Equality Beyond Reservation: The Case for an Equal Opportunity Commission

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I. THE MEANING AND SIGNIFICANCE OF EQUALITY

Equality is not just a legally protected right of every individual, but a foundational value of the Indian Republic. The Preamble of the Indian Constitution declares "Equality of Status and of Opportunity" to all citizens.¹ As a guaranteed fundamental right, the Right to Equality promises equality before the law to all persons and prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. Equality provisions of the Constitution also enable the State to make provisions for affirmative action including reservation in favour of Scheduled Castes, Scheduled Tribes, women, children, and socially and educationally backward classes of citizens.²

The Directive Principles of State Policy, which are fundamental in the governance of the country, emphasise the State's obligation to eliminate inequalities in status, facilities, and opportunities, not only among individuals but also among groups of people.³ The Directive Principles also mandate the State to ensure adequate means of livelihood equally to men and women and secure equal pay for equal work for both men and women.⁴ The State is further obliged to ensure that the legal system promotes justice, on a basis of equal opportunity and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.⁵

The Constitution has taken care to accommodate the special interests and needs of minorities.⁶ It provides for reservations for Scheduled Castes and Scheduled Tribes in Parliament, state assemblies, and panchayat bodies. In fact, the Fifth and Sixth Schedules to

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¹ INDIA CONST. preamble.
² Id. arts. 14, 15, 16.
³ Id. part IV ("Directive Principles of State Policy"), art. 38.
⁴ Id. art. 39.
⁵ Id. art 39A.
⁶ Id. arts. 29, 30.
the Constitution provide for special provisions for administration of Scheduled Areas and Scheduled Tribes. Thus perceived, equality is not just a right but part of the constitutional culture and social philosophy of the Indian people. This explains its importance to political parties, governments, corporate enterprises, and civil society organizations.\textsuperscript{7}

II. INEQUALITIES IN THE SENSE OF DIFFERENCES ARE PART OF SOCIAL REALITY AND EQUALITY IS ABOUT ACCOMMODATING THESE DIFFERENCES UNDER RULE OF LAW

Inequality is related to "difference" in three senses. First, differences (boundaries among communities or social groups) may correspond to actual inequalities (legal disabilities or access to opportunities) due to historical prejudices, perceptions and practices, identity formation, conflict, and invidious differentiation. Secondly these actual inequalities should now be understood as "real differences" only in the sense that we confront them as a part of our social reality, albeit a reality amenable to policy interventions and social change. Third, it may be proposed that the positive value of difference (as "diversity" or "pluralism") has some role in the concept of equality, and albeit to a minimal extent, the self-assertion of social identities must be incorporated into the concept of equality. How can recognition of these notions of difference help us conceive of equality in the constitutional sense? Can equality in the constitutional sense be brought about through rule of law alone? Amid sharp empirical inequalities what do we aim to achieve with an idealistic constitutional sense of equality?

First, equality in the constitutional sense is not merely an ideal but an element of social reality that seeks to overcome historical realities.\textsuperscript{8} Historically, communities fought and eliminated others who

\textsuperscript{7} Id., scheds. V, VI.

were different from themselves. Frequent tribal wars and ethnic cleansing were the result. In later years, the more powerful groups segregated and exploited the less powerful groups, thus resulting in forms of domination including slavery, untouchability, and social hierarchies. It was only after a series of struggles and two world wars that the ideal of equality came to occupy a central place in social organization and governance. Nevertheless, discrimination and denial of opportunities continued to persist, sometimes with the sanction of law and custom. The challenge before us is to overcome this historical mindset and reconstruct social relations on the basis of dignity of the individual and equality of opportunity for all. Equality in the constitutional sense aims to achieve them as a part of our social reality, policy interventions, social organization, and governance guided by the Constitution. Equality in the constitutional sense therefore has a three-fold meaning:

1. Socially constructed inequalities and resultant discriminatory practices should be removed to provide equality before law and equal protection of laws (e.g. untouchability, bonded labour, sex-based discrimination etc. should be put an end to).

2. Victims of past discrimination who suffer disabilities and consequent denial of equal opportunities should be able to avail of preferential discrimination (reservation) benefits to be able to overcome the disabilities and access equal opportunities. Unfair discrimination should be prohibited by law.

3. The State should prevent emergence of new forms of inequalities by undertaking positive obligations as stipulated by the Directive Principles of State Policy with a view to create conditions of equal opportunities to the weaker sections of society. The object is to promote equality in outcomes through parity of conditions to the weak as well as the strong.

In the above three-dimensional view, equality is shored against past, present, and future discrimination. But it is not enough to immediately and finally decouple inequality from difference as a formal matter. Inequalities inherited from the past as well as new ones require continuing engagement in the form of corrective and remedial measures. These should be guided by the Constitution. The Indian Constitution, through abolition of disabilities; prohibition of discrimination; reservation of seats in education, employment, and representative bodies in government; and a series of administrative measures, attempts to advance individual and group equality in society. No doubt a great deal of success has been achieved in the last six decades. Entrenched social attitudes take a long time to disappear.

Preferential discrimination (reservation) benefits are meant to overcome the disabilities and access equal opportunities. Unfair discrimination should be prohibited by law, and care should be taken to ensure that reservation does not result in reverse discrimination tending to divide society further.

III. LEGISLATIVE AND JUDICIAL TREATMENT OF EQUALITY AND NON-DISCRIMINATION

Engineering equality in an unequal society through instrumentalties of law and justice is a delicate task which has led to differences between the legislature and the judiciary, a series of constitutional amendments and occasional social conflicts. There is need for political parties to understand the limits and dynamics of affirmative action if they were to act as agents of social change sharing the constitutional philosophy of rule of law and human rights.

The legislative treatment of equality has been two-fold. On the one hand, there has been a consistent policy of expanding the eligible categories for reservation and enhancing the percentage of reservation inviting judicial interventions. On the other hand, the State adopted a rather ad hoc and inadequate response to positive obligations in directing policies and resources towards equalization of status and opportunities. Despite these steps, inequalities in access to education, health, housing, food, and security continue unabated in different pockets particularly where the poor and disadvantaged live. Globalization and liberalization in certain situations have in fact accentuated inequalities sometimes erupting into social conflicts and forced migration. Nonetheless, no one can deny that legislative measures invoked in the recent past have addressed some of these issues of poverty-induced inequalities much to the relief of large sections of deprived people. Legislatures and political parties are slowly realizing the importance of non-reservation affirmative action measures to realize the equality guarantee, though reservation continues to be the favourite strategy across the political spectrum. Today the debate is how to extend reservation to the private sector as well.

The judiciary's treatment of the equality issue has been an attempt to balance competing interests though in the process, it lacked consistency of approach and a philosophy of social justice. On the question of "discrimination," the courts adopted an over-simplified "reasonable classification" formula which laid emphasis on technicalities of procedure rather than equalities in outcomes. What emerged after three decades of judicial practice was a jurisprudence of "formal equality" rather than a well-constructed move towards "substantive equality." This was quite evident in gender and wage discrimination cases against which feminist groups have made a lot of hue and cry.
Discrimination is the soul of inequality and it is an attitude of mind, a reluctance to examine entrenched biases on the basis of dignity, equity, and social justice. The loss of equal opportunity to groups of people was not examined in social context partly because of the non-availability of empirical data and partly because of the poverty of judicially determinable standards of discrimination. It was this intellectual poverty which was attempted to be remedied by the proposed Equal Opportunity Commission discussed elsewhere in this Article.

On the reservation issue, the judiciary has had a balancing approach acknowledging the need while subjecting the techniques to close scrutiny and objective standards. In the M.R. Balaji v. State of Mysore case (1963), the Supreme Court initially held that caste of a group of persons cannot be the sole or predominant factor for ascertaining the backwardness of a class.\(^9\) The Court later held that sixty-eight percent reservation was clearly unreasonable. In the Vasant Kumar case (1985) some judges even held that to be declared backward for purposes of reservation, their status should be comparable to that of Scheduled Castes and Scheduled Tribes.\(^10\) Finally in the Mandal Judgment (1993), the Supreme Court favoured tests based on field surveys and independent evidence collected on objective criteria including caste factor as appropriate to determine backwardness.\(^11\)

However, the Court felt it necessary to deny reservation to the socially and educationally advanced persons (the so-called “creamy layer”) among the backward classes. The economic criterion thus assumed some importance in the scheme of things. Following this, in some states there have been attempts to classify backward classes into “backward” and “most backward” in order to ensure that the benefits go to the actually deserving persons among the group. The Mandal Judgment also capped reservation at fifty percent. Though the court denied reservation in promotional posts, Parliament introduced Clause 4a to Article 16 and extended the benefits of reservation in promotion as well.\(^12\)

Another issue which came up for adjudication was the scope of reservation in private unaided educational institutions. In the Inamdar case (2005), unaided professional institutions challenged the State’s authority to impose quotas on them. The Court held that the State cannot impose quotas on unaided (minority and non-minority)

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\(^12\) INDIA CONST. art. 16, cl. 4(a).
institutions.\textsuperscript{13} State and unaided institutions may enter into consensual agreement regarding reservation. The Central Educational Institutions (Reservation in Admission) Act, 2007 together with the Ninety-Third Constitution Amendment Act (2005) changed the Inamdar rule and extended reservation to private unaided educational institutions as well.\textsuperscript{14} Only minority institutions are now outside the scope of State imposed reservation.

The Ninety-Third Amendment to the Constitution which introduced Clause 5 to Article 15\textsuperscript{15} came to be challenged in Ashoka Kumar Thakur v. Union of India (2008).\textsuperscript{16} The Court upheld the constitutionality of the amendment which, in principle, recognized the applicability of reservations in the private sector as well.

IV. "\textit{Equality of Status and of Opportunity} is Wider Than What Reservation or Non-Discrimination Can Offer"

In a beautiful statement during the Civil Rights Movement, the American President Lyndon Johnson highlighted the importance of "equal opportunity" in achieving equality in the following terms:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "Now you are free and can compete with the others." This is completely unfair. All our citizens must have the ability to walk through those gates of opportunity . . . . We seek not just freedom but opportunity. We seek not just legal equality but human ability, not just equality as a right and an ideal, but equality as a fact and equality as a result. To this end equal opportunity is essential, but not enough, not enough . . . . \textsuperscript{17}

Equality of opportunity can be understood in two different ways: formal and substantive. The formal approach involves merely openness of opportunity without discrimination. The Constitution no doubt provides this minimal guarantee. But inherent in the right to equality is a substantive understanding of equality of opportunity. This approach involves creation of level playing fields by neutralizing

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\item \textsuperscript{13} P.A. Inamdar v. State of Maharashtra (Inamdar Case), (2005) 6 S.C.C. 537.
\item \textsuperscript{14} The Central Educational Institutions (Reservation in Admission) Act, 2007; Ninety-Third Constitution Amendment Act, 2005.
\item \textsuperscript{15} \textit{India Const.} art. 15, cl. 5.
\item \textsuperscript{16} Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1.
\item \textsuperscript{17} President Lyndon Johnson Addressing at Howard University Graduation (June 4, 1965), quoted in Richard Kahlenberg, \textit{The Remedy} 3 (1996).
\end{itemize}
the effect of differential circumstances. This approach puts a positive obligation on the State to limit discriminatory impact of the burdens of history.

Equality of opportunity may or may not lead to equal outcomes. Unequal rewards are morally acceptable as long as everyone had an equal chance in the race and as long as the unequal rewards were due only to unequal ability or effort.

The formal approach to equality of opportunity places minimum demands on the State. It emphasizes absence of direct or explicit discrimination. It ignores indirect or structural discrimination. A substantive model of equality places much higher burden on the State compared to the formal model.\textsuperscript{18} It demands creating parity of conditions or a level playing field providing equal opportunity for all citizens irrespective of where they live or whatever vocations they are involved in. In this approach, too, the outcomes may justifiably differ; if they are not due to differential circumstances but due only to differential effort or choice then they are morally acceptable and are constitutionally justified. Remedial measures, while necessary, must be sensitive to facts to serve equality in the constitutional sense. The Directive Principles clearly enjoin upon the State a positive duty to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.\textsuperscript{19} This is what substantive equality is about where affirmative action beyond reservation is called for. Addressing this integral approach to equality through generating evidence of unequal circumstances adversely affecting equal opportunity right of groups of persons and proposing affirmative action to remedy the imbalance is the function of the Equal Opportunity Commission.

V. **The Role and Functions of an Equal Opportunity Commission (EOC)**

The EOC is to be a proactive independent agency constantly monitoring inequalities-generating factors and gathering evidence to substantiate discriminatory incidence of circumstances to identifiable groups or resulting in the violation of their right to equality of opportunity. EOC has to intervene to correct the situation for the advantage of deprived sections. An expert committee appointed by the


\textsuperscript{19} *India Const.* pt. IV, art. 38, cl. 2.
Ministry of Minority Affairs of the Government of India under the Chairmanship of the author of this Article drafted the blueprint for legislation that would establish an Equal Opportunity Commission, which is now under the consideration of the Government of India. As and when the EOC is set up, it is hoped that the incidence of indirect discrimination resulting in denial of equal opportunities to groups of persons can be effectively addressed by remedial measures. That will lead to more substantive equality, particularly for the deprived sections, irrespective of whichever identity or identities they possess. For example, if a group of persons living in the far-flung areas of a state complain of denial of opportunities in the matter of access to health, education, housing, or employment, the EOC will get into action by gathering facts and figures in comparison to other areas in the state and statistically assess the extent of deprivation to prove discrimination in respect of investment, facilities, opportunities, etc. If they are proved to be significantly below the state average or the situation in surrounding areas in the state, the failure of equality obligations of the state vis-à-vis that group of persons living in the area is proved, justifying the demand for immediate corrective action. The denial of equal opportunities for all citizens irrespective of where they live or whatever vocations they take violates Article 38(2) and is unconstitutional under Article 14 of the Constitution. Thus the State has no alternative except to take corrective action. This is the constitutional way of remedying indirect discrimination by way of denial of equal opportunities.

Equalization of opportunities to groups who are denied equality in violation of the constitutional guarantee of equality before law and equal protection of the laws is a different approach than reservation of posts, which is an individual right to preferential treatment. The equal opportunities approach takes account of indirect discrimination not discernible in individual cases but ascertainable by empirical evidence and statistical methods in group situations. Furthermore, it does not divide persons in the name of caste or religion but promotes social integration while allowing individual identi-


22 India Const. art. 14.

23 Id.
ties and individual choices. What is being gathered is evidence of differential or unequal situations in which different groups are placed for which they themselves are not responsible. It may be because of political and administrative neglect, or distortions in development, or democratic deficit, or such other reasons outside the choice of individuals who happen to live and work in some part of the country. The Directive Principles of State Policy which are fundamental in governance take cognizance of the prevailing inequalities and have mandated the governments to adopt policies and programmes for equalization of opportunities for all sections of people. If governments fail to do so, resulting in denial of equal opportunities, citizens get the right to challenge such discrimination under the equality provisions of fundamental rights.

Thus conceived, the Equal Opportunity Commission can be a wholesome constitutional instrument potentially much more significant than "reservation" to achieve an egalitarian social order. If reservation is appropriated by dominant sections of the backward classes, the benefits get denied to the poorer sections among them. Even the "creamy layer" formula is unable to rectify the resultant discriminatory situation among people similarly placed. Furthermore, the equal opportunity strategy is applicable to the private sector as well. Diversity is a value which can be constitutionally promoted by evolving a "diversity index" for every organization to follow if they want to claim benefits from the Government and the community. In fact, another expert group set up by the Government has recommended a "diversity index formula" for promoting equality while preserving diversity, thereby making reservation irrelevant in course of time.24

The EOC's jurisdiction should be wide-ranging in terms of social groups and occupational sectors. However, to be manageable, the EOC itself would limit its jurisdiction at any given time in terms of priority of domains which affect the equality status most. And in those chosen domains, the EOC may at a particular time concentrate on particular issues. However, its jurisdiction should extend on chosen domains and issues in both public and private sectors. The expert group recommended that the domains of education and employment should be taken up first by the EOC. Though the EOC is concerned only with group inequality, it can take cognizance of individual complaints on group equality related matters.

The EOC's evidence-based advocacy on indirect discrimination against groups of persons would be an approach unique among human right-based commissions set up by the Government. Generat-

ing, collecting and collating, processing, and disseminating various kinds of data on equal opportunity issues is going to be the key to success of the EOC. Based on its studies, the EOC can announce Codes of Good Practices for different sectors and enterprises. The EOC would conduct General and Special Investigations by following a standard, transparent, fair and time-bound procedure. An evidence-based advocacy role would involve many functions:

i) a research and data gathering function so as to allow identification of beneficiaries;
ii) a monitoring and auditing function, in order to assess the impact of laws and policies;
iii) an advisory and consultative function, for various organs and levels of government;
iv) a policy intervention function, by way of various equal opportunity practice codes;
v) a grievance redress function, in a limited and supportive capacity;
vi) co-ordination function, in its role as an equal opportunity watchdog;
vii) a promotion and advocacy function, aimed at shaping public opinion; and
viii) a reporting and dissemination function, including the preparation and publication of performance reports and Status Reports on the Equal Opportunity situation.

VI. CONCLUSION

EOCs are fast becoming the norm in democracies that are waking up to the challenges of diversity or pluralism across the world. Social identities need to be recognized whatever be the system of governance. The burden of history cannot be wished away by constitutional declarations. Inequalities often coincide with boundaries of social groups and communities, making inter-group inequalities more visible than before. Hence there is a need to address inequalities and supplement the existing policies of reservations by fine tuning the definition of the beneficiaries, expanding the range of modalities, and evolving a forward looking and integral approach to affirmative action. For all of these reasons, India needs an Equal Opportunity Commission.