The State Shall Not Discriminate

A Roadmap for the Right Against Discrimination in India

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V | D H | Centre for Legal Policy

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Executive Summary

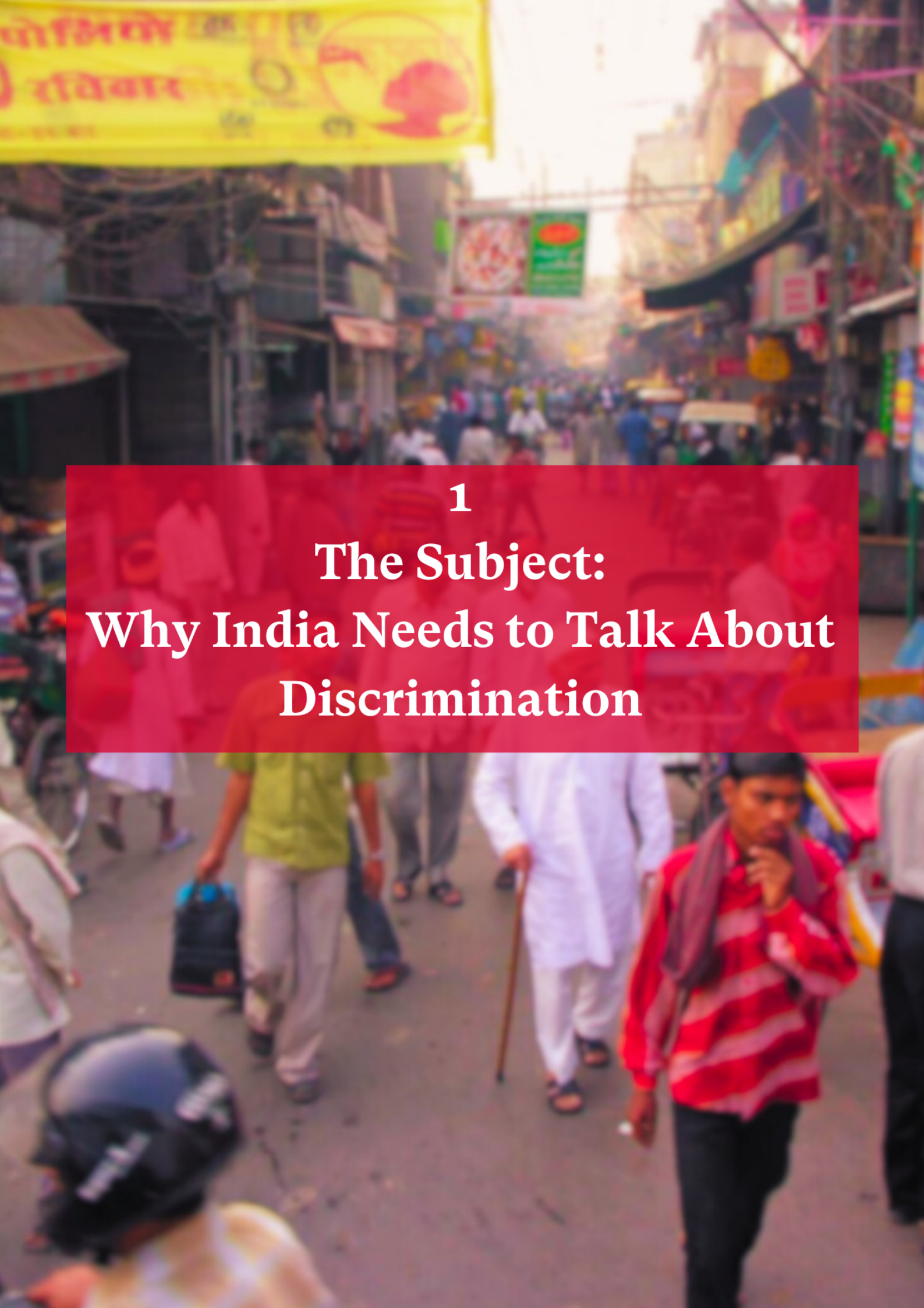
Discrimination is a central issue in Indian politics and society. It consistently turns up as the underlying subject of disagreement in a range of the country's most contentious political disputes. Religious conflict, the caste system and patriarchal institutions have played significant roles in India's history and continue to hold sway in our society today. Contemporary controversies related to these issues sometimes reveal deep differences regarding the nation's identity itself. While popular imagination is captured by reservations, illegal migrants, uniform civil codes, places of worship, conversion, religious dresses, marital rape, marriage equality, hate speech, lynch mobs and the like, it is little understood how fundamentally these issues are linked with discrimination.

Despite the significance of discrimination to India's story, the nation's legal system has failed to develop a robust framework to deal with it. Part of the problem is that scholarship and court cases on the subject have been dealing with different issues piecemeal instead of developing a concrete foundation for the fundamental right against discrimination. Relying on modern legal scholarship on the subject and a more holistic survey of Indian jurisprudence, this report attempts to bring together in one place an accessible picture of the foremost challenges faced by this right in India. Seven such challenges are identified:

- Lack of common principles: Different judges use entirely different approaches when dealing with discrimination, causing considerable uncertainty regarding the law.
- Ease of justification: The most common and well-established approaches provide little protection against discrimination because they emphasise government aims.
- Immunity and deference: Religion-specific rules have a special place in Indian governance, but their insulation from judicial review impacts how we deal with religious and sex discrimination.
- Failure to address indirect discrimination: Even if a law's words and aims are neutral, its impact in society can be discriminatory. This idea is yet to take root in Indian jurisprudence.
- Failure to treat affirmative action as a duty: Protecting against discrimination and related forms of inequality can sometimes require positive steps to address disadvantages faced by groups, but Indian law has not made such steps compulsory.
- Failure to address unlisted forms of discrimination: The Constitution of India refers to discrimination against citizens only on certain listed grounds though there are other unlisted ones and non-citizens also face discrimination.
- Failure to address discrimination by private persons: Only a few forms of discrimination by private persons are referred to in the Constitution, but private discrimination is a prevalent and pressing concern for India.

To address these challenges, the report also outlines how Indian constitutional law can reframe the basis of the right against discrimination to account for how discrimination affects equal dignity, equal opportunity and equal freedom. It suggests this approach as it would help courts and governments avoid errors in the ways they have been applying the right, deepen their understanding of the ground realities of discrimination, and adapt the Constitution's text to meet those realities. In emphasising the need for a common yet dynamic vision for the right, the report offers a systematic approach for engaging with the variety and complexity of the social issues that discrimination raises in India.

Accompanying this report, in a separate document, is a compilation of 118 Indian judgments on the right against discrimination along with summaries of the findings in these judgments.



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The Subject: Why India Needs to Talk About Discrimination

1.1 What's in it for India?

Discrimination is a central problem in Indian society, politics and law. There is ample evidence of this both in recent times as well as in history. Consider these controversies, many of which have been pivotal in determining the direction and shape of Indian politics as we know it:

- The Citizenship (Amendment) Act, 2019 ('CAA') provided for relaxed eligibility for citizenship for migrant members of certain religious minorities from certain countries to the exclusion of others. Widespread criticism of this law is aimed specifically at the way it differentiates between persons on the basis of their respective religions.
- The 103rd Amendment to the Constitution of India created the basis for reservations for economically weaker sections of citizens ('EWS'). But this was only from classes of citizens other than the backward classes already receiving reservations. The Supreme Court bench deciding on the Amendment was divided on the question of whether it was illegal to exclude members of disadvantaged castes from the measure.
- Prior to this, while reservation policies over decades have been designed to address India's long history of casteism, these policies have faced continued allegations that they exclude members of advantaged castes from educational and employment opportunities, and harm efficiency and meritocracy.
- Legal controversies on personal laws and religious practices such as maintenance, divorce, succession and denial of access to women to places of worship have consistently brought out the tension between religious traditions and sex equality in matters of property, family and worship.
- Criminal law does not treat the rape of a wife by a husband as an offence and challenges to this marital rape exception bring to the fore questions about the position of women in marriages, questions that are connected with the restrictions and abuse that women generally face in Indian society.
- Personal laws apply differentiated religious norms in various matters of family law such as marriage, divorce and maintenance, such that the treatment a person receives under Indian law on these matters depends on her religious identity. There has long been disagreement as to whether such differentiation is contrary to a robust understanding of secularism and should be resolved by implementing a Uniform Civil Code. Similarly, criticism of India's post-Independence model of religious governance alleges that there has been lopsided reform only of Hindu practices and government control only over Hindu institutions.
- In the backdrop of a history of communal violence, the growth of majoritarian Hindu-nationalist politics in India has raised concerns of religious persecution, for instance, in the form of violence by vigilante groups and hate speech or misinformation about minorities by public figures. In addition to the failure of state authorities to discourage these actions, there are apprehensions regarding the formal and informal involvement of government and political actors in such persecution.
- In one formal measure, the government of Karnataka imposed a seemingly neutral policy regarding uniforms in educational institutions without accounting for the traditional religious dress of some students. A two-judge bench of the Supreme Court delivered a split verdict, with each judge subscribing to a different understanding of secularism, equality between religions, and accommodation of differences.
- A Haryana law imposed requirements on private sector employers to hire a certain proportion of their employees from amongst local candidates, thus favouring individuals on the basis of their place of residence.

- Though intimate homosexual conduct has been decriminalised following a 2018 Supreme Court judgment, marriage laws in the country continue to only recognise the civil union of a man with a woman, to the exclusion of same-sex and non-heterosexual partnerships. On a related note, though the Court has ruled in favour of reservations for transgender persons, governments have yet to comply with the ruling.

The issues in this list, some of which will be discussed further in the report below, are not just emotive or prominent controversies that make the headlines. The breadth of the list is indicative of a more serious underlying problem. It is not even a complete list of similar issues, with a range of other questions haunting the Indian polity at nearly every turn: anti-conversion laws, dietary restrictions, restitution of conjugal rights, women in the armed forces, barriers faced by persons with disabilities, the applicability and design of reservations, racism and regional bias, and trenchant socio-economic disparities.[1] Some of these issues certainly have other aspects involving privacy, religious freedoms, livelihood, free speech, national security, or state capacity. But they do have one common aspect: the idea that a person should not be discriminated against on certain grounds which include religion, caste, and sex. Discrimination on grounds such as these is even reflected generally in Article 15 of the Constitution and specifically in Articles 16, 17, 27, 29 and 325 of the Constitution on matters such as public employment, untouchability, public finance, public education, and voting.

However, for a nation that has had and continues to have such deep concerns and differences regarding discrimination, India's constitutional law has neglected the development of the right against discrimination, often dealing with different issues and different grounds of discrimination piecemeal. As a result, our courts have failed to produce a concrete finding about what is unique about discrimination and what is common to discrimination on different grounds. In the next part, to break from this trend, we take a holistic approach in discussing how this critical right has been viewed and applied under Indian constitutional law. But first, it is essential that we understand how to think about discrimination as a concept because differences in this understanding have been the foremost reason for India's failure to protect the right.

1.2 Why is Discrimination Wrong?

Whether we believe that a particular action is discriminatory and wrong depends on what we think is wrong about discrimination. This determines, for example, how courts will examine a governmental measure to find out if it violates the fundamental right against discrimination and what kinds of arguments a government can make to justify the measure's constitutionality.

So why is discrimination wrong? We often understand discrimination as treating someone worse than others because they are from a particular category of people, such as a particular ethnicity, religion, sex, caste, nationality or other similar category. But what makes such treatment wrong? Are there situations where discrimination is justified? A common way of thinking about discrimination is that differentiating between people on the basis of personal traits such as religion, caste or sex is wrong because these traits

[1] For a recent study of the prevalence of sex, caste and religion-based discrimination in labour markets, agricultural credit markets and access to healthcare in urban and rural India, see Oxfam India "India Discrimination Report 2022" *Oxfam India*, available at https://www.oxfamindia.org/knowledgehub/workingpaper/india-discrimination-report-2022 (last accessed 11th April, 2023).

are irrelevant.[2] By this logic, someone's religion doesn't decide whether they can perform a job well, and someone's sex has nothing to do with what properties should be transferred to them.

While many think of discrimination in this way, there are a number of reasons why it is incorrect or at least inadequate. Using irrelevant traits is certainly wrong, but if we think discrimination is wrong only because the trait it is based on is irrelevant, *then we would also have to believe that discrimination is justified if the trait happens to be relevant in some situations*. After all, no personal characteristic is completely irrelevant in each and every situation. Consider these examples:

- A woman employee is working for an employer in a customer-facing role where she will have to interact with predominantly male customers who greatly prefer younger women but are indifferent towards the age of men in the same role. So even though the employer doesn't want to discriminate against women employees, sex is relevant in deciding the retirement age for the job. Similarly, if the employer wants to maximise attendance at work, sex is relevant to this aim due to the higher chances that women will take maternity leave.
- A college wants to enrol students who have up-to-date knowledge of certain subjects, score better marks in examinations, use the correct terminology when communicating, and are easily employable on graduating. On the basis of data, it finds that students from certain castes and regions usually perform better than others on these criteria. To maximise the chances of finding better-performing students in any given year, caste and place of birth are useful proxies for the college's selection process.[3]
- A particular religion carries out a religious practice X that disadvantages women in matters of property. The government wants to prohibit X. Religion is relevant in applying this prohibition because only persons from a particular religion carry out X, even if there is a practice Y under a different religion that also similarly disadvantages women.[4]
- The government aims to provide protections to refugees who suffered religious persecution due to the adoption of a state religion by a neighbouring country.[5] Religion is relevant in designing this protection if it so happens that only certain religions have been adopted as state religions in

[2] Lena Halldenius, "Discrimination and Irrelevance" in K. Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 108, 108-110. On a related note, for evidence on how discrimination has a wide range of direct economic costs, see Gaëlle Ferrant and Alexandre Kolev, "The economic cost of gender-based discrimination in social institutions," *OECD Development Centre* (June 2016), available at https://www.oecd.org/development/gender-development/SIGI_cost_final.pdf (last accessed 12th April, 2023); Kilian Huber, "How Discrimination Harms the Economy and Business" *Chicago Booth Review* (July 15, 2020), available at https://www.chicagobooth.edu/review/how-discrimination-harms-economy-and-business (last accessed 12th April, 2023). For a brief survey of how economic theory views discrimination, see Caroline Krafft, *Economics for the Greater Good: An Introduction to Economic Thinking for Public Policy* (Minnesota Libraries Publishing Project 2019) Ch 6, available at https://mlpp.pressbooks.pub/economicsforthegreatergood/chapter/the-economics-of-discrimination/ (last accessed 12th April, 2023).

[3] On statistical discrimination generally, see Kasper Lippert-Rasmussen, "Nothing Personal: On Statistical Discrimination" 15(4) *The Journal of Political Philosophy* 385 (2007). For similar issues discussed in the context of sex discrimination, see Frederick Schauer, *Profiles, Probabilities and Stereotypes* (Harvard University Press, 2003), Chapter 5.

[4] This is similar to the reasoning adopted by some High Courts in dealing with personal laws, as discussed in *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, paras 10-12; *Srinivasa Iyer v. Saraswathi Ammal*, AIR 1952 Mad 193; *Amit Bhagat v. Govt. of NCT of Delhi*, 2014 SCC Online Del 7020, para 28.

[5] See, for instance, the Statement of Objects and Reasons of the Citizenship (Amendment) Bill, 2019 ("The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries."). Note that this is not a full reflection of the relevance of the classification in that law, but only an example that assumes such relevance.

such countries, even if refugees may have suffered similar or even worse forms of religious persecution due to reasons other than the adoption of a state religion.

Sex, caste, place of birth, and religion are, strictly speaking, "relevant" in the above examples, whether to the effective performance of a job, selection process, prohibition of a given practice, or protection from a particular kind of persecution. *But treating people differently on the basis of such traits can still be unjust even when the traits seem to be relevant in this way*.

In the first two examples, even if the likeability and attendance of employees and the academic performance of students are worthwhile aims, the right against discrimination would be of little worth if it is not able to combat prejudiced attitudes in society[6] and the prior disadvantages of those entering open competition,[7] or if it fails to treat people as individuals making choices about their own lives.[8] The third and fourth examples illustrate another issue: the question of relevance *depends on how you define your aim or objective*. In those examples, there is no discrimination if the government's aims are defined narrowly or selectively (e.g., the prohibition of X practice only or the protection of refugees from one kind of religious persecution only). But if we instead frame the objectives in a broader way (e.g., the prohibition of all practices disadvantaging women in matters of property or the protection of refugees from all forms of religious persecution), the use of religion as a differentiating factor starts to seem unfair.[9]

What does this mean? It means that it is problematic to decide whether an action is discriminatory based only on the aims, objectives and intentions that a person is supposedly pursuing. It is important to examine the objectives, but government officers and elected representatives motivated by prejudice and hatred can hide their real intentions by coming up with a different objective as a smokescreen or excuse.[10] And even when there is no prejudice involved at all, a discriminatory action can harm individuals in unfair ways by making it difficult for them to enjoy many valuable things that social life has to offer. It is only possible for us to protect individuals from these harms if we consider the *effects* of

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[6] This is referred to as a "reaction qualification" or as discrimination on the basis of "reactive attitudes". Alan Wertheimer, "Jobs, Qualifications, and Preferences" 94(1) *Ethics* 99 (1983); Lena Halldenius, "Discrimination and Irrelevance" in K. Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 108, 115-116.

[7] Deborah Hellman, "Discrimination and Social Meaning" in K. Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 99. For surveys indicating the challenges faced by disadvantaged groups in performing at academic institutions, see Chirayu Jain et al, "The Elusive Island of Excellence: A Study on Student Demographics, Accessibility and Inclusivity at National Law School 2015-16" (June 2016) Ch 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788311 (last accessed 13th June, 2023); Gatha G. Namboothiri, "The NUJS Diversity Report 2019" (February 2020), pp.97-236, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550684 (last accessed 13th June, 2023); Husain Aanis Khan, "Inclusivity and Diversity in Minority Central University: A Report on Jamia Diversity Census 2018-19" (May 2019) Ch 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541086 (last accessed 13th June, 2023).

[8] Benjamin Eidelson, "Treating People as Individuals" in Hellman and Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013).

[9] A relevance-based test is considered to be circular and capable of being manipulated. See, Kate O'Regan and Nick Friedman, "Equality" in Ginsburg and Dixon (eds.) *Comparative Constitutional Law* (Edward Elgar 2011) 477; *Miron v. Trudel*, [1995] 2 SCR 418, 489 (Supreme Court of Canada) (McLachlin, J.) ("Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination …").

[10] Under a relevance-based test, courts are encouraged to side with the legislature's choice instead of considering alternatives. See, Susanne Baer, "Equality" in Rosenfeld and Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 986-987; Denise Réaume, "Dignity, Equality, and Comparison" in Hellman and Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013).

an action on valuable individual interests (e.g., employment, education, property, or citizenship) and not just its stated *objectives* (e.g., job performance or academic performance, reform of one practice, or protection from only one kind of persecution).[11]

This also means that, in essence, discrimination is wrongful not because certain traits are generally irrelevant but because it *uses characteristics of ours that we can't change or that we shouldn't be forced to change*[12] in depriving us and those like us of a life with dignity or in deciding what opportunities and freedoms we will get in life or whether our choices and interests will be given the same weight as those of others in society.[13] The chances of a woman to have a stable job in the field of her choice shouldn't depend on her sex, youth or decision to have a child. Whether a person gets the education of her choice shouldn't depend on her caste and the limitations her caste has placed on her prior opportunities. Whether a woman receives inheritance or maintenance and whether a refugee receives protection from persecution shouldn't depend on which religion she is from. It is critical that we recognise the difference between a protection against the use of irrelevant characteristics and a meaningful protection for equality, liberty and dignity. One is only concerned with the aims that governments choose to pursue while the other recognises the worth of an individual's own choices and her self-respect even where these conflict with collective goals.

Beyond this, there are other questions about discrimination for which there might be more disagreements. For instance, there may not be a clear consensus on whether discrimination law is best explained in terms of equality, liberty, dignity or a combination of these. Similarly, there might be disagreements on whether discrimination law should eliminate all differences based on a ground. One might want to eradicate caste difference,[14] and yet celebrate religious differences, and be uncertain about how differences in biological sex can continue to play a role in narrow circumstances.[15] This can affect what kind of discrimination can be excused or justified. And then one might also have disagreements on whether and why discrimination against advantaged groups like men or forward castes should be considered unfair.[16] But this should not hold us back from improving our understanding of discrimination law by rejecting narrow and outdated views that many still hold today.

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[11] Kate O'Regan and Nick Friedman, "Equality" in Ginsburg and Dixon (eds.) *Comparative Constitutional Law* (Edward Elgar 2011) 474.

[12] Courts and legal scholars have argued that grounds of discrimination are socially salient personal characteristics that are either immutable (unchangeable) or that represent a fundamental choice. See, Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 56-60; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras 638.1-639.4 (Malhotra, J.).

[13] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 6-9 (remarking on how legal scholars have offered different foundations or bases for discrimination law in the form of equality, liberty (or autonomy or freedom) and dignity (or personhood or individuality)).

[14] See, for instance, *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, para 779 (Jeevan Reddy, J.) ("[The phenomenon of caste] must be eradicated. That is the ideal – the goal."); B.R. Ambedkar, *Annihilation of Caste* (Verso 2014; originally published 1936).

[15] See, for discussion of sex and religious discrimination, Susanne Baer, "Equality" in Rosenfeld and Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 987-988.

[16] Compare Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 41, 179-180 with Colm O'Cinneide, "Justifying Discrimination Law", 36 *Oxford J. Legal Stud.* 909, 926 (2016).

2

The Problem: What India is Getting Wrong

If the question of discrimination has been and continues to be a critical one for Indian society and politics, and discrimination law is a prerequisite to enjoying real equality, liberty and dignity, then why has Indian constitutional law failed to develop it satisfactorily? Outlined below are seven interlocking problems that prevent the right against discrimination under the Indian Constitution from doing its job:

2.1 Lack of Common Principles

Courts in India have not been consistent in applying the right against discrimination. The meaning of the right changes from case to case and judges do not seem to be in agreement about how it should be interpreted:

- In some cases, courts have suggested that there is an *absolute prohibition* on disadvantaging citizens on the basis of religion, caste, sex and other listed grounds,[17] and the only exceptions from this rule are specifically provided in relevant constitutional provisions themselves (e.g., treating Articles 15(4) or 16(4) as the only exceptions to caste discrimination). Under this view, if there is any discrimination that does not fall within such specific exceptions, it is prohibited.
- In an array of cases, courts have read the right against discrimination narrowly as prohibiting only those actions that disadvantage citizens on the listed grounds where this disadvantage is the *exclusive aim* of the state.[18] Under this view, if an action discriminates on the basis of religion, caste or sex but is not motivated "only" by considerations of those grounds but by "additional" considerations, it is justified.
- A further set of decisions apply the right against discrimination in the same way as courts have applied the general right to equality. This means that they apply the *reasonable classification* test, under which any classification in a law is justified if it helps meet the objective of the law.[19] Under

[17] *Walter Alfred Baid v. Union of India*, AIR 1976 Del 302, paras 7, 10; *Rani Raj Rajeshwari v. State of Uttar Pradesh*, AIR 1954 All 608, paras.73, 76, 94-96; *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123, at para.7 (Sastri, C.J.); *P.P. John v. Zonal Manager*, 1995 SCC Online AP 261; *G.K. Pushpa v. State of Karnataka*, 2012 SCC Online Kar 8725, para 29.

[18] *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226, paras 19-20; *Mahadeb Jiew v. Dr B.B. Sen*, AIR 1951 Cal 563; *Anjali Roy v. State of West Bengal*, AIR 1952 Cal 825; *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, paras 10-12; *Srinivasa Iyer v. Saraswathi Ammal*, AIR 1952 Mad 193; *Dattatraya Motiram More v. State of Bombay*, AIR 1953 Bom 311; *Pujari Narasappa v. Shaik Hazrat*, AIR 1960 Mys 59, paras 18-20, 23; *M.I. Shahdad v. Mohd. Abdullah Mir*, AIR 1967 J&K 120; *R.S. Singh v. State of Punjab*, AIR 1972 P&H 117, para 17; *Sucha Singh Bajwa v. State of Punjab*, AIR 1974 P&H 162, paras 13 and 17; *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, paras 43, 82, 135 and 169; *Ambika Prasad Mishra v. State of Uttar Pradesh*, (1980) 3 SCC 719, paras 29-30; *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; *Indra Sawhney v. Union of India*, (1992) 3 Supp SCC 217, paras 323(2), 418, 784; *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, para 137; *A.M. Shaila v. Chairman, Cochin Port Trust*, 1994 SCC OnLine Ker, paras 14-15, 24-25; *Ammini E.J. v. Union of India*, 1995 SCC Online Ker 47, paras 23-24, 36-39; 572 *Indra Sawhney v. Union of India (II)*, (2000) 1 SCC 168, paras 8, 65; *Satyendra Kumar Tripathi v. State of Uttar Pradesh*, 2004 SCC OnLine All 1340, para 32; *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, at para 149; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, paras 162-163, 170-171, 351, 358(7), 650, 659, 664-665; *V. Sivamurthy v. State of Andhra Pradesh*, (2008) 13 SCC 730, para 9; *K.P.A. Nallamohamed v. Director, Department of Archaeology*, 2011 SCC OnLine Mad 145, para 22; *Mamta Dinesh Vakil v. Bansi S. Wadhwa*, 2012 SCC OnLine Bom 1685, paras 78, 81, 94, 93-98; *R. Krishnaiah v. Union of India*, 2012 SCC Online AP 113, paras 24-25; *Adam Chaki v. Government of India*, 2013 SCC OnLine Guj 8811, para 64.

[19] *Mahant Moti Das v. S.P. Sahi, The Special Officer in Charge of Hindu Religious Trust*, AIR 1959 SC 942, para 7; *Gogireddy Sambireddy v. Gogireddy Jayamma*, 1971 SCC Online AP 134, para 3; *R.S. Singh v. State of Punjab* AIR 1972 P&H 117, paras 18-19; *V. Sunithakumari v. Kerala State Electricity Board*, 1992 SCC OnLine Ker 145, paras 7-9; *Preman v. Union of India*, 1998 SCC Online Ker 158, paras 42-44; *Narayan Sharma v. Pankaj Kumar Lehkar*, (2000) 1 SCC 44, paras 24(b), 26-27; *Girish Uskaikar v. Chief Secretary*, 2001 SCC OnLine Bom 41, para 11; *Vijay Lakshmi v. Punjab University*, (2003) 8 SCC 440, paras 4-5; *R. Krishnaiah v. Union of India*, 2012 SCC Online AP 113, paras 32-

this view, differentiating between citizens on a listed ground is permitted if the state's chosen objective can be better achieved by making such a differentiation. This is similar to the approach described immediately above, but allows for discrimination to be justified not just by any additional consideration but only those considerations that are part of the law's stated objective. This view sometimes rejects outright prejudice or hostility against a group because it would be an illegitimate objective.

- In a final category of more recent opinions, judges have begun to define the right against discrimination as prohibiting actions that aggravate the *group disadvantage* suffered by weaker or already disadvantaged sections of society.[20] Under this view, the right is primarily meant to protect backward castes and women, for example. If a measure reduces the disadvantages that members of such groups face, then it is justified even if it differentiates on the basis of caste, sex etc.

There may be good reasons to have different approaches when dealing with discrimination on different grounds, for example because there may be valuable differences between religions that are worth preserving but no such differences between castes. The problem, however, is that Indian courts sometimes apply different approaches in relation with the same ground, or do not explain their inconsistency, meaning that neither the state nor citizens can have assurance about how rights will be protected in a given case. What is more, judges have often engaged with discrimination on one particular ground without accounting for or explaining how their views relate to other grounds. This includes, for example, the failure to reconcile the law on sex discrimination with caste discrimination.[21]

2.2 Ease of Justification

In two of the approaches described above, the "reasonable classification" and "exclusive aim" approaches, courts allow governments to justify discriminatory acts too easily, making the protection provided by the right against discrimination weak and pliable.

With the reasonable classification test, courts fail to account for how such a state aim can itself be defined in a discriminatory way, or how an action can have the effect of discrimination even if it has a legitimate objective. This has been discussed in section 1.2 above. Even though some judges recognise this problem (finding that discrimination is *per se* unreasonable or prohibited even if otherwise reasonable),[22] others have applied the reasonable classification test to questions of discrimination, suggesting that a law's objective can justify discriminatory treatment. It has even been treated as the underlying basic principle behind equality and non-discrimination, which would mean that this minimal

33; *Adam Chaki v. Government of India*, 2013 SCC OnLine Guj 8811, paras 39, 65; *Amit Bhagat v. Govt. of NCT of Delhi*, 2014 SCC Online Del 7020, para 28.

[20] *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1; *Naz Foundation v. Government of N.C.T. of Delhi*, (2009) 160 DLT 277; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; *Inspector (Mahila) Ravina v. Union of India*, 2015 SCC OnLine Del 14619; *Madhu v. Northern Railway*, 2018 SCC OnLine Del 6660; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Secretary, Ministry of Defence v. Babita Puniya*, (2020) 7 SCC 469; *Union of India v. Lt. Cdr. Annie Nagaraja*, (2020) 13 SCC 1; *Lt. Col. Nitisha v. Union of India*, 2021 SCC OnLine SC 261.

[21] This may be seen, for instance, in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras 431-439 (Chandrachud, J.), where the traditional doctrine related to sex discrimination is discussed and criticised without noting or accounting for how the doctrine has also been applied in relation with other grounds of discrimination. See, Lalit Panda, "Rationality by Any Other Name: Common Principles for an Evolving Equality Code" 10 *Indian Journal of Constitutional Law* (2021), at section 2.2.2.

[22] *Walter Alfred Baid v. Union of India*, AIR 1976 Del 302, paras 7, 10; *Rani Raj Rajeshwari v. State of Uttar Pradesh*, AIR 1954 All 608, paras.73, 76, 94-96.

standard is all that stands in the way of these constitutional rights being freely amended.[23] Another source of confusion is the use of reasonable classification in justifying the classification of beneficiaries for reservations,[24] an understanding that treats affirmative action as a discretionary legislative objective rather than a remedy for discrimination or duty to address social disadvantage (discussed further in section 2.5 below).

The second approach is an even weaker and more minimal standard. Relevant provisions in the Constitution like Articles 15(1), 16(2) and 29(2) all prohibit discrimination when it is on grounds "only" of religion, race, caste, etc. In a long line of judgments, courts have read this to mean that where there are any kind of additional considerations for a discriminatory measure at all, then the discrimination is excused because it is not on grounds *only* of the listed characteristic but also on those additional grounds.[25] While this reading may have given rise to appropriate results in some limited situations,[26] these (and even better) results can be achieved in a different way (this is discussed in section 3.2 below). An alternative is needed because permitting governments to justify discrimination on the basis of any additional consideration whatsoever can often lead to absurd findings.

In a prominent example,[27] the Supreme Court upheld a policy setting a lower retirement age for women employees (along with a requirement of compulsory retirement if such an employee married early), finding that the policy did not discriminate "only" on the ground of sex, but "due to a lot of other considerations also".[28] What other considerations? Apparently, the posts for male and female employees were "essentially" different categories with different qualifications, salaries, retirement benefits, etc.[29] Similarly, the Court has upheld a constitutional amendment reserving a seat in a legislative body exclusively for members of a religious institution to be nominated by the institution itself, finding that the institution was not "merely" a religious one but also a political and social one.[30]

The low bar set when judges focus on the government's chosen aims can also be seen in the Supreme Court's judgment upholding the constitutional amendments on EWS reservations.[31] One judge in the majority considered the exclusion of backward classes from those reservations to be valid because it was not prejudiced or contemptuous.[32] The failing of such an approach is that courts do not recognise how discrimination is better identified through the effects of a law rather than just its supposed objectives. Sometimes, grave harm can be caused even when there is no explicit classification in a law

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[23] *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1, paras 142 (Maheshwari, J.), 211-212 (Trivedi, J.), and 393-394 (Pardiwala, J.).
[24] For instance, see *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, paras 21, 24 (Ray, C.J.), and 137 (Krishna Iyer, J.); *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, para 741 (Jeevan Reddy, J.).
[25] *Supra* n.18.
[26] The approach is partly responsible, for instance, for the permissibility of the usage of caste as one of the markers of backwardness in reservations. It is thus one of the reasons why reservations are not treated as a violation of the prohibition on caste discrimination. See, for instance, *Indra Sawhney v. Union of India*, (1992) 3 Supp SCC 217, at paras.784 (Jeevan Reddy, J), 418 (Sawant, J.), 323(2) (Thommen, J.); *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, at paras.162-163 (Balakrishnan, C.J.), 351, 358(7) (Pasayat and Thakker, JJ.), 650, 664 (Raveendran, J.). It has also been applied in the context of reservations for women, for example in *Dattatraya Motiram More v. State of Bombay*, AIR 1953 Bom 311.
[27] *Air India v. Nergesh Meerza*, (1981) 4 SCC 335. The infirmities of the judgment are discussed (along with a proposal for an alternative approach) in Shreya Atrey and Gauri Pillai, "A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)" 5(3) *Indian Law Review* 338 (2021).
[28] *Ibid*, para 64.
[29] *Ibid*, paras 39-60.
[30] *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, para 137.
[31] *Supra* n.23.
[32] *Janhit Abhiyan v. Union of India*, (2023) 5 SCC 1, paras 399-400 (Pardiwala, J.).

on the basis of religion, caste, sex, etc or any evidence of contempt (which is, in any case, difficult to prove).[33] This is discussed in section 2.4 below. While some opinions in recent judgments have challenged the correctness of these lax approaches in the context of sex discrimination, they have neither effectively overruled the old approaches nor accounted for their continued application in relation with discrimination on grounds other than sex.[34]

2.3 Immunity and Deference

Courts have also read general provisions on fundamental rights in a way that such rights are not made applicable to "personal laws" and religious customs. Personal laws consist of certain legal rules drawn from religious texts and doctrines and applicable only to members of those religions, particularly on matters of family law such as marriage, divorce, succession, and maintenance. Due to a specific method of interpreting Article 13 of the Constitution, courts have found that these personal laws and customs are not subject to judicial review as they do not seem to fall within the category of laws that the Constitution applies fundamental rights to.[35]

This approach to religious laws has been criticised not just because of flaws in the technical interpretation of the relevant constitutional provisions,[36] but also because the implications of such a reading on our society. It leaves individuals defenceless against the application and enforcement of unjust religious rules directly by India's courts themselves and supposedly on behalf of the relevant religious communities. And these rules are applicable not just to an abstract space of religious freedom where communities can legitimately claim that they need to preserve their belief systems, values, rituals and practices, but also in a range of matters that touch upon the "civil status" that individuals have in society in relation with marriage and property. By shielding personal laws from the application of fundamental rights, courts also suggest that religion stands as a source of legal authority outside of the Constitution. This raises grave questions regarding the supremacy of the Constitution in establishing a government in India subject to the rule of law.[37]

A further complication is that only certain of these religious rules enjoy such immunity. Where the rules are "codified" (made into legislations passed by legislatures), they appear to be subject to judicial review, but not otherwise.[38] Even where they are reviewable, however, the applicability of fundamental rights is hampered because courts have held that they are not the appropriate fora to decide questions related

[33] The weakness of a conception of equality of opportunity that is formal (i.e., in principle open to everyone) and only prohibits "explicit discrimination" has been recognised in India since a long time without being meaningfully implemented. For example, see Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission set up by the Ministry of Minority Affairs, Government of India (February, 2008) 15-23.

[34] Lalit Panda, "Rationality by Any Other Name: Common Principles for an Evolving Equality Code" 10 *Indian Journal of Constitutional Law* (2021), at section 2.2.2; Shreya Atrey and Gauri Pillai, "A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)" 5(3) *Indian Law Review* 338, 345 (2021) (pointing out that judgments applying the weak standard have only been criticised without being overruled).

[35] *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, paras 14-16 and 23-29.

[36] *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1, paras 385-393 (Chandrachud, J.); *Sant Ram v. Labh Singh*, AIR 1965 SC 166.

[37] *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1, paras 394-398 (Chandrachud, J.).

[38] There is some lack of clarity as to what constitutes an effective codification of a personal law or what converts a personal law into a statutory law. See, *Shayara Bano v. Union of India*, (2017) 9 SCC 1, paras 3-5 (Joseph, J.), 43-48 (Nariman, J.), and 322-333 (Khehar, C.J.).

to personal laws.[39] In this view, decisions on such matters are "policy" questions that are to be resolved by the legislature, which should have the discretion of determining which issues and communities it will regulate or reform.

While such immunity and deference has been applied in the context of all fundamental rights, they are of particular significance when implementing the right against discrimination because various personal laws and customs contain rules or practices that discriminate on the basis of sex, for example. Being religious laws, they also directly apply differentiated schemes of governance to members of different religions.[40] Effectively, this state of affairs implies that, despite India's commitment to equal citizenship, there is legal permission for determining the conditions of people's lives on the basis of sex and religion. In any case, if these doctrines of immunity and deference are to be rejected by courts in future, it will be the job of discrimination law to explain whether personal laws are justified, and to what extent.[41]

2.4 Failure to Address Indirect Discrimination

Modern discrimination law recognises that even when the same rule is applied to everyone, discrimination may occur because the rule significantly disadvantages a particular group in society.[42] In such instances, the law is driven to the inevitable realisation that it is sometimes unfair and wrong to treat everyone the same, because a rule that is seemingly neutral in its form may not be neutral in its effects. This form of discrimination is called "indirect discrimination" or "disparate impact".

As discussed in sections 2.1 and 2.2 above, Indian courts have traditionally chosen to assess questions of discrimination on the basis of a law's objective or the considerations that have been accounted for in making a law. These views continue to hold sway today and the effect or impact of a law has not been considered the appropriate touchstone to decide whether the right against discrimination has been violated. Usually, the result of this view is that only discrimination that is apparent from the text of a law is open to challenge and individuals are required to be treated exactly the same even when there are differences in their social conditions.

For instance, in the controversy over the *hijab* ban in educational institutions in Karnataka, the government order in question did not single out or target any one religion, instead implementing a policy on uniforms that applied to all students regardless of their traditional religious dresses. The controversy illustrated the lack of consensus in Indian jurisprudence on the relationship between neutrality and equality: in the two-judge bench decision of the Supreme Court on the constitutionality of the ban, one judge held that no religion should get preferential treatment in a secular polity, while the other found that governments had a duty to accommodate religious differences.[43] Neither found it necessary to discuss the fundamental right against religious discrimination.

Similarly, one may consider policies that discriminate on the ground of sex that don't ever mention sex. They might impose disadvantages on pregnancy, in which case there is an obvious link with the

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[39] *Pannalal Bansilal Pitti v. State of Andhra Pradesh*, (1996) 2 SCC 498, para 12; *Ahmedabad Women Action Group (AWAG) v. Union of India*, (1997) 3 SCC 573, paras 4 and 11.
[40] Farrah Ahmed, "Remedying Personal Law Systems", 30(3) *International Journal of Law, Policy and the Family* 248, 248-249 (2016).
[41] Tarunabh Khaitan, "Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement" 50(2) *Journal of the Indian Law Institute* 177 (2008), at 178-179, fn.5 and 193 ("[A] powerful article 15 cannot co-exist with religion-based and gender-unjust personal laws.").
[42] See generally, on the subject, Hugh Collins & Tarunabh Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018).
[43] *Aishat Shifa v. State of Karnataka*, C.A. 7095/2022, paras 183 (Gupta, J.) and 67, 71 and 79 (Dhulia, J.).

biological sex of a person.[44] Or else, there might be a link that isn't as immediate but is fairly discernible: a policy that makes it difficult for dependents to obtain social service benefits, for example, is likely to impact women disproportionately more than it impacts men, because more women are dependents in today's India than men.[45]

In 2021, while considering how women officers were disadvantaged in the selection procedure for permanent commissions in the Army, a two-judge bench of the Supreme Court did in fact recognise that discrimination could be indirect (or even systemic) instead of just being something that is always explicit or visibly hostile towards a group. Outlining a test to be applied in other cases, it held that if an action disproportionately affected a group and aggravated the group's disadvantages, it would be considered discriminatory.[46] However, as the *hijab* split verdict shows, this notion has still to take root in Indian law, not least because our jurisprudence is still in the thrall of the weak standards mentioned in section 2.2 above.[47]

2.5 Failure to Treat Affirmative Action as a Duty

India has the distinction of being one of the first jurisdictions to adopt an understanding of equality that accounted for group disadvantages. In doing so, it recognised the unfairness of "colour-blindness" i.e., a complete prohibition on distinctions between races, religions, castes, sexes etc. even when such distinctions are aimed at addressing group disadvantages.[48] In Articles 15(3), 15(4), 16(4), the directive principle in Article 46, as well as in provisions protecting the rights of religious and linguistic minorities, the Constitution affirms a vision of equality that was described in the section on indirect discrimination immediately above: that it is sometimes unfair to treat everyone exactly the same and that, therefore, we are sometimes required under the right to equality to treat them differently.

Connected with this idea of indirect discrimination is the notion of affirmative action, or positive measures designed to benefit a disadvantaged group.[49] Affirmative action measures can act as a remedy for some immediate discrimination that a person has suffered, or else it can serve to address and remedy past discrimination faced by a group generally.[50] It can facilitate access to some advantage that the

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[44] Consider the facts in the case of *Inspector (Mahila) Ravina v. Union of India*, 2015 SCC OnLine Del 14619.
[45] See, *Madhu v. Northern Railway*, 2018 SCC OnLine Del 6660.
[46] *Lt. Col. Nitisha v. Union of India*, 2021 SCC OnLine SC 261.
[47] For a brief account of the strengths and drawbacks of the Supreme Court's 2021 indirect discrimination judgment, see Gauri Pillai, "A continuing constitutional conversation: Locating Nitisha," 22(1) *International Journal of Discrimination and the Law* 87 (2022).
[48] For a discussion on the persistence of "colour-blindness" or "anti-classification" in the United States, see Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*", 117 *Harvard Law Review* 1470 (2003-2004).
[49] For a discussion on differences between distributive and relational equality that also illuminates the common distributive basis of affirmative action and remedies for indirect discrimination, see Kasper Lippert-Rasmussen, "Indirect Discrimination, Affirmative Action and Relational Egalitarianism" in Collins & Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018) (noting, at the outset, that "[a]t least one important rationale for affirmative action is that it is a way of eliminating or neutralising the adverse effects of rules and practices that amount to indirect discrimination"). Anti-discrimination is not the only reason to engage in affirmative action, with other reasons including compensation, equality of opportunity, role models, the promotion of diversity, and social integration (Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (Oxford University Press 2020)). Additionally, it has also been argued that many forms of redistributive measures under laws that are often associated with and termed as remedies to indirect discrimination are not conceptually relatable to the idea of discrimination and should be kept separate from it (Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) Ch 2). These could then be addressed under the general right to equality for constitutional goals running parallel to anti-discrimination.
[50] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 81-82.

group has been lacking or provide the advantage itself.[51] It can directly target the disadvantaged group or it can provide some benefits that indirectly benefit the disadvantaged group.[52] Regardless of how it is designed, affirmative action is very much connected to forms of social disadvantage that run alongside discrimination. For instance, if we accept that indirect discrimination is unconstitutional, we would have a duty not only to modify rigid rules that create disadvantage but also to take active steps to reduce the current effects of past discrimination. In this relation, it is worth acknowledging that the right against discrimination can be violated by negligent inaction in the same way that it is harmed by deliberate action.[53] Not taking active steps to address discrimination, even when one is in a good position to do so, can also mean that one is at least partly responsible for its continuation. Even if we do not think affirmative action is meant to directly prevent discrimination, we would nonetheless have associated constitutional reasons to implement such measures under the general right to equality under Article 14 (alongside the right against discrimination) to address group disadvantages.

In sum, what this means is that there is a constitutional duty to provide affirmative action. Indian constitutional law has failed to recognise this. The provisions on affirmative action for women in Article 15(3) and for backward classes in Articles 15(4) and 16(4) are all phrased in a way that make them appear like exceptions to the right against discrimination on the ground of sex or caste. Even when courts have accepted that such positive measures are not exceptions to equality of opportunity, but are instead only some out of a range of methods for implementing such equality,[54] two critical issues remain.

First, the reasons why courts consider caste-based reservations to not be a form of caste discrimination is because such measures are not made "only" on the basis of caste, but instead on the basis of additional considerations like social and educational backwardness. This way of identifying what is and is not discrimination may seem to have a beneficial outcome here, but it is a poor way of defining the right when considered generally. This has been discussed in section 2.2 above. *Second*, even when the provisions on affirmative action are considered to be in line with the right to equality, courts have read them as merely empowering or enabling governments to take such measures and not obligating them.[55] This means that affirmative action is not viewed as a remedy for the violation of the right against discrimination. In this view, even if a group suffers from grave disadvantages, it cannot demand measures like reservations as a right. Instead, reservations are seen as policy decisions that governments can choose to initiate, not initiate or even withdraw, for instance by relying on electoral considerations and without accounting for rights such as equality, non-discrimination, dignity, education and related freedoms.

2.6 Failure to Address Unlisted Forms of Discrimination

The right against discrimination in India faces another issue because of the text of the relevant provisions in the Constitution: provisions like Articles 15(1), 16(2) and 29(2) all prohibit only certain forms of discrimination. The provisions only refer to discrimination on certain limited grounds, and each provision refers to a different list of grounds. Article 15(1) prohibits discrimination on the grounds of religion, race, caste, sex and place of birth. Article 16(2), in relation with public employment, additionally

[51] *Ibid*, 83-84.
[52] *Ibid*, 84-85.
[53] Sophia Moreau, "The Moral Seriousness of Indirect Discrimination" in Collins & Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018).
[54] *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, paras 43, 46 (Ray, C.J.), 78 (Mathew, J.), 136-137 (Krishna Iyer, J.), 184 (Fazal Ali, J.).
[55] For a discussion of the related judgments and opinions, as well as an argument that this view is incorrect in law, see Anurag Bhaskar, "Reservation as a Fundamental Right: Interpretation of Article 16(4)" 10 *Indian Journal of Constitutional Law* (2021).

refers to the grounds of descent and place of residence. Article 29(2), in relation with admissions to State or State-funded educational institutions, refers to the grounds of religion, race, and caste, and additionally refers to language. And Article 325, in relation with electoral rolls, only refers to religion, race, caste and sex. This has caused two distinct problems.

First, discrimination occurs on grounds other than the ones that are listed in the Constitution. As discussed in section 1.2, the right against discrimination is aimed at preventing wrongs caused when individuals are demeaned or not provided equal opportunities or freedoms, particularly because they have characteristics that they cannot choose or shouldn't be forced to choose. There are a number of such characteristics other than the ones in the Constitution, such as disability, gender identity (or gender expression or reassignment), sexual orientation, age, marital status, family status, illegitimacy (of children), and pregnancy. One may even be discriminated against on the basis of socioeconomic status, political ideology or philosophical belief. Just as with grounds like religion, caste and sex, these grounds also represent features that individuals cannot change at will or are choices that are so fundamental and personal that it would be unfair to force a person to make the choice one way or another. The Supreme Court recognised a link between sex discrimination and gender identity discrimination in 2014[56] and one judge recognised a link between sex discrimination and sexual orientation discrimination in 2018.[57] In the same 2018 case, another judge expressed that the list of grounds in the Constitution need not be closed at all but could include other similar grounds.[58] In some cases, discrimination on the grounds of disability and HIV-status have also been considered in terms of the general rights to equality and life with dignity.[59] Yet, little else has been done to formally recognise discrimination on unlisted grounds.

Second, because different non-discrimination provisions have different lists of grounds, courts have treated these differences to be significant. For example, because "place of residence" is mentioned in Article 16(2) but not in Article 15(1), courts have read this to mean that discrimination on the ground of place of residence is prohibited in relation with public employment but permissible otherwise.[60] This has signalled to state governments that providing domicile reservations in education and private employment is not discriminatory (even if the choice of place of residence is a significant freedom that should not be unreasonably restricted, or even if place of residence is merely intended as a proxy in trying to benefit individuals on the basis of their place of birth or region of origin). This reading would similarly suggest that the Constitution generally allows for descent- and language-based discrimination, which do not feature in Article 15(1), or sex discrimination in educational institutions which is not mentioned in Article 29(2).[61]

Along similar lines, it is worth noting that the provisions on discrimination are only applicable to citizens. In prohibiting discrimination against citizens only, the Constitution seems to suggest that non-citizens do not have any right against discrimination, and courts have readily latched on to this interpretation.[62] Because the primary responsibility of the Indian State is towards Indian citizens, there may be legitimate reasons why a number of governance initiatives and benefits should be limited on the basis of citizenship. Discrimination against non-citizens on grounds like place of birth and residence should

[56] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
[57] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, paras 448-453 (Chandrachud, J.).
[58] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras 638.1-638.4 (Malhotra, J.).
[59] *MX v. ZY*, AIR 1997 Bom 406; *Ranjit Kumar Rajak v. State Bank of India*, 2009 SCC OnLine Bom 732
[60] *D.P. Doshi v. State of Madhya Bharat*, AIR 1955 SC 334, para 5; *Dr. Pradeep Jain v. Union of India*, (1984) 3 SCC 654, para 6.
[61] *University of Madras v. Shantha Bai*, AIR 1954 Mad 67, pp.669-670.
[62] *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465, at para 28; *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs*, AIR 1964 SC 1140, at para 35.

indeed be permissible in such situations. But it is absurd to think, for instance, that sex discrimination against a South African woman is somehow less unfair than sex discrimination against an Indian woman. In a prominent recent controversy, this question has arisen in relation with the allegation of religious discrimination against migrants under the CAA. The matter is significant not just because non-citizens can be discriminated against on various grounds like religion, but also because nationality (a concept distinct from but related to citizenship) has long been recognised as a ground of wrongful discrimination.[63]

Here, it is worth remembering that recognising such unlisted forms of discrimination does not automatically mean prohibiting them. What is important is that such recognition will require the government to justify its actions on the basis of a stricter test, along the lines of what is proposed in sections 3.2, 3.3 and 3.5 below.

2.7 Failure to Address Discrimination by Private Persons

A slightly more challenging question is that of discrimination by private persons. This is of particular relevance in the Indian context because there has been no general legislation dealing with private discrimination. Given this state of affairs, it is worth considering whether the constitutional right against discrimination can and should be made applicable to private persons in some ways.

Most prominently, one may note that the Constitution does directly prohibit discrimination by persons who do not form part of the Indian "State" in certain limited circumstances. These may be seen in Articles 15(2) and 17. Article 15(2) states that citizens are not to be subject to any "disability, liability, restriction or condition" on the same grounds as mentioned in Article 15(1) with regard to access to certain places like shops and hotels and use of certain further places like wells and "places of public resort" that are State-funded or are meant for public use. Similarly, Article 17 abolishes "untouchability", forbids its practice "in any form", and requires it to be made into an offence, thus protecting against certain forms of caste discrimination by private persons both directly and by requiring legislation. While these provisions refer only to limited kinds of places and practices, they recognise the need to address private discrimination, at least to some extent, under the Constitution itself. Electoral majorities may not be concerned that minority groups are subjected to exclusionary practices, harassment, persecution and atrocities by majority groups.

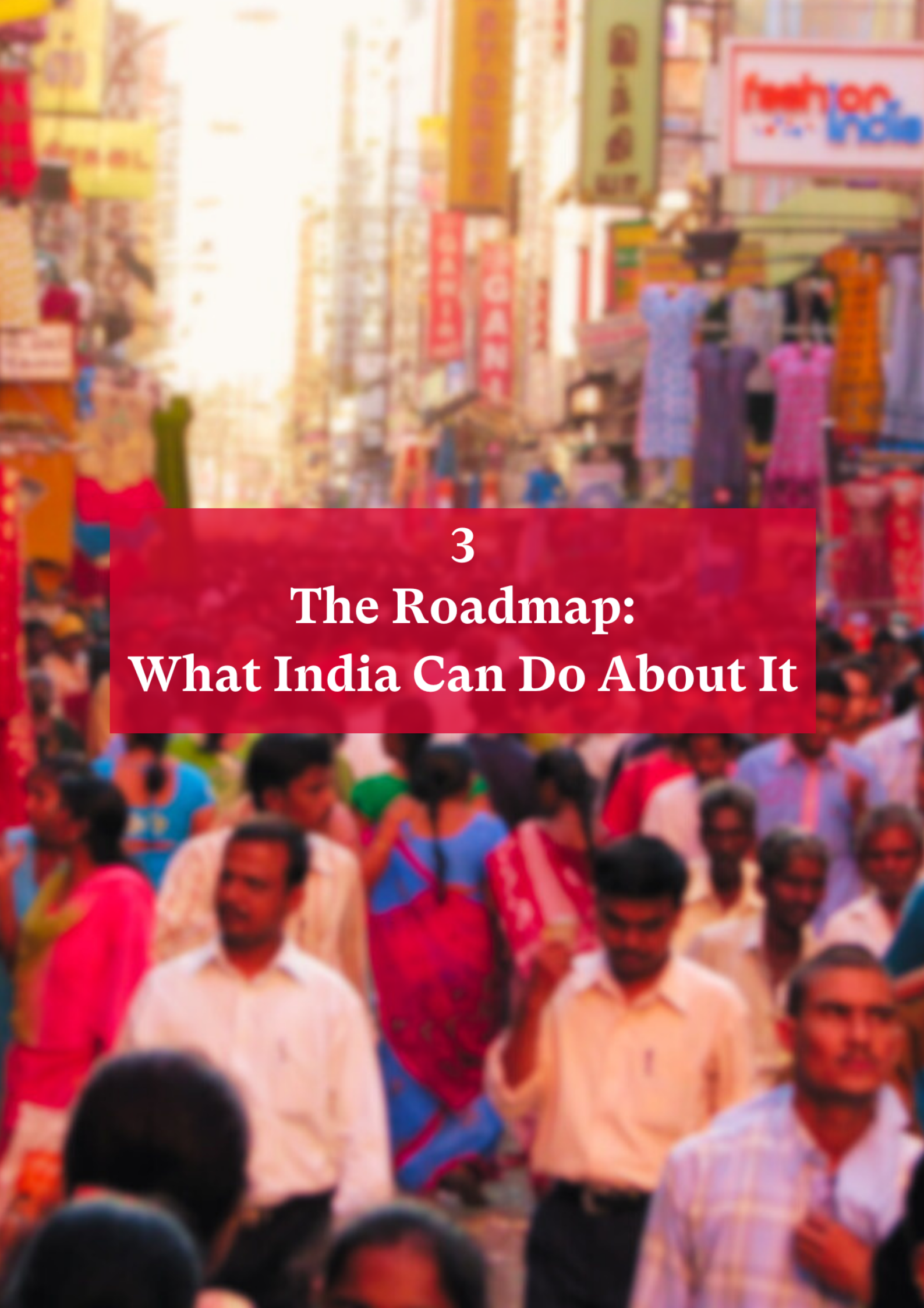
While there have been some limited legislative efforts to prevent private discrimination of some forms and in relation with some grounds,[64] our constitutional law should be developed to deal with private discrimination in situations beyond those mentioned in Articles 15(2) and 17. This question is also of great significance in the current socio-political climate, where the ascendence of religious majoritarianism in Indian politics has raised concerns that private persons in various walks of life (not

[63] See, for instance, Article 1, International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolution 2106 (XX) (adopted 21 December 1965). Citizenship itself can also be a ground of discrimination in some instances e.g., in relation with employment in 8 U.S.C. § 1324B ("Unfair Immigration-Related Employment Practices").

[64] Ss.153A, 153B, 295A, 354-354D, 375-376E, 505, Indian Penal Code, 1860 (on hate speech and sexual crimes); Maternity Benefit Act, 1961; Equal Remuneration Act, 1976; Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989; Rights of Persons with Disabilities Act, 2016; ss.18(2), 18(8) and 21, Mental Healthcare Act, 2017; ss.3, 4, 17 and 29, Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017; Transgender Persons (Protection of Rights) Act 2019.

to mention vigilante groups, self-appointed moral police, and political outfits) are increasingly emboldened to engage in religious discrimination.[65]

[65] Christophe Jaffrelot, "A De Facto Ethnic Democracy? Obliterating and Targeting the Other, Hindu Vigilantes, and the Ethno-State" in Chatterji et al (eds.), *Majoritarian State: How Hindu Nationalism is Changing India* (Oxford University Press, 2019); Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton University Press, 2021), Chs 6 and 7; Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India" 14(1) *Law & Ethics of Human Rights* 49, 58-59, 91-92 (2020); M. Mohsin Alam Bhat, "Segregated minds, segregated markets: The nature of rental discrimination against Muslims in Delhi and Mumbai", *India Housing Report* (12 June 2020), available at https://indiahousingreport.in/outputs/opinion/segregated-minds-segregated-markets-the-nature-of-rental-discrimination-against-muslims-in-delhi-and-mumbai/ (last accessed 12th April, 2023); Neha Sahgal et al, "Religion in India: Tolerance and Segregation", *Pew Research Center* (29 June 2021), available at https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/ (last accessed 12th April, 2023). See, for other empirical studies on private discrimination, including in the context of caste, Sukhadeo Thorat & Paul Attewell, "The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India" 42(41) *Economic & Political Weekly* 4141 (October 13, 2007); Sukhadeo Thorat & Katherine S. Newman (eds.), *Blocked by Caste: Economic Discrimination in Modern India* (Oxford India Paperbacks 2012); Sukhadeo Thorat et al, "Urban Rental Housing Market: Caste and Religion Matters in Access" 50(26-27) *Economic & Political Weekly* 47 (June 27, 2015).



3
The Roadmap: What India Can Do About It

While the number and complexity of these interlocking issues may seem rather formidable, there are a few practicable steps that can be taken to develop solutions within Indian constitutional law. In taking these steps, courts and legislatures will face grave dilemmas on some matters, even while the answers can be more apparent in others. If we can correctly identify the key considerations in taking each step, however, it will be possible to make meaningful and lasting progress. These are outlined below:

3.1 Clarify the Basis of the Right

To start with, a common misunderstanding is that the right against discrimination prevents any kind of distinction at all from being made between people on the basis of religion, caste, sex etc. Courts have not clarified as to when using such grounds is discriminatory and when it is not. In this light, we must first understand that the series of related problems in the way Indian courts have been applying the right against discrimination can be traced back to their failure to adopt a more robust understanding of both the right to equality and the right against discrimination. In section 1.2 above, we have described how discrimination occurs when, because a person has certain kinds of characteristics, her dignity is undermined, freedoms limited, or interests treated as less important than those of others. The significance of these individual values, and their connection with non-discrimination, will not be recognised in our law and society as long as courts continue to decide questions of discrimination solely on the basis of government objectives.

Since a number of years, Indian courts have acknowledged that our fundamental rights are interrelated.[66] This was in response to the manner in which government actions were being excused because they met the lighter requirements for the restriction of one right instead of having to meet the stricter requirements under another right. Most prominently, the acknowledgment of the interrelation between rights led courts to apply a standard of reasonableness from the right to equality under Article 14 to strengthen the right to life and personal liberty under Article 21, which was otherwise phrased in a way that made it a weak right.[67] Courts should similarly recognise that while discrimination is related to equality, it is special and distinct from other questions of equality because of how discriminatory actions not only affect equal opportunity but also significantly restrict fundamental freedoms, personal liberty, life with dignity and minority rights protected under various other fundamental rights.[68]

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[66] Beginning with *R.C. Cooper v. Union of India*, AIR 1970 SC 564 and culminating most recently in *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

[67] *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

[68] A growing body of scholarly work discusses such linkages between discrimination and rights other than equality. See, Susanne Baer, "Equality" in Rosenfeld and Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 994 ("The more equality is understood as a right against discrimination, the more a test moves away from a comparative exercise and resembles a liberty test, directed against a violation of a fundamental interest or need."); Tarunabh Khaitan, "Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement" 50(2) *Journal of the Indian Law Institute* 177, 197-201 (2008); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019) 68; Elisa Holmes, "Anti-Discrimination Rights without Equality" 68(2) *The Modern Law Review* 175 (2005); Kenji Yoshino, "The New Equal Protection" 124(3) *Harvard Law Review* 747 (2011); Denise Réaume, "Dignity, Equality, and Comparison" in Hellman and Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013); Sophia Moreau, "In Defense of a Liberty-based Account of Discrimination" in Hellman and Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013); Laurence H. Tribe, "Equal Dignity: Speaking Its Name" 129 *Harvard Law Review Forum* 16 (2015). This manner of framing the right against discrimination should also have the additional benefit of saving Indian discrimination law from being mired in the exclusive protection of certain kinds of statuses by permitting it to also protect certain forms of conduct. Such problems have plagued discrimination law in other countries. See, for instance, Deborah A. Widiss, "Intimate Liberties and Antidiscrimination Law" 97 *Boston University Law Review* 2083 (2017).

While there may be differences in how non-discrimination is understood depending on whether one frames it in terms of equality, liberty or dignity, courts need to begin identifying the relations between such rights, because it is likely that each of them plays some role in protecting against discrimination.[69]

3.2 Adopt a New Judicial Test

Once we accept that the basis for the right against discrimination is not a weak standard such as the reasonableness of the classification or the exclusiveness of the discriminatory intention for a measure, we are faced with the question of developing a different test that courts can apply to decide whether there has been a violation of the right or whether there is adequate justification for the violation.

To establish a new test for courts, a starting point is locating the standard in the text of the Constitution. As described above, courts have read the prohibition on discrimination as one that targets measures that are taken "only" on some particular ground of discrimination. By this reading, actions that are "only" on a ground like religion or caste are prohibited, while those that are not "only" on such a ground do not violate the right. Why did courts feel compelled to adopt this reading? As it happens, each non-discrimination provision is otherwise phrased as an *absolute prohibition* ("The State shall not discriminate…"; "No citizen shall… be subject to any disability…"; "No citizen shall… be ineligible for, or discriminated against…"; "No citizen shall be denied admission…"). The provisions do not prohibit "wrongful" or "unfair" discrimination, but any discrimination at all. There seems to be no room for exceptions because courts appear to have understood the word "discriminate" to mean *any* usage of a ground like religion or caste, or *any* classification on the basis of such a feature. But should governments be completely prohibited from differentiating between religions or castes, even though there might be situations where this is justified? A blanket prohibition is probably what courts sought to avoid when they permitted discrimination that is not "only" on a listed ground.[70] While this allows room for the imperatives of community-specific reform, religious accommodation, and caste-based affirmative action in Indian governance, it goes too far and provides more leeway than is acceptable.

If we understand religion- and caste-based classification to be legitimate in certain situations, then a better way for courts to permit such classification would be to change the way they interpret the word "discriminate".[71] For instance, even if reasonable accommodation and affirmative action differentiate on the basis of a ground like religion, caste or sex, such measures are not discriminatory at all as long as they are actually aimed at preventing indirect discrimination or addressing group disadvantages. In certain other instances that do not involve remedying discrimination or disadvantage, there may still be strong reasons for engaging in indirect or even direct discrimination. If courts consider such actions to be legitimate within the constitutional scheme, they too can be kept outside of the scope of the word "discriminate". This would mean that, by a legal fiction, justified forms of discrimination would be deemed not to be "discrimination" at all (for the purposes of provisions like Articles 15(1)).

However, to identify these latter forms of justified discrimination, courts must apply a stricter test, such as one that considers whether the discriminatory action is necessary for some legitimate aim and

[69] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) Ch 4; Sophia Moreau, "Equality and Discrimination" in John Tasioulas (ed.) *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020).

[70] This kind of explanation for the weak standards of non-discrimination in India is also discussed in Shreya Atrey and Gauri Pillai, "A feminist rewriting of *Air India v Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)" 5(3) *Indian Law Review* 338, 343-44 (2021).

[71] Indeed, the term has been considered to have different meanings in lay and legal usage as well as in a value-neutral and value-laden sense. See, for example, Lena Halldenius, "Discrimination and Irrelevance" in K. Lippert-Rasmussen (ed.), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 108, 111.

whether the discriminatory effects on dignity, liberty and equal opportunity are proportionate to the importance of the aim.[72] One serious problem preventing the adoption of a new test, however, is the difficulty of overruling the old approaches, given the number and binding nature of the precedents endorsing them.[73]

3.3 Consider the Differences Between Grounds

As mentioned in discussions above, even while there are foundational principles common to the different grounds of discrimination, the approach for each ground need not be exactly the same. The Supreme Court has, for example, suggested that the objective of the prohibition on caste discrimination and caste-based reservations is to eventually bring to an end distinctions on the ground of caste.[74] But must we apply this logic to other grounds of discrimination as well? For example, one particular view on secularism demands that religion should make no difference at all in governance. This has been criticised as it can cause complicated clashes with freedoms related to religious and spiritual life.[75] It is of some relevance that the Indian model of secularism has long tolerated differentiated treatment of different religions in certain areas,[76] and the Constitution itself has special provisions related to the practices and institutions of certain religions (or religious minorities), but not others.[77] Similarly, despite its appeal in a wide range of situations, neutrality is a contentious aim for sex discrimination law to have: it can hinder an adequate understanding of diversity and raise complex difficulties in relation with sex-specific biological attributes, sexual orientation, gender identity, and appearance.[78]

One method of resolving these issues is to acknowledge significant differences between the grounds in applying the test discussed in section 3.2 immediately above. Courts would have to place appropriate weight on the different reasons why distinctions arise in relation with different grounds. There do not seem to be any constitutionally legitimate reasons to differentiate between castes except the need to address discrimination against disadvantaged castes through targeted remedies like affirmative action. Since affirmative action is a measure that furthers the right to equality and is not a form of discrimination, it would not be correct to apply a strict proportionality test to it. In the context of

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[72] This kind of a test, referred to as a proportionality test, is used in other jurisdictions on questions of discrimination. See, European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (2018 Edition) 91-103. For an example of variations in the formulation of the test and its application to discrimination, Jackie A. Lane & Rachel Ingleby, "Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage?" 47(4) *Industrial Law Journal* 531 (2018). For a discussion on the difficulties and choices involved in using proportionality in the context of the right to equality, see Guy Lurie, "Proportionality and the Right to Equality" 21 *German Law Journal* 174 (2020). For general discussion on the question of justification of discrimination, see Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 180-194 and Hugh Collins, "Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination" in Collins & Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018). The proportionality test is already being applied in India in relation with fundamental freedoms, for example in *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1; *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637; *Akshay N. Patel v. Reserve Bank of India*, (2022) 3 SCC 694. For an earlier proposal to apply the test to gender equality cases in India, see Juliette G. Duara, *Gender Justice and Proportionality in India: Comparative Perspectives* (Routledge 2018).

[73] *Supra* n.18, 19, 23, 24 and 32.

[74] *Supra* n.14.

[75] Susanne Baer, "Equality" in Rosenfeld and Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 987.

[76] Rajeev Bhargava, "India's Secular Constitution" in Hasan et al (eds.), *India's Living Constitution: Ideas, Practices, Controversies* (Anthem Press, 2005) 105-33; Rajeev Dhavan, "The Road to Xanadu: India's Quest for Secularism" in Larson (ed.), *Religion and Personal Law in Secular India* (Bloomington, 2001) 301-29; Cecile Laborde, "Minimal Secularism: Lessons for, and from, India" 115(1) *American Political Science Review* 1 (2021).

[77] Consider Articles 17, 25(2)(b), 29 and 30, as well as Explanation I to Article 25.

[78] Kimberly A. Yuracko, *Gender Nonconformity & the Law* (Yale University Press 2016) Ch 2.

existing Indian jurisprudence, courts will have to undertake a distinct balancing or redefinition exercise to address the question of reservations ceilings and excessive reservations.[79] A proportionality test may, however, apply more readily in the case of religious discrimination, where matters have been allowed to fester unaddressed. For reasons mentioned in section 2.3 above, Indian constitutional law would do well to apply fundamental rights like the right against discrimination to all forms of personal law and religious custom instead of affording them immunity. Consequently, when determining whether some distinction between religions is justified or whether uniform treatment is appropriate, courts need to consider whether (and to what extent) specific religious freedoms can be accommodated[80] (or minority protections implemented) or if such accommodation (or protection) would impose disproportionate discriminatory effects on the opportunities, freedoms and dignity of members of other religious groups (or of members of the same group).[81] A similar exercise may be needed in instances of religious reform that are targeted at a particular religion even though they can be implemented more generally. Courts and legislatures must also take seriously the need to identify and address socioeconomic disadvantages, and other forms of discrimination faced by religious minorities, including through affirmative action.

Further significant questions on the differences between grounds relate to the question of discrimination against advantaged groups. While protection from discrimination for advantaged groups would not make sense in relation with some grounds (e.g., able-bodied persons in relation with disability discrimination), courts must clarify how and when it applies to groups like men, forward castes, Hindus etc.[82] With so much adaptation becoming necessary in dealing with different grounds, there can be legitimate fear that a dynamic proportionality test would make the right against discrimination too flexible. While any such flexibility would certainly not make the right any weaker than it already is, scope for misapplication of the test would have to be restricted by developing prior rules and standards of scrutiny in relation with different grounds and situations.[83]

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[79] Note that the balancing involved here is not the kind of balancing involved in justifying rights violations but is better understood as the kind involved in defining the scope or content of the right to affirmative action. See, for such questions of balancing, T.M. Scanlon, "A Framework for Thinking about Freedom of Speech, and Some of its Applications" (2018) (unpublished manuscript), available at https://www.law.berkeley.edu/wp-content/uploads/2018/10/Freedom-of-Speech-Berkeley.pdf (last accessed 12th April, 2023) ("My view in a slogan: interests are balanced, rights are redefined.").

[80] It should be noted that, given how personal laws are currently treated as immune to judicial review, there does not seem to have been any systematic discussion from courts as to whether potential violations of rights in personal laws can be justified on the basis of religious freedom. One exception appears to be the treatment of personal laws as being part of religious freedoms in the dissenting opinion in *Shayara Bano v. Union of India*, (2017) 9 SCC 1, at paras.332, 337.8, 347-352, 383.7-383.9 (Khehar, C.J.). Sustained study regarding how personal laws relate to autonomy and religious freedoms may be found in Farrah Ahmed, "Personal Autonomy and the Option of Religious Law" 24(2) *International Journal of Law, Policy and Family* 222 (2010); Farrah Ahmed, "Remedying Personal Law Systems" 30(3) *International Journal of Law, Policy and Family* 248 (2016); Farrah Ahmed, *Religious Freedom Under the Personal Law System* (Oxford University Press 2016).

[81] In implementing this solution, it is necessary to understand that Indian constitutional law also currently defines religious freedoms in a weak manner. If personal laws are to be meaningfully assessed for religious discrimination on the basis that such discrimination promotes religious freedoms, courts will need to first strengthen the constitutional protection for those freedoms, which is currently minimal in law. For a brief account of the infirmities, see Aditya Prasanna Bhattacharya et al, "One Nation, Many Paths: A Position Paper on the Indian Constitution" *Vidhi Centre for Legal Policy*, at pp.4-5, available at https://vidhilegalpolicy.in/wp-content/uploads/2022/09/One-Nation-Many-Paths_Position-Paper.pdf (last accessed 11th April, 2023).

[82] *Supra* n.16. The question is also of immediate relevance in working out the doctrinal basis and legitimacy of the "50% ceiling" which is the judicially-imposed limitation on the extent of seats in educational institutions and jobs in public employment that can be provided under any reservations programme.

[83] For example, the anti-stereotyping principle could be one prior rule of this kind, guiding the proportionality test in the context of sex discrimination. *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras 429-440 (Chandrachud, J.).

3.4 Look at Society, Not Just Law

The failure to treat indirect discrimination as a wrong and the failure to treat affirmative action as a duty both stem from a common set of assumptions regarding the basis of the right against discrimination. Once courts accept the need to change the basis of the right (as discussed in section 3.1), they must look beyond the form and text of legal rules and consider the effects these rules have on the opportunities, freedoms and dignity of different groups in society.

When creating rules related to indirect discrimination, courts must decide on how it is different from direct discrimination. While the Supreme Court has held that direct discrimination is intentional and indirect discrimination is identified by its effects,[84] this does not resolve our problems. For one matter, it would be important to figure out how intention is to be proved. As discussed in section 2.2, it has not always been clear whether explicit reference to a ground of discrimination indicates that there is intention to discriminate. What is more, there are various ways to define and identify the intention to discriminate other than explicit reference to a ground.[85]

More importantly though, courts will have to consider carefully as to what difference it makes if some discrimination is identified as direct or indirect. It might be that because intentional discrimination seems like a more serious moral wrong, it should be dealt with through harsher punishments, more effective remedies, and less (or no) scope for justifications and exceptions.[86] But if this is so, courts will have to consider that in some cases where the intention to discriminate is not proved, the effect of the discrimination can still be extraordinarily harsh. This can happen, for instance, when the prejudice is disguised or when the action exclusively or almost exclusively impacts one group.[87] Perhaps, the distinction between direct and indirect discrimination should not make too much of a difference.[88]

In the same vein, courts must also accept that protecting fundamental rights not only requires preventing wrongful actions but also addressing certain wrongful *inactions*. Accordingly, the approach for affirmative action and reservations policy should evolve in line with the proposal made in the sections above on the basis and scope of the right against discrimination (sections 3.1, 3.2 and 3.3). The application of reservations along caste lines is legitimate not because the classification is reasonable or because discrimination is on the basis of additional considerations apart from caste. Those arguments are correct, but relying on them leaves us with a weak right against discrimination. The relationship between the non-discrimination guarantees (Articles 15(1), 16(2) and 29(2)) and the affirmative action provisions (Articles 15(3), 15(4) and 16(4)) should instead be clarified to explain that there is a right to affirmative action because, for example, caste-based reservations in an educational institution address discrimination in the same way that prohibiting a caste-based admissions policy addresses discrimination.[89] It may well be that different ways of addressing discrimination can, in certain situations, conflict with each other. But it has not been clear how and when such conflict can occur, and

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[84] *Lt. Col. Nitisha v. Union of India*, (2021) 15 SCC 125, paras 70-71.
[85] Aziz Z. Huq, "What is Discriminatory Intent?", 103 *Cornell Law Review* 1211 (2019); Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) Ch 2.
[86] Hugh Collins & Tarunabh Khaitan, "Indirect Discrimination Law: Controversies and Critical Questions" in Collins & Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018) 20-25.
[87] *Ibid*.
[88] Sandra Fredman, "Direct and Indirect Discrimination: Is There Still a Divide?" in Collins & Khaitan (eds.), *Foundations of Indirect Discrimination Law* (Bloomsbury 2018).
[89] There is also pressing need for governments to expand the modes of affirmative action actively undertaken by them beyond reservations and quotas to other targeted and general interventions and outreach programmes. See, Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) Ch 8; Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (Oxford University Press 2020).

courts have been content with an artificial 50% ceiling on reservations.[90] Two lines of development can address this problem:

First, courts need to clarify the principles on the basis of which they decide as to how much reservations is too much. This means that they will have to clearly define how and when there can be discrimination against advantaged groups like forward castes, how the limits of reservations policies can depend on social values like efficiency and merit,[91] and how to address the relatively distinct levels of disadvantage faced by different disadvantaged groups and different sub-groups within a group.[92] *Second*, the governance architecture for reservations would benefit not only from treating affirmative action as an enforceable duty, but also from requiring this duty to be fulfilled through better institutional mechanisms. This would mean bolstering the authority and professional capacities of national and state level commissions for backward classes and minorities. Coordination between them should be solidified so as to obtain a clearer picture of relative disadvantage, enhance the reach and effectiveness of reservations, and expand affirmative action methods beyond reservations. Ground rules must be set demarcating the independence of these institutions and the appropriate level of accountability they should have to political representatives. Finally, clarity is needed on the role that court scrutiny and evidence-based policymaking should play within this framework so as to allay fears that reservations are driven by purely electoral interests.[93]

3.5 Look Beyond the Lists

The final two issues mentioned in the previous part are also rooted in a common problem. Courts recognise only certain grounds of discrimination, only discrimination against citizens, and only certain types of private discrimination because those are the only types of discrimination that are listed in the Constitution. Courts find that if such things have been specifically included in the Constitution, then this means that the framers of the Constitution intended for there to be no constitutional protection in relation with other grounds of discrimination, discrimination against persons other than citizens, and other types of private discrimination.[94]

However, for a long time, this has not been a sound way of reading what the Constitution means because courts have expanded the meaning of various other provisions of the Constitution in ways that can

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[90] *Indra Sawhney v. Union of India*, (1992) 3 Supp SCC 217, at paras. 328(8), 384, 552, 635(4), 804-814, 859.
[91] *Supra* n.16 and 79.
[92] The question of sub-classification is discussed at length in Anup Surendranath, "Judicial discourse on India's affirmative action policies: the challenge and potential of sub-classification," Thesis, University of Oxford (2013), available at https://ora.ox.ac.uk/objects/uuid:69493f4c-a6e3-48df-bee1-08bc3c8f4a41 (last accessed 17th April, 2023). A related question is that of intersectional discrimination which, while not how we usually visualise discrimination, is a necessary consideration when dealing with the complexities of relative disadvantage and priority in social reality. See Shreya Atrey, "On the Central Case Methodology in Discrimination Law" 41(3) *Oxford Journal of Legal Studies* 776 (2021) (arguing that intersectionality is of unique significance to the moral purpose of discrimination law).
[93] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 239-40 (in relation with the global debate on affirmative action, remarking on "how fact-sensitive the viability of any affirmative action measure is" and finding that "[t]he debate has been mired too deeply in ideology, with very little reliance on sociological data", but also noting that such measures are "primarily political rather than adjudicative tasks"). See also, Vinay Sitapati, "Reservations" in Sujit Choudhry et al (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 738-41 (remarking that the "absence of data [on inequality] is telling" and arguing that reservations law in India is better explained as an instance of disadvantaged groups acting in concert to form a democratic majority rather than any principle of substantive equality or balancing).
[94] This interpretative tool is captured in the Latin maxim "expressio unius est exclusio alterius". For an (outmoded) example of its usage in constitutional interpretation see, *A.K. Gopalan v. Union of India*, AIR 1950 SC 27, para 201 (Mahajan, J.).

adequately address the changing needs of Indian society.[95] The framers' intentions can only provide limited guidance in dealing with issues that they may not have been able to envisage. As it happens, the need to deal with various additional forms of discrimination through legal and constitutional protections is an understanding that had not developed in Indian or comparative law, politics and society as of 1950. This understanding developed a number of decades later. At the same time it is also not appropriate to entirely ignore the text of the Constitution as this provides a blank cheque to future judges to decide on questions of constitutional law on the basis of their personal preferences instead of a principled legal basis.

Perhaps a good way to reconcile these two issues is to provide protection for unlisted forms of discrimination but not under those same provisions that specifically provide limited lists. Under this method, courts can address discrimination on unlisted grounds and discrimination against non-citizens not under Articles 15(1), 16(2) and 29(2) but under the general right to equality under Article 14 (but while applying a test that is stricter than the reasonable classification test).[96] Sections 1.2 and 3.1 above already describe how the basis for the right against discrimination should be reframed. In the same vein, they should also recognise that unlisted forms of discrimination should be addressed as situations involving an overlap between the general right to equality under Article 14 and other freedom and dignity-related rights in the Constitution. Similarly, while Articles 15(2) and 17 only deal with certain kinds of private discrimination, courts can expand the content of these provisions[97] and recognise that the State has a general obligation to protect against discrimination under Articles 15(1) and 14. This obligation requires taking active steps to deal with listed and unlisted forms of private discrimination, including by legislating a private discrimination law.[98] A number of proposals regarding such a law have been made before and the project needs to be taken further.[99]

[95] *Supra* n.66 and 67.

[96] Similar proposals have been made in Tarunabh Khaitan, "Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement" 50(2) *Journal of the Indian Law Institute* 177, 203 (2008); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019) 57-59.

[97] For a survey of various methods for doing this, see Thulasi K. Raj, "Private discrimination, public service and the constitution" 6(1) *Indian Law Review* 17 (2022). See, generally in relation with the fundamental rights responsibilities of corporations, David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge University Press 2021).

[98] The Indian Constitution does impose obligations on the government to take positive steps to adequately protect rights from violations by private persons as may be seen in previous rulings of the Supreme Court in *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 and *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, at paras 272 and 326. Generally, on the question of how constitutional rights can impose duties on private persons through obligations on the State, see, Stephen Gardbaum, "The "Horizontal Effect" of Constitutional Rights" 102(3) *Michigan Law Review* 387 (2003); Mark Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" 1(1) *International Journal of Constitutional Law* 79 (2003); Stephen Gardbaum, "The Indian Constitution and Horizontal Effect" in *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016), Ch 33.

[99] For example, see Anti-Discrimination and Equality Bill, 2016 (Bill No. 289 of 2016 introduced in the Lok Sabha); Centre for Law & Policy Research, The Equality (Prohibition of Discrimination) Bill, 2021, available at https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf (last accessed 12th April, 2023).

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