other caste systems in India. Every religion has two kinds of castes. In Christians, there are Catholics and Protestants. When you look at discrimination based on sex, discrimination against transgenders should also be looked into. That is a challenge and kind of a discrimination that can arise.

Often, we speak of different classes of people in India, say one class of people in one religion as against another class of people in another religion. But advantages that are distributed by state must be given equally and any kind of discrimination will amount to breach of the same. So that is something that needs to be appreciated and understood in terms of what this means. Where discrimination is not permitted, it is important to understand that it is not that in the entire country there would not be the practice of discrimination.

Discrimination may exist in private places, in one's own house, like one may not want a particular religion or religious people to enter into and to exercise one's right to privacy. Discrimination shall not be practiced by the state or by the government and it shall not be practiced in public places, which is the rule. Here, a public place could be a restaurant, a cinema hall, a well with water where people wish to access it because it is not a private well as public wells are for everyone's use or it may be a lake or a pond. This is where no kind of discrimination can exist because these are constitutionally protected public spaces where every person in India, irrespective of religion, race, caste, sex, or place of birth must have equal access to. A public place could also be a parking place; it could be roads or trains. Wherever the state has given certain privileges and forms, discrimination shall not be practiced and that is a clear prohibition of the state. While the state shall not discriminate, people who are licensed by the state or who are given the privileges, the state also has a duty not to exercise these kinds and forms of discrimination. That is how the basis of rule of law exists. While this is the rule, there are also exceptions to the same. The constitution itself provides for certain exceptions and one of the rules are very strong exceptions which are in favor of women and children.

As generally understood, women and children are not necessarily equals. While the rule of equality says that likes should be treated alike, women and children are not included in the likes, they are unlike or different individuals or allies. Women particularly, in terms of their vulnerability to social violence, their exposure to certain kinds of social stigmas and discrimination that existed in Indian society. Whether the state makes special protection for women and children. Women could be in terms of sex; children also could be also in terms of the individuals in human society. So, suppose the state wants to make certain kinds of reservation for women in parliament, whether it is permitted and will it affect Article 15? The answer to it is no. Reservation for women in the local panchayat, will not attract Section 15. So also, reservation for women and children, in bus or public transport will not attract the provisions of article 15. This is essential, but one must justify its essentiality

in terms of public policy with the land. That public policy itself was reflected in the constitution saying any kind of special protection to women and state legislations that protect women and children shall not attract the rule of non-discrimination under Article 15.

Secondly, any kind of provision, which is justified as a special provision under Article 15, can be made for socially and educationally backward classes of citizens by the state. Primarily the test is being socially backward plus educationally backward for the advancement of such kinds of citizens and community. There can be reservation of seats in public education institutions for socially and economically backward sections of the community. Similarly, in the socially backward sections of the community, can we include scheduled caste and scheduled tribes in terms of making certain kinds of reservations for scheduled caste in educational institutions to empower them, especially in those kinds of educational institutions that are aided institutions that are government funded institutions. This excludes minority institutions. Minority institutions are protected against these kinds of provisions. All the institutions may be subject to the aspect of reservation, because that is something as an exception to equality and something that is provided in the constitution as well. An important amendment was brought to the constitution namely, the 103rd amendment in 2019. This amendment created another class of individuals that required be given special protection which is the economically weaker sections of the community called EWS. After this amendment reservation can be provided not only on grounds of social and educational backwardness, in public employment and in institutions of government funding, reservation can be provided based on your backwardness in terms of economic capacity or economically weaker sections of the community as well. This amendment talks about reservation based on a 10 percent limit. What an economically weaker section is to be decided by the law. Of course, there must be an income limit, anything above which may come under the creamy layer of which means that if you do not fall in the economically weaker section category, you will not be entitled to the reservation. The constitutional validity of the 103rd amendment was challenged before the court, but the court agreed to providing reservation based on economic weakness as well. When you talk about the economically weaker section of the community, the benefit of this 10 percent reservation is to be given to individuals or is available only to individuals who are not covered by any of the existing schemes of reservation that is given for SC, ST and OBCs.

The criteria for giving this economically weaker section of the committee reservation applies to persons whose annual gross income is less than 8 lakh rupees, that is 8 lakhs should be the overall income, be it income from salary, agricultural business, profession, and it is for the financial year in which the applicant is making his application. So, anyone who has a gross annual income of less than 8 lakh rupees comes under this scheme. But a person whose family owns or possesses any of the following assets are excluded from the EWS category. So, anyone who has an agricultural land of more than 5 acres, or who has

a residential flat of more than 1000 square feet, anyone who has a residential plot of more than 100 square yards in any municipal area and any residential plot over 200 square meters in a notified municipal area are excluded from the EWS category.

If property is held by a family in different locations or different places or cities, all of them will be clubbed together to calculate the income limit of the normally weaker section of the community quota. Now, families for this purpose would include the person who seeks benefit of the reservation, his or her parents or siblings below the age of 18 years or his children below the age of 18 years. So, this is the combination of families that will be looking at income, property assets and so on. These are excluded from the EWS category. The rest, anyone who has less than 8 lakh annual income can claim this kind of a reservation

When it comes to reservation for the OBC community, the other backward classes, this is different from SC-ST. The exception for reservation for OBC was brought about by the 93rd amendment in 2005. And to give effect to this provision, the central government enacted what is known as the Central Educational Institution, Reservation and Admission Act of 2006, providing a quota of nearly 27% for candidates belonging to the OBCs in all central higher education institutions, including the IITs and the IIPs. The Supreme Court upheld the validity of this Act, but said the Act excluded the creamy layer form. Children who want to get into these higher education institutions and claim the 26% reservation in IITs, IIMs and all central government institutions or universities are under the OBC category. But children of the following category will not get this quota. Children will be brought under the creamy layer rule, if any of their parents have held constitutional posts like the President, the Vice President, judges of Supreme Court, High Court, Chairman and members of UPSC, State Public Service Commissions, CEC, CAG and so on and so forth. Children of Group A or Class I or Group B class of offices in all central and state civil services or any kind of employees of PSUs, banks, insurance organizations or even employees of universities, also in some kind of private employment, will be brought under the creamy layer rule. If you are holding the rank of a Colonel or above in the army or equivalent positions in the Navy and Air Force, your children also will be brought under the creamy layer rule. In the same style, doctors, lawyers, engineers, artists, authors, consultants and so on, are also considered as privileged, and their economic status would have been elevated and hence they are also brought under the creamy layer rule. People who are engaged in trade, business and industry are also brought under the same.

Anyone who owns an agricultural land above a certain kind of limit or a vacant land or a building in certain urban areas are immediately brought under the creamy layer rule. Anyone who has a gross annual income of above 8 lakh rupees or possessing wealth of a similar kind of nature and character, is also the basis on which a creamy layer rule can be established. Now please note, the creamy layer rule was introduced in the year 1993. The initial ceiling of 1 lakh was subsequently raised to 2 lakhs, then 5 lakhs, then it was raised

to 4.5 lakhs in 2008, 6 lakhs in 2013 and finally 8 lakhs in 2017. So, a family with an annual gross income of 8 lakhs or above will be treated as a creamy layer family and a person from it is not entitled to the OBC reservation of 27 percent.