

Constitutional Studies
Professor Raag Yadava
National Law School of India University
Lecture 12
Right to Equality

Hello everyone. My name is Raag Yadava. I am an assistant professor at the National Law School in Bangalore and I will be stepping in for Professor Sudhir Krishnaswamy this week for the Constitutional Studies, for week 6 of the Constitutional Studies course. I am delighted to be with you this week to discuss what is a very interesting, engaging and controversial topic under the rubric of Constitutional Studies namely - the Right to Equality.

Last week, you were introduced to two parts of the Indian Constitution, the Fundamental Rights chapter under part 3 of the Constitution and the Directive Principles of State Policy under part 4 of the Constitution. This week we will be speaking about and trying to understand a subset of our parts 3 and 4, which concern the Right to Equality and the vision that the constitution puts forward for equality in Indian society and the Indian polity.

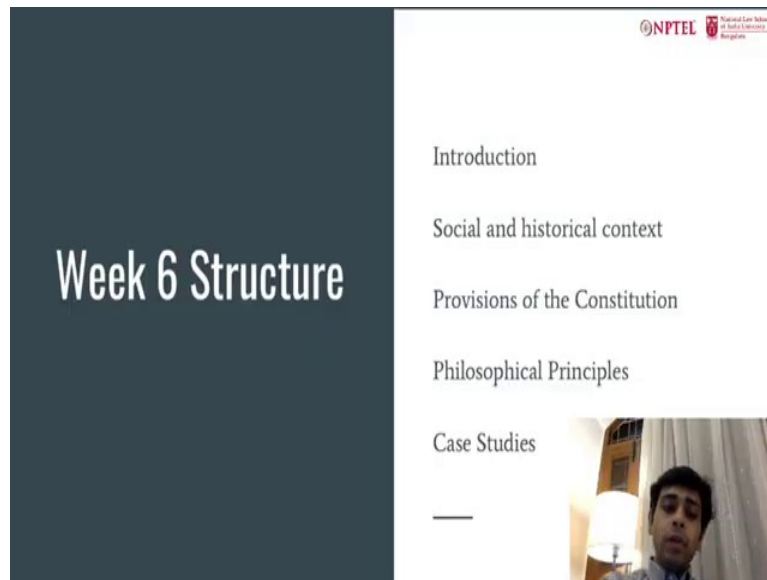
In particular, we will be speaking about Articles 14, 15, 16, 17 and 18 of the constitution under part 3 and Articles 38, 39, 39 a, 41 and 46 under part 4 of the constitution. Now before we get to the text of the constitution and what it says about equality, I would like to make a simple but important observation, which is that the idea of equality unlike other provisions of the Indian Constitution, say the Principle of Federalism or Trade and Commerce, is an idea that is not just a political principle, but also a moral principle.

Now, what do I mean by that? I mean that the idea or principle of equality is something that we struggle with and fight with and try to establish in our own daily lives, whether it is our personal lives or our professional lives. In that sense, the idea of equality is not introduced to us by the constitution, rather it is a moral principle that we all discuss; debate and try to implement in our daily lives.

And so with this in mind, I encourage all of you to look at this week's lessons and what the constitution says about equality in light not just of political debates in the parliament or state legislatures or in the courts, but also as material for you to consider in the application of equality in your daily lives, in fact only then can the real constitutionalism that we spoke about in the first

few lectures come alive when the practice of the constitution becomes an important part of our daily lives in whatever spheres of influence that we carry. So, with that brief remark let us jump straight into this week's course.

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This week will be divided into 5 themes. The first theme is an introductory theme where we will go through the basics of what the principle of equality means in starting from our independence movement and the establishment of the constitution itself. How the political principle of equality has played out in our public debates in independent India, both in the first steps of our republic and in recent debates?

After we have this brief introduction about what the principle of equality means, we will enter a very important aspect which is the social and historical context of Indian Society viewed from the lens of equality and inequality. It is very important for us to have a sense of the kinds of inequalities that we view, that we have in Indian Society, that have been plaguing our society before we address the provisions of the constitution themselves.

In this part we will be looking at caste, class and gender inequalities, which are the 3 primary fault lines that define Indian Society when viewed from the prism of equality. In the third theme we will look at the various provisions of the constitution that I mentioned earlier. We will carefully go through the text of each of these provisions to see what exactly the framers of the constitution had in mind and how these principles play out in our lives today.

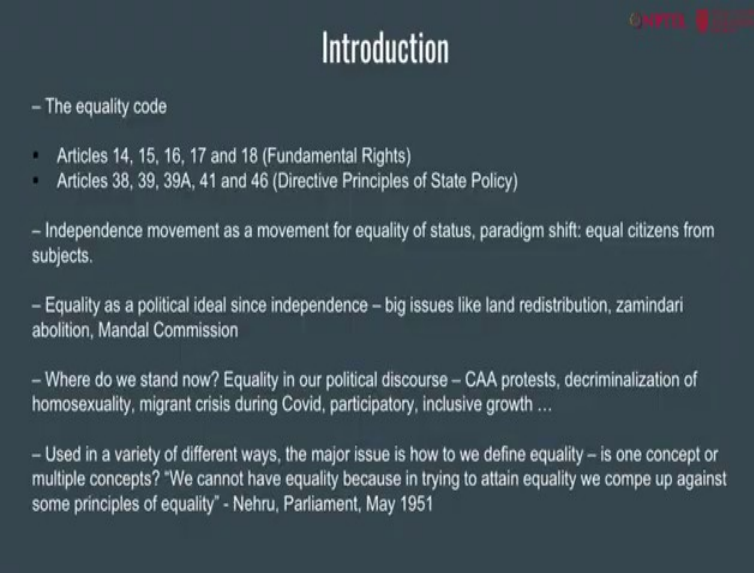
In the fourth theme, we will go beneath the surface, we will see the provisions of the constitution not in the text, but rather the philosophical principles that they are founded upon. Now this is very important because as you will see and as you may have already guessed, the word equality is notoriously difficult to define. Everyone agrees that we need an equal society, you agree, I agree, all of our political leaders, our leaders in business, in governance, indeed in any profession would agree that we must have an equal society.

But there is disagreement all over when we decide, when we enter the question of what exactly do we mean by equality. So, what we will do in the fourth module is to unpack the different meanings that the word equality has and in doing so we will realize that we are actually not talking about one principle but rather a whole range of concepts and ideas that are usually clubbed together under this one word.

Finally, with an understanding of the social and historical context, of the text of the constitution, and the underlying philosophical principles, we will in the fifth module deal with three case studies to see precisely how these principles have played out in real world scenarios. The first case study will be about sex discrimination.

The second case study will be about reservations and affirmative action under the Indian Constitution and the third case study will be about the very famous and somewhat recent case of Naz Foundation where the Supreme Court of India decriminalized homosexuality under Section 377 of the Indian Penal Code. So with that let us proceed to the first module which is the introductory module.

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The slide is titled "Introduction" and features a dark blue background with white text. In the top right corner, there is a small logo for "NPTA" and "NIPUN INDIA". The main content is organized into several bullet points and paragraphs. The first bullet point is "– The equality code", followed by two sub-bullets: "• Articles 14, 15, 16, 17 and 18 (Fundamental Rights)" and "• Articles 38, 39, 39A, 41 and 46 (Directive Principles of State Policy)". The next paragraph is "– Independence movement as a movement for equality of status, paradigm shift: equal citizens from subjects." This is followed by "– Equality as a political ideal since independence – big issues like land redistribution, zamindari abolition, Mandal Commission". The next paragraph is "– Where do we stand now? Equality in our political discourse – CAA protests, decriminalization of homosexuality, migrant crisis during Covid, participatory, inclusive growth ...". The final paragraph is "– Used in a variety of different ways, the major issue is how to we define equality – is one concept or multiple concepts? "We cannot have equality because in trying to attain equality we come up against some principles of equality" - Nehru, Parliament, May 1951".

Now as I noted earlier the so-called equality code under the Indian Constitution can be said to be comprised of two different bunches of provisions; the first is in the Fundamental Rights chapter and the second is in the Directive Principles of State Policy. If we refresh our minds to what we learned last week, the Fundamental Rights are provisions which can be enforced directly by any individual before a court of law.

They are in that sense immediately enforceable and justiciable. The Directive Principles of State Policy however are aspirational goals for the government of the day to consider while formulating its programs and policies. They are not immediately enforceable in any court of law. Now the Articles under the Fundamental Rights chapter that we will be concerned with are Articles 14 to 18, very briefly Article 14 concerns the Right to Equality defined as the equal protection of laws and equality before the law.

We will discuss what this means very shortly. Article 15 ensures that the state cannot prohibit, I am sorry, the state cannot discriminate on the basis of race, caste, religion, sex or place of birth. Article 17 is a unique provision in the Indian Constitution which deals with the social melody of untouchability, which has plagued the Indian Society for many centuries and unfortunately still continues to play a part in large parts of this country. This Article prohibits the practice of untouchability.

We then finally have Article 18, which removes all official titles in India and therefore ensures that we are all equal citizens, there are no princes or maharajas or kings amongst us anymore, we are all equal citizens before the eyes of the law, including the president of India who is nothing more than the first amongst equals. We then get to the Directive Principles of State Policy which we will go over in the coming slides, which concern a wide range of issues that are enormously important to all of us concerning maternity leave, equal pay for men and women, to remove the gender pay gap and a number of other provisions that we will consider.

Now before we jump into understanding these particular provisions of the Indian Constitution, it is important for us to remember that equality as a political ideal has a history in India, especially in modern India, and in modern India this a good place to locate the beginning of this history, of the idea is our independence movement itself. Now as we know before India was independent, Indians were not citizens with equal rights, Indians were rather subjects, subjected to the laws of another sovereign.

What our forefathers fought for and what the political document that is the constitution enshrines is in some ways a movement for the equality of status and that I think is very important for us to remember because this paradigm shift from being subjects to being equal citizens is what is at the very core of our constitution. In fact, this commitment to equality is also found as we saw in the first week of this course in the preamble to the constitution, which commits us to equality of status and opportunity and also to justice social economic and political.

Now ever since independence the ideal of equality has played an enormous role in our social and political debates as you can imagine. Some of the biggest issues that our society has had to deal with like land redistribution and Zamindari abolition, but essentially issues of equality. As we know immediately after independence a large proportion of the land in India was held by a small group of people called the Zamindars and one of the first moves made by the newly elected Indian Parliament was to ensure that we do not remain in a situation where there are large masses of people without land who are homeless, who are landless.

While a few groups, while a few minority of people have enormous access to land and to resources. The entire political motive was to ensure that there is a certain amount of equality in society. Similarly, in a very unrelated issue but again one that has enormous political importance,

the issue of equality plays out and this is the Mandal Commission in the early 90s. As we may know the Mandal Commission was charged with delineating the ways in which the so-called other backward classes; that is groups of individuals who are socially and economically backward would have access to preferential treatment to reservations and affirmative action under the Indian Constitution.

There were enormous protests at the time. But the core of the issue was whether these individuals and these groups of individuals had a claim to a greater share of the resources in India; in other words, was the inequality in that case sufficient to allow for a constitutional provision for reservations for other backward classes. Now if we begin to understand what equality means we can see that in all sorts of fundamental issues that concern our polity, our understanding of equality will allow us to have a greater understanding of how these issues should have been decided.

For example, should reservations have been on the basis of caste or class, in what way should equality of ownership of property and wealth and resources be translated into actual policy programs, what sort of political parties support a more equal society, what sort of political parties follow policies that continue to lead to deepening inequality in India. These are issues that are of fundamental importance to us as citizens and an understanding of the conceptual vocabulary of the idea of equality will allow us to make more informed decisions about some of these issues.

In fact, even if we look to the political discourse today, we see that the idea of equality is very much important and debated. Take for example, the recent protests before the Covid pandemic hit, around the Citizenship Amendment Act, which excluded a certain group of religious minority that is Muslims from the benefits provided to various other religious communities. The primary issue which led to nationwide protests was the exclusion and unequal treatment of a particular religious minority.

Now the government's arguments were, in fact, that Muslims were not equal to others in a number of respects. Our appreciation of the argument therefore depends on how we understood the term equality. Were Muslims to be treated as equals with others for the purposes of the Citizenship Amendment Act or were they as the government claimed different? Again an understanding of the conceptual vocabulary of equality is critical.

Take for example, another case which we will be addressing in much greater detail towards the end of this week, which is the decriminalization of homosexuality under Section 377 of the Indian Penal Code. The Indian Penal Code had long been (16:03) to mean that any acts of homosexuality, even conducted in private, would be subject to the Criminal Laws of India. Now this kind of treatment of sexual minorities that is homosexuals compared to heterosexuals was something that had operated in Indian Society and indeed in many other societies for a very long time.

But should homosexuals be treated differently from heterosexuals? Are they not equal? That is the question that one must consider, again an understanding of what we mean by equality is very important. Take another issue, the migrant crisis during Covid. As many of us would have seen in the newspapers and on our TV screens, heartbreaking picture photos of large numbers of migrants being stranded and being forced to return back to their villages in absolutely horrible living conditions.

Now, the reason why these migrants were affected was because of their unequal status in society, the fact that they did not have access to savings, to money, to resources and indeed to government help in the way that many other people in society, many of us had. This issue again is one of treating individuals equally so that they have equal access to basic provisions, to basic goods, like food, shelter and health.

Indeed, what ties many of these debates is the idea that for India to grow, it must have a participatory and inclusive model of growth and governance where different categories of individuals whether they be men and women, whether they be rich or poor, whether they be of different religious orientations; that each of them be treated equally and that none of them be discriminated against. So what we see is that the political ideal of equality has been used in a variety of different ways from land redistribution to the Mandal Commission to the Citizenship Amendment protests and the migrant crisis.

Now obviously in all of these debates we use the term equality in a number of different ways. So the major issue which we have to grapple with in this week is how do we define equality? What do we mean when we say that India must be an equal society? Is it one concept or is it multiple concepts? In fact, in a very pungent remark, Jawaharlal Nehru in introducing the first

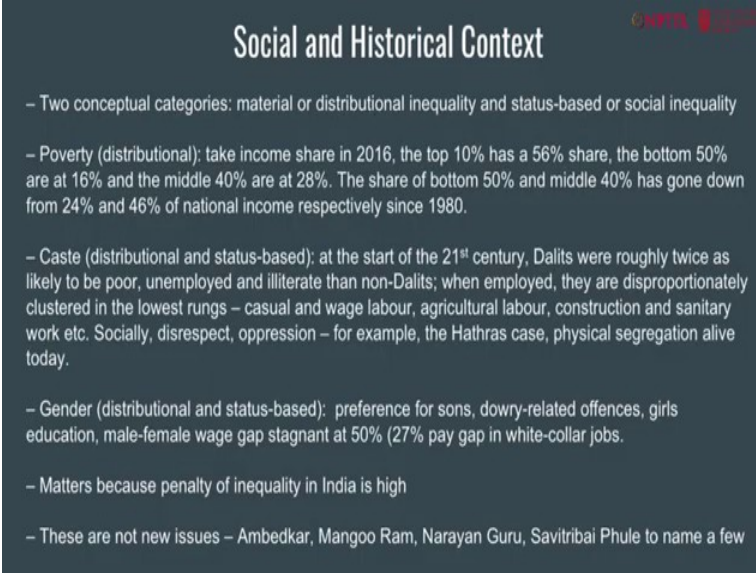
Amendment to the Indian Constitution in 1951, said on the floor of the house that, “paradoxically we cannot have equality, because in trying to attain equality, we come up against some principles of equality.”

Now what Mister Nehru meant by the statement was that in wanting an equal society we often have to balance different interests; two individuals may agree that they want an equal society, but one person's equality may be another person's inequality. A classic example of this is the issue of reservations. In India currently we have reservations for scheduled caste, scheduled tribes and other backward classes.

Now a common question that comes up is, well, if you want to have an equal society then why must we pay attention to these different caste issues. In order to have a casteless society should we not be blind to caste, should we not forget that someone is a scheduled caste or a scheduled tribe or belongs to any particular caste community as we saw in the protests in Delhi with the Gujjars.

One individual may argue that to attain an equal society we must forget about caste, another individual will argue that to attain an equal society we must place these caste issues, right front and center. So, the issue that we will explore and investigate in this week which I hope you will see now has enormous implications is what are the different ways in which the constitution looks at equality? How does the constitution help us think about these various issues? And how exactly are we to understand what an equal society looks like in India?

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Social and Historical Context

- Two conceptual categories: material or distributional inequality and status-based or social inequality
- Poverty (distributional): take income share in 2016, the top 10% has a 56% share, the bottom 50% are at 16% and the middle 40% are at 28%. The share of bottom 50% and middle 40% has gone down from 24% and 46% of national income respectively since 1980.
- Caste (distributional and status-based): at the start of the 21st century, Dalits were roughly twice as likely to be poor, unemployed and illiterate than non-Dalits; when employed, they are disproportionately clustered in the lowest rungs – casual and wage labour, agricultural labour, construction and sanitary work etc. Socially, disrespect, oppression – for example, the Hathras case, physical segregation alive today.
- Gender (distributional and status-based): preference for sons, dowry-related offences, girls education, male-female wage gap stagnant at 50% (27% pay gap in white-collar jobs).
- Matters because penalty of inequality in India is high
- These are not new issues – Ambedkar, Mangoo Ram, Narayan Guru, Savitribai Phule to name a few

Now with this brief introduction, let us proceed to the social and historical context which is the second theme that we will be speaking about in this week's course. Now India has historically as many of you will know been a deeply unequal society. It has been deeply unequal in two ways, in two conceptual ways. The first is material or distributional inequality and the second is status based or social inequality. What do we mean by this?

Material or distributional inequality is when different groups of people are unequal with respect to material goods, that is financial goods, differences in housing, differences in consumption, differences in provision of health care, differences in the wages and the incomes that they earn; in other words, that the material aspects of life are distributed unequally amongst us. And the second kind of inequality is what we call status based or social inequality. Now this is primarily found in gender and caste discrimination.

This kind of inequality is not where you have less or more of any particular thing, but rather that you are not seen as an equal member of the community, that you are not given the respect and dignity that is due to you by virtue of being a human being. The abominable practice of untouchability in India is a classic example of this. Untouchables or members of the Dalit community in the centuries past and indeed in many parts of India even today are not seen as equal members.

They are seen as impure members. They are seen as second-rate citizens. Indeed, this may be the case even if they reach a certain economic status. They may have money, but they may still be subject to social discrimination. They will find it difficult to rent houses, they will find it difficult to get into social groups, and they will find it difficult to receive the social respect and status that all of us are due in society. Indeed, the same thing happens often with sex discrimination in India.

Women especially those who are not part of the workforce or indeed even if they are part of the workforce and are equally capable and diligent and hardworking as their male counterparts are not given the same respect and status. They are considered as inferior in some way shape or form. So these are the two kinds of inequalities that are important to understand in India. Let me just give you some basic facts about these three kinds of inequalities that we have just discussed that is poverty, which is material inequality, caste based and gender based inequality.

To give you a flavor of how unequal our Indian Society is today, in terms of poverty it is quite astounding that in terms of the income shared in 2016, the top 10 percent of the Indian population has a whopping 56 percent of the share of income; while the bottom 50 percent are only at 16 and the middle 40 percent are at 28 percent, in fact since 1980 the share of the bottom 50 percent and the middle 40 percent has gone down rather than gone up.

This includes the period since liberalization of the Indian Economy in 1990, when we have seen the most rapid economic progress and development that modern India has ever seen. One would anticipate that as the fruits of our economic success have grown that all members of the Indian community would benefit and in fact those at the bottom of the Indian society who need greater support would benefit more, but rather what we see through a number of studies which have come out in recent years is that the rich keep getting richer while the poor keep getting poorer.

Now this means that the material or distributional inequality in India is increasing. Now mind you, this may mean that individuals may be relatively better off from what they were some years ago, but in terms of their relative wealth compared to other members of the community, they have gotten worse, therefore inequality is on the rise in India and this is a very troubling factor.

As we will see later in designing the different policies the Directive Principles of State Policy require that the Government Act to help economically weaker sections of society and if these statistics are true then that gives us grave reason to doubt and to criticize the various policies that have been formulated by the government in the last, by various governments of various political parties in the last few years. Take next the issue of caste inequality.

Now at the start of the 21st century Dalits that is members of the scheduled caste and scheduled tribe community were roughly twice as likely to be poor, unemployed, and illiterate than non-Dalits. And in fact, when they were employed they were disproportionately clustered in lower rungs of employment that is casual and wage labor, agricultural labor, construction sanitary, work, etcetera. So the modern industry and the services industry which have been the poster child's of the modern Indian economic story have largely been closed to members of the Dalit community.

And this is an enormously troubling development, indeed even aside from the distributional aspect that is the fact that they were poor and unemployed, socially Dalits today are often disrespected and subject to social oppression not just in villages but also in cities. Take for example, the recent Hathras case, the horrible sexual violence that was committed against a member of Dalit community and the sort of public complicity of the state administration that took place in hiding or trying to attempting to hide this act of violence from the public case.

This again demonstrates the enormous reality and the deeply worrying state of caste inequality in India. In fact, in many parts of India physical segregation is still practiced and therefore the practice of untouchability which is prohibited under Article 17 of the Indian Constitution yet remains a ideal that we must work towards, that is not yet fulfilled in Indian Society. Finally, let us come to the issue of gender discrimination which again is both a distributional and a status based issue.

In India for example, sons are often preferred, we have a number of dowry related offenses that are committed in India in large numbers. Girls are often not provided the same educational opportunities as boys and coming to the workplace the male - female wage gap has been stagnant at 50 percent for the recent past and in fact that is 27 percent even in white collar jobs in urban areas where we think that gender discrimination is no longer a part of the social fabric.

Now all of this matters very, very much because first we must realize that while we have made enormous strides in independent India towards being a more equal society, we still have a long way to go and therefore the provisions of the Indian Constitution that concern equality are extremely important going forward and that each of us must assimilate these principles of equality to try and address in whatever way, shape and form we can inequality at least along these three different axis.

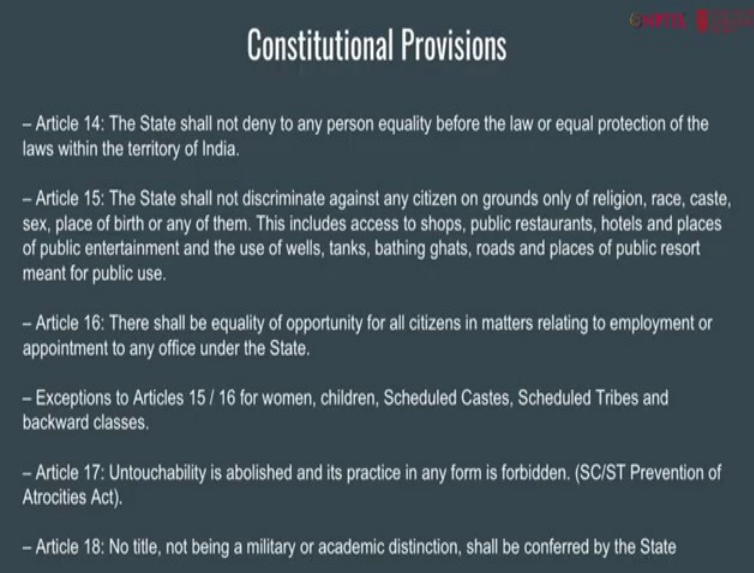
In fact, in India it is particularly important because the penalty of inequality in India is very high. One of the recommended videos that you will see at the end of this lecture is a video by the noted economist and Nobel laureate Amartya Sen, precisely examining this question as to why the issue of inequality in India is so important from an economic and social perspective.

Since we will primarily be focusing on the constitutional provisions dealing with equality, I encourage you, I strongly encourage you to listen to that lecture to get a better understanding of the social and political and economic dynamics of equality in Indian society and why is it that India still remains despite the enormous energy that has gone into our legislation and our economic system, why we still remain a deeply unequal society.

Let me just note though that these are not new issues. The idea of inequality in India has constantly attracted attention from thinker after thinker, from leader after leader and from statesman after statesman. The drafting committee of the Indian Constitution was headed in fact by Doctor B. R. Ambedkar whose name some of you may have heard, who himself was from a Dalit community, who himself came from a very poor background and was subject to practices of social and status based discrimination.

But he was able to overcome these odds and rise to the highest levels in the Indian political sphere as an example for other Dalits and other oppressed classes. But a number of other individuals have been speaking about these issues for a very long time and therefore we would not expect these issues to fade away overnight, but we must remember that it is only by a slow and sustained effort that the idea of equality will manifest in India.

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Constitutional Provisions

- Article 14: The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.
- Article 15: The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. This includes access to shops, public restaurants, hotels and places of public entertainment and the use of wells, tanks, bathing ghats, roads and places of public resort meant for public use.
- Article 16: There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- Exceptions to Articles 15 / 16 for women, children, Scheduled Castes, Scheduled Tribes and backward classes.
- Article 17: Untouchability is abolished and its practice in any form is forbidden. (SC/ST Prevention of Atrocities Act).
- Article 18: No title, not being a military or academic distinction, shall be conferred by the State

Now with that, let us finally come to addressing the Constitutional Provisions which concern the Right to Equality and the ways in which we ought to appreciate and understand them. So in part 3 of the Indian Constitution which we will speak about first, there are 5 articles that we must consider. The first is Article 14, which notes that the state shall not deny to any person equality before the law or equal protection of laws within the territory of India.

Now if we read this Article closely it ensures that all citizens of India are equal before the law, that we all must be treated in the same manner, that no one must be discriminated against, that no one must receive undue favor by the government of the day. We will go into detail as to what the phrases equality before the law and equal protection of the laws means within a moment.

The next Article is Article 15 of the Indian Constitution which notes that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. This includes access to shops, public restaurants, hotels and places of public entertainment and the use of wells, tanks, bathing ghats, roads and places of public resort meant for public use. Now this is extremely important because as we have seen India has known discrimination on ground of religion, caste, sex in a number of different ways.

The Constitution ensures that the state cannot discriminate or provide preferential treatment to any one religious community, any one racial community, any particular caste, any particular sex, whether male, female or transgender or indeed in relation to where and in which state the person

happens to be born, whether in the north or the south of India. Very importantly this includes access to shops, restaurants, hotels and other public places which are not owned by the state.

They are owned by private individuals but are meant for public use. Now this as we will see later is an enormously important and critical aspect of the constitution which ensures that in our public life when we go to the market, when we go to cinema, when we go to any hotel or any restaurant, no owner of any of these establishments can discriminate against us. So it is not just the state that cannot discriminate, it is also any private party which cannot discriminate us as long as that establishment is open for public use.

This is especially important for the practice of caste which because of ideals of ritual impurity segregated individuals. Next comes Article 16 of the Constitution which notes that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. Essentially what this means is that whether it is the state government or the central government or any other body under the state.

This could be a PSU, a Public Sector Undertaking, it could be an independent body constituted by the state under a legislation that all in citizens of India will have an equal opportunity for employment. They will not be discriminated by the state by providing preferential treatment to certain groups of individuals when it comes to matters of employment.

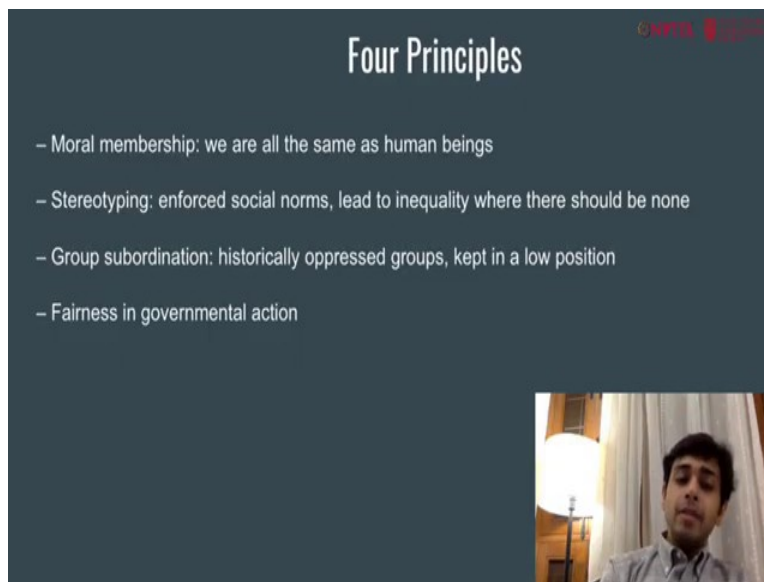
Now it is very important and we will to remember and we will get to this in some detail later that Articles 15 and 16 to the constitution contain exceptions in relation to women, children, schedule castes, schedule tribes and backward classes, the state may make provisions to ensure that these individuals are granted reservations or preferential treatment.

That is to say that for these categories of individuals who belong to disadvantaged or vulnerable or historically oppressed categories of communities, the state may make an exception to the principle of equality and ensure that these individuals are given the necessary help and support to make sure that their idea, that their place in society is established. We will see later how actually these exceptions are part of the principle of equality, rather than being true exceptions to the principle.

We next have Article 17 of the Indian Constitution which as I noted prohibits the practice of untouchability in any form. Now this Article has been used to enact what is known as a schedule caste and schedule tribes Prevention of Atrocities Act which criminalizes any form of untouchability in India. Now sadly the number of prosecutions and successful prosecutions under the Prevention of Atrocities Act have been far below the number of reported instances of caste based injustice in India. That said this statute is on the books in India and formerly criminalizes the practice of untouchability.

Finally, we come to Article 18 of the Indian Constitution which notes that no title not being a military or academic distinction shall be conferred by the state. Now what this means is that unless you are a doctor or an academic who has achieved say a PhD or an MPhil or any other degree or if you happen to be a member of the military, in no other instance shall the state confer any title which places you above or below any other citizen. Like I said there are no more maharajas, there are no more kings in India today; rather we are all equal citizens before the law.

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The slide is titled "Four Principles" and lists the following points:

- Moral membership: we are all the same as human beings
- Stereotyping: enforced social norms, lead to inequality where there should be none
- Group subordination: historically oppressed groups, kept in a low position
- Fairness in governmental action

In the bottom right corner of the slide, there is a small video inset showing a man speaking.

In speaking about equality what we will notice is that these various articles speak about 4 kinds of equality. These are what I will call the 4 principles of equality which we must remember. The first is the idea of moral membership. Now what this means is that as members of the human race, as human beings, we have a basic right to be treated equally as we are entitled no matter who we are, no matter how rich or poor, no matter what religion, race or caste, we are entitled by

virtue of being human beings to a basic minimum of respect and dignity as moral members of the human community.

Now like I said the independence movement was fighting for moral membership. It was fighting to ensure that Indians were equal members of the political community at the international level, that we were not second-rate citizens, that we were not subjects of the British Empire, but rather that we were equal moral members of the British, of equal moral members the same as British citizens. The same thing applies for caste injustices.

The Dalits today are claiming that they have by virtue of being human beings equal moral membership of the Indian political community. They are not to be treated as second-rate citizens who are impure or to be excluded in any way from respect and dignity that they are due, whether at the workplace or at home. The second kind of equality that we are talking about is the equality of non-stereotyping. Now in society and especially with respect of sex discrimination we have many enforced social norms which lead to inequality where there should be none.

Women in India today are often forced into certain social roles of being caretakers, of being inferior at work, of having to be more docile and accommodative than their male counterparts, of being less capable of leading teams, of as we will see less capable of joining the army and serving in combat positions and a number of other discriminatory practices, while there are differences between men and women because of the difference in sex.

There are many enforced social norms of gender which are actually enforced by society without any reason or rationale. We stereotype women; we think that all women are subject to certain broad social norms, which are enforced upon them. Where in fact, they should be treated equally with men and judged on the basis of their individual characteristics rather than some supposed characteristic that they have as member of a group. This is called the stereotyping principle.

Now remember that as we go through this course I will be constantly referring to these principles and we will understand in greater detail how they play out in real life. The third kind of principle which you will see is the principle of group subordination. Now there are historically in India certain oppressed groups, religious and caste based groups, minorities, which have been oppressed through the exploitative action of the majority and kept in a low position.

This principle of group subordination is very important because individuals are subordinated not as individuals, but rather as members of a group and therefore there is a group identity. The entity claiming equality, in this case is not an individual. It is not me going to the government and or to the courts and claiming that I have been treated unequally compared to any other individual, it is rather that my group has been treated unequally with respect to another group. And the principle of group subordination is all too real in India with respect to caste based injustices and indeed with respect to sex discrimination or to discrimination on the basis of sexual orientation for transgender individuals.


Finally, the principle of equality that we must understand is the principle of fairness in governmental action. Now the government makes a number of decisions every day and every year and one of the basic principles of fairness in governmental action which we will see in the very next slide is the principle that like cases must be treated alike, that no two individuals who are similarly situated must be subjected to differential treatment. This basic principle of fairness is enshrined in the Indian Constitution and must be kept in mind as we go through this course.

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GATEWAY TO KNOWLEDGE

Article 14

- The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.
- 'Equality before the law' and 'equal protection of the laws': what do these expressions mean?
- Equality, intelligible differentia and rational nexus.
- Fairness, reasonableness, non-arbitrariness of government action, no preferential treatment to favoured groups.
- Case study: Babita Puniya, Supreme Court, February 17, 2020
- Case study: maternity and paternity leave
- Basic principle of justice: treating like alike, in law as in life
- The conundrum: how we decide if two situations are alike?



So let us now come to Article 14 of the constitution. Article 14 notes that the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Now if you notice there are two expressions here to which you must pay close attention. The first is the expression equality before the law and the second is equal protection of the laws. Now

what do these expressions mean? The phrase equality before the law means that all citizens of India or all persons shall be subject to the same ordinary law of the land administered by the ordinary law courts.

It establishes that there is an absence of privilege in favor of any particular individual no matter who you are, rich or poor, in an official capacity or non-official capacity, whether you are high or low on the social ladder. This therefore, is one of the cornerstones of the Indian equality code. The idea that no matter who you are the same law of the parliament or the state legislature applies to you just like every other citizen of the country.

The second phrase which is equal protection of the laws means that individuals who are situated in similar circumstances shall be treated equally by the state and those who are situated in different circumstances may be treated differently by the state. Now what does this mean? Now this principle is actually one of the oldest principles of justice that we can trace back to the famous philosopher Aristotle, which is the idea that like must be treated like. Now let me just give you an example of this and to invite you to do a small thought experiment with me.

Imagine that in this MOOC, that in this course, we said that all individuals above 6 feet will be given a better grade or that all women will receive a better grade. Now this obviously is incorrect. You will say that it is not correct that you create a classification of individuals those who are above 6 feet and those who are below 6 feet or men and women, because that has no purpose, no relationship to what we are trying to do in this course.

So when we have the evaluations for this course whether it is the assignments every week or your final exam paper, what we are trying to do is to sift through students to try and understand who has prepared better, who has understood the material and who has grasped the major concepts. So therefore we create classes of individuals based on a criterion that is relevant for the objective we have in mind that is to test students on their knowledge.

Now this may seem a very flippant example, but what the phrase equal protection of the laws does is make sure that any government rule, regulation or legislation, which creates a classification of individuals, has a relationship to the objective that is being achieved. In the law we note that there must be an intelligible differentia between the categories of people who have been put within the legislation or within the rule and those that have been left out and that this

intelligible differentia must have a rational nexus with the objective that the legislation or rule seeks to achieve.

In our case the rule seeks to achieve the objective that we test students on their knowledge of constitutional studies and therefore the classification that I must create, the differentia, the intelligible differential I must create must bear some purpose to that end, therefore the only differential is to have an exam system, which places individuals who have prepared better or have worked harder into one category, and those who have not into another category.

Therefore, the principal underlying the phrase equal protection of the laws is that government in its action needs to create classifications. Certain categories of people need to be provided tax benefits, other categories of people need not be provided those tax benefits, certain categories of people will be entitled to certain services, other categories will not be entitled to those services, but when the government makes such a rule, it must ensure that the classification that it creates is intelligible and that this classification has a bearing, a rational nexus with the objective of that legislation.

This codifies the principles of fairness, reasonableness, non-arbitrariness of government action and an absence of preferential treatment to favored groups. Now let us take an example of this, so that you understand this better. This example is a case that was heard by the Supreme Court of India and on which judgement was pronounced earlier this year in the matter of Babita Puniya. Now the case of Babita Puniya concerned recruitment of women in the army.

Section 12 of the Army Act prohibits the recruitment of females into the army except where and to the extent that the central government might allow. Now the central government had over the years allowed for the inclusion of women in certain cadres and in certain branches of the army, but it excluded women from all command positions. So no woman could enter a command position in the army. So what was the differentia or the classification created by the legislation?

The legislation said that there are two categories, men and women. Men can join the army and be in command positions; women cannot join the army and be in command positions. So is this an intelligible classification? Yes, it is an intelligible classification, but does this classification have any rational nexus with the objective sought to be achieved? The Supreme Court ruled that it does not. Now let us first understand the argument that the government gave.

The government said that women are different from men for the purposes of joining the army in command positions because of four reasons; first - that because of pregnancy, motherhood and domestic obligations women will often have to abandon their posts. Second - that women are different from men in terms of their physical capabilities. Third - that all male units have a quote-unquote “peculiar dynamic” by which they operate and so therefore women do not fit into that peculiar dynamic.

And finally, the government argued that there were issues of hygiene by which I presume that they refer to issues of reproductive hygiene. So the argument made by the government which you must consider before I tell you what the Supreme Court said is that because of these 4 reasons there is a nexus between the categories created by the legislation, because women are not able to serve in command positions because of these 4 reasons therefore the government is allowed to discriminate between men and women.

Now do you think that this classifies as an intelligible differentia with a rational nexus to the objective of the government? Does it fall foul of the equal protection of the law's clause or is it consonant with the clause? The Supreme Court ruled that this legislation was unconstitutional because it discriminated between men and women in a way that was not in keeping with the phrase “equal protection of the laws.”

The the Supreme Court first noted that the decision of the union government recognizes in other parts, recognizes that physiological features of a woman have no significance of her equal entitlements under the constitution. Further the Supreme Court noted that these arguments that were advanced are based on sexual stereotypes premised on assumptions about socially ascribed roles of gender, which discriminate against women.

Underlying the statement that it is a greater challenge for women officers to meet the hazards of service owing to their prolonged absence during pregnancy, motherhood and domestic obligations toward their children and families is a strong stereotype which assumes that domestic obligations rest solely on women. Reliance on the inherent physiological differences between men and women rests in a deeply entrenched stereotypical and constitutionally flawed notion that women are the weaker sex, it may not take undertake tasks that are too arduous for them.

Now these arguments focused on physical strength of weaknesses of men and women clearly rest on assumptions about women in the social context of marriage and family and these are not constitutionally valid basis for denying equal opportunity to women officers. This was the ruling of the Supreme Court. Was that the government may discriminate against men and women, that is perfectly fine, that is understandable, but when it discriminates between men and women it must do so in a way that the difference has some bearing, has a rational nexus upon the job that needs to be done.

That some women may decide to bear children, that some women may decide to focus on raising families, that some women may not have the physical capacity does not mean that we can extend that stereotype to all women. All women as we saw are not subject to these gender roles, therefore what the court has done is to ensure that women are included within the fold of the army and by doing this given us an understanding of what the phrase equal protection of the laws means.

Now contrast this case study with the case study of maternity and paternity, now in many places, in many organizations women are given a longer maternity leave than men are given a paternity leave if men are given a paternity leave at all. Now is this also equally then unconstitutional. Examine the argument; women are given a maternity leave of a longer period because of the physical exertion required by childbirth and by breastfeeding.

Whereas men who may take a paternity leave to assist in the raising of the child, to spend more time with the child and to participate in the raising of the family, do not have these additional physical exertions that they must perform and therefore one understands why women may get a longer maternity leave than men, although there too one must consider the reasons for why a maternity leave is longer than a paternity leave. Is there a rational nexus between why men have less leave and women have more leave?

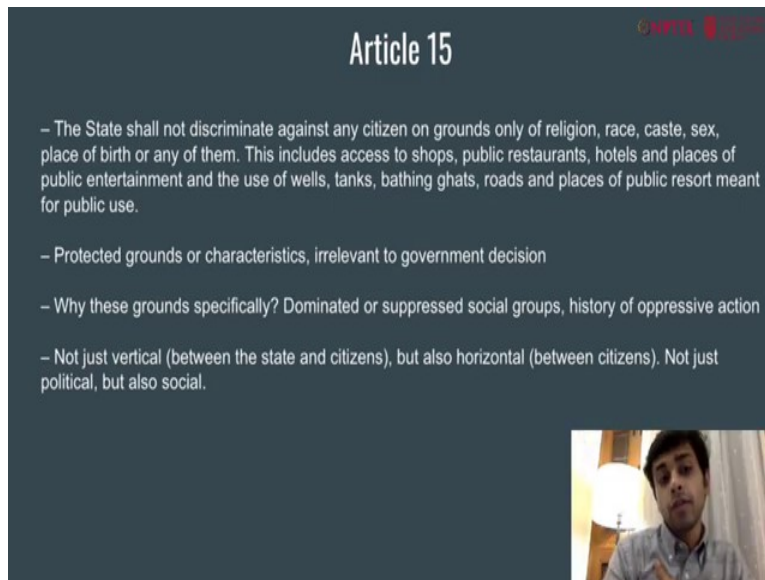
And the fact that women are subject to physical exertion during the act of childbirth. That is an argument to say that they do and therefore one can understand when we compare and contrast the case study of Babita Puniya and the case study of maternity and paternity leave, to understand why in some instances the difference in the biology and the sex of men and women could result

and should result in differential treatment. But in many other instances the difference between men and women is not one in reality that exists between them.

Rather these are enforced gender stereotypes where women are forced to take upon certain roles not because they want to or they chose them or it is within their nature, but rather because it was enforced upon them by some governmental rule or regulation or parliamentary legislation. And it is precisely to make sure that we can separate and sift through these various instances that Article 14 contains the equal protection of the law's clause. Again the basic principle of justice that underlies this analysis that we have done is the principle that we must treat like alike and we must treat those who are placed differently differently.

Now this is true in law as in life. So, the basic conundrum that we are trying to understand in Article 14 is that whilst everyone is subject to the same law when the government creates a classification, how do we decide if two groups of people one who has been introduced within the legislation and the other who has been kept out of the legislation are situated alike or are situated differently for the purposes of that legislation? And it is in this conceptual exercise that the core provision of Article 14's equality guarantees lies. Now that was Article 14.

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The slide features a dark blue background with the title 'Article 15' in white at the top center. In the top right corner, there is a small logo for 'NPTEL' and 'IIT KANPUR'. The main content consists of four bullet points in white text. In the bottom right corner, there is a small inset video frame showing a man speaking.

Article 15

- The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. This includes access to shops, public restaurants, hotels and places of public entertainment and the use of wells, tanks, bathing ghats, roads and places of public resort meant for public use.
- Protected grounds or characteristics, irrelevant to government decision
- Why these grounds specifically? Dominated or suppressed social groups, history of oppressive action
- Not just vertical (between the state and citizens), but also horizontal (between citizens). Not just political, but also social.

Let us move on to Article 15 of the Constitution. Article 15 says that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. This includes access to shops, public restaurants, hotels and public places of public entertainment and the use of wells, tanks, bathing ghats, roads and places of public resort meant for public use. Religion, race, caste, sex and place of birth are known as protected grounds or characteristics.

Now usually we can say that these ought to have no place in the decision of the government. They should be irrelevant to government decision. It should in the ideal course of things not matter whether I am a Hindu or a Muslim or a Sikh. It should not matter whether I am Caucasian or of another racial background. It should not matter whether I am from upper caste or lower caste, whether I am a man or a woman or whether I was born in the northern part of the country or the southern part of the country.

So prima facie that is to say at first blush, the state cannot discriminate against any citizen simply because they happen to fall foul of any of these particular protective grounds or characteristics. Now you may ask why these grounds specifically? There are many reasons why the state should not discriminate. But why does Article 15 list these 5 grounds. Now this has its roots in history. There is huge has been and a history of oppressive action against individuals, against social groups based on these protected characteristics.

These characteristics have what we call socially salient features that is to say that certain groups of individuals have usually been dominated or subjected or suppressed because of these different characteristics and therefore the drafters of our constitution thought it fit and prudent to place these characteristics in the explicit text of the constitution so that no government could make any legislation which discriminated individuals on this basis.

Indeed, one must examine whether the Citizenship Amendment Act discriminates on the basis of religion. But at the same time, one must note that Article 15 is limited to citizens, while Article 14 applied to all persons. Article 15 is limited to citizens of India and therefore those who are not citizens cannot claim the protection of Article 15. Now another important aspect of Article 15 is in the second part of Article 15 where it notes that this prohibition does not apply simply to the state, but rather also to shops, restaurants, hotels, places of public entertainment, indeed any place of public use.

Now what this means is that the protection is not just vertical between the state and the citizens, but also horizontal that is between citizens. In other words, Article 15 prohibits discriminatory treatment which is not just political but is also social. Now this is a critical and revolutionary and radical step in the Indian Constitution which makes sure that the constitution is not just a politically transformative document, which binds the government of the day to certain norms of conduct.

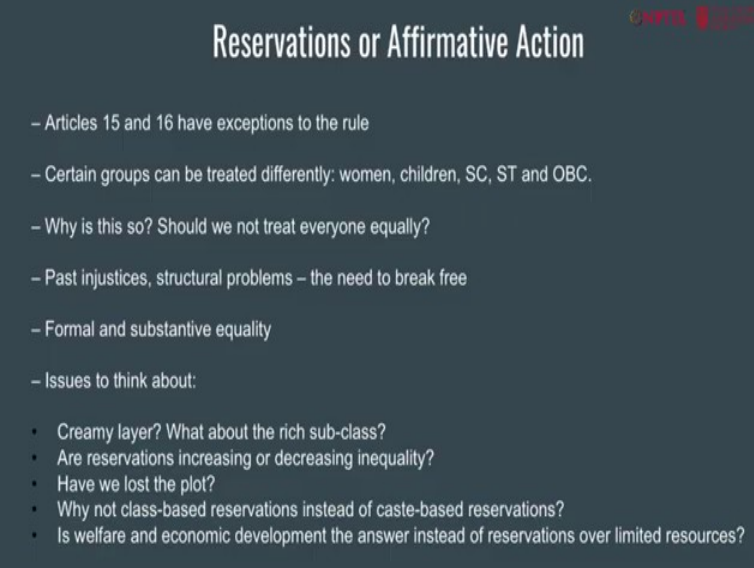
But rather it also says that citizens in their relationships with each other cannot subject each other to discrimination on the basis of religion, race, caste, sex or place of birth. The constitution therefore heralds not just a political transformation but a social transformation. Please note however that this restriction applies only to places for public use. The constitution does not tell us what we can do or cannot do in our private lives, where a large amount of discrimination happens, especially in relation to matters of caste and of sex discrimination.

Indeed, this is a topic that one, we must consider in some greater detail as we go through in our lives as to whether the discrimination that we see is occurring in the public sphere or the private sphere. If it is occurring in the public sphere then one can look for the constitution and to its various provisions to see whether there is any remedy, but if the discrimination is happening in

the private sphere we must use other modes of persuasion and of influence to see what we can do about lessening the discrimination in that sphere.

As I said at the beginning of this lecture, the ideal of equality is not just a political principle but also a moral principle and when discrimination occurs in the private sphere is when our moral principles are involved because that matter is beyond the control of the state.

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The slide is titled "Reservations or Affirmative Action" and features a list of bullet points. The text is white on a dark background. The bullet points are as follows:

- Articles 15 and 16 have exceptions to the rule
- Certain groups can be treated differently: women, children, SC, ST and OBC.
- Why is this so? Should we not treat everyone equally?
- Past injustices, structural problems – the need to break free
- Formal and substantive equality
- Issues to think about:
 - Creamy layer? What about the rich sub-class?
 - Are reservations increasing or decreasing inequality?
 - Have we lost the plot?
 - Why not class-based reservations instead of caste-based reservations?
 - Is welfare and economic development the answer instead of reservations over limited resources?

Now there is a very important issue in Articles 15 and 16, which we have not yet addressed, which is that both these articles have exceptions to the rule. Both these articles note that certain groups of individuals namely women, children, schedule cast, schedule tribes and other backward classes can be treated differently. That the state may provide for reservations or affirmative action, for preferential treatment, for these categories of individuals in instances where otherwise these would be prohibited.

Now why should this be so? Why should we not treat everyone equally? Now, this is because women and children as also SCs, STs and OBCs are subject to special considerations which need to be taken into account. Particularly women, schedule caste, schedule tribes and other backward classes have been subject to past injustices and to structural problems, which mean that if we were to apply the same rule to everyone, the net result of that rule would be that these categories of individuals would be excluded.

That is to say, we would have a system of formal equality but not of substantive equality. Take the following situation; imagine that I say that in the examination for to enter a particular college or university I will test English and Mathematics. Now it so happens that members of the scheduled caste and schedule tribe community because they are socially and economically backward do not have the same educational attainment as members of the higher caste communities.

This is because for many centuries they have been subjected to discrimination and to oppression. As a result, it will mean that lesser number of scheduled caste and scheduled tribes members will make it to the college and pass this entrance examination. The entrance examination is not in itself discriminating on the basis of caste, it is only testing English and Math which is perfectly right. But the result of this formal equality will actually be substantive inequality.

And this is the core principle of reservations and of affirmative action that we have to think about, which is that in instances where there has been a long history of subjugation and oppression, the state needs to take additional measures to make sure that these groups of individuals break free of these structural patterns of discrimination, left to our own devices if we are formally equal and blind to caste and blind to the exclusion of women, these inequalities will continue.

Indeed, one of the reasons why as we noted earlier in our discussion of social and historical inequality, one of the reasons why women and members of the lower caste communities have continued to remain excluded is precisely because the fact that the structural inequality of the past continues today, that while we may say today that our examinations are based on the principle of merit that our job interviews are based on the principle of merit.

What ultimately happens is that we choose not individuals who are meritorious, but rather that we choose individuals whose merit is a reflection of their high caste status or of their status as men and there are these implicit structural biases and norms that continue unaddressed until we take the radical step of ensuring reservations or affirmative action in India to make sure that these past injustices are corrected as we move forward.

As we will see in the next lecture, this idea of formal and substantive equality is critical in our understanding of equality in Indian Society. Now having said this, having said the fact that the

Constitution allows reservations and affirmative action, the issue is one which is extremely thorny and requires us to think about many, many aspects before we can come to any definitive answer. The first issue that we must think about which is an issue that many of you may have heard of is the issue of the creamy layer.

A creamy layer is a subclass of the members of the schedule caste and scheduled tribe and OBC category, who while they are subject to the same discrimination and injustice as other members of the community have managed to rise above it. So many members of the schedule caste and schedule tribe communities for a whole variety of reasons have now managed to make it to positions of power, have now managed to make it to positions of economic success, and of wealth.

Now should we exclude these people from these reservations? Should we exclude the creamy layer from the benefit of the exceptions provided under Article 15 and 16? Should this rich subclass be able to siphon away the benefits that have been provided to the larger community? This is the first issue that we must think about. The second issue we must think about is whether these reservations while well-intentioned are actually increasing or decreasing inequality.

There has been an argument that especially amongst members of the OBC category, the Other Backward Classes category that OBC reservations are no longer about ensuring that members of these backward classes are able to catch up with the rest of society and receive compensation for the historical injustices that have been meted out to them. Rather it has become a political issue where people instead of trying to break free of these negative identities are in fact using these negative identities as political cards to receive access to jobs, to receive access to other resources.

Now this obviously was not the purpose or the point of reservations or affirmative action. The point of reservations was to ensure that these categories are provided preferential treatment with the view that in some time, in some years the very need for these reservations will go away, but rather what seems to be happening, at least arguably, is that these identities are getting more and more entrenched because they have political value today.

They have political value in ensuring that they receive access to government's resources, in ensuring that they receive access to government patent and therefore we must think whether we

have lost the plot, whether these reservations or affirmative action must have a limited time period, whether they must be defined in particular ways, so as to ensure that individuals are not able to play a game in which there is a marketplace of identity politics.

This in fact leads us to the next question which is why not have class based reservations instead of caste based reservations? A major issue in India today is that individuals of the OBC category are often using their caste names instead of relying on the underlying economic or educational backwardness, which ought to be improved. In this way, caste identities are getting entrenched.

So is the answer then to improve our economic development and to ensure that there is a greater wealth of resources that we generate through economic development, which can then be spread across larger sections of the society to schedule caste, scheduled tribes, OBCs and to women and children or should we continue the system where limited number of jobs in the public sphere, jobs offered by the state are subject to this kind of bargaining process by different caste categories.

Is the answer then not to increase the size of the pie rather than fight over who gets which slice of this small little pie? Now in all of these, we must keep in mind that Article 15 and 16 had a clear and definite purpose; that is to make sure that members of these subjugated and vulnerable categories are provided the necessary help and support they can, so as to become members, equal members of society and to receive the necessary help to lead to an inclusive social and political fabric.

While that basic principle is laudable and ought to be supported, we must see whether the means and mechanisms of reservations or affirmative action are actually leading to this end or whether they are deviating from that end. Thank you very much for listening into this lecture. In the next lecture, we will be addressing the directive principles of state policy and moving on to the fourth theme which is the philosophical ideas that one must keep into mind when addressing these provisions of the Constitution. Thank you very much.

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Please watch - Why Is the Penalty of Inequality So High in India?

By Amartya Sen

Youtube Link - <https://youtu.be/wIR-VsXtM4Y>