Chapter V
Re-imagining the State of the Law through the tools of Transformative Constitutionalism

Introduction
This Chapter largely deals with what the ‘state’ ought to do in terms of its constitutional obligations on matters of one’s intimate-life choices, relationalities—eros, erotica, the social and its public manifestation. Hence, the primary question—why the Indian state and its law ought not continue to get involved in the re-production and re-enforcement of the hegemonic structure of the heteronormative kinship and family under a democratic and constitutional order? This way, the Chapter challenges the systemic efforts that purport to reflect a natural desire for the institution of marriage—how it actually draws upon and, endorses the state’s deep involvement in shaping our ideas of human intimacy and connection, in guiding our desires, and in persuading us to assume status-like relations with respect to one another.570

Family has been a site of one of law’s project to regulate and control sexuality, reproduction and parenting and, this has historically disadvantaged the gender and sexual non-conformists. This depicts the state’s core mission of heteronormalizing all human-relationships. Speaking about ‘family jurisprudence’, it is as if, we cannot imagine this piece of legal thought, without the institution of marriage, or without the heteronormatively mandatory, essential norms such as, dyadic relations, monogamy in relations, sexual privacy of the married couple (which is the main reason of marital rape and, other forms of domestic sexual violence) etc. There are persons living outside these heteronormative realms (in ways, seen through the participant-narratives) and, the core purpose of this chapter is to examine what ought to be the role of the state, given its constitutional commitments to the people of India.

The family as a socio-legal discourse is formally about heteronormative ideas/values like coverture, dyadic heterosexuality, monogamy, marriage, or sexual privacy, demonising incest and adultery, etc. Our Family Jurisprudence is so imbued in heteronormativity that, it is almost impossible to think of alternative forms of doing families, viz., child-births, parenting, property-succession, et.al. It is being forever, that non-heteronormative relations have been kept away from accessing law’s benefits on matters of family formation and doing families. Indeed, a core historical purpose of

570 Supra note 14 at 17 and footnote 3.
family laws has been the promotion of heterosexual, monogamous marriage and patriarchal gender relations.\textsuperscript{571}

The work produced in the previous chapters demonstrates the impact of the theory and praxis of family jurisprudence on queer lives and queer relationalities. It clearly shows the deep role of the state, and its laws in the monolithic production and enforcement of the heteronormative social relations of power. The lived experiences of the queer provide us with ethnographic details, the ways in which law, and the state operate—this allows us, as an academic community a bottom-top perspective, to understand the narratives that do not form the dominant discourse. Such ethnographic data is useful to map the gaps between the real obligations/locations of the state/law, \textit{vis-à-vis} the constitutional obligations/locations of the state/law in queer lives. The generation of new epistemic-literatures at such levels is much needed, keeping in mind the existing-conventional episteme of heteronormative (top-down) references in family jurisprudence. As Kim Lane Scheppele explains the role of \textit{Constitutional Ethnography} as: “its goal is to better understand how constitutional systems operate by identifying the \textit{mechanisms} through which governance is accomplished and the \textit{strategies} through which governance is attempted, experienced, resisted and revised, taken in historical depth and cultural context.”\textsuperscript{572} This way, constitutional ethnography is the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape.\textsuperscript{573} While constitutional ethnography emphasizes the particular, it has theoretical ambitions. Theory is “a precursor, medium and outcome of ethnography, study and writing”.\textsuperscript{574} In the end, what one has is not a universal one-size-fits-all theory, or an elegant model that abstracts away the distinctive, but instead a set of \textit{repertoires} that can be found in real cases and that provide insight into how constitutional regimes operate.\textsuperscript{575} Based on the set of repertoires, then it becomes easy to understand how the constitution works in certain specific circumstances. As Scheppele says: “Constitutional ethnography has as its goal, then, not prediction but \textit{comprehension}, not explained variation but \textit{thematization}.”\textsuperscript{576}

\textsuperscript{571} Laura T. Kessler, “Transgressive Caregiving”, in \textit{Supra} note 90 at 354.
\textsuperscript{573} Id. at 391.
\textsuperscript{574} Paul Willis, Mats Trondman, "Manifesto for Ethnography," 1 \textit{Ethnography} (2000) 5 at 7.
\textsuperscript{575} \textit{Supra} note 572 at 391.
\textsuperscript{576} Id.
The previous chapters produce a ‘re-imagined state of the law’ from the queer lenses—and, this chapter is mainly aimed to produce a theoretical justification to such ‘re-imagined state of the law’ from a constitutional perspective. Broadly, these are the following demands that are brought forth in the previous two chapters, which I call as the ‘re-imagined state of the law’:

i. The state must withdraw from its existing impositional roles of normalising/enforcing heteronormative relationships/families through the social institutions of marriage and kinship;

ii. The law must respect the freedom of all individuals to form the chosen relationalities/families of their own choice; and, in order to facilitate this freedom of choice the law must respect if any individual wants to legally enforce its chosen relationalities through freely agreed terms of a valid contract with other individual(s) of its choice;

iii. In order to actualise law’s formal commitment to withdraw its role/participation in the monolithic enforcement of heteronormativity (as is imagined), the law must open-up all the privileges/exemptions/benefits/protections that it endows upon the heteronormative/marital family (and the individuals associated with it) to the newly contracted relationalities (and the individuals associated therein) as well;

iv. To incorporate a supportive ecosystem of equal opportunities to all those who choose to do their own kind of relationalities, certain incidental changes in the existing legal structures are needed:
   a. Repeal of Section 377, IPC;
   b. Repeal of Section 8 of ITPA;
   c. Enacting a law on anti-discrimination in public and private spaces on grounds of sexual orientation, gender and marital status;
   d. Amending the substantive provisions that define sexual offences to make them gender-neutral;
   e. Amending the substantive provisions dealing with domestic violence to make them gender-neutral;
   f. Amending the substantive provisions that define kidnapping and, abduction in the IPC so that run-away queer couples cannot be harassed through juridical means;

v. Enacting the necessary legal changes to incorporate the directives of the Supreme Court as was given under the NALSA v. Union of India judgment;

vi. Engaging with the medical, psychiatric, nursing fraternity and, their respective regulating bodies so that the episteme and practice of such fraternities is made SOGI inclusive;

See Conclusions I to IV of both, Chapters 3 and 4 to understand, what I call as the ‘re-imagined state of the law’.
vii. Engaging with the educational bodies that regulate school and higher education so that the existing curricula are made SOGI inclusive;

With such objects in mind, the scheme of this chapter is divided into two sections. The first section provides ‘an orientation’ into the theory of reading constitutionalism as a tool of transformative justice—an exercise of re-imagining the constitution as a vehicle of meaningful social and legal change. Here, I have attempted to draw a genealogy of Constitutionalism through its dual-pasts that may be identified as liberal and post-liberal—wherein, I try to map the location of the Indian Constitution through its formative and interpretative discursivity. Taking the clue from Jacques Derrida and reading its extensions through the works of Upendra Baxi, Ranabir Samaddar, Karl Klare and, Kalpana Kannabiran, I try to discuss the mystification/justification of constitutionalism’s multifaceted roles in re-defining justice; and, how the ‘foundational violence of law’ and the ‘politics of forgetting’ very successfully have contributed to a sense of denial and betrayal to the otherwise legitimate claims of the subaltern (the queer). This sense of denial and betrayal of the subaltern’s legitimate claims, hopes, and desires are further nuanced through the theorisations of Wendy Brown and Oishik Sircar wherein, they discuss the inherent and inevitable paradoxes of the liberal rights’ regimes and their cumulative-impact that creates certain special ontological sites for the subaltern—the sites of the disadvantaged. This section, after discussing the crisis within constitutionalism, goes to further discuss the growing epistemology of ‘transformative constitutionalism’ or, ‘insurgent constitutionalism’—taking it as an exercise of re-reading the constitutional text, its histories of rupture and connections with the past, and developing certain new scales of re-articulating the frames of constitutional justice, attempting to re-define its understanding of failures and successes. Overall, this section provides an orientation to the reader about the theoretical lenses and methodologies (i.e., transformative constitutionalism) that are used to theorise the constitutionality of the ‘re-imagined state of law’ (as was proposed through the works in Chapters 3 and 4).

The second section uses the frames of transformative constitutionalism to re-evaluate the abstract power relations that are produced through the impact of certain hegemonic ideologies (i.e., heteronormativity, in particular) over onto the theory and operation of the Indian constitutional order. In other words, it discusses the primary question—how can the scales of constitutional justice be perpetually tilted to favour the heteronormative power relations at all possible times and spaces? Deliberating on this question, the discussion takes us to understand the shifting bases of constitutional thinking—and, specifically onto the question, why Indian Constitutionalism ought not be tilted in favour of the dominant narrative of justice, i.e., heteronormative justice;
and, why is it important to substitute the hegemonic order of heteronormative justice with the power of constitutional justice?

This second section, further deliberates upon the use and efficacy of certain insurgent tools of constitutional justice that could be deployed as an attempt to transform the meaning and working of certain conventional principles of constitutional justice—namely, the new relationships formulated through the works of Upendra Baxi, Tarunabh Khaitan and Kalpana Kannabiran (e.g., trying to re-understand the relationship between discrimination and liberty through an extended analysis of Article 15 with Article 21 and the golden triangle jurisprudence espoused by the Supreme Court in Maneka Gandhi or, to re-imagine swaraj through a fresh reading of Article 15). In short, this section discusses the various constitutional means to fructify the ‘re-imagined state of the law’ as proposed through the analysis of queer narratives demonstrated in Chapters 3 and 4 of this thesis.

1. Re-articulating Constitutional Justice through the tools of Transformative Constitutionalism: an orientation

What all is signified by constitutionalism? Is it a mere abstract discourse, or are there any essential parameters that may definitely put on certain boundaries? Apparently, there seems to be no accepted definition of constitutionalism but, as put forth by the scholarship of Professor Michael Rosenfeld, “in broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.”

But, then, what are the relationships between having constitutionalism and having a constitution? And, more essentially, what are the concomitants of ‘constitutional justice’, if any? Is there only one universal format/template for ‘constitutional justice’? More on the idea of constitutional justice in the next section; for now, a few remarks on constitutionalism are in order. At a more basic and formative level, Professor Baxi classifies the idea of having constitutions at three interlocking planes with descriptions of his three Cs:

i. C1: are the constitutions for which “words are their world” (constitutional text)—the site of initially formulated historic constitutional texts (in the history of any constitution);

ii. C2: are those moments/spaces in the “constitutional idea” that represent constitutional hermeneutics—also called as constitutional law or the constitutional interpretation.\(^{581}\)

iii. C3: this signifies constitutionalism—“a set of ideological ideas that provide justification/mystification for constitutional theory and practice”.

According to Baxi, these are the three different ‘forming practices’ that may constitute the idea in complex and contradictory mode, of a constitution. He believes that, “an understanding of forming practices helps us evade nominalism and essentialism, and raises questions concerning what Edward Said called the authority of authority.”\(^{582}\)

Of course, to be able to question the authority of authorities one must have an understanding of what the promissory component in a constitution is Is it that easy, a task? If it was, there would perhaps be no need for so much literature on this. The hard side of this matter is that, what is promised in a constitution is always a field for open contestations and deliberations—perhaps, that’s why democratic frames acquire an important dimension in the life of such dialectics. As Bhim Rao Ambedkar puts forth on one of the last days of the deliberations in the Constituent Assembly:

> “On the 26th January, 1950, we are going to enter into a life of contradictions. In politics, we shall be recognising the principle of one man one vote one value. In our social and economic life, we shall, by reason of economic structure continue to deny. How long shall we continue to live this life of contradiction? If we continue to deny it for long, we will do so by putting our democracy in peril.”\(^{583}\)

Here, Ambedkar is pointing out that mere promise of formal equality is not all what the Indian Constitution has made to its people; if it was so, the meaning of having a constitution would lose its meaning—rather, the real constitutional promise is not just to have a hollow promise of formal equality before the law,

\(^{581}\) There are five different Cs that Baxi discusses within the conception of C2, which will be discussed later in this section. See Upendra Baxi, “Preliminary notes on Transformative Constitutionalism” in Oscar Vilhena, Upendra Baxi, Frans Viljoen (eds.), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa 19-46 (Pretoria University Law Press, 2013).

\(^{582}\) Supra note 580 at 1188.

\(^{583}\) See Constituent Assembly Debates, Vol. XIX at 979.
but for having a real/substantively equal protection of the laws. According to Baxi, Ambedkar’s statement surely indicates the transformative potential of the constitution for its people. Now, what is perceived as the constitutional promise of real equality is subjective and this is where the paradoxical nature of liberal rights comes to haunt the life of the subaltern. We are here taking the example of the equality principles of the constitution just to merely illustrate the larger problems of the liberal scheme of our constitution’s rights’ language; not for any other reason. So, if there was a common, universal understanding of the constitution’s promise, there would not have been diametrically opposing judicial stands on the promissory potential of the same constitutional principles.

There are some of the serious problems in reading this ‘promissory component’ in the theory and practice of constitutions as it is an interpretative field, forever open for dialogue and contestations. Below we discuss therefore, these problems in detail—wherein, I have identified it as a two-fold category, when seen at a macro-level: (1) the first problem being the politics of forgetting the foundational violence of a constitutional order; and, (2) the second problem being the paradoxical nature generally associated with the liberal rights’-based language that defines the ‘promissory component’ in a constitution. These two categorical issues indicate the problems inherently associated with the conventional nature of constitutional discourse as a site of majoritarian/dominant politics. After discussing these two problematic legacies of the conventional constitutional order, I would take on a discussion over the conception of ‘transformative constitutionalism’ as an alternative interpretative-means for re-imaging the ‘promissory component’ in the Indian Constitution—which understands constitutional promises from subaltern perspectives, instead of merely valuing the dominant narrative.

The Politics of Forgetting the Foundational Violence of Law
There are different kinds of constitutions with different ideological inclinations—some formally incorporated into the constitution’s text and history, some informally remain always a part or, become a part through the working of a constitution. For example, some constitutions are a product of a liberal ideological discourse (e.g., the American Constitution); some are a product of varying degrees of communitarian dominance (e.g., the 1924 Soviet Constitution born out of the Bolshevik Revolution against the Czars, or the 1979 Iranian Constitution born out of an outright right-wing Shiaite Islamic Revolution against the Persian Monarchy). Over and out, constitutions are

584 Supra note 581 at 22.
585 Note the contradiction in judicial approaches on the principles of equality. See the Supreme Court’s analysis of equality principles in cases such as Anuj Garg v. Hotel Association of India, AIR 2008 SC 663; NALSA v. Union of India on the one hand and, Suresh Kumar Kaushal v. Naz Foundation on the other.
generally considered to be a product of certain historical forms of discourse—wherein, certain dominant ideological forces shape the majoritarian meta-narrative of constitution-making—which diachronically settles down as a monolithic-naturalised order in the life of a nation.

Nonetheless, for a certain ideological discourse to become a constitution, there are different levels of discursivity through which it has to pass. The Indian Constitution in many ways, could be described as a post-liberal constitution, especially, keeping in mind the formative dialectics based on certain selective frames of socialist politics—which manifested very substantially in the forms such as the constitutional criminal sanctions in the case of ‘abolition of untouchability’, ‘prohibition of employment of children in factories’, ‘prohibition of forced labour and traffic in humans’, or the entire gamete of socio-economic promises manifested through the ‘directive principles of state policy’. But, in my understanding, these are some of the limited visible-reasons that make the Indian Constitution a post-liberal phenomenon—which, means there are many other vital formative dialectical junctions that easily made our constitution very much a site for liberal politics and its interpretative contestations. One such vital site that has a liberal genealogy is the Doctrine of ‘Rule of Law’. The problem with this doctrine is that, it has to depend upon the ‘law’ to save the ‘Rule of Law’—so, whatever be the law (howsoever worse), once, it’s a law, it has an equal application throughout all the cross-sections of the society—wherein, the ontological precarity of any of these cross-sectional bodies do not count; instead, what counts is a formal-universal application of equality before the law and, hardly anything else.

Jacques Derrida in his work The Force of Law: the Mystical Foundation of Authority theorises the problematic nature of the foundational violence of law. According to Derrida, the law inevitably is a production of certain sites of violence (be it of whatever degree, lesser, negligible, or grave, all of which is relative on their own right). Historically, if we see the origins of the dialectical forces to abolish untouchability, we could feel the formative presence of caste-based violence in the production of Article 17 of our constitution, whose project was to annihilate (at least, try its best to disrupt) the oppressive caste-order in the society. In the same way, the same holds true in the dialectical origins of Article 25 of our constitution, wherein, the

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587 See Id. at 6 wherein Derrida cites one English idiom for which, being an idiom, there is no strict equivalent in French. The idiom is "to enforce the law" or "enforceability of law or contract". This idiomatic expression, writes Derrida, reminds us that "... there is no such thing as law (droit) that does not imply in itself, in the analytic structure of its concept, the possibility of being 'enforced', applied by force".
freedom of practicing, professing, and propagating religion and conscience is deliberately made subject to public order, public health and, all the provisions of Part-III—perhaps, that was a direct result of the painful memories of Partition followed with a nation-wide rioting and mass-murders on communal lines. Now, Baxi takes this discourse further to amalgamate it with an experiential leaning from the annals of his comparative analysis of constitutional histories of certain post-colonial constitutions—wherein, he argues that, the shared heritage of our common constitutional legacies (in the constitutional memories of India, Brazil and South Africa, at least) has been operationally involved in a certain painful politics of forgetting. He invokes Derrida to emphasise the need for a common ‘responsibility towards memory’, as an essential condition to the forward movement of a progressive constitutional practice.

Baxi’s argument that the post-colonial constitutional practice moreover, ends up forgetting the pain and horrors of the formative moments of violence in its due course of diachronic movement in the future, fits well when we see the (nearly) despotic operation of the Indian legislature over the (almost) unhindered continuation of colonial violence over the queer. There is a certain visible politics of forgetting the violence of the notorious Criminal Tribes Act, 1925 (of whose repeal Nehru spoke vehemently in the first Lok Sabha and, which was repealed as well in 1952) when we see the unhindered continuation of an entire omnibus of colonial-minded criminal sanctions that expose the queer to largely under-discussed, silent forms of violence as one could see in the form of Section 377 of the IPC, the Bombay Prevention of Begging Act, 1959 or, the Immoral Traffic (Prevention) Act, 1956, or the Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 F, et.al. The constitutional legislatures of the post-colonial India have in fact, contributed directly to this collective act of forgetting the formative violence of law against the queer, through both its passive and active involvement in law making, or the lack of it. Article 372 of the Constitution allows all colonial laws to continue being in force until they are repealed by the appropriate legislatures. In the guise of the same, the Section 377 of the IPC still continues to take its last breaths.

It is quite trite in the Indian experiences of constitutional practice that, not just our popular representatives, but other constitutional functionaries (mainly the judiciary) keeps forgetting the pains of the formative violence of the constitutional law—when they pronounce judgments such as, *Kumkum (male Hijra) v. State*, wherein, the Delhi High Court held that under Section 5 of the Bombay Prevention of Begging Act, 1959 the trial court was obliged to send a beggar to a certified institution for a minimum period of one year; and,

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this was after recording the statement of the petitioner that begging was the customary profession of the petitioner since the petitioner belonged to the hijra community, and therefore, Petitioner was bound to beg. The case of Kumkum demonstrates the colonial mind-set of our judges who see such colonially-inherited legislations as a mere piece of positive law, forgetting the politics of class-struggle behind/against such legislations. For a discussion on other such instances in the history of Indian constitutional practice, one may refer to the Section 2.4 of the Chapter 3 of this thesis.

This politics of forgetting emanates from the colonial meta-narratives of preferring good sex over bad sex; or, of preferring acceptable bodies over unacceptable bodies, etc.—hardly, do our constitutional functionaries (even including our judges, in most occasions) remember to trace the histories of such violence from the distinctively subaltern perspectives. Now, such conventional ways of interpreting the ‘promissory component’ of our constitution is surely problematic to the politics of the transformative methods of interpreting the constitution.\footnote{For a detailed discussion on meaning, scope and application of “Transformative Methods” for the interpretation of the Indian constitution, see Section 2 of this Chapter.}

1.1. Some Paradoxes in the Liberal Language of Rights
As discussed before, the Indian constitutional design speaks a language of negative rights against the state—a discourse that mainly emanates from its liberal utilitarian origins. Remember that none of our enforceable constitutional rights are absolute; our courts have time and again reiterated that all fundamental rights bear reasonable restrictions in their thinking and practice. At the same time, our non-enforceable positive rights, namely the directive principles of state policies bear a potentially-perpetual order of constitutional deference in the name of ‘progressive realisation’ as enshrined in Article 37 of the Constitution. This potentially-perpetual saga of deference of enforceability provides the state with ample leg room to stretch its anti-subaltern and pro-majoritarian agenda. As Oishik Sircar brings in the Derridian reference to \textit{différance}\footnote{Derrida uses the expression \textit{différance} as a combination of notions to signify “deferral” and “difference”. \textit{See Jacques Derrida, Différence, 1-28 in Jacques Derrida, Margins of Philosophy Translated by Alan Bass (University of Chicago Press, 1982).}} when he discusses Susan George’s “civilizational difference as the justification of deferring the subaltern’s march to the Promised Land”\footnote{See Oishik Sircar, “Some Paradoxes of Human Rights: Fragmented Refractions in Neo-Liberal Times” 2 Journal of Indian Law and Society (2011) 182 at 198.} that as if the liberal constitutional promise metaphorically sits well with an imaginary ‘queue to civilization’ wherein, the idea is to “take the best and leave the rest”. As he notes quoting George that, “this queue leading to the distant threshold of liberalism’s fruits, “gives the impression that all people from all regions of the globe are somehow caught
up in a single movement an all embracing phenomenon and are all marching towards some future Promised Land”. As he further notes, “the queue is clearly hierarchised and distance from the threshold determines when in the future the subaltern will get to cross it or if the subaltern will get to cross it at all.”

This is certainly a major problem with the liberal promise of rights, that we do not yet know, sometimes, what are our rights; and if we know, well then, it is difficult to be sure when we will get our rights. There are more theoretical paradoxes inherent within the liberal language of rights, as what Wendy Brown puts forth in her work on the Leftist Critique of Liberal Rights, wherein, she mainly takes the illustrative stance of women’s rights to explain the problem.

Based on the past experiences of a century long proliferation of rights for women, Brown suggests that “rights almost always serve as mitigation—not as a resolution.” She further illustrates, “Although rights may attenuate the subordination and violation to which women are vulnerable in a masculinist social, political, and economic regime, they vanquish neither the regime nor its mechanisms of reproduction.” As she presents us with the paradox, in the form of violence against women: she argues, “(rights) do not eliminate male dominance even as they soften some of its effects. Such softening is not itself a problem: if violence is upon you, almost any means of reducing it is of value. The problem surfaces in the question of when and whether rights for women are formulated in such a way as to enable the escape of the subordinated from the site of that violation, and when and whether they build a fence around us at that site, regulating rather than challenging the conditions within. And the paradox within this problem is this: the more highly specified rights are as rights for women, the more likely they are to build that fence insofar as they are more likely to encode a definition of women premised on our subordination in the transhistorical discourse of liberal jurisprudence. Yet the opposite is also true, albeit for different reasons. As Catharine MacKinnon has rightly insisted, the more gender-neutral or gender-blind a particular right (or any law or public policy) is, the more likely it is to enhance the privilege of men and eclipse the needs of the women as subordinates.”

593 Supra note 591 at 198.
594 See Wendy Brown “Suffering the Paradoxes of Rights” in Supra note 14 at 420-433.
595 Id. at 422.
596 Id.
597 Id. Also see, Catherine MacKinnon’s defence for gender-specific rights that resonates the fear against the colour-blind rights; Catherine MacKinnon, Feminism Unmodified: Discourses on Life and Law (Harvard University Press, 1988). See generally, Cheryl Harris, "Whiteness
In cases of Gender, for example, the law has always treated gender as ‘sex’, until the NALSA verdict. The law has been protecting the women and continues to do so, in the name of biological sex, and on a naturalised understanding of heterosexuality. For law, a woman is always a heterosexual woman. Brown refers to such inadequacies in identity-based legal protections. The result is exclusion of the non-heterosexual women from legal protections, when it comes to the same issues of violence in intimate relations, or adoption rights, or custody issues, etc. It is only heterosexuality that continues to be normalised again and again, at the cost of the marginalisation and invisibilisation of non-heterosexual women. And this problem will persist, as long as, the category ‘women’ is continued to be produced through heterosexual norms. Brown draws this thesis of ‘regulatory power of identities’ and, ‘the problems arising out of the rights-based on identity’ from Foucault. She illustrates: “Rights ranging from the right to abort unwanted pregnancies to the right to litigate sexual harassment have presented this dilemma: we are interpelled as women when we exercise these rights, not only by the law but by all the agencies, clinics, employers, political discourses, mass media, and more that are triggered by our exercise of such rights.”

The rights that are defined based on certain specifications of a subordinated group (e.g., suffering, injury, discrimination suffered by women, gays, etc.) lock such groups based on such subordination; and, rights that avoid/ignore/eschew this specificity (e.g., subordination, discrimination, suffering, injury, etc.) not only sustain the invisibility of subordination, but can potentially even enhance it. For example, if women are a historically subordinated group, then somebody is seen as the subordinator who causes such subordination. Now, the moment, we make the rights gender-neutral, the law shuts itself completely from seeing that subordination (rather, the law becomes gender-blind, in such instances of subordination). In such a scenario, the gender-neutral law would end up strengthening the subordinator, and, in turn may further produce subordination. This is what MacKinnon, Haris and Gotanda are vary about identity-neutral rights.

Basing upon Kimberlé Crenshaw’s ‘intersectionality’ in the context of understanding the rights’ discourse, Brown puts further the complicated nature of identities—and, explains how the liberal arrangement fails to appreciate the ‘identity-subject’ in its full entirety of complex intersectionalities. Now, the question is, has our law/state/judiciary been able

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598 Supra note 14 at 422-423.
to respond to discrimination/violation caused to subjects with such multi-layered forms of intersectional identities? Brown provides the example of the absence of the universal protection of privacy to all different forms of identities; and, how the response of the law has fluctuated from identity to identity (i.e., subject to subject) in the case of the American juridical response; for example, how easy it was for the law to enter into Hardwick or Lawrence’s bedroom, as these subjects never had the right to privacy, owing to the production of an identity (with which they could be so easily labelled with) enforced by the Georgian or Texan sodomy laws. The Indian scenario is not very different, at the same time. Take the NALSA judgment, for example—the Supreme Court acknowledges the production of a gender-based identity (say transgender) through the historically found diverse forms of social, political, economic and legal discursiveness—resulting in the court directing the state to create educational, employment and other opportunities aiming at inclusion of this newly found identity-category (called transgenders). But, here, does the court guarantee the equal extension of the right to privacy to the transgender as against archaic laws such as Section 377, or 392, etc.? Even, post-NALSA the state can legally enter the bedroom of a transgender person, as the treatment of that particular identity by the state would change from law to law. Hence, that newly procured rights for this newly founded identity-category (of transgenders) as determined by the court remain still so incoherent, fragile and hence, easily violable by the same law.

This problem of lack of a coherent identity acts as a major spoiler in the liberal arrangement of things—as the liberal rights discourse “almost presumes an ontologically autonomous, self-sufficient, unencumbered subject”599 in its thinking and development; which is like believing in a fictional identity. As Brown says, “Rights function to articulate a need, a condition of lack or injury that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way. Thus, rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation. Yet the absence of rights in these domains leaves fully intact these same conditions.”600

Now, these are some of the major problems in my understanding that originate from the working of the conventional interpretative domains of constitutional thought. Perhaps, much of these theoretical contradictions and problematic issues led to the discursive development of ‘transformative constitutionalism’ in the late 1990s as the South African Constitution of 1996

599 Id. at 431.
600 Id. at 431-432.
was getting discussed worldwide. This section now discusses the body of this new epistemological development in constitutional hermeneutics.

1.2. Transformative Constitutionalism: alternative ways of re-articulating justice

As Professor Karl Klare discusses his thoughts\textsuperscript{601} on Transformative Constitutionalism in one of the first few academic writings on the subject; he says:

"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.'"\textsuperscript{602}

Based on what Klare says, then the project of constitutionalism is a desire to re-imagine a state of law that fosters egalitarian power relations amongst individuals and, between individuals; and, the institutions of the state and the social. Baxi sees the subaltern narratives as a pre-condition to the journey for this re-imagined state—as for him, a bottom to top approach is much needed to unlearn and dismantle the meta-narrative of the bourgeoisie, dominant and powerful majority—as unless any constitutional system understands the pain of the subaltern, it cannot re-imagine change in existing power relations. As Baxi therefore, asks—How to read the subaltern voice in the constitutions, or in constitutionalism? For him, the idea is to “conceptualise the constitutional theory and practice in terms of the political practices of cruelty, or histories of deprivation, denial, sustainable political violence and disadvantage.”\textsuperscript{603}

\textsuperscript{602} Id. at 150.
\textsuperscript{603} Supra note 580 at 1191.
As Baxi notes, “from a subaltern perspective, the making of constitutions is always an enactment of several orders of violence.” This way, modern constitutions are a site which is constructed through the foundations of violence—as the discourse of the dominant narrative of a modern constitution then lives on the silencing of the histories of collective hurt of the subaltern. This makes modern constitutions a site where the politics that is practiced is that of forgetting—an annihilation of contexts—it is a site where the collective hurt is not remembered, rather is forgot. For example, how much of our judges today remember, or live the pain caused by the wantonly severe moments of our past (or even the present), e.g., moments lived under the fear of being arrested in the colonial regime for speaking one’s mind or for speaking against the state. How much of our analysis is based on the deaths caused by the people every year in the Floods when we discuss or criticise our constitutional theory and its practice. Somehow, the meta-narrative of the modern constitutions is so heavy that the lived experiences of the other (of the constitution) is always forgotten in oblivion—therefore, the idea is to revive the painful narratives of the subaltern into the hermeneutical discourse of the constitution, and, thus, re-imagine change.

As Baxi asks then, “what could be the ways to re-engage with the conflict between the dominant civic culture and the subaltern cultures—can there be ways to re-imagine nationhood and citizenship beyond the normative frames of the hegemonic imagination.” Perhaps, it is important here, that we take up to understand the concept of ‘hegemony’ as was espoused by the writings of Antonio Gramsci. As Baxi then writes about hegemony, taking from Gramsci:

“An abiding message of Antonio Gramsci, who invented this complex term for social theory, has been that any account of hegemony has to be tentative and partial; the hegemonic is an attempt to describe the appearance of, not the actual, production of political consent or consensus. How that appearance is constructed and achieved is a real problem in studying hegemony. Liberal constitutional theory that insists on ‘separation of powers’, and counsels that the ‘rule of law’ is best attained by distributing powers among the legislature, executive, and the judiciary, is just one important mythical device for securing constitutional hegemony.”

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604 Id.
605 See generally Arvind Narain, “A new Language of Morality: from the Trial of Nowshirwan to the judgment in Naz Foundation” in Supra note 581 at 290.
606 Id. at 1210.
Then, what are the ways and scales to read constitutionalism in its transformative sense? Taking a clue from Kafka’s *The Trial*, Baxi writes, “if the transformative is the promise, it only makes sense in the context of betrayal. Our preferred ways of reading transformative constitutionalism will always determine our grasp of the promise within the context of betrayal.”

Perhaps, this is when it is important that we understand the difference between what is constitutionally valid and, what is constitutionally legitimate—the difference that Hans Kelsen brings into his work of the *grundnorm*. To understand the moral force of the constitution is an important act in the process of appreciating the transformative potential of constitutionalism. Perhaps, that is why “the interpretative praxis of emanating from the voices of the human and social suffering of the rightless or the worst off citizens and persons who claim the human right to have rights” is essential for us to locate legitimacy by reading the queer-subaltern narratives into the Indian constitutionalism. As Audre Lorde writes: “for the master’s tools will never dismantle the master’s house”—this deployment of Lorde fits well in the context of our discussion, as changing the tools becomes an important strategic shift if we have to dismantle the dominant meta-narrative of constitutionalism (to dismantle the master’s house, the tools of the subaltern surely cut a better deal).

As Kalpana Kannabiran and Ranabir Samaddar refer the transformative ways of re-reading constitutionalism as doing it through acts of ‘insurgent constitutionalism’—“exploring the idea of insurgency, recovering it from the monopoly of statist military discourse and thereby revalorising it, helps resurrect and develop the radical possibilities of constitutionalism... the hierarchies of citizenship and the politics of disentitlement and exclusion, contested relentlessly by radical activists and communities waging dramatic struggles, in the process creating new mediums of ‘constitutional communication’ and constitutional conversations. Herein blooms another

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608 Supra note 581 at 24.
609 The italicised expressions are Hannah Arendt’s powerful critique to human rights. See generally Hannah Arendt, *Origins of Totalitarianism* (Mariner Books, 1973). For Baxi, reading the “the interpretative praxis of emanating from the voices of the human and social suffering of the rightless or the worst off citizens and persons who claim the human right to have rights” takes the shape of C6, amongst his order of 8 Cs to understand the transformative worth of post-colonial constitutionalism (specially, in the strict contexts of the constitutions of Brazil, South Africa and India). All his 8 Cs form a part of the C2 (the interpretative constitutional episteme) as discussed above n this section. See Supra note 581 at 27.
613 Id. at 55.
history of constitutionalism: for historically oppressed classes, constitutionalism continues to hold the promise of change.⁶¹⁴

The next section explains in greater depths and details the use and efficacy of certain insurgent tools of constitutional justice that could be deployed as an attempt to transform the meaning and working of certain conventional principles of constitutional justice. It uses the frames of transformative constitutionalism to re-evaluate the abstract power relations that are produced through the impact of certain hegemonic ideologies (i.e., heteronormativity in particular) over onto the theory and operation of the Indian constitutional order. In other words, it discusses the primary question—how can the scales of constitutional justice be perpetually tilted to favour the heteronormative power relations at all possible times and spaces?

2. Re-articulating Constitutional Justice through the tools of Transformative Constitutionalism: an explanation

As discussed in the previous section, the act of re-reading the constitution from the transformative lenses demands a bottom-to-top approach, i.e., a subaltern approach to value the narratives of pain, suffering and oppression of the subordinated classes, and discarding the top-to-bottom approach of understanding constitution through the narratives of the dominant classes. Certainly, in the theory and practice of the contemporary forms of law, we do exclusively find the marks and reflections of the dominant power relations prevailing in the society. For the subject of our discussion, that is ‘family jurisprudence’—the Chapters 3 and 4 empirically show us how intensely this field of jurisprudence is imbued in the dominant notions of heteronormative-justice. These two chapters 3 and 4 also demonstrate before us, how deeply ‘the state’ is involved in the re-production and re-enforcement of the dominant notions of heteronormativity.

A very significant issue for our consideration in this section is—why do the state and its law become/are politically oriented to impose heteronormativity as a naturalised order of social life? Based upon the Marxist traditions of analysing law and the hegemony of dominant ideologies—the first part of this section attempts theorise that the state and its laws are a manifestation of the dominant power relations prevailing in the existing society.

Since, the state and its laws are already fine-tuned with a pre-determined political orientation (i.e., heteronormativity), the issues for our consideration are: (1) why the state’s unilateral, imposition of a monolithic-hegemonic

⁶¹⁴ Supra note 611 at 3, 5 and 6.
political order of exclusive-heteronormativity ought not be constitutionally sustainable; and, (2) why the state and its law constitutionally ought to encourage (and, not deny or penalise) non-heteronormative forms of interpersonal relationships? These two issues are discussed in the second part of this section through the frames of transformative constitutionalism as developed by the constitutional courts in India.

2.1. The Ideology of Heteronormativity and the Law

By heteronormativity I mean what Lauren Berlant and Michael Warner call "the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent ... but also privileged."615 While Berlant and Warner understand heteronormativity to comprise less a body of norms that can be located in particular practices, processes or doctrines; and more a ‘sense of rightness’ that characterizes heterosexuality in the contemporary, the practices, processes and doctrines of law—both are one of the most important mechanisms for ensuring the ‘privilege’ of heterosexuality and the ‘effortless superiority’ that it commonly achieves in social life.616 Heteronormativity is therefore not only a legal concept, but also, a concept that permeates our cultural understanding of sexuality.617 In a heteronormative world, discursive practices as well as legal regulation help to construct a hierarchy of sexual desires, practices and identities and, this hierarchy has a disciplining force that influences the way we understand and order the world through law; yes, but also through other social practices.618

The ethnographic work in the previous Chapters 3 and 4 explain in detail, how the Indian state plays a central role in the re-production and re-enforcement of heteronormativity through its coercive/subtle legal regime that normalises heteronormative forms of relationships/families through the social institutions of marriage and kinship. The questions that are not discussed in those two previous chapters are: what are discursive forms of power that induce “heteronormativity” within the ideology of law? How does heteronormativity acquire the status of an ideology through its legitimation by the law? What tempts law to fetishise heteronormativity and act as its agent in the course of its life? Is law’s obsession with heteronormativity an infinite bond? If so, when did that happen? Can the law not be imagined, theorised or/and operate without heteronormativity? If heteronormativity is taken out of

the law, does it become meaningless? Of course, these issues are tangentially addressed in multiple forms in the previous chapters; but, in this section, I attempt to theorise these possibilities with my reading of some of the pertinent Leftist writings on the ideology and law.

In contrast to the liberal theory where state and the law are projected as two separate entities which necessarily do not intersect—the Marxist theory sees itself in opposition to this liberal notion of separation. In the Marxist traditions of analysing law, the state and the law are seen as the reflection of the concerns and the interests of the dominant political narrative that are defined and informed by the prevailing power relations in the social.619 This way, law is ideological; it both exemplifies and provides legitimation to the embedded values of the dominant class(es).620 As Marx stated:

Society does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand ... To be a slave, to be a citizen are social characteristics, relations between human beings A & B. Human being A, as such, is not a slave. He is a slave in and through society.621

This way, the heterosexual and its opposition—the queer, both are products of the dominant power relations of the society which is well legitimised by the act of the law. Because of law’s act of legitimation, the ‘heterosexual’ acquires the status of the ‘legal subject’, whereas, the ‘queer’ becomes the law’s ‘abject’ (to borrow this term from Butler). This act of law’s legitimation interpellates the ‘heterosexual’ to now become a subject that bears rights and duties under the law—this is law’s regulative capacity.622 By this way, the heterosexual becomes the subject of law’s manipulation, its agenda of biopolitics; as, the law demands a disciplined subject—the moment this rights-bearing subject crosses the line of law, it becomes perverse, the law’s other—the queer. The law has multiple ways to discipline its subject—part of it comes through, the criminal sanctions, and much of it comes through law’s

620 Id.
622 See Louis Althusser, For Marx Translated by Ben Brewster (Penguin, 1969); where Althusser argues that a subject is created through and by a range of different discourses, e.g., a political discourse creates a woman, a refugee, or the heterosexual subject. Similarly, the creation of the legal subjects involves the recognition of the law. It is by transforming the human subject into a legal subject, the law influences the way in which participants experience and perceive their relations with others. Althusser calls this metamorphosis of the human subject into a legal subject as “the lived relation” of human actors.
overlap with the wider normative and moral discourses. One thing to be understood about law very particularly is that the nature of law is not always prohibitive, it is also permissive and regulatory at times. At the same time, law can also take direct, as well as, tacit roles in creating such regimes of permissiveness or regulation. Family jurisprudence is one such example of the tacit (almost invisibly appearing) role of the law as the hegemonic standardized-normative principles of family jurisprudence are produced and re-produced by the socio-cultural (often, non-juridical/non-state) apparatuses like the social unit of family, or the schools, or the workspaces, the neighbourhoods, etc. As Foucault helps here to understand the micro-power of the state, that the function of law is not just to impose the sovereign will of the state, but it also operates in a manifold of managerial, normative, regularising, biopoweristic forms. For example, when the biological parents of a queer child in their bid to discipline their child for being queer take the child to a medical professional, the way that medical professional sees the queer child as a patient and genuinely attempts to cure it—this shows how the micro-power of the state can operate.

This interface of legal and moral rights provides for both the authoritative determinations of rights/duties in litigation, a meta-discourse which provides legitimation and also a terrain, a contestation, and change in which new or variant claim-rights are articulated and asserted. One important implication of this interpellation is that, diachronically, we are encouraged to view law not merely as an external mechanism of regulation but as a constituent of the way in which social relations are lived and experienced. This is when law acts to replicate the social relations of power. This way, the ideology of heteronormativity is perceived not as a form of consciousness, but as a constituent of the unconscious, in which social relations are already framed with certain pre-determined power relations. If Marx can be quoted here:

“It is not the consciousness of men that determines their being, but on the contrary, it is the social being that determines their consciousness.”

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623 Supra note 619 at 357.
624 Supra note 14 at 13.
625 Id.
627 Karl Marx, A Contribution to the Critique of Political Economy Translated by S. W. Ryazanskaya (Progress Publishers, Moscow, 1977) available at: https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm (last retrieved on 21st July, 2017). I am not getting into Marx’s notions of “false consciousness” here, as I find it little contested to bring it here, and, I think, I am yet to understand this conception of his in a better way. See Supra note 626.
How does heteronormativity qualify to become an ideology? Ideologies are not, as Poulantzas argues “as if they were political number plates worn by social classes on their backs”. As Hunt suggests, “(ideologies) draws its power from its ability to connect and combine diverse mental elements (such as) concepts, ideas, etc. into combinations that influence and structure the perception and cognition of social agents.” Ideologies then act like a grid that elect, sort, order and reorder the elements of thought. Since, the elements of thought of the human subject operates in multiple layers in the social and legal order—some thoughts are manifested in families, some in schools, some at colleges and universities, some at workspaces, and some in the courts of law or at the legislative halls or centres of bureaucracy—many of which defy the liberal legalism’s public/private divide. When Ratish’s mother threatens of committing suicide, if Ratish doesn’t get married to a girl—this is the manifestation of the ideology of heteronormativity through the act of Ratish’s mother—the space and the actors of which are private, as opposed to the public. Is there then, no role of law (either through presence or absence) when Ratish’s mother resonates her heteronormative tactic over her son to extort an act of heteronormative-compliance (marriage) from him? Perhaps, this is how an ideology acts like a cohesive force that “slides into every level of the social structure” wherein, not all of them are exclusively private spaces.

Ontologically, is Ratish’s mother manufacturing the ideology of heteronormativity, or is she merely reflecting or transmitting the existing strains (as known to her) of the ideology of heteronormativity? Louis Althusser with his work on ideology, interpellation and subjecthood is useful for us to understand this ideological expansion. Interpellation is the constitutive process where individuals acknowledge and respond to ideologies, thereby recognizing themselves as subjects. He defines ideology as “the imaginary relationship of individuals to their real conditions of existence” and explains how individuals are complacently involved in

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629 Supra note 626 at 16.
631 Supra note 628 at 207.
632 Althusser argues how individuals subject themselves to an ideology and remain complacent by allowing them to be dominated by it. He establishes this argument with his famous explanation: when a police officer shouts at you in the middle of a street, “Hey, you there!” Upon hearing this it is obvious that an individual would turn around “by this mere one hundred and eighty degree physical conversation, he becomes a subject”. His point is that, this is how we embody subjecthood and allow ourselves to be dominated. Louis Althusser, Lenin and Philosophy and Other Essays Translated by Ben Brewster 174 (Monthly Review Press, 1971).
633 Id. at 162.
and subjected to the domination of the Ideological State Apparatuses (ISAs) like the family, schools, universities, media, literature, and the Repressive State Apparatuses (RSAs) such as the military, police, courts, legislature, etc. The individual is constantly interpellated by these agencies of the social, the economy, the state and all forms of the structure; the structure being ubiquitously reproduced through individual act and thinking in all forms of its life. In other words ideology, interpellation, and subjecthood, mutually reinforce each other so that “ideology has always-already interpellated individuals as subjects, which amounts to making it clear that individuals are always-already interpellated by ideology as subjects, which necessarily leads us to (the) proposition: individuals are always-already subjects.”

Heteronormativity as an ideology hails an entire structure of subjection and domination and as Foucault would say, it is possible because it is based on ‘discourse’. Foucault, who has worked to extend the theories of Althusser, notes that, heteronormativity, has interpellated individuals, institutions, and cultures because of the power and knowledge that is produced, resonated, reproduced and amplified through ‘discourse’. Heteronormativity represents a sexuality-based-ideology, which has a history of its own. In other words, heteronormativity is the outcome of certain interplay of power, knowledge and strategy. As constructivists would do, Foucault argues that “Sexuality must not be thought of as a kind of a natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is a name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement of discourse, the formation of special knowledge, the strengthening of controls and resistances, are linked to one another, in accordance with a few major strategies of knowledge and power.”

A little before Louis Althusser, one of the most influential political theorists who saw the role of ideology in spaces that of the law and that of the social, was Antonio Gramsci, whose work on the concept of ‘hegemony’ becomes very significant for us to understand the hegemony of heteronormativity and how it operates through the legal and the social. Gramsci developed the concept of hegemony to describe a condition in which the supremacy of a social group is achieved not only by physical force (which he calls ‘domination’ and ‘command’) but also through consensual submission of the very people who were dominated (a phenomenon that he called ‘leadership’, ‘direction’ or ‘hegemony’). Unlike the other Marxist philosophers, Gramsci

634 Id. at 176.
635 Supra note 68 at 105-106.
not only considers ‘coercion’ as the tool of operation for the legal ideology, but that it also acts through ‘consent’ of the people. As Gramsci notes:

“The supremacy of a social group manifests itself in two ways, as ‘domination’ and as ‘intellectual and moral leadership’. A social group dominates antagonistic groups, which it tends to ‘liquidate’, or to subjugate perhaps even by armed force; it leads kindred and allied groups. A social group can, and indeed must, already exercise ‘leadership’ before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to ‘lead’ as well.”637

As Litowitz who analysis his work with law writes:

The first type of domination is commonly associated with coercive state action by the courts, the police, the army, and the national guard. The second type of control (‘hegemony’ proper) is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture. Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.638

Perhaps, it is through this act of consent (in whatever form and degree) the hegemonic heteronormativity acquires the status of naturalised heteronormativity in the operation of our thinking and practice as a society—as interpellated on each one of us by the law. Certainly, in the theory and practice of the contemporary forms of law, we do exclusively find the marks and reflections of the dominant power relations prevailing in the society—

637 Geoffrey Smith, Quintin Hoare (eds.) Selections from The Prison Notebooks of Antonio Gramsci 57-58 (International Publishers, 1971). Wherein, Gramsci describes hegemony as, “the spontaneous consent” given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is “historically caused” by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.” Id. at 12.
638 Supra note 636 at 519.
resultantly, what we get in the name of justice (from such a legal system) reaches to us in the form of a completely bourgeoisie sense of binarised-justice where, everything is understood in exclusively binarised-opposing scales of right/wrong, licit/illicit, moral/immoral, legitimate/illegitimate, public/private, natural/unnatural, hetero/homo, etc. Anything that lies in between or beyond these notions is discarded or not-read by the scales of the dominant notions of justice—simply because, doing so would mean that its subjects (people) would start doubting its meta-narrative which is otherwise based on a monolithic plot of bipolar black and white notions.

The questions then would be: how can the constitution be used as a tool for transformative justice to eliminate such dominant and oppressive notions of justice? What are tools of insurgent constitutionalism that are going to be deployed in this forthcoming constitutional argumentation? How can the project of the ‘re-imagined state of the law’ (as discussed previously) be constitutionally argued? This next section deals with these issues.

2.2. The Constitution Re-debated
The Indian Constitution favours accommodating differences, instead of enforcing a one-size-fits-all approach; and, if I can bring one of most important judgments of our Supreme Court from the most-recent past—it would be the nine-judges bench that read ‘right to privacy’ as a fundamental right. Wherein, Justice Kaul observed in the following words:

“There are sure to be times in the future, similar to our experience today, perhaps as close as 10 years from today or as far off as a 100 years, when we will debate and deliberate whether a certain right is fundamental or not. At that time it must be understood that the Constitution was always meant to be an accommodative and all-encompassing document, framed to cover in its fold all those rights that are most deeply cherished and required for a ‘peaceful, harmonious and orderly social living. The Constitution and its all-encompassing spirit forever grows, but never ages.’

The objective of this section is to discuss certain key constitutional strategies to justify the ‘re-imagined state of the law’ (as proposed in Conclusions I to IV of Chapters 3 and 4 of this thesis). This section is thus, distributed under certain thematic heads—each one of which discusses one particular set of constitutional strategies to justify ‘re-imagined state of the law’. It must be mentioned here, that all these sets of constitutional strategies involve various discursive layers of argumentation—some are based on courtroom

639 Justice KS Puttaswamy v. Union of India, Writ Petition (Civil) 494 of 2012 at para 48 and 49.
arguments, some are what our judges have held, some come from the comparative experiences of foreign courts, some are based upon ethnographic data (mainly queer narratives gathered and collated in this project) and, finally, much of it comes from academic discourse. In the scheme of these forthcoming thematic sections, much of the arguments are a product of an insurgent reading of the constitution—as a departure from the conventional practices of constitutional hermeneutics, as discussed in Section 1 of this Chapter.

2.2.1. Re-constructing the Promise of Equality with the tools of Substantive Equality

The notion of equality has been perceived in multiple ways throughout different human generations in the past; of course, our generation is no different. There is no one particular principle of law that could capture the idea of equality comprehensively. Plato or Aristotle found equality to be based on the principle of domination by men that resulted in the subordination of women, slaves and the children. Such subordination of one set of humans over the ‘others’ was based on the assumptions of the inherent inferiority and irrationality of this ‘other’ and their perceived-need of supervision and guidance. This role of supervision and guidance was strengthened by the paternalistic state through its laws and, hence, the rich and wealthy males started dominating their wives or their slaves. What about the poor and enslaved class; they remained forever subjugated until somehow they are freed, at least, formally. The societal conditions in India were not very different in the Vedic period; and, until this date each successive-governments in India have been attempting to reverse this cycle of class-based subordination through different approaches/principles of equality. In this section, I will discuss the colonial hangover of the Indian juridical approaches with “formal equality”; and, why are these approaches constitutionally unjust for the queer. Later, in this section, I will discuss the bourgeoning importance of the principles of “substantive equality”; and, why a shift to these approaches could better deliver the constitutional promise of justice to the queer.

2.2.1.1. Principles of Formal Equality: a critique

Equality is one amongst many of our constitutional ideals. The preamble to the Constitution of India expresses that, the people of India having solemnly resolved to constitute India into a democracy and they further want to secure to ‘all its citizens’ primarily, Justice, which is social, economic and political; Liberty of thought and expression; and finally, Equality of status and of opportunity. Here the constitution wants an inclusive politics, inclusive society which is free of undue discrimination. This is a bit about the ideal socio-political standard(s) of the constitution of India. Let’s look into the legality and enforcement-potential of these ideal standards through the regular state
activities. State activities include, both active and passive interventions in age-old societal practices, as well as it includes the silence of its omissions to intervene positively into the continuing practice of some age-old practices. Equality is a constitutional ideal enshrined into the preamble of the Constitution, as explained above. Also, equality and non-discrimination are two different rights enshrined in two separate provisions of the Constitution of India. The Article 14 states the Right to Equality in the following terms:

“14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”

Further, the Right to Non-discrimination is enshrined in multiple provisions, viz., Article 15(1) and (2), Article 16(2), Article 29(2) and Article 325. Amongst all these provisions, Article 15(1) is a general guarantee to the Right against discrimination on certain specific grounds, whereas the Articles 16(2) and 29(2) guarantee right against discrimination only in specific matters relating to state services and admission to state educational institutions. While speaking about right against discrimination in state services, mere mention of Article 16(2) without 16(1) doesn’t deem fit. The required provisions of Article 16 are provided below:

“16. Equality of opportunity in matters of public employment: (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”

The Article 29(2) of the Constitution provides for certain specific cultural and educational rights of some of the selected type of minorities (linguistic, cultural and scriptural minorities) in the following words:

“29. Protection of interests of minorities: (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”
All these three provisions are classified as Fundamental Rights guaranteed by the Constitution, which are thus, enforceable in the courts of law. Whereas, the last one, i.e., Article 325 is a general constitutional provision that provides:

“325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex: "No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

All the three above-mentioned provisions provide for the right against discrimination in their own specific ways. This also emphasises the fact that the scope of these three non-discrimination provisions are specific to certain kind of situations. Whereas, the Article 15(1) and (2) guarantees a general right against discrimination, which is also a fundamental right, hence, is justiciable in a court of law. Article 15(1) and (2) provides as follows:

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.”

The difference between the clauses (1) and (2) of Article 15 is that, the former, is a general fundamental right that guarantees justiciability against discrimination and is only applicable against the state; whereas, the latter, is a slightly specific fundamental right that is enforceable against private
citizens in cases of entry into certain kind of establishments. The commonality between the two is that both the rights protect on certain specific groups amongst all citizens based on the grounds only of religion, race, caste, sex, place of birth or any of them. The idea of formal equality is based on the ancient Greek practice of defining ‘equality’ in society, state, politics and in the eyes of law through the principle of ‘like should be treated alike’. This is adopted by the courts and the law-makers as the basis of their ‘equality approach’. This is called as the form-based equality, i.e., there should be formal or de jure equality (doesn’t matter, whether there is real and de facto equality in substance, or not). As the US Supreme Court in Plessy v. Ferguson,640 upheld the Louisiana law that segregated rail coaches based on race. The coloured citizens had separate coaches from that of the whites in the same train.641 Why did the Court find the law not violating the Amendment Fourteenth of the US Constitution (that guarantees equal protection)? It is that the judges applied the principles of formal equality to state that ‘likes should be treated alike’ and, not that unlikes should not be treated alike and passed its judgment in favour of the state with a 7:1 majority. For the Plessy Court, blacks and coloured citizens were a separate class of individuals, different from the whites on a number of factors.642 The court didn’t acknowledge that their judgment negatively impacts the coloured population of Louisiana and that such a judgment would further strengthen the institutional and societal prejudice against them. A century after Plessy, the Indian LGBT community had a similar news, when the Supreme Court of India pronounced its division bench judgment643 upholding the constitutionality of the Section 377 of the Indian Penal Code, 1860 on various fundamental rights, including the one on the Right to Equality. Justice G.S. Sanghvi who wrote the judgment for the bench, didn’t find that Section 377 created any invalid classification at the first place between the ones who indulge in penal-vaginal intercourse and, the ones who indulge in any other kind of penetrative sexual activity. The reason stated was:

“What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal

640 163 U.S. 537 (1896).
641 This is the judgment, where the US Supreme Court upheld the state policy of ‘separate but equal’, until it was overruled almost 60 years later in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
642 Justice Brewer contended that it was a matter of public policy to segregate the Blacks from that of the whites. The law did the same, but it wasn’t found to be violative of the Equality Clause of the Constitution not because that the law’s intention was to label the colored population as inferior to the whites, but (according to Justice Brown), it were the Blacks and coloureds themselves who choose to put themselves under that construction.
643 Supra note 72.
Procedure and other statutes of the same family the person is found guilty.\textsuperscript{644}

Both the judgments though, set in two very different set of environs of their own, produce a common result by treating likes alike. The common resultant in both the cases being that the courts justified the respective state acts that led to further marginalisation and deprivation amongst the two most vulnerable minorities of their times, the coloured population in the former and the LGBT population in the later.

Sandra Fredman in her one of the most seminal works has summed up a four-point critique of the ‘likes should be treated alike’ principle of formal equality.\textsuperscript{645} For her, this principle brings forth tremendous pressures on the minorities and vulnerable sections of a society (who are mostly the petitioners demanding equality and non-discrimination in state and non-state actions) to confirm to the mainstream practices and beliefs of the society. Such very strong ‘conformist’ pressures on the minorities further led to stigmatization and marginalisation of these minorities. Off late the constitutional courts around the world characterize vulnerability of a group on the basis of, whether the particular (allegedly vulnerable cross-section of the society) is an ‘insular and discrete minority’ or not. Ackerman further argues that the most vulnerable groups are those who are in the greatest need for protection are not always merely ‘insular or discrete’ minorities, rather they sometimes are the most ‘diffused’ population within a society.\textsuperscript{646} According to him, it is precisely because certain groups find it difficult or impossible to organise themselves sufficiently to compete or raise their voices against the ever-strong majority. This ‘diffusion’ theory of Ackerman is very true in the case of the queer in India, at least, where the queer is forced not to acknowledge its sexual choices, and to keep confirming with the mainstream heterosexual patriarchal norms of the majority. Some of them get married to the persons of the opposite sexes under unbearable conformist-societal pressures—resultant being, the queer, either masters the practice of suppressing its desires, or it gets into acts of deception—quenching its desires outside its marriage, all in the guise of secrecy.\textsuperscript{647} In most of these cases, the queer is forced into bigotry (as it keeps on cheating on its spouse, parents and the children) and shame (as it is forced to lead a life of self-denial, pretension and deception).

Returning to Fredman’s four-point critique of the ‘likes should be treated alike’ principle of formal equality, she collates that this principle raises at least

\begin{itemize}
  \item \textsuperscript{644} Id., at para 42.
  \item \textsuperscript{645} Sandra Fredman, \textit{Discrimination Law}, (Oxford University Press, 2011).
  \item \textsuperscript{646} Bruce Ackerman, “Beyond Carolene Products” 98 \textit{Harvard Law Review} (1985) 713.
  \item \textsuperscript{647} See the narratives in Section 3.4 of Chapter 3.
\end{itemize}
four set of problems. First, “When are two individuals alike?” she asks. On what basis could this premise be decided, or on the happening of what all criterion/events would likeliness be presumed by courts? Until that happens, an individual or a group has to be treated differently as per this principle, e.g., for long women or blacks are treated differently because they were treated inferior to men or whites, until recently. Hence, our understanding of a ‘group’ or a ‘person’ plays an underlying role in deciding the primary question, ‘whether a group or person deserves equal treatment at the first place?’ she contends. If the answer to this question is ‘yes’, then that group or person would be treated equally, and not until that happens.

The second difficulty is that equality in this sense is merely a relative principle. It requires only that two similarly situated individuals be treated alike. In other words, fairness is a matter of consistency. It doesn’t matter, how badly or how nicely, the other comparator is being treated under the law, as long as they both are treated equally. The result of the blatant application of formal equality could lead to the treatment of both the persons (the complainant as well as the comparator, with whom the complainant is compared under this ‘treat alike’ principle) equally badly. She gives the example of equal pay laws, and says that equal pay laws are of no benefit, if both women and their comparator men are equally badly paid. To exemplify this argument, take the British appellate case of Stewart v. Cleveland Guest (Engineering) Ltd where the petitioner argued that she has been discriminated against on the grounds of her sex when her employer required her to work in areas under her workplace where her fellow male employees displayed pictures of naked and semi-naked women on the walls which she found offensive. The appellate court upheld the decision of the trial court dismissing her petition stating that it is difficult to presume that all her male employees were accepting to the display of naked or semi-naked women at the workplace and there could be some of her male colleagues who could have felt such a display equally offensive. Though, the court did not direct the employer for the removal of such pictures from the workplace at the first place, it dismissed her plea of alleged discrimination caused to her by such display, finding some of her male comparators equally vulnerable to such treatment by their employer. This shows that the formal equality principle of treating likes alike, resulting into equally detrimental consequences for both the complainant and her supposed comparators. In this judgment, a critical question that arises is that, was it just and fair on the part of the court to leave both the male as well as the female employees of that workplace to be

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648 Supra note 645 at 8.
649 Id. at 9.
650 Id.
651 Id.
subject to the same offensive work conditions. This illustration depicts that perhaps a singular application of the formal equality principle could be equally bad for anyone who is complaining as well as her comparators, who are presumed by the court to be an equally circumstanced individual. A very similar approach could be traced from the approach of the Indian Supreme Court in the case of Suresh Kumar Koushal where on the question of constitutionality of Section 377 of the Indian Penal Code, 1860 the court applied the formal equality principle singularly and found both the persons, one indulging into same-sex sexual intercourse and the other, indulging into opposite-sex sexual intercourse to be similarly circumstanced and denying both these two classes of individuals to be not worthy of exercising their personal choices in matters of their individual sexual lives.

The third problem with the principle of Formal Equality is that of the inevitable need to find a comparator. Inconsistent treatment can only be demonstrated by finding a similarly situated person, or group who does not share the ground of inconsistent behaviour (such as religion, or race, or sex) and who has been treated more favourably than the complainant. The underlying assumption is that once these characteristics are disregarded, individuals can be treated entirely on the merits of their own case. Now, this is a very important critique of the formal equality approach, as this approach is always laden by the inherent need to find a suitable comparator. What if the court’s choice of the appropriate comparator is faulty, in which case, is it not detrimental to the legitimate interests of the complainant? What if, the comparator so chosen by the court itself is not sure of their own reaction in the event of facing such an alleged discriminatory situation? After applying the comparators qualificatory remarks, whether is it just and fair on the part of the courts to subject the complainant to modify her behaviour as per the majoritarian conduct of the mainstream comparator? In which case, will it not be an act of pigeon-holing the complainant to fall in the pre-defined roles of the comparator? It is argued here, that these last two issues raised against the comparator’s need, in the application of the formal equality principle demands tremendous pressures of conformism on the complainant. Fredman contends that, generally, the complainants are seen to be the minority or the powerless individuals or groups seeking justice, who are compared with the ones who are from an already-established mainstream of the society.

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653 Supra note 72.
654 Supra note 645 at 11.
655 There could be numerous examples to argue this proposition from the judicial patterns traced in many cases across jurisdictions. Let’s take some of the Indian Court cases to exemplify this point. See the approach of the Supreme Court of India in Revathi v Union of India, AIR 1988 SC 835; Sowmithri Vishnu v Union of India, AIR 1985 SC 1618. Both these cases question the constitutionality of Criminal Laws relating to the offence of ‘Adultery’, so defined under Section 497 of the Indian Penal Code, 1860 and further facilitated Section 198 of the Code of Criminal Procedure, 1973, where the Supreme Court has upheld the
if, the comparator isn’t from the majority, a fact may still remain that both these ‘complainants’ and their supposed ‘comparators’ could have their own social, political and economic situations, heavily drawn by their own typical characteristics and background. Thus, the basic premise that there exists a ‘universal comparator’ in each case of discrimination is deeply deceptive.\(^{656}\)

The result of the assumption of such a ‘universal individual or a group’ (who is usually considered to be a suitable comparator if courts apply the formal equality principle), therefore has the potential to create powerful conformist and assimilationist pressures on the minorities in any society, argues Fredman. This proposition could be further illustrated by the approach followed by the European Court of Human Rights in the case of Ahmed v. The United Kingdom,\(^{657}\) in which a Muslim Teacher claimed that he was forced to resign from his teaching post after his employer insisted that his attendance at the nearby mosque during Friday Prayers was in contravention with his full-time job contract. From the employer’s point-of-view this could be a genuine concern, but the question that was raised by the petitioner was that of a discriminatory behaviour against him on the grounds of his religion. The European Commission dismissed the petition on the basis of a narrowly-drawn conception of equality. It chose to rely on the proposition that a Muslim Teacher should be compared to all other teachers (irrespective of the fact that in UK, mostly the other teachers are of the Christian Faith) for whom there is no religious requirement of attending Friday Prayers at a Mosque. Instead for all Christian Teachers (the comparators, in this case) Sunday is a holiday, as it has been in UK for centuries following the Christian Calendar.
The Commission found that the applicant had not proved ‘less difference’, hence, it deemed sufficient to observe that, “in most countries, only religious holidays of the majority of the population are celebrated as public holidays”.\(^{658}\) Where is the ‘accommodation of difference’ in this present approach of the European Court? One could compare the approach undertaken in this judgment with that of the Indian Supreme Court in the case of *Suresh Kumar Kaushal*.\(^{659}\) Bikhu Parekh puts it starkly:

“The choice before the minorities is simple. If they wish to become part of and be treated like the rest of the community, they should think and live like the later; if instead they insists on retaining their separate cultures, they should not complain if they are treated differently.”\(^{660}\)

Hence, ‘equality as consistency’ requires an answer to the question, ‘equality with whom’? Is it of a female with that of the male; or is it of a juvenile with that of an adult; or is it of a religious minority with that of the majority; or is it of a homosexual with that of a heterosexual?

The *fourth* problematic aspect of ‘equality as consistency’ is the treatment of difference. According to the approach in hand, only ‘likes’ qualify for equal treatment; there is no requirement that people be treated appropriately according to their difference. As the French Novelist, Anatole France has said:

“to labour in the face of majestic equality of the law, which forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread.”\(^{661}\)

There is no ‘one universal way’ of treating everyone alike, the need is not to eliminate difference, but to prohibit the harm caused by such difference, says Fredman.\(^{662}\) Going by this contention, the legitimate state goal should be to adjust existing norms to accommodate difference and not to force people to follow themselves up in ‘one’ line of consistency. An example of the Karnataka Prohibition of Beggary Act of 1975 or such similar laws\(^{663}\) could be made at this juncture to exemplify this point. Recently, during the on-going

\(^{658}\) Id. at para 28.

\(^{659}\) *Supra* note 72.


\(^{661}\) Anatole France, *The Red Lily* Translated by Winfred Stephens (John Lane, 1924).

\(^{662}\) *Supra* note 645 at 13.

\(^{663}\) Sections 377 and 497, Indian Penal Code, 1860; Bombay Prevention of Beggary Act, 1959 *et al.*
preparations of a Global Meet of Investors to encouragement Foreign Investment in the Indian State of Karnataka, the police has been accused by several human rights groups of attempting to evict the transgenders from begging on the streets of the City of Bengaluru (the Capital city of the State of Karnataka).\textsuperscript{664} Under this Act, begging is a prohibited\textsuperscript{665} and any person found to be doing so attracts the penal, pecuniary and rehabilitation measures under this Act. The economic and social condition of transgender is one of the worst in India,\textsuperscript{666} and in such conditions of poverty, social stigma and lack of state’s intervention measures, the obvious result is almost negligible access to educational institutions and employment by the transgenders. Under such stressful conditions the state expects poor (particularly, transgenders) not to beg on the streets of Karnataka. Instead of addressing the long-standing issues of social stigma, poor financial background and growing vulnerability of the transgenders (and other poor persons) the State has made laws, which in the words of Anatole France fits well to explain the uniform and blind application of “equality as consistency” approach by the state. Where is the issue of substantive equality, constitutional justice, right to be treated with dignity and the right to pursuit of happiness, amidst this kind of a state-approach? Hence, one can infer from such laws, that the state actions (such as laws like Karnataka Prohibition of Beggary Act of 1975) are tools of injustice, though they may be just and apt at least from the lone perspective of the principle of ‘likes should be treated alike’ where is the ‘treatment of difference’, amidst all this?

The problem with ‘formal equality’ principle is its assumption that the aim of law should be identical treatment. The critique is that, identical treatment as per the standards of whom? This problem deepens even more, when the law is expected to fight the historically-rooted prejudices, stereotypes attached with certain cross-sections of people, where the majority is used to certain type of conduct from generations. Certainly, a democratic state comprises of the majority and also reflects majoritarian views in law-making and adjudication. It may thus, be instrumental, at this stage to realise that ‘formal equality as consistency’ approach by the state. Where is the issue of substantive equality, constitutional justice, right to be treated with dignity and the right to pursuit of happiness, amidst this kind of a state-approach? Hence, one can infer from such laws, that the state actions (such as laws like Karnataka Prohibition of Beggary Act of 1975) are tools of injustice, though they may be just and apt at least from the lone perspective of the principle of ‘likes should be treated alike’ where is the ‘treatment of difference’, amidst all this?

665 See Section 2 and 3 of the Karnataka Prohibition of Beggary Act, 1975.
666 Supra note 8 at paragraph 112; where the Supreme Court acknowledges the problems faced by the transgender population in India in the following words: “112. Some of the common and reported problem that transgender most commonly suffer are: harassment by the police in public places, harassment at home, police entrapment, rape, discriminations, abuse in public places et. al. The other major problems that the transgender people face in their daily life are discrimination, lack of educational facilities, lack of medical facilities, homelessness, unemployment, depression, hormone pill abuse, tobacco and alcohol abuse, and problems related to marriage and adoption.”
equality’ isn’t the singular answer to deal with discrimination in the society. It is important to look beyond ‘formal equality’ as everyone cannot be treated equally, or with one set of uniform standards. The law and society must celebrate difference and effort enough to ensure appropriate accommodation of difference. Otherwise, consistency and assimilationist tendencies could keep misguiding development. With this we now turn to substantive approaches to equality that involves other constitutional values like justice, liberty, pluralism, dignity and human worth as additional concerns in determining some better approach(s) to deal with discrimination.

2.2.1.2. Principles of Substantive Equality: an alternative to Formal Equality

In the previous section, the nuances of the principles of formal equality are discussed. The problems posed by formal equality are well discussed in detail. This section attempts to explain, what is substantive equality? Unlike, its counterpart, the principles of substantive equality are quite un-rigid, inconsistent and lucid. Different scholars have slightly diverse notions to offer on the subject-matter of substantive equality; not to mention all are equally enriching. In this section, I have decided to look at Sandra Fredman’s four-overlapping objects of substantive equality, as it assimilates and summarises most of the common strains under that stream that I could come across. She argues that, Equality should be seen as a multi-dimensional concept, pursuing four overlapping aims:

i. Breaking the cycle of disadvantage associated with status, which is the ‘redistributive dimension’ of equality.

ii. Promoting respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation and violence because of membership to a particular out-group—this is called as the ‘recognition dimension’ of equality.

iii. Since, substantive equality isn’t about extracting a ‘conformist behaviour’ as a price of equality. Instead, it should accommodate difference and aim to achieve structural change—this is referred by Fredman as the ‘transformative dimension’ of equality.

iv. Facilitating ‘full participation’ in society, socially, politically and economically is also another objective of equality—this is referred to as the ‘participative dimension’ of equality.

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The redistributive dimension: breaking the cycle of disadvantage
Unlike formal equality, substantive equality is expressly asymmetric. The idea here is to ensure that there is a redistribution of the existing material societal resources, without any denial on the socio-economic or any political ground(s). Nancy Fraser brings in the dichotomy between ‘redistribution’ as a socio-economic dimension of equality (e.g., ‘poverty’ or ‘educational status’ as a factor determining depravity of societal resources) and, the ‘recognition’ dimension of equality which is ‘status-based’ (e.g., ‘race’, ‘caste’, ‘sex’ or such other identities based on which societal resources are denied).668 Both ‘recognition’ and ‘redistribution’ dimensions have to work hand in hand to ensure substantive equality.669 Recognising that it is not so much the ‘identity’ which is the problem, rather it is the detrimental consequences (disadvantages and prejudices) attached with one’s identity, which is the problem. The focus of substantive equality is to correct the cycle of disadvantage experienced by persons belonging to a particular status. For example, take the American Supreme Court judgment of the year 1973 in the case of San Antonio Independent School District v Rodriguez,670 where the court denied admitting a petition seeking to question the state policy on the proportion of tax-payer’s money on public education. The United States Supreme Court in particular has refused to shape the constitutional equality guarantee in the US Constitution to cover groups defined only by their poverty. In this case, the claimants argued that a school system funded by local taxes discriminated against those who lived in poor areas, the Court drew a bright line between claims based on poverty and those traditionally identified as ‘suspect’ under the Equal Protection Clause. The difference between status and poverty, as well as the non-justiciable nature of socio-economic claims are highlighted in the judgement of Powell J:

“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”

The Court found it particularly difficult to accept that there could be justiciable criteria for what amounted to poverty:

668 Supra note 645 at 25.
670 411 US 959: 93 S. Ct. 1919, 1924
“The Texas system of school financing might be regarded as discriminating (1) against ‘poor’ persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally ‘indigent,’ or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. Yet appellees have not defined the term ‘poor’ with reference to any absolute or functional level of impecunity.”

Anyway, in this case the justice was denied to the poor and indigent citizens of Edgewood and such like districts, as the court did not want to define issues of state policy, i.e., factors constituting poverty, or fiscal policy of state on tax-benefit sharing between geographic-political regions. Additionally, the court didn’t want to get convinced with the argument that, such a law restrains the people of Edgewood and such other districts from exercising their autonomy and free choices on matters relating to their residence, and schooling because of socio-economic inequalities amongst high-taxpaying and low-taxpaying districts. The court restrained from remedying this depravity, on which the poor citizens of Edgewood had no control, as poverty is purely an impersonal socio-economic factor. Such is the result of the application of ‘formal equality’. Many rights’ structures across various jurisdictions have deliberately chosen to put their people’s socio-economic rights as non-justiciable rights.671 This was the problem with ‘redistribution’ as a principle of perpetuating substantive equality.

The ‘recognition’ or ‘status-based’ principles which also act as constitutional guarantees of substantive equality and anti-discrimination have its own contradictions. One such pertinent issue is the problem of defining these status groups or out-groups. Professor Iris Marion Young argues in her book *Justice and the Politics of Difference*672 that the facet of substantive equality shouldn’t be confined to distributive paradigm, rather the focus should be on ‘redistribution’ of societal resources to end social injustice. She puts forth the idea that it is not possible to exclusively define any particular ‘status’ or ‘out-group’ on any of the typically-exclusive characteristics which would

671 For example, see the Directive Principles of state policy in India, as a part of the constitutional scheme in India, that puts the state under positive obligations of non-justiciable nature. Also, see the International Covenant on Economic, Social and Cultural Rights, 1966 that is based on the principle of ‘progressive realisation’ of rights which are socio-economic in nature, e.g., the state’s duty to take measures to eradicate poverty, or to minimize the gap between the rich and the poor in the society.

distinguish one such vulnerable out-group from the other completely. She claims that every vulnerable group has lot of common characteristics to share. For her, the groups intersect among each other, and that the different groups share some common experiences and even have some common membership. This in turn entails a reconceptualization of the notion of difference itself. Instead of ‘difference’ connoting ‘absolute otherness’ or deviance from a single norm, difference is about relationships between and within groups. This allows groups to define themselves, rather than being subject to a devalued essence imposed from outside.\textsuperscript{673} Thus, group membership is conceived of as having fluid boundaries, not dependant on the rigid definition of the group itself. Young raises the concern of ‘intersectional discrimination and cumulative discrimination.\textsuperscript{674} She argues that that the facet of substantive equality should not be confined to distributive paradigm, rather the focus should be on re-distribution of societal resources to end social injustice. Her claim is that instead of focusing on disadvantage, the focus of developing societies should be on domination or structures that exclude people from participating in determining their actions. The ‘distributive structure’ must focus on ‘societal power-relations’ such as: decision-making power; division of labour; culture; symbolic meaning attached to people, actions and things. For example, women who are trapped in the private sphere will suffer disadvantage in this sense even if they live in affluent households. Hence, a distribution of groups based on financially affluent women and otherwise would not be socially just and morally fair. Keeping this example in mind, it could be said that, substantive equality should focus on the nature of disadvantage caused, rather than just focusing on the consequences attached to such disadvantage. The discourse on disadvantage must include constraints which power structures impose on individuals because of their status, e.g., domination, cultural of subjugation and silence resulting into creation of unequal statuses.

Disadvantage could also be understood as a deprivation of genuine opportunities to pursue one’s own valued choices. Amartya Sen and Martha Nussbaum’s capabilities approach focuses on considering the extent to which people are actually able to exercise their valued choices, rather than simply having the formal right to do so. Sen argues that, what people can achieve is influenced by economic opportunities, political liberties, social powers and enabling conditions of good health, basic education, \\textsuperscript{673} Id. at 168-172. \\
\textsuperscript{674} There are two questions on Article15(1) ’s potential-application to cases of intersectional and cumulative discrimination: Is inter-sectional or cumulative discrimination forbidden under the Article 15(1) of the Constitution of India even if the ‘grounds’ of discrimination are within the ones protected under the said provision? Second, whether the singular or inter-sectional or cumulative discrimination(s) based on any other ‘ground’ not expressly protected under Article 15(1) isn’t constitutionally forbidden as well? See the Section 2.2.2 of this Chapter for Kalpana Kannabiran’s re-reading of Article 15(1) of this issue.
encouragement and cultivation of initiatives.\textsuperscript{675} It may not be feasible to for a person to achieve the goals she values due to social, economic or physical constraints as well as due to political interferences.\textsuperscript{676} Thus, the redistributive dimension of equality aims to redress disadvantage by removing obstacles to genuine choice. Merely, having the same approach to equality for all cannot be a substantively productive approach as everyone is with different constraints, and merely doing so may replicate disadvantage, resulting in inequality. For example, the institution of marriage in a society could be legally broadened to give space to same-sex couples, but the same notions that have been governing different-sex marriages for ages cannot be applied on the new entrants of same-sex couples, as the constraints and obstacles for the former could be different from the later. The criminal provisions on laws addressing ‘cruelty’ or ‘domestic violence’ are completely gendered and one-sided (male to female, where male/husband/family-members of the husband is always the perpetrator of cruelty or violence and the victim is always the female/wife). In all probabilities, the victim has to be a female. Such identity-based definition of violence must be made identity-neutral, as disadvantage has to be read in its particular contexts not blindfolded through a universal template.

The Recognition Dimension: respect and dignity of an individual as a concern for substantive equality

More than understanding ‘disadvantage’ as a major challenge to ensure substantive equality and, to oppose stigma, stereotyping, humiliation and violence based on grounds such as sex, religion, race, ethnicity, sexual orientation \textit{et.al.}, could be a major challenge to the object of substantive equality. Thus, a major challenge for substantive equality is to promote and protect individual dignity and worth of all.

Equality attaches to all individuals not because of their fundamental choices, e.g., sexual orientation, gender, nationality or their immutable statuses, e.g., sex, race or ethnicity, but because of their humanity. Individuals shouldn’t be humiliated or degraded through racism, sexism, violence or other status-based prejudice.\textsuperscript{677}

However, redistribution of material resources of the society could be one of the concerns of distributive justice; it’s not the only concern for anti-discrimination law. The politics of identity surrounded with notions of recognition and misrecognition are important discourses that must be

\textsuperscript{675} Supra note 667 at 5.
\textsuperscript{676} Martha Nussbaum, \textit{Women and Human Development} 90-91 (Cambridge University Press, 2000).
\textsuperscript{677} Supra note 645 at 28.
addressed while dealing with substantive equality. As discussed above, Nancy Fraser’s ideas on distinctions between ‘redistribution’ and ‘recognition’ are of much help in dissecting the politics of identity and recognition. Redistribution refers to material inequality and the redistribution of goods and opportunities to redress this material inequality. Whereas, recognition is more complex. Drawing on the concept originally developed by Hegel, Fraser refers to recognition as the central importance to the interpersonal affirmation of who we are (or inter-subjective recognition within the subject of social relations). Identity is shaped through how others recognise us and how we recognise others. Fraser argues that recognition is about social status, the relative standing of social actors within cultural value patterns. Status subordination and misrecognition arises when cultural value patterns constitute some as inferior, excluded or invisible. Here Charles Taylor’s thesis on recognition and identity can be used to further nuance the politics surrounding ‘recognition’. For Taylor, identity designates something like a person’s understanding of who they are, of their fundamental defining characteristics as a human being. Whereas, he considers that the human identity is “partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves”. Non-recognition or misrecognition can inflict harm; it can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being. Fraser points out that, social groups are consequently defined not by relations of production, but of esteem, respect and prestige enjoyed relative to other groups in society. Status equality consists of the equal ability to participate in social life. Honneth characterises recognition in terms of self-realisation. For him, the individual subject can only achieve autonomy if he or she can develop an intact self-relation through the experience of social recognition. On either definition, the recognition hierarchy can be distorted by prejudice and irrationality. The distinction between recognition and redistribution readily maps onto the two spheres of equality discussed here. The notion of socio-economic equality within the welfare state can be understood as aiming at redistribution, to correct economic injustices in terms of access of individuals to resources. Status-equalities, as conceived by Honneth, are about recognition; whereas, Fraser’s redist-

678 See Nancy Fraser, Honneth, *Redistribution and Recognition: a political-philosophical exchange* 13 (Verso, 2004).
679 Id. at 13.
680 Id. at 29.
682 Id.
683 Id.
684 Supra note 678 at 14.
685 Id. at 29.
based inequality, on the other hand, can be characterised as a recognition issue, with anti-discrimination laws and constitutional equality guarantees addressing distortions caused by misrecognition, or failure to treat all with equal respect.

But recognition does not only matter normatively. It is also of psychological importance. Most theories of recognition assume that in order to develop a practical identity, persons fundamentally depend on the feedback of other subjects (and of society as a whole). According to this view, those who fail to experience adequate recognition, i.e., those who are depicted by the surrounding others or the societal norms and values in a one-sided or negative way, will find it much harder to embrace themselves and their projects as valuable. Misrecognition thereby hinders or destroys persons’ successful relationship to their selves. It has been poignantly described how the victims of racism and colonialism have suffered severe psychological harm by being demeaned as inferior humans.686

Fraser speaks of two possible ways to address ‘status hierarchy’. The first is to dissolve the status and make institutionalised attempts to assimilate all statuses by deconstructing difference. This is the formal approach to status-based equality. Under the streams of formal equality, the status of the individual is non-existent; rather, it is just the method that creates the difference is existent. Formal equality is based on the premise that ‘everyone is equal before the law’. It is obvious, if the state follows this school of thought, then a society under this kind of a state will lose all its differences. Soon assimilation with the majority will become the norm.

The second response to ‘status-hierarchy’ is to retain the status but to eliminate the hierarchy. This is based on the premise that differences are “benign, pre-existing cultural variations which have been maliciously transformed into a value hierarchy by an unjust interpretative schema.”687 This requires not elimination of group difference, but its celebration through revaluing devalued traits.688 This possibility is based on the approaches to substantive equality, where differences are celebrated and all statuses are accommodated within the laws and the society. Lest, the purpose of substantive equality is not to dissolve different statuses into a homogeneous society, rather it is to remove the detrimental consequences that flow from the disadvantage suffered by such statuses because of the majoritarian tyranny and to accommodate them all in the spirit of equality. As according to

686 Frantz Fanon, Black Skin, White Masks Translated by Richard Philcox (Grove Press, New York, 1967).
687 Supra note 678 at 15.
688 Id.
Fredman, “Equality must move beyond sameness of treatment, to accommodation of difference”.689

Further Fredman brings out the relationship between state policy and the recognition dimension out here, that in many ways, recognition inequality covers the familiar grounds of anti-discrimination law: addressing prejudices in all forms, including racism, sexism, homophobia as well as violence.690 Stigma, stereotyping, humiliation and violence on the grounds of race, gender, sex disability, caste, sexual orientation or any other status can be experienced in its various manifestations in the Indian society today. The above discussion addresses the disadvantages caused by such denigration of humans representing such statuses. Thus, the focus is to remove such disadvantages and to harbour substantive equality by restoring the dignity of the human person irrespective of her fundamental choices or immutable statuses that cause different identities to shape-up in the society. Therefore, the second aim of substantive equality should be to promote equal dignity and worth of all.

The notion of dignity has been given central importance in many jurisdictions and legal systems through constitutional, statutory proclamations and also through courts. Fundamental amongst these is the Charter of the United Nations, which proclaims in its preamble that:

“We, the people of the United Nations... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”

The Preamble to the Canadian Charter of Rights and Freedoms provides:

“Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law”

So, does the Constitutions of South Africa and Germany or the European Charter of Human Rights. Section I of the South African Constitution states that the new South African state is founded on the values of ‘human dignity, the achievement of equality, and the advancement of human rights and freedoms’. The general limitation clause in the South African Constitution also states emphatically that a right entrenched by the Constitution can only be limited to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, autonomy and

689 Supra note 669 at 216.
690 Supra note 645 at 17.
freedom’. Every court, when interpreting human rights, must do so in a way which promotes the values of human dignity, equality and freedom.\(^{691}\) Similarly, the German basic law provides in its first article that human dignity is unassailable and that it is the duty of all state authority to respect and protect it.\(^{692}\) In the EU Charter of Fundamental Right,\(^{693}\) dignity plays a significantly central role. Other than being a part of the preamble, dignity is accorded as a specific right under Article I: ‘Human dignity is inviolable. It must be respected and promoted’.

The Indian Supreme Court has located the right to dignity as a Fundamental Constitutional Right through a plethora of its judgments, starting from one of its seminal judgments of all times: \textit{Maneka Gandhi v. Union of India}\(^{695}\) where the court through Justice Beg said:

> “Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not, mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual and the unity of the nation) which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat very objects of such protection.”

Equality attaches to all individuals, not because of their merit, or rationality or their citizenship or membership of any particular group but because of their

\(^{691}\) South African Constitution, Section 36.
\(^{692}\) Id. at Section 39(1) and (2).
\(^{693}\) Basic Law for the Federal Republic of Germany (Grundgesetz, GG), Article 1(1).
\(^{694}\) Charter of Fundamental Human Rights proclaimed in December, 2000 is now incorporated in the Lisbon Treaty, in effect from December, 2009 (except an ‘opt-out’ by the UK).
\(^{695}\) AIR 1978 SC 597 at 623-624.
humanity. Individuals should not be humiliated, demeaned or stereotyped because of their race, sex, sexual orientation or any other statuses.

Dignity plays a very significant role in understanding equality claims of different groups. Take the example of women’s voting rights. For decades together, women have been denied the right to vote by many early democracies on the ground of their mental inferiority when compared to the male voters. The basis of state-differentiation in denying women voting rights was based on lack of rationality of women while choosing the right candidate to vote. This rationality requirement of formal equality was supplanted by dignity requirement and now, all women have the right to vote. Similar were the formal reasons for the state to deny the Blacks or Hispanics or other coloured citizens of America to claim equal rights. As Fredman puts it, ‘the crucial advance represented by substituting dignity for rationality is that dignity for rationality is that dignity is seen to be inherent in the humanity of all people’.696

Locating dignity as one of the several dimensions of equality also enables us to see that dignity is not a separate and additional element to socio-economic disadvantage in an equality claim. Socio-economic disadvantage is in itself an assault on an individual’s basic humanity.697 The South African case of Khosa and Mahlaule v. Minister for Social Development698 the issue before the Constitutional Court was that of a legislative enactment that created pension benefit and child-care benefit only restricted for the citizens of South Africa that excluded all the permanent residents. The South African Constitutional Court struck down this enactment not just for the socio-economic impact on the South African Permanent Residents, but moreover, because of the stigmatizing impact it had on them giving them an impression that they are second-class persons living in the South Africa who have a claim over the state resources only after the citizens. Permanent residents were in effect ‘related to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution’.699

Dignity has been a key component in influencing the evolution of the equality principle. First is the reduction in the possibility of a supposed levelling down of rights for any of the parties to a litigation (remember, Palmer v. Thomson discussed in the previous section on formal equality which demonstrates that levelling down has been a key component in applying the principles of formal equality). Formal equality has been used in the past to diminish the status of

696 Supra note 645 at 20.
697 Id. at 29.
698 2004 (6) BCLR 569.
699 Id. at para 77.
individuals to maintain absolute equality of status. Whereas, the equality based on dignity must enhance rather than diminish or level down the status of individuals. In *Palmer v. Thomson*\(^{700}\) the city of Jackson in Mississippi was ordered to desegregate all its four ‘whites only’ and one ‘blacks only’ swimming pools. The city instead doing this decided to close down all its public swimming pools. This is a classic case of levelling down of status of individuals while applying the principles of formal equality. Same type of state’s action of levelling down could be seen in the passage of the Prevention of Terrorism Act, 2005 in the UK. Prior to the enactment of this Act, under the Anti-Terrorism Crime and Security Act, 2001, only the non-UK nationals could be arrested indefinitely without trial if they were suspected of international terrorism. After the House of Lords struck down this legislation on the grounds, inter alia that it only applied to non-UK nationals, whereas any UK national involved in similar acts could never be arrested without trial, perpetuated inequality.\(^{701}\) In a knee-jerk reaction, the UK Parliament enacted the 2005 Act, wherein both non-UK as well as UK nationals could be arrested (again without trial) indefinitely on the same charges.

These are two cases of classic levelling down of the statuses of individuals on formal grounds of equality. What could happen if equality could be read with dignity in similar cases? In a case brought initially to the UK courts, and consequently under the EU law, to the European Court of Justice, the claim of discrimination put forth by men aged between 60-64 was upheld. In this case, the minimum age for grant of pension for women applicants was reduced from 65 to 60 years, whereas the minimum age for men applicants remained the same, *i.e.* 65 years. However, unlike the City of Jackson, Mississippi the EU parliament used substantive principles of equality and averted any possible ‘levelling down’ of either men or women pension applicants. The Social Assistance Amendment Bill was passed in 2008 that allows men aged between 60-64 to also be eligible for pension. This move neither hampers women pension applicants, nor the men pension applicants.

There is also a second way in which dignity has helped equality and anti-discrimination laws to evolve for courts in various jurisdictions. The human dignity could be used as a component to add new protected groups in the anti-discrimination laws. For example, the Canadian Supreme Court has held that the decision as to whether the equality guarantee in the Canadian Charter of Rights prevents discrimination on a ground not specifically enumerated should be decided by the primary mission of equality guarantee. The Supreme Court in Canada has held this mission as ‘the promotion of a society in which all are secure in knowledge that they are recognised at law

\(^{700}\) 403 U.S. 217 (1971).
as human beings equally deserving of concern, respect and consideration’. On this view, a person or a group has been discriminated against when a legislative distinction makes them feel that they are less worthy of recognition or value as human beings, as members of society. Similarly, a question of whether differentiation on a ground not specified in the South African Constitution amounts to discrimination is answered by considering whether the differentiation is based on attribute and characteristics which objectively have the potential to impair the fundamental dignity of the persons as human beings.

Taking the assistance of ‘dignity’ to resolve ‘equality’ claims always doesn’t end up in having a just outcome. It has been seen sometimes, ‘dignity’ taking over ‘equality’ and almost replacing it with its appeal and candour in a rights’ litigation. This is an over-emphasis on ‘dignity’, which sometimes the courts happen to be doing. At least, ‘dignity’ cannot be used as a sole argument replacing all the principles of substantive and formal equality. For example, take ‘rationality’ as a tool applied by standards of equality and its application on women’s rights. McCrudden argues that ‘instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion.’ However, Carozza in his reply to McCrudden’s thesis emphasises that the fact of disagreement as to the meaning of dignity doesn’t constitute a reason for discarding the concept, but instead for engaging in a continued discussion to determine its meaning.

The first problem is that the concept of dignity is open to different interpretations, and even opposite results. The case of President of the Republic of South Africa v. Hugo where pardon was ordered by President Nelson Mandela to all women prisoners who were mothers of young children. The pardon was challenged by a male prisoner, the sole carer of his young children, on the basis that it discriminated on the grounds of gender. The court dismissed his plea. The court through Goldstone J held that, ‘the Presidential Act might have denied fathers an opportunity it afforded mothers, but it could not be said to have fundamentally impaired their rights to dignity.

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or the sense of equal worth.\textsuperscript{709} The dissent was written by Kriegler J, who held that, it was the assumption that women are primary childcarers which constituted an assault on their dignity. As he puts in his dissent:

“one of the ways in which one accords equal dignity and respect to the persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely...”\textsuperscript{710}

This problem has now been recognized by the Canadian Court. It acknowledged the problematic repercussions of over scoring dignity on equality in the case of \textit{R. v. Kapp}:\textsuperscript{711}

“Several difficulties have arisen from the attempt...to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the Section 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity... But as critics have pointed out, human dignity is an abstract and subjective notion that ... has proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.”\textsuperscript{712}

The \textit{second} problem with exclusive reliance on dignity is that, it is not sufficiently sensitive to conflicts with individual liberty and autonomy.\textsuperscript{713} The difficulty arises when an individual chooses to act in a way which conflicts with the state’s view of individual dignity. For example, Feldman brings the example of the ban placed by the France on the cultural practice of ‘dwarf-throwing’. An individual argued that this deprived him, not only of his source of income, but his possibility of achieving fame. Given that health and safety conditions could be assured, was the prohibition a means to protect his dignity and common humanity, or was it an infringement on his autonomy?\textsuperscript{714}

\textsuperscript{709} Id. at para 47.
\textsuperscript{710} Id. at para 80.
\textsuperscript{711} 2008 SCC 41.
\textsuperscript{712} Id. at para 21, 22.
\textsuperscript{714} \textit{Supra} note 707 at 701-702.
This brings down a fundamental question as to, who’s perception of dignity should be followed as the just perception?

Whereas, Hepple argues that instead of an intrusive paternalistic model, equality law should advance a ‘stewardship model’, whereby the State is entitled to express value judgments about what is good for individuals, but should then leave it to those individuals to make up their own minds. On this basis, ‘treating dignity as an overreaching or superior value’, the question should be whether the State’s action was a proportionate means of achieving a legitimate end.\textsuperscript{715}

These difficulties can be avoided by regarding dignity as an aspect of equality rather than attempting to reduce equality to a single notion of dignity.

**The Transformative Dimension: accommodating difference and structural change**

Sandra Fredman argues that the problem isn’t ‘difference’ in society rather it is the detriment which is attached with such difference. Therefore, the third aim of substantive equality, she suggests is to accommodate difference, removing the detriment but not the difference itself.\textsuperscript{716}

The principles of formal equality presuppose that it is both desirable and possible to denude an individual from her immutable choices and fundamental statuses (which forms her identity) and to treat her purely on merit. The criterion for formal equality is to differentiate between individuals, groups based on their abilities and not based on their diverse backgrounds and disadvantages. Hence, the result of the application of formal equality in a society leads to streamlining the identities or forcing the minorities to confirm to the pressures of the majority. Whereas, substantive equality recognises that these characteristics can be the valued aspects of an individual’s personality. The aim of substantive equality is redoing some structural patterns of the society, workforce and the government, e.g., building environments to accommodate disabled persons, ethnic and religious minorities. Hence, the substantive equality leads to transformation in the society. One of the classic examples of the transformative dimension to substantive equality is the one on the long working hours for women in factories. Many legal systems take a protectionist approach towards women workers and deny night work to the women on the pretext that women workers could be unsafe in a male-only work force, especially at nights. Though, this would be a perfect state policy as per the formal principles of equality. However, the substantive equality principles would demand in this

\textsuperscript{715} Supra note 713 at 12.

\textsuperscript{716} Supra note 645 at 30.
situation that adequate lighting, requisite transport facilities and stricter laws be made at the workplaces, so that all employees (female or otherwise) could have an equal access to workplaces at all times.\textsuperscript{717} Similarly, the built-in environment must be adapted to accommodate the needs of the disabled people, and dress codes and holidays must accommodate religious and ethnic minorities.

The recent judgment of the Supreme Court of India in the case of \textit{NALSA v. Union of India}\textsuperscript{718} can be discussed under this section. This is a case where the National Legal Services Authority, a statutory body responsible for supporting litigants to pursue their right to equal justice filed a writ petition seeking directions to the various governments and private bodies to accommodate the transgender persons instead of discriminating them based on their different gender identity (which doesn’t fit in the conventional binary of male and female genders). Justice Radhakrishnan observed in his judgment:

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49. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. We have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by
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\textsuperscript{717} See for example a very transformative judgment by the Indian Supreme Court in the case of \textit{Vishaka v. State of Rajasthan}, AIR 1997 SC 3011.

\textsuperscript{718} \textit{Supra} note 8 at 49.
laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.”

Also, as Justice Sikri in his concurring judgment has resonated the need for an accommodative structure to be in place to ensure the due recognition to the transgenders in the society and has emphasised on the due role of the law in this process of the realisation of their constitutional rights, the judge has observed:

“119. The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play more pre-dominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.”

This is seminal judgment that is shaping the Indian laws on transgender rights. While the bench made such observations and expressed the need to restructure the society and governmental approach while dealing with persons who do not want to fit in the conventional binary of genders, the court called for the adoption of an accommodative set of norms and directed the state to comply by the following orders:

“129. We, therefore, declare:

\[719 Id. at 119.\]
1. Hijras, Eunuchs, apart from binary gender, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.

2. Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

3. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.

5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.

6. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

8. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

9. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.”

This is a case, where the burden of redoing the social, economic and political structures in favour of the differently identifying minority (the transgenders, in this case) was put on the government. In many other cases, a more
jurisprudential question arises as to who should bear the cost of such transformation and to what extent such transformation could be allowed to take place as against the majoritarian structures. In this context, the following discussion on the challenges to the transformative role of substantive equality would be useful.

The transformative dimension to substantive equality is challenging when it comes to its enforcement. Even where there is an in-principle agreement to accommodate different identities in the societal mainstream, the enforcement of this agreed precept deserves a good deal of agreement on a few other issues. According to Fredman, there are two main challenges in implementing the transformative dimension to substantive equality. First, is a prior agreement as to who should bear the cost of such transformation or accommodation? Second, is to what extent should such transformation or accommodation be allowed as against the existing structures of society?

The first challenge is based on fixing the liability bearing the cost for transacting a policy change into a real change. Who should bear the economic burden? Should it be the state? Should it be the employer? Should it be the individual or the group itself? Fredman argues, that 'it is misleading to argue that it is too costly to accommodate difference, since the cost is incurred in any event'.\textsuperscript{721} The status quo, without legal intervention, requires the individual or the out-group to bear the full cost: women bear the cost of child-bearing, ethnic minorities bear the cost of their cultural or religious commitments.\textsuperscript{722} Substantive equality aims to redistribute these costs in ways which are fairer to all.\textsuperscript{723}

The second challenge is more complex when it comes to the criss-cross of various conflicting philosophical arguments. Fredman asks the following, very relevant questions: ‘At what point is it unreasonable or even wrong to accommodate difference or tolerate minority cultures?’\textsuperscript{724} She gives some examples from the dilemmas that arise because of the conflict between religion versus liberty debates. She asks: ‘should polygamy be accommodated? Should exclusion of gays and women? Should burqas be permitted? Female mutilation? How does this compare with the minority approaches to religious festivals, dietary laws, ritual slaughter of animals? What about minority views which are racist? Here again, resolution of these difficult dilemmas is facilitated by the multi-faceted approach to equality.\textsuperscript{725} In this context, the human rights’ debates from the early 1970s between the

\textsuperscript{721} \textit{Supra} note 645 at 30.
\textsuperscript{722} Id. at 31.
\textsuperscript{723} Id.
\textsuperscript{724} Id.
\textsuperscript{725} Id.
Universalists versus cultural relativists’ arguments could be useful. The dignity and worth of the human being has always been a universalist argument (which is found in almost all UN human rights charters) to accommodate different identities in the society. This discussion can be rolled on the transformative dimension of the UN Convention on All forms of Discrimination against Women, 1979 (CEDAW).

Thus, as Fredman argues, that ‘the transformative dimension must co-exist with the recognition dimension. Practices which compromise the basic dignity and humanity of the individuals cannot be acceptable in order to accommodate difference.’

Although, there could be an ongoing engagement with the culturally relativist arguments in order to carve out a reasonable and fair set of values to deal with the scope and extent of accommodation of difference, but an absolute negation of the dignity of the different identities cannot be allowed to happen as the core of all humans is their dignity and individual worth.

The Participative dimension: social inclusion and political voice

The fourth dimension substantive equality is based on the ideas of participation. One of the ideals of the principles of substantive equality is to develop a society where, individuals based on their fundamental choices or immutable statuses are not denied equal opportunities to participate at all levels of social, political and economic life. The constitutional democracies are under a primordial obligation to create an inclusive environment where no one is denigrated on the basis of her status or identity rather everyone has equal access to all societal resources and societal activities. Despite these humanist constitutional ideals, individuals are loathed, stereotyped, dominated and finally excluded from joining the mainstream. The whole gamete of political philosophy on subalterism deals with the power-politics of

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727 Sadly, India has put this declaration while signing the CEDAW on this Article: “With regard to articles 5 (a) ... of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.” Available at: http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last retrieved on 06th February, 2016).

728 Supra note 645 at 31.
dominance and encourages the fostering of inclusive policies of social, political and economic inclusion of the powerless.

Indeed, one of the key contributions of the US Supreme Court has been its recognition of the role of equality in compensating for the absence of political power. Thus, in one of the most famous footnotes in the annals of the court’s history, the US Supreme Court stated that judicial intervention under the equality guarantee was particularly necessary because of the ‘way in which prejudice against discrete and insular minorities... tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities’.\(^{729}\) This famous observation by the US Supreme Court is considered to be the starting point of the strict scrutiny test against state power. Wherein, the courts strictly review a state action with the presumption that the state has primarily no right to discriminate on the basis of certain protected grounds, like sex or race, \(\text{et.al.}\) Under this test, the courts further inquire, if the state action is narrowly tailored to only satisfy a very important state interest, and if the courts find otherwise then such state action is declared void under the law. Though, there could be many criticisms of the strict scrutiny approach, the essential purpose of it is to protect the discrete and insular minorities from being oppressed and excluded through any state action. What makes any particular group based a discrete and insular minority?

Professor John Hart Ely, a lifetime supporter of the Warren Court has convincingly established his theory of ‘representation-reinforcement’ on the footnote number 34 of Justice Stone in the \textit{Carolene Products Case}\(^{730}\) where he argues for a Judiciary which should be wary of the majoritarian tyranny against the discrete and insular minorities, who lack representation and hence are political voiceless.\(^{731}\) His theory of judicial review is mainly in relation to groups ‘to whose needs and wishes elected officials have no apparent interest in attending’.\(^{732}\)

Similarly, the Indian Supreme Court has stressed on the need to mainstream the oppressed and the weaker sections of the society, whether it is about poor,\(^{733}\) or the gender minorities,\(^{734}\) women,\(^{735}\) children\(^{736}\) \(\text{et. al.}\) All the core

\(^{729}\) \textit{United States v. Carolene Products Company}, 304 US 144 (1938) at 152 (per Stone J).
\(^{730}\) 304 U.S. 144 (1938).
\(^{734}\) \textit{Supra} note 8.
\(^{735}\) \textit{Supra} note 716.
international human rights instruments also obligates the state parties to create conducive environs within their municipal jurisdictions to enable all persons, especially the minority and the oppressed classes of individuals to be able to fully participate in all spheres of human life (whether political, economic, social or otherwise).

The importance of participation is highlighted by different theorists in different ways. Thus, for Iris Marion Young, the focus of the theories of justice should be on structures which exclude people from participating in determining their actions. She argues therefore, social equality refers both to the distribution of social goods, and to the full participation and inclusion of everyone in major social institutions. Nancy Fraser puts particular emphasis on participation, regarding parity of participation as the normative core of her conception of justice, encompassing both redistribution and recognition without reducing either one or the other.

2.2.2. Re-equipping the Promise of Non-discrimination: reading sexual orientation, gender and marital status within Article 15(1)

This part attempts to address the question: why ‘sexual orientation’, ‘gender’ and ‘marital status’ should be included as a ground of non-discrimination under Article 15(1) of the Constitution of India? The main emphasis in this part is to further fine-tune the “analogous-grounds principle” as theorised by the Naz Court and the NALSA Court so it could be used as a more fool proof principle of constitutional interpretation. This part comprises of four sections. The first section discusses three “drafting-models” used in the anti-discrimination laws of five jurisdictions of United States, Canada, United Kingdom, the European Union and South Africa and then, tries to map the Indian Article 15 on a graph of these models. The second section provides the historical background to Article 15(1), including the pre-constitutional laws on anti-discrimination and the discussions at the Constituent Assembly which led to the inclusion of the said Article as a fundamental right. The third section envisages some guiding principles for the Indian judges on how to read Article 15 more inclusively, so that newer grounds could be protected within its ambit. This section mainly evaluates different working possibilities and combinations to theorise ways to include newer grounds under Article 15. Finally, the fourth section theorises a revised interpretative understanding of Article 15 and 21 with a view to enhance its potential to include intersectional grounds of discrimination within its ambit. Overall, this section

737 Supra note 672 at 31-32.
738 Id. at 173.
739 Supra note 678 at 36-37.
attempts to theorise the constitutional schema of rights to justify the proposed “reimagined state of the law”.

2.2.2.1. Three Models of Drafting Anti-discrimination Protections

This section brings a descriptive write-up on the legal provisions incorporated as discrimination laws from several jurisdictions, viz., USA, UK, South Africa and the EU. The Indian laws on discrimination will also be broached in between, as and when it so needs. The purpose of including this section is to check the background and evolution of discrimination laws in these jurisdictions, that is to say: firstly, to discuss the different drafting patterns (or models) followed in these jurisdictions; secondly, where does the Article 15(1) figure within these drafting patterns?; thirdly, to discuss the inclusivity of these drafting patterns to allow the addition of newer grounds of discrimination; and fourthly, to discuss the legal tests used by courts to grant new additions to these drafting patterns. The idea is to draw newer perspectives based on these transnational experiences which may positively contribute to reinvent the scope of Article 15(1) of the Constitution of India.

The discrimination laws are modelled on certain protected groups of individuals, which the law considers to be worth protecting from majoritarian aggression. The right to non-discrimination is found to be an essential human right in all international human rights instruments, viz., the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the Convention on Elimination of All forms of Discrimination against Women, the Convention on the Rights of Children, et.al. The right to non-discrimination is also found to be a human right in all the regional instruments on human rights, viz., the European Charter of Fundamental Rights, the European Convention on Human Rights, the African Charter of Human and Peoples’ Rights, the American Convention of Human Rights, et.al. Also, the right to non-discrimination is considered to be an essential part of the constitutional rights of the people world-over.

As discussed before, discrimination per se is not always wrong. The states often discriminate for positive reasons, which is acceptable. It is only certain forms of discrimination against certain groups or identities (e.g., based on grounds such as sex, race, or nationality, et.al.) which is unacceptable. Different non-discrimination provisions world-over protect different such grounds, e.g., the EU laws prohibit discrimination based on genetic features and most of the jurisdictions world-over don’t prohibit discrimination based on genetic features. The essential issue here is what sort of discriminations is acceptable or legitimate? This raises two more

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740 Charter of Fundamental Rights of the European Union, Article 21.
questions: firstly, what are the criterions that define a group as a protected group? Secondly, whether judiciary or the legislature decides on matters relating to the inclusion of newer groups?

What sort of discriminations is acceptable or legitimate? The answer to this question is heavily influenced by the political and social context in which discrimination law has developed. In the US, the development began with race. Expansion into other grounds has taken place primarily by way of extrapolation of principles developed for race. In the EU, by contrast, equality law began with nationality and sex. Race was not included until as recently as 2000, together with sexual orientation, disability, age, and religion and belief. Sandra Fredman argues that the list of grounds in the European Convention on Human Rights, 1950 similarly reflects the immediate post-war context in which it was formulated, hence, it expressly characteristics such as birth, political opinion and property, but not disability or sexual orientation (until the year 2000).

Most modern non-discrimination laws are modelled around newer grounds, unforeseeable in the earlier decades. The South African Constitution of 1996 has a non-exhaustive list of 17 grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The EU Charter of Fundamental Rights, 2000 includes genetic features as one of the 14 listed grounds that include sex, race, colour, ethnic or social origin, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. While the UK’s Equality Act, 2010 includes gender reassignment and civil partnership amongst its list of eight grounds that include age, disability, marriage and civil partnership, pregnancy and maternity, race, religion or belief, and sex. All three of these instruments, include sexual orientation as a protected ground.

This above-discussion indicates that there is no uniformity of grounds on which individuals are protected from discrimination under these jurisdictions. Also, that there is always an ongoing struggle in the life of these democracies, including India to have newer grounds included in the already existing set of protected grounds. These newer grounds could be anything.

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742 Supra note 645 at 110.
743 Id.
744 South African Constitution, Section 9(3).
745 Id. at Article 21(1).
746 Id. at Section 4.
ranging from poverty, or gender, to HIV status or physical features, etc. In this context, a few questions emerge. What should be the standard of extending the protection of anti-discrimination laws to any new ground? Should there be a set of objective criterion? Should subjective tests suit better? Should all grounds be considered equally invidious, or are distinctions on the basis of some grounds more invidious than others? How should law deal with an individual who belong to more than one protected ground, such as a *dalit* women or lesbian women?

Now, if these grounds are mainly drawn into the anti-discrimination laws because of political and social factors prevailing at the time of drafting these laws, then who owns the burden of deciding as to decide, whether or not such anti-discrimination laws should be extended to newer grounds like sexual orientation or gender? And such extensions are to be made, then who owns the burden to decide that ‘x’ ground should be included and not the ‘y’ ground? On the one hand, it is the political powerlessness and social vulnerability of a particular group that are some of the major reasons that determine such legal protection. In which case, it should logically be the judiciary, which should own the burden of deciding whether or not any ground is to be included and if so, which ground. On the other hand, the judges lack the democratic credentials, which is why the political legitimacy on deciding such questions is always seen with scepticism.

These are some of the issues that are going to be a part of the discussions under this section. To start with, the author begins with the discussions on the different drafting patterns on which the different anti-discrimination laws are modelled in these aforesaid jurisdictions.

There are three ways in which constitutional or legislative instruments formulate protected grounds of discrimination. Discussions on these three models of drafting patterns that define the anti-discrimination laws in the aforesaid jurisdictions are largely drawn from chapter three of Sandra Fredman’s book, Discrimination Law.747

i. **An exhaustive list model:** The first is by means of an exhaustive list of grounds. Here, the choice of ground is made wholly within the political, constitutional or treaty-making process with no discretion left to the judges. Grounds could be added or removed only legislatively or by amendment of the constitution or the treaty. This fixed category can be found in UK, EU anti-discrimination laws, as well s in the Article 15(1) of the Constitution of India. That doesn’t mean that the courts have no role at all. Remember, that the courts have brought newer

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747 *Supra* note 645 at 112-130.
and additional grounds within the meaning and scope of their respective anti-discrimination laws. The European Court of Justice while interpreting the Article 14 of the European Convention of Human Rights, has included discrimination against ‘transsexuals’ within the ambit of ‘sex discrimination’.748 Also, see the Supreme Court of India’s judgment in NALSA v. Union of India,749 where the court found ‘gender’ to be analogous to that of ‘sex’, and hence, it extended the protection of Article 15(1) of the Constitution of India to prohibit discrimination based on ‘gender’. But the judicial response has been mixed and unpredictable, says, Sandra Fredman.750 The same European Court of Justice, in the case of Grant v. South-west Trains Ltd.,751 declined to include ‘sexual orientation’ as a ground of non-discrimination. So is the case with the House of Lords, when it denied passing ‘ethnicity’ as analogous to ‘religion’; or when it denied including ‘age’ discrimination as analogous to ‘sex’ discrimination.752 Moreover, in Britain, with the passage of the Equality Act of 2010, the Parliament has included eleven grounds of discrimination which includes, gender reassignment, sexual orientation, disability, civil partnership, sex, gender and also age, within its purview.753 Note that, Section 4 of the Equality Act, 2010, the text provides for a closed list of eleven grounds. Again, it is difficult to bring additional grounds of discrimination within the ambit of Section 4, unless the judiciary interprets any existing ground to have been including within itself any additional ground, or until the legislature amends Section 4 to add additional grounds. A similar impetus has come from the European Union as well. As a result of the adoption of the Lisbon Treaty in 2000, a further close list of newer grounds were added in the EU laws on anti-discrimination.

ii. An open-textured model: leaving it to the judiciary: The second model is at the opposite extreme of the spectrum. Instead of an exhaustive list of categories, this approach is based on an open-ended constitutional equality guarantee. This is more so, the case with the US Constitution, which simply states in the Fourteenth Amendment,

748 P v. S and Corwall County Council, (1996) ECR I 2143. The Article 14 of the European Convention of Human Rights states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”
749 Supra note 8.
750 Supra note 645 at 114-115.
754 Equality Act, 2010 (UK), Sections 4-12.
that no state may, ‘deny to any person within its jurisdiction the equal protection of the laws’. In principle, then, any classification whatsoever may be challenged, be it a welfare law providing specific protection to vulnerable members of society or one that unduly burdens a group for reasons of pure prejudice.\textsuperscript{755} The only way in the breadth of this provision can be handled is by adjusting the intensity of judicial scrutiny. In practice, then, the questions of which the classifications are illegitimate is determined by the judiciary through its power to decide how closely to scrutinize a legislative or other classification.\textsuperscript{756} The US Supreme Court has taken on itself the full responsibility of determining protected groups. To do this, it has developed its differing levels of scrutiny. The basic amongst these levels are the reasonability test followed by the courts. In this test, the courts see, if the classification is based on a reasonable basis and whether such basis has a rational nexus with the object of the legislation. This test is followed in most of the Article 14 violations in India. On the other hand, the other extreme of these levels is the test of strict scrutiny, in which rather than rationally relating the mode of classification with the state interest, the courts see, whether the classification is narrowly tailored to satisfy the compelling state interest. In the later test, only if the state action is saved by the courts, only if it can be justified that no alternative state actions were available to the state while doing the discrimination. In this test, the burden of proof lies on the state, rather than on the petitioner. The US Courts have evolved different protected grounds within its anti-discrimination law. Race was one of the first entrants to this list of twelve protected grounds protected by the various Federal laws.\textsuperscript{757} Many of these grounds were initially protected by the courts as protected grounds of discrimination, and later, the legislations are passed to protect them statutorily. The first such example is discrimination on the grounds of ‘race’. After, the US Supreme Court denied protecting discrimination based on race in 1896 in one of its most notorious judgments, \textit{Plessy v. Ferguson},\textsuperscript{758} where it held that segregating blacks and whites doesn’t breach equality guarantee. The Court said, ‘if one race be inferior to the other socially, the Constitution of the United States cannot put them upon

\textsuperscript{755} Supra note 645 at 118.
\textsuperscript{756} Id. at 118.
\textsuperscript{757} Race, Colour, National Origin, Religion and Sex are protected by the Civil Rights Act, 1964; Age is protected by Age Discrimination in Employment Act, 1967; Pregnancy is a ground under the Pregnancy Discrimination Act, Citizenship is a ground under the Immigration Reform and Control Act, 1986; Disability is a ground under the Americans with Disability Act, 1991; Military Veterans are protected under the Uniformed Services Employment and Reemployment Act, 1994; Genetic Information is protected under the Genetic Information Non-discrimination Act, 2008.
\textsuperscript{758} 163 US 537.
the same plane’. The first case, wherein the US Supreme Court overruled its decision in Plessy was its 1944 judgment in Korematsu v. United States, where regarding the internship of Japanese Citizens during the World War II, the Court held: ‘Legal restrictions which curtail the civil rights of a single racial group are immediately suspect.... Courts must subject them to the most rigid scrutiny.’ Though, it is noteworthy to see that protection against discrimination on the grounds of sexual orientation has developed outside the Equality Protection Clause of the US Constitution.

iii. **The Non-exhaustive List:** The third approach is a non-exhaustive list, which enumerates grounds but leaves it to the judges to expand it further to ‘any other ground’ as and when necessary. This is the drafting model adopted in the European Union through the European Convention of Human Rights, 1950 and European Charter of Fundamental Rights, 2000, in South African Constitution, the Canadian Charter of Rights and Freedoms. The text of these provisions include expressions such as, ‘the state shall not discriminate on the grounds including/in particular/such as race, sex, ... or any other status.’ These texts are purposefully underlined for an easy reference. The non-exhaustive list has made the Courts to ‘update’ the protected grounds in response to changing circumstances. This is particularly evident in relation to sexual orientation discrimination. In the earlier cases, the European Court if

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759 Id. at 552.
760 323 US 214.
761 Id. at 216.
762 Bowers v. Hardwick, 478 US 186; See Justice Kennedy’s judgment in Lawrence v. Texas, 539 US 558 at 539, on why it is better to protect ‘sexual orientation’ as a ground of discrimination under the dignity claims of Due Protection Clause, rather than under the Equality Protection Clause.
763 See Article 14 that states ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
764 See Article 21 that states, ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’
765 See Section 9 that states, The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’
766 See Article 15 that states, ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’
Human Rights had no difficulty in regarding sexual orientation as an aspect of sex discrimination.\textsuperscript{767} In more recent cases, the court has been prepared to regard ‘sexual orientation’ as a ground covered as a separate ground of non-discrimination in itself under Article 14.\textsuperscript{768} The Canadian Supreme Court included ‘sexual orientation’ as a ground analogous to ‘sex’ in its non-discrimination provision of Article 15.\textsuperscript{769} In Canada, analogousness of any ‘unremunerated ground’ with that of an ‘enumerated ground’ is generally followed as the pattern of inclusion of newer grounds within Article 15. Whereas, in South African Constitution, the Constitutional Court like the US Supreme Court, presumes unfair discrimination and shifts the burden of proof on the State if the discrimination happens on any of the enumerated grounds protected under Section 9(3). On the other hand, the cases of discrimination on unremunerated grounds the burden of proof lies on the petitioner to prove unfair discrimination by State. In case, the petitioner establishes unfair discrimination before the Court, then the Courts have two options, \textit{first}, is to either fit the unremunerated ground within an enumerated ground on the grounds of analogousness; and the \textit{second} alternative could be to create a new unremunerated ground in itself within Section 9(3).\textsuperscript{770} Note that, in India, the Delhi High Court in \textit{Naz Foundation v. State of NCT of Delhi}\textsuperscript{771} had held ‘sexual orientation’ to be a ground analogous to that of ‘sex’ so as to protect it under the provisions of Article 15(1) of the Constitution of India. The judgments based by the Delhi High Court were that of these cases from Canada and South Africa, as discussed above. Other than the drafting models of these jurisdictions, it is pertinent to emphasise upon the drafting model of the United Nations Human Rights instruments regarding the anti-discrimination provisions. The manner of drafting of the UN provisions on anti-discrimination also follows the ‘non-exhaustive’ pattern. Take for example, the Article 2 of the International Covalent on Civil and Political Rights, 1966;\textsuperscript{772} or Article 1 of the Convention on Elimination of all Forms of Discrimination against Women, 1979,\textsuperscript{773} \textit{et.al}. These provisions use the expression

\textsuperscript{772} Article 2 states: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’
\textsuperscript{773} Article 1 states: "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying
2.2.2.2. Reading the Fundamental Right to Non-discrimination under Article 15(1): the originalist perspective

The Anti-discrimination provisions of Article 15(1) pose a central dilemma in the Indian Constitutional structure. The language with which the Constituent Assembly has worded Article 15(1) is quite narrow and hence, it closes all possibilities of adding newer grounds within its scope, through future interpretation by courts. In such a situation, the fundamental dilemma is, whether newer grounds, such as disability, age, or sexual orientation et.al. could be interpretatively added into Article 15(1), or should its usage be restricted to the five original grounds i.e., religion, race, caste, sex, place of birth?

It is important to look into the legislative history of anti-discrimination laws in India. The general protection for the citizens against some forms of state-discrimination were included first time in the Indian Constitutional Laws through the induction of Section 298(1) of the Government of India Act, 1935. The Section 298(1) provided:

“298. Persons not to be subjected to disability by reason of race, religion, etc.: No Subject of his majesty domiciled in India shall on the grounds only of religion, place of birth or decent, colour or any of them be intelligible for office under the Crown in India or prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.”

The Section 298 of the Government of India Act, 1935 has a specific application restricted only to acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India. Also, this Section protects the subjects of her majesty on the grounds only of religion, place of birth or decent, colour or any of them. The question is as to why be only a few such grounds (as mentioned above) protected? What about the other subjects of her majesty? Of course, as per this provision the remaining subjects of her majesty aren’t protected.
When the Constitution of India was under the process of being drafted between 1946 to 1949, the Constituent Assembly had decided to incorporate separate rights to non-discrimination giving it the status of a Fundamental Right through the induction of Article 15(1), 15(2) and 29(2). The discussions in this section shall be limited only to Article 15(1), as it forms the most general protection against discrimination available to all citizens under all circumstances, unlike Article 29(2).

Initially, there were two drafts of the Right on Prohibition of Discrimination (then ordered as Article 3(2)) that were submitted by the Sub-committee on Fundamental Rights. The two drafts were prepared by K.M. Munshi and Dr. B.R. Ambedkar. According to Munshi’s draft:

“All persons irrespective of religion, race, colour, caste, language or sex are equal before the law and are entitled to the same rights and are subject to the same duties.”

Whereas, the draft submitted by Ambedkar was:

“whoever denies to any person, except for reasons by law applicable to persons of all classes and regardless of their social status, the full enjoyment of any of the accommodations, advantages, facilities, privileges, of inns, educational institutions, roads, paths,, streets, tanks, wells and other watering places, public conveyances on land, air or water, theatres or other places of public amusement, resort or convenience, where they are dedicated to or maintained or licensed for the use of the public, shall be guilty of an offence.”

After discussing the alternative drafts, the Sub-committee on Fundamental Rights formulated a Non-discrimination provision as a part of the clause 5 (the legal equality clause) in its draft report. The provision read:

“(1) All persons within the Union shall be equal before the law. No person shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on the grounds of religion, race, caste, language or sex.”

775 Id. at 183.
Later, when the Advisory Committee discussed the recommendations of the two Sub-committees on April, 21 and 22, 1947, it was realised that, the way the sub-committees drafted the provision, it made it quite complicated to comprehend, its outcome. There were discussions on the removal of the word, language, as there were a number of “denominational” schools for which provision had to be made for the grant of aid from the state. As the general clause forbidding discrimination in state-aided schools would prevent the continuance of aid to such schools. Therefore, language was proposed to be removed at this stage. After due deliberation at this stage, the Constituent Assembly decides to refer this matter for redrafting to the Sub-committee comprising of Munshi, Rajgopalachari, Panikar and Ambedkar. This sub-committee made a general provision that read as:

“the State shall make no discrimination against any citizens on the grounds of religion, race, caste or sex.”

This was now numbered as clause 4. This clause came up for consideration before the Constituent Assembly on 29thApril, 1947. After hearing quite a few proposal for changes, one change was agreed to by the Assembly. The words, “not discriminate” were substituted by the words “make no discrimination” as it was merely a matter of phraseology. There were many other changes brought, but all of them were negatived. Most of the changes were regarding the inclusion of newer grounds, such as political creed (as was proposed by Somnath Lahiri), or colour, creed (as was proposed by H.V. Kamath), or “dress worn by any nationality” (as was proposed by Rohini Kumar Choudhary), et.al.

Subsequently, the clause was further modified by the Constitutional Advisor, B.N. Rau, and it appeared like this in the clause 11 of the Draft Constitution of October, 1947:

“11. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them.”

This was the first such occasion, when the expression ‘only of’ was added to the text of the anti-discrimination law. It was much because, B.N. Rau was of the belief that it was so under the Section 298(1) of the Government of India Act, 1935. The Drafting Committee considered the clause on 30th October, 1947 and accepted as it was proposed aforesaid. When the Draft Constitution was circulated for eliciting opinion, a number of amendments to Article 9 were proposed by members of the Assembly and others. Pattabhi

776 Id. at 185.
777 Constitutional Assembly Debates (III) 411-418.
Sitaramaya, Shrimari G. Durgabai, Thakurdas Bhargava, B.V. Keskar, T.T. Krishnamachari, M. Ananthasayanam Ayyangar and K. Santhanam proposed the amendment that: the word ‘only’ wherever it occurs be deleted. The amendment failed. The Constitutional Advisor’s note replies this amendment in the following words:

“The wording used is in Section 298 (1) of the Government of India Act, 1935. There are disadvantages in retaining this wording. For example, suppose, because of discrimination against Indians in South Africa, India decides to discriminate against South African Europeans in India. Such discrimination would be on the grounds of ‘race’, but not on the grounds only of race; the Draft Constitution, as it stands, would permit it, but not if it is amended as proposed.”

Finally, after the due deliberation on this provision, the words, ‘place of birth’ as a ground was added after the word ‘sex’, whereas the rest of the clause 11 or Article 9 of the Draft Constitution was passed as it was presented.

The following conclusions are drawn based on the debates held amongst the members of Constituent Assembly on the Article 15(1) of the Constitution of India:

i. It was unanimous amongst the members that, the people of independent India needed to have the Right to Non-discrimination as a justiciable right. Hence, Article 15(1).

ii. There was no fixed manner in which the members of the Constituent Assembly wanted to add newer grounds to the originally added five grounds of race, sex, religion, language, caste. The ground of ‘language’ was excluded later, because of the reasons, discussed above. Newer grounds were proposed to be added, like that of ‘place of birth’, political creed’, or ‘colour’ or ‘creed’, etc. Logically, no common connection could be drawn that defines any particular magical or mystical pattern in the proposal of these grounds.

iii. Logically, it is also not possible to draw any common connection between the five original grounds of religion, race, caste, language or sex as was suggested by the Drafting Committee to the Assembly that has led to their inclusion in the magic circle of Article 15(1) except that all these five protected grounds were and continue to be marginalised sections of the society.

iv. The members of the Assembly have never been opposed to the idea of the addition of newer grounds of protection. In fact, they have suggested many, during the course of the deliberations.
v. The expression ‘only of’ was added by Constitutional Advisor, B.N. Rau in the First Draft of the Constitution of October, 1947, which was duly approved by the Assembly. The only occasion where this expression was debated was when Pattabhi Sitaramaya, along with a few others seeking an amendment to the following, failed to get it approved through the assembly.

vi. The Constituent Assembly never discussed the inclusion of grounds such as disability or sexual orientation or gender, etc. Does that deny the courts from adding newer grounds within the protection of Article 15? If the courts bring additional grounds under the protection of Article 15(1), then what should be the guiding principle for such further addition?

vii. As stated in iii, the only common connection between the five protected grounds under Article 15(1) was the respective ‘marginality’ of these groups. If that is the case, additional marginalised groups (such as the ones based on sexual orientation, disability, age, etc.) couldn’t be denied the protection of the same right.

Based on the discussions that were held in the Constituent Assembly, the members did not bring the issue of the ‘narrow textual structure’ of Article 9 (of draft constitution) in their entire deliberations. There was not even a single proposal from any member of the assembly that sought clarifications from the Drafting Committee as to why there are no grounds such as disability or gender or sexual orientation. One of the major reasons of limited inclusion, could be that, the drafting structure of Article 15(1) reflected nothing more than the prevailing political and social awareness and information available to the constitution makers. In the other section on the comparative history of the anti-discrimination laws in the five foreign jurisdictions also show a similar pattern.

While keeping her insurgent traditions of interpreting the constitutional text, Kalpana Kannabiran provides for a provides us with another very distinguished perspective on interpreting the text of Article 15(1). She emphasises upon the need to re-examine the phrases “only” and “or any of them” in the text of Article 15(1). She uses the literary tools of interpreting language to make her point. For she brings, Bryan Garner’s A Dictionary of Modern Legal Usage to suggest that—the word “only” denotes “solely” and the word “or” in legal usage means both “and,” and “or”. To put this in her own words: “opening this clause out and re-examining its import points us

778 Note the inclusion of ‘gender’ as a ground of non-discrimination as it was found to be analogous to the already protected ground of ‘sex’ under Article 15(1).
780 Id. at 390.
781 Id. at 394.
in a different direction: namely, the state shall not discriminate solely on the listed grounds, and on any of the listed grounds—in the singular or the plural, and on grounds of any of the listed indices with actors that do not figure in this list—factors that allude to the larger context. The specific conjunction of sex with any other factors or listed grounds that are alleged to result in discrimination based on sex, then, must be examined by the court (some emphasis supplied).\textsuperscript{782}

Such a fresh perspective as brought by Kannabiran, re-equip Article 15(1) with a much-needed broader ambit—as, then, this not only allows newer (un-enumerated) grounds such as sex, disability, age, or sexual orientation, \textit{et.al.} to become a part of the magic circle of our constitutional anti-discrimination provision—but, also, it re-fits this provision to cover the intersectional violence caused by multiple-markers of discrimination, such as that of race and gender, or that of sex and sexual orientation, etc.

\subsection*{2.2.2.3. Some Guiding Principles for the Indian Courts on reading unremunerated grounds under Article 15(1)}

What constitutes a suspect class (in the language of the American courts)? What are the indicators that tell a court, this is the right group that deserves protection of anti-discrimination laws? What characteristics establish discrimination against a group? Do all groups face some of the common forms of discrimination? If so, how are these groups defined? These are the questions that this section intends to discuss.

The Indian Courts have not gone much into looking for some unifying/guiding principles to include more grounds in Article 15(1). This section attempts to discuss the jurisprudence developed by courts in South Africa, Canada, United States, United Kingdom and the European Union regarding the evolution of different guiding principles to expand the scope of anti-discrimination laws to un-enumerated groups. These principles evolved by the courts in the aforesaid jurisdictions will be used to analyse some workable principles that could guide the Indian Courts while dealing with similar issues. References will be made to the Indian judgments that bring in the need to have an inclusive construction of the Article 15(1) of the Constitution of India. The content of this section is highly drawn from the works of Sandra Fredman, Iris Marion Young, Robert Wintemute, and John Gardner. Sandra Fredman brings in her analysis of various judicial pronouncements and comes out with her ‘four-point indicators’ that explains, the basis on which the courts generally include un-enumerated groups in anti-discrimination laws. These indicators will be analysed in the light of some Indian Supreme Court cases to explain the manner of engagement of the

\textsuperscript{782} \textit{Supra} note 611 at 368-369.
country's top court in this kind of jurisprudence. Robert Wintemute’s thesis on the inclusion of ‘sexual orientation’ as a ground analogous to that of ‘sex’ (and John Gardner’s reflections on the same) will be discussed in the Indian context at the later part of this section. Finally, this section contends that analogous interpretation is the best alternative for the un-enumerated groups to have the protection of the Article 15(1) of the Constitution of India, for the reasons discussed therein.

Iris Marrion Young finds the politics of domination and oppression of certain sections of the society as the core issue that defines why certain groups need an increased protection under the law. The Right to Personal Autonomy of an individual (and of course a group that consists of individuals sharing some common identities, like similar sexual orientation, or similar mental disabilities) is the purpose of anti-discrimination laws. What is personal autonomy is described by Joseph Raz in the following way: “The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.” Autonomous persons “are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete”. Now, who should be protected under the anti-discrimination laws? Since, the protection under the anti-discrimination laws are based on certain grounds (like race, or sex, or gender) on which discrimination is most likely to happen, it is therefore, anyone who is not able to exercise her personal autonomy because of such grounds. What defines these grounds? Sandra Fredman brings in her ‘four-point indicators’ that the Courts in various jurisdictions have evolved over decades of practice to answer this question. These are:

i. **Immutability, Choice and Autonomy:** Immutable characteristics of an individual’s personality could be those over which she has no control, where she is powerless to change them, e.g., the sex, race, ethnicity, place of birth, caste, colour, *et al.* of an individual as it is determined at birth. Though, all immutable characteristics cannot be determined at birth, as there could be characteristics that could be acquired over a period of time, e.g., disability, a particular medical condition of a person like HIV status. With these acquired characteristics, the fact remains that the individual has no control over

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783 Supra note 672 at 33.
785 Id.
these characteristics which start defining her identity at a private or public level. As for the Supreme Court of Canada, the common factor to all the enumerated and analogous grounds is that ‘they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of personal characteristics that are immutable’.\footnote{Corbiere v. Canada, (1999) 2 S.C.R. 203. Also, see the observations of Baroness Hale of the House of Lords in Ghaidan v. Godin-Mendoza, (2004) UKHL 30 at para 19.} At the same time, there could be characteristics of an individual’s personality that could be changed, suppressed or muted by an individual at great cost to her personality and free will, \textit{e.g.}, gender, sexual orientation, sex reassignment, marital status, religion, citizenship, nationality or pregnancy. Though, some may argue (and to some extent it is true) that these characteristics are a matter of choice for an individual, but the essential question for any constitutional democracy based on the liberal ideals of personal autonomy and free will, that is it fair on the part of the state to dictate any particular form of choices as legally accepted ones to the detriment of all other form of alternative choices? Often, the states dictate the majoritarian norms over the minorities who choose not to fit into the mainstream roles. Any liberal democracy cannot mandate any particular form of choices to its individuals. Though, often states may not directly dictate the terms of one’s choices, but the public pressures could be such that an individual is bound to fit herself into the mainstream roles or identities. As the Indian Supreme Court observes about the freedom to pursue the fundamental choices of a person in the \textit{Anuj Garg Case}:\footnote{Anuj Garg v. Hotel Association of India, AIR 2008 SC 663, see para 51.} “The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.” This principle was used by the Delhi High Court in the \textit{Naz Foundation Case}\footnote{Supra note 70.} in 2009 to extend protection of Article 15(1) of the Constitution on the grounds of sexual orientation. The Canadian Supreme Court has thus, refined the ‘immutability principle’ to include ‘fundamental choices’ into it to further nuance the meaning and scope of discrimination under the Article 15 of the Canadian Charter of Rights. In the case of \textit{Corbiere v. Canada},\footnote{Corbiere v. Canada, (1999) 2 S.C.R. 203 at para 13.} the court holds that immutability principle must include characteristics that are ‘changeable only at unacceptable cost to personal identity...or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law’.\footnote{Id.} It is on this basis that the court has held sexual orientation to be analogous ground as it is
'unchangeable or changeable only at unacceptable personal costs.' A similar example could be given over discrimination on the grounds of citizenship and the decision of the Canadian Supreme Court and the South African Constitutional Court wherein both the courts have found citizenship to be a ground of discrimination analogous to the protected grounds under their respective anti-discrimination laws. As in the later case, the South African Constitutional Court held that: ‘...citizenship is typically not within the control of an individual and is, at least temporarily a characteristic of personhood not alterable by conscious action in some cases not alterable except on the basis of unacceptable costs.’ Sometimes, it gets challenging to decide what is an immutable characteristic or a fundamental choice? Two such British cases are discussed here to explain some of these challenges. The first is the question as to whether ‘place of residence’ is an immutable characteristic and thus, protected under the catch-all phrase of ‘other status’ under Article 14 of the European Convention of Human Rights? This is the case of R (Carson) v. Secretary of State for Works and Pensions, the Court was to decide whether the government’s decision to increase the pensions of all resident British citizens at the exclusion of all non-resident British citizens was an act of discrimination against the later. Lord Walker did not regard the role of choice as central to the question. Instead, he held that ‘where an individual lives is in principle a matter of choice. So although it can be regarded as a personal characteristic it is not immutable.’ The second British case in the series of the two cases would be, AL (Serbia) v. Secretary of State for Home Department, where young asylum seekers without families were excluded from an amnesty extended to all asylum seekers in the UK with families. Is being ‘without a family’ an immutable characteristic? To answer this, required a particular complex understanding of immutability: ‘being without a family may not be immutable, like sex and race, but it is something over which the young person has no control.’

ii. **Access to Political Process**—discrete and insular minorities: The second factor frequently used by courts to determine whether a group should be protected relates to the extent to which the group at issue is marginalised in the political process/ here, the underlying assumption

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793 *Khosa v. Minister of Social Development*, 2004 (6) BCLR 569.
794 Id. at para 71.
796 Id. at para 58.
797 (2008) UKHL 42.
798 Id. at para 32.
is that equality law should aim to redress imbalances in majoritarian democracy. This originates from the footnote 4 of Justice Stone’s decision in Carolene Products Case in 1938. According to Justice Stone, ‘more searching judicial inquiry’ may be required for statutes directed at particular religious or national or racial minorities, or where ‘prejudice against discrete and insular minorities ...tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities’. As discussed above, this led the American Supreme Court decreeing the Japanese-Americans, African-Americans as protected groups, attracting strict scrutiny under the Fourteenth Amendment. It is important to quote John Hart Ely himself while discussing the role of the courts when it comes to the rescue of the discrete and the insular minorities through his representative-reinforcement theory: judicial review is particularly appropriate when ‘(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest and thereby denying that minority the protection afforded other groups by a representative system.’ The Courts across the world are influenced by Hart’s representation-reinforcement theory, which is based on the discrete and insular minorities. The Canadian Supreme Court in Andrews v. Law Society of British Columbia dealt with the alleged case of discrimination against a British Citizen permanently resident in Canada who was denied entry in Bar because he was not a Canadian citizen, he met all the other qualifying criterion except for citizenship. The court used the Ely’s thesis to conclude the case in favour of the petitioner and observed, the test to be applied in such situations, per Wilson J was ‘that those groups in society to whose needs and wishes elected officials have no apparent interest in attending’ constitute the ‘discrete and insular minorities’ and hence, they need to be protected by the courts against the majoritarian tyranny. In that case, they were held to be analogous to the groups enumerated in the Charter. The South

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799 Supra note 645 at 134.
800 United States v. Carolene Products Co., 304 US 144.
801 Id. at 152.
802 Korematsu v. United States, 65 S Ct 193 (1944).
803 See Mc Laughlin v. Florida, 85 S Ct 283 (1964);
804 supra note 732 at 103.
805 (1989) 1 SCR 143.
806 Id. at 51.
African Constitutional Court in 1997 confronted with a similar case\(^{807}\) of the discrimination against the educators of different nationalities resident in South Africa. Thus, regulations excluding non-citizens from being employed as educators was held to be discriminatory. The Court heavily drew on the Canadian case of \textit{Andrews} and Ely’s thesis on representation-reinforcement. This was reinforced in the case of \textit{Khosa},\(^{808}\) where court held ‘citizenship’ to be a ground analogous to that of the enumerated grounds under Section 9(3) of the South African Constitution. Bruce Ackerman in extension and support of John Ely’s representation-reinforcement theory argues that, those who are less likely to succeed in the political process are the ones who are neither discrete nor insular. It is precisely because they are the ones who are so diffused with that of the majority that they find it difficult and almost impossible to organise themselves sufficiently to compete. Those who have the least access to resources are probably the most diffuse, it is as per the Ely’s thesis, that they should have the greatest claim over the judicial concern and to the fairness of the political process.\(^{809}\) The law and its regulation of sexuality remain a critical terrain on which the construction of marginalized sexualities are constantly contested and challenged. It is pertinent to bring some notions from the subaltern perspectives here. Ratna Kapoor addresses the equivocal results of legal claims and legal recognition in the context of enforced western sexual morality on the eastern cultures. She brings out how a specific sexual practice or construction is neither totally repressive nor liberating. Each practice is capable of being redefined and reshaped. Ratna Kapur challenges the West's received wisdom about sex, desire, and the law in India.\(^{810}\) As a comparative study of the legal issues around India's sexual culture and the West's relation to that culture, her work stimulates dialog across many previously unattended fictional dichotomies in legal thought and practice. Such dichotomies as "the West and the Rest," the powerful and the impoverished, and in the sexual context, between those whose sexual identities comport with the law and those whose sexual identities are at odd with it, "sexual subalterns," tend to perpetuate legal structures that completely fail to recognize the rights of those legal 'others'. Kapur shows how plurality of sexual practices and resistance of sexual subalterns complicates the notion of culture, as something that is constantly negotiated and in the process of

\(^{807}\) Larbi-Odam and Others v. Member of Executive Council for Education (North-west Province) and another, (1997) ZAAC 16.

\(^{808}\) Khosa v. Minister of Social Development, 2004 (6) BCLR 569.

\(^{809}\) Supra note 646 at 718.

construction. Kapur is concerned that the only safe way to discuss sex publicly is through the discourse of violence, coercion, and victimization. This posture proliferates legal regimes that do not recognize those of non-traditional sexual identities, making ‘others’ of them. Kapur calls for new conversations across the divide between the law and its ‘others’. This discourse gets into the discrete and insular identities out of the sexual minorities in the eastern social landscape, where Victorian sexual morals were enforced centuries ago by the British Colonialists through penal laws, and which by now have changed the traditional notions and cultures of sex from these Eastern Societies. Take the example of the social near-invisibility and political powerlessness of the LGB population in India, which is reinforced twice in the last two months in the Parliament of India.iii. Dignity: treating individuals as less valuable members of society: Dignity has been an important connecting link between the different grounds of discrimination under these anti-discrimination laws. As Iris Marion Young holds: “Violence is systemic because it is directed at members of a group simply because they are members of that group. Any woman, for example, has a reason to fear rape. Regardless of what a Black man has done to escape the oppressions of marginality or powerlessness, he lives knowing he is subject to attack or harassment. The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, solely on account of their group identity. Just living under such a threat of attack on oneself or family or friends deprives the oppressed of freedom and dignity, and needlessly expends their energy.”812 Dignity constitutes as the third factor frequently used by courts to delineate protected groups. The basis for including non-enumerated grounds within the scope of the anti-discrimination laws is the inherent human dignity of the victim of discrimination. Thus, in Egan v. Canada,813 a case concerning the

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811 Two attempts were made by Dr. Shashi Tharoor, Member of Parliament from Indian National Congress Party introduced two consecutive Private Member’s Bills to amend Section 377 of the Indian Penal Code, 1860 so as to decriminalize Gay sexual intercourse. Not to anybody’s surprise, neither his own party, the Indian National Congress nor any other party in the Lok Sabha (lower house of the Indian Parliament) supported this bill, except some lone members. So, at both these two instances, the attempt to get representation for the Gay community failed amongst the people’s representatives. See “Lok Sabha Votes against Shashi Tharoor’s Bill to decriminalize homosexuality” The Indian Express, (12th March, 2016) available at: http://indianexpress.com/article/india/india-news-india/decriminalising-homosexuality-lok-sabha-votes-against-shashi-tharoors-bill-again/ (last retrieved on 17th March, 2016).
812 Supra note 645 at 62.
legislative exclusion of same-sex couples, Justice Cory stated that the fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny essential human dignity of the Charter claimant. Similarly, the South African Constitutional Court has held that under the South African Constitution, ‘there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of the individuals as human beings, or to affect them adversely in a comparably serious manner’.\textsuperscript{814} In the previous section on substantive equality, dignity is discussed as a major determinant in the principles of substantive equality. The flipside of a singular reliance on dignity is discussed over there with illustrations. It is illogical to say, if the dignity of a women who is discriminated on the grounds of her sex is more valuable than the dignity of a women, who is discriminated on the grounds of her sexual orientation; as in both these two cases, human dignity is the common denominator. Though, yes some courts may agree that the dignity of the women in the first case is more precious than the second one, because in the first case, she is discriminated on the grounds of ‘sex’ (which is an enumerated ground), hence, that could be more valuable to some courts.\textsuperscript{815} The major problem with dignity is that everyone has it and because of which the courts have to sometimes create a hierarchy of groups, some deserving more dignified lives, and some deserving less. It is therefore suggested to relate dignity with that of other principles of substantive equality, if discrimination has to be avoided. The Delhi High Court has done the same by relating dignity with that of personal autonomy, wherein it stated that: “at the root of dignity is autonomy of the private will and a person’s freedom of choice and of action. Human dignity rests on the recognition of the physical and spiritual dignity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.”\textsuperscript{816}

iv. **History of Disadvantage:** A fourth factor assisting the courts to determine whether a group should be protected relates to whether the

\textsuperscript{814} *Supra* note 70 at para 46.

\textsuperscript{815} See the logical depravity in the Supreme Court of India’s judgments in cases like *Suresh Kumar Kaushal v. Naz Foundation*, where the dignity of the Gays was simply denied because the text of Section 377 of the Indian Penal Code simply provided penalties for anyone indulging into penile-non-vaginal sexual intercourse, brushing aside the fact that this is the only form of sex available to the Gays as opposed to the heterosexuals. It is obvious through a logical deduction that the court upheld the dignity of the heterosexuals as more valuable than that of the homosexuals.

\textsuperscript{816} See *Supra* note 70 at para 26.
group has been subject to a history of disadvantage or prejudice. This is one of the obvious indicators that has assisted the courts to determine systematic patterns of discrimination against the individuals belonging to a certain identity. The US Supreme Court, for example in the case of *San Antonio Independent School District v. Rodriguez*, has taken ‘a history of purposeful unequal treatment’ as factors determining discrimination. The South African Constitutional Court has held patterns describing the history of disadvantage suffered by a group of individuals as factors that help determining fairness under the equality guarantee, regardless of whether the ground of discrimination is an enumerated ground or not. So was the test used by the Canadian Supreme Court in *Egan v. Canada*, which concerned same-sex couples, the state argued that sexual orientation should only be considered an analogous ground if the appellants could show that the homosexuals suffered a specific form of economic disadvantage which was exacerbated by the legislation in question. In this instant case, treating the appellants as single rather than cohabitees gave them access to better benefits than married couples. However, the Court, recognised that disadvantage must be read in the context of the overall social, political and economic powerlessness, in all of which homosexuals have clearly suffered disadvantage.

The above discussion outlines the various approaches adopted by courts in these aforesaid jurisdictions to read additional un-enumerated grounds into the respective anti-discrimination provisions. These different judicial tests act as indicators to help the judges to dispense justice to all classes of persons in the society, especially to the minorities and the vulnerable groups. Now, applying these tests *in toto* may not be acceptable to the judges of the Supreme Court of India in respect of Article 15(1). The judges in their constitutional might are always capable to deny applying these tests. One of for such resistance could be because of the originalist versus purposive arguments. Both, originalist and purposive principles of interpretation are used by the Indian judges in various occasions in the past. The originalists believe that the Constitution cannot be stretched too far in its interpretational aspects. In order to pursue the original structure of the constitution, the judges often refer to the intention of the constitution makers. This makes them intentionalist in their

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817 Supra note 8 at 138.
818 411 US 1.
819 Supra note 704 at para 50.
821 Id.
The intentionalist and originalist arguments play antithetical to the purposive or pragmatic schools of interpretation.\footnote{See, Raoul Berger, “New Theories of Interpretation: the Activist flight from the Constitution”, 47 Ohio State Law Journal (1986) 1.} The purposive or pragmatic tools may always give an inclusive construction to Article 15(1), as they are generally free from the dead hands of the Constitution makers. The fact of the Constituent Assembly debates, in the case of Article 15(1) is that the Constitution makers never brought the grounds such as gender or sexual orientation in their discussions, hence, the possibility of the inclusion of such grounds is not possible from the intentionalist or originalist perspectives. These interpretative tussles between judges shouldn’t be a reason for delaying or denying justice to anyone. To resolve this ideological conflict, (at least for the inclusion of sexual orientation or gender, if not for grounds such as physical appearance, like height or weight) the principle of analogousness can be a good alternative for the judges. This route has been taken by courts in these aforesaid jurisdictions as well. Because the judges lack the democratic credentials of representation, activist judges are sometimes perceived to be transgressing the delicate division of powers in any democracy. Hence, the principles of analogousness could be brought as an acceptable deal to the judges in India as well, like their counterparts.

The usage of the principle of analogousness isn’t new for the Indian judges, regarding the sexual orientation cases. Two such instances, where the courts have relied on this principle and read ‘sexual orientation’ within ‘sex’ under Article 15(1), are the Delhi High Court’s judgment in Naz Foundation and the Supreme Court’s judgment in the NALSA Case. The application of the principle of analogousness for the inclusion of ‘sexual orientation’ within ‘sex’ has its own complexities. For example, Robert Wintemute considers discrimination based on ‘sexual orientation’ to be a form of ‘sex’ discrimination\footnote{See, S.P. Sathe, “India: Positivism to Structuralism”, in Jeffrey Goldsworthy (ed.), Interpreting Constitutions: a comparative study, 259-261 (Oxford University Press, 2008).} with the following of his examples:

“Suppose you are a woman with a female sexual partner, and you are refused a job when and because you reveal your same-sex relationship. \textit{Ceteris paribus}, if you had been a man with the same female sexual partner you would not have been turned down for the job. So the fact that you are a woman is of the essence
in your non-appointment. *Mutatis mutandis* for a man with a male partner. Either way, this is sex discrimination pure and simple. And the logic works every time: it is not just an accidental result in a few scattered cases.\(^{825}\)

John Gardner criticises Wintemute’s reasoning on analogousness between ‘sex’ and ‘sexual orientation’ of a person through his logical arguments. I think it is fit to quote Gardner himself on this note.\(^{826}\)

“The elegance of this argument masks certain conceptual difficulties within it which recur throughout anti-discrimination law (and in many other legal contexts besides)... The key question is: did the sex of the person before him figure in his thinking when he treated her like this? Now the employer in the case just sketched might honestly answer this question in the negative, by saying that he would have treated a gay man just the same. Male or female, it made no difference to his decision-people in his office just couldn't seem to work with homosexual colleagues. The problem with settling for this answer, however, is that it glosses over some serious ambiguities in the question. What does it mean for the sex of an applicant to 'figure in one's thinking'? There are two dimensions of uncertainty. In the first place, does our 'thinking' include only the concepts and categories which we invoke in it, or are concepts and categories logically related to these also automatically incorporated by reference? If I say 'I didn't have it in mind to kill him, only to rip out his heart and cut off his head', can't this be met with the response that this logically entails killing him, so it doesn't matter whether that's how I thought of it? In the second place, does it matter *where* in my thinking the relevant concepts and categories figured? All reasoning contains both major (or operative) premises and minor (or auxiliary) ones. I reason: (1) I need to be home by seven; (2) it's now six; (3) the bus sometimes takes as much as an hour; so (4) I'd better leave now. Only (1) is an operative premiss, while (2) and (3) are auxiliary, leading to conclusion (4). Premisses (2) and (3) simply supply the information

\(^{825}\) Id. at 202-203.

which allows me to derive one injunction to action from another, to work out the means I must use, (4), from the end I must achieve, (1). That 'it's now six' or 'the bus sometimes takes as much as an hour' is motivationally inert by itself, without some premiss like (1) to give it some significance for my action. That's what makes these premisses auxiliary. And the issue now is: When some factor figures in the auxiliary prentisses of my thinking but not in the operative ones, does it still figure in my thinking in the sense which is relevant for the question we just put to our hypothetical discriminator? An employer may say: I didn't sack her because she's a woman, I sacked her because she's pregnant; that she's a woman never bothered me at all. The law may answer: Sorry, but since only women can get pregnant, sacking her because she's pregnant just is a case of sacking her because, among other things, she's a woman. Being pregnant is a logically sufficient condition of womanhood even though not a logically necessary one, in much the same way that having one's heart ripped out and having one's head cut off add up to a logically sufficient condition of death even though not a logically necessary one. So denying that pregnancy discrimination is sex discrimination is just like saying you intended to rip out the heart and cut off the head, but not to kill. One may argue that those who say such things are playing with words, and not offering a serious defence.”

Therefore, it depends how the principle of analogousness is used in a particular instance. To avoid, such logic-based contradictions, the Delhi High Court in Naz Foundation Case and the Supreme Court in the NALSA Case used the analogousness principle to include sexual orientation within sex under article 15(1) on the basis of the inherent value of human dignity. The Delhi High Court states that:

“Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex... We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15.”

827 Supra. note 70 at 99-102.
The Supreme Court in the aforesaid case has held, on similar lines that:

"Article 14 has used the expression "person" and the Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution."\(^{828}\)

Though, dignity was not the only basis for such a usage of the principle of analogousness in Article 15(1), these two courts also placed their reasoning on other arguments such as immutability, fundamental choices and vulnerability with all of which dignity is the common denominator. This approach is much as to what is being adopted by the other jurisdictions, as discussed above. An essential question that often arise for courts and for academics is that of analogous to what? Whether the courts should strictly evaluate the similarities between an un-enumerated ground (which is one of the contenders for inclusion, take sexual orientation) and that of the already enumerated grounds (take sex for example) in order to assume analogousness? The tests followed by the judges in the aforesaid jurisdictions (including Indian judges) are broadly based on Fredman's four-point indicators, as discussed above. Some of these indicators are quite narrow and difficult to establish, especially the first two tests of immutability of one's status, or fundamental choice of an individual. Though, sexual orientation fits in both these tests, as is agreed and determined by judgments discussed above. It is

\(^{828}\) Supra. note 8 at 76-77.
considered to be immutable as it is beyond someone’s wilful control, whereas, at the same time, one can suppress her sexuality to the extent of forcing her in the socially or legally accepted sexual roles, but this is undertaken by such an individual at greater personal cost. Though, sexual orientation is now regarded as a protected ground in these aforesaid jurisdictions, what about grounds such as disability or physical characteristics of a person (e.g., height or weight, colour, etc.)? Whether they could be regarded as a protected ground through tests such as immutability or fundamental choices? Applying the tests of inherent human dignity or vulnerability of an individual, or the test of discrete or insular minorities, it is possible for an obese person to get protection against discrimination.\footnote{See Emily Luther, “Justice for All Shapes and Sizes: Combating Weight Discrimination in Canada” 48 Alberta Law Review (2010)167.} Not to forget, these were the tests applied by the Indian judges in the Naz and NALSA judgments. Such judicial approach(s) define analogousness and address the question, analogous to what? The author’s understanding is that, any additional ground could be added in the Article 15(1), if it satisfies the tests of immutability, fundamental choices, or inherent human dignity, \textit{et.al}. Whether or not it has any physical analogousness with the enumerated grounds under Article 15(1), un-enumerated grounds could always be added, if it is a vulnerable, discrete or insular group, or which has a history of disadvantage, or if the characteristic is immutable or is a matter of fundamental choice and dignity of an individual. Ultimately, personal autonomy and dignity of the individual act as the common denominators for all the other tests, which liberates the interpretative role of the judges to have more flexibility. Now, ethnicity and sexual orientation, both being un-enumerated grounds, could be protected under Article 15(1) on the grounds of its analogousness with race and sex, both of which are enumerated grounds. What about a person with HIV status or with disability or who is obese? Can the test of analogousness help them as well to get inclusive protection under Article 15(1)? What kind of analogousness should the courts look for? Is it the analogousness of any of the following between an un-enumerated and an enumerated ground:

\begin{enumerate}
\item social challenges, \textit{e.g.} stereotyping and stigma related issue(s), or
\item should it be the history of suppression and disadvantage, or
\item should it be the impact caused by discrimination on such ground(s) on the individual, \textit{e.g.}, the impact of discrimination on the human dignity, or fundamental choices and personal autonomy, or
\item should it be a cumulative impact of all the three?
\end{enumerate}
The judicial tests evolved in the aforesaid jurisdictions, apply a cumulative impact of all these tests, whereas all these tests act as indicators of analogousness. For the test of analogousness, the indicator numbered ‘iv’ is the best suitable alternative for any court. Therefore, for all future litigations on discrimination based on sexual orientation, gender and, marital status the Indian Courts shouldn’t have any hesitation to use analogousness as the basis for extending the protection of Article 15(1) to the queer persons.

2.2.2.4. Reviewing the Intersectional Potential of Articles 15 and 21
This section mainly attempts to draw interpretative links between the Articles 15 and 21 of the Constitution. So far, the Indian courts have not been able to harness the intersectional potential of these two provisions, barring a very few judgments.830 This section also argues that the purpose of Article 15(1) is personal autonomy of the individuals, based on the Gandhian and Razian philosophy of Swaraj and the Morality of Freedom. It concludes that, the object of personal autonomy of Article 15(1) cannot be realised until its text is construed purposively.

Anti-discrimination law is necessarily a response to particular manifestations of inequality, which are themselves deeply embedded in the historical and political context of a given society.831 Discrimination laws are only effective if they are moulded to deal with the types of inequalities which have developed in the society to which they refer.832

The general protection for the citizens against some forms of state-discrimination were included first time in the Indian Constitutional Laws through the induction of Section 298(1) of the Government of India Act, 1935. The Section 298(1) provided:

“298. Persons not to be subjected to disability by reason of race, religion, etc.: No Subject of his majesty domiciled in India shall on the grounds only of religion, place of birth or decent, colour or any of them be intelligible for office under the Crown in India or prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.” [emphasis mine]

When the Constitution of India was under the process of being drafted between 1946 to 1949, the Constituent Assembly had decided to incorporate

830 Supra note 611 at 228.
831 Supra note 645 of 38.
832 Id.
separate rights to non-discrimination giving it the status of a Fundamental Right through the induction of Article 15(1) and (2). Fundamental rights are separate from other constitutionally recognised rights because they are enforceable in the courts of law. Fredman contends, discrimination law poses a central dilemma. On the one hand, the individuals are judged according to their personal qualities (which is what happens in the case of Article 14, the general guarantee on equality). According to the tenets of formal equality, everyone is treated as per her merits and not as per her status or background or not as per the disadvantages faced by her. Fredman points out that this basic tenet of formal equality is breached if the treatment accorded to individuals is based on status, viz., group membership or other physical or mental characteristics. Partly, her justification on the utility of anti-discrimination rights is based on the distinction of the state’s power of doing only positive discrimination and not negative ones. It is best to quote her on this issue:

“...not every distinction is discriminatory. Governments classify people into groups for a wide variety of reasons and many of them are legitimate. In addition there are many group characteristics which are a valued part of the identity of individuals. The challenge therefore is to frame laws which are sensitive enough to outlaw invidious distinctions; while permitting and even supporting positive difference. Which characteristics, then ought to be protected and why? Although there is now general consensus that sex and race should be within the list of grounds of discrimination, even these were achieved only after struggle and controversy. It is only relatively recently that the grounds, such as disability and sexual orientation, have been accepted as attracting special protection, and the inclusion of age in the more recent years.”

Her justification here is based on the ability of the state to use its powers to legitimately discriminate, which is also referred as positive discrimination. It is obvious that the constitutional protections on anti-discrimination based on certain statuses astutely restrict the state’s powers to only use it to do positive discrimination and not the negative ones. The idea here, is to liberate certain vulnerable groups (which in the understanding of the state need special protection) from any negative state action, leading to discrimination. History tells us the struggles of the feminists in the 1920s to 50s and of the racial minorities world-over, specially the blacks in the west from the 19th

834 Supra note 645 at 109.
835 Id.
century till the 1960s to get themselves protected under their respective
country's anti-discrimination provisions on the grounds of their ‘sex’ and
‘race’. Their struggles made the states look beyond the walls of formal
equality and to accord them special protection (through the respective anti-
discrimination provisions) seeing the vulnerability they were exposed to,
otherwise in the society and through the state institutions. It is pertinent to
quote John Hart Ely on his ‘representation-reinforcement’ theory where he
bases it partly on the James Madison’s thesis of majoritarian democracy
versus constitutional democracy and the protection of the vulnerable and
minorities, at this juncture:

“What the system, at least as described thus far, does not ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us. For if it is not the “many” who are being treated unreasonably but rather only some minority, that obviously will not be so comfortably amenable to political correction. Quite the contrary, there may be political pressures to encourage our representatives to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities they feel they do not need in a less favorable way; the fact that the representatives personally must be treated as the majority is treated is obviously no guarantee against that. There are those who argue that that is precisely the way democracy is supposed to work, that minorities that do not like what is being done to them should simply get busy bargaining, and combine with other groups into what amount to mutual defence pacts. It would probably be a mistake, however, to attribute that view to the founders of our nation. The "republic" they sought to create was not one in which the government pursued the interests of a privileged few or even only the interests of those groups that could work themselves into some majority coalition, but rather one in which the majority would govern in the interest of the whole people.

This was at the essence of the judgment of the Naz Foundation v. State of NCT of Delhi case wherein the division bench of the Delhi High Court read

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836 The author has deliberated on interchangeably use the expressions ‘minorities’ and ‘vulnerable persons’ because of the essential similarities between them in terms of their political, economic, social or any form of vulnerability, irrespective of their numbers.
837 Supra note 732 at 457-458.
838 Supra note 70.
down Section 377 of the Indian Penal Code, 1860 to allow all consenting adults to have the sexual intercourse of their choice in private. The court thought it prudent to quote Ambedkar from the Constitutional Assembly debates on the role of the Government in the context of the Section 377’s violation of the right to personal autonomy enshrined in the Article 21 of the Constitution of India:

“79. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly [Constitutional Assembly Debates : Official Reports Vol.VII: November 4, 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said: The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.

After quoting Grote, Dr. Ambedkar added: While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution. The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to
learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.\textsuperscript{839}

This was the essential difference between the popular morality and constitutional morality when Ambedkar wanted to explain the role of the prospective governments in independent India. Though, the successive governments could be mandated by the popular sentiments of their respective constituencies but essentially what they have to do while being in power is too protect the constitutional morality at all levels of democracy. This according to Ambedkar was the essential role of the state, to protect the interests of the minorities as India is not just a democracy but a constitutional democracy.

The constitutional value of personal autonomy is at the core of Article 15 as well, as it enables the all citizens to express themselves without the fear of the being discriminated by the state on the grounds only of religion, race, caste, sex, place of birth or any of them. The Article15 is a part of the larger scheme of the Constitutional protections accorded to fundamental rights, especially the right to personal liberty and the right to due process (as protected by the Article 21), the right to equality (as protected by the Article 14) and the right to certain freedoms (viz., freedom of expression, movement, assembly, etc. as guaranteed by the Article 19). If freedom from fear of the state to get discriminated on the basis of one’s identity is not the purpose of any constitutionally protected anti-discrimination right; then what is it? Legal systems, courts and academics across the world have found anti-discrimination laws to be the basis of one’s personal autonomy. Garnering this relation, Tarunabh Khaitan has deduced a reinvented role for Article 15 in one of his remarkable writings\textsuperscript{840}: “Reading Swaraj into Article 15: a new deal for the minorities” published shortly after the Delhi High Court’s iconic judgment on decriminalising gay sexual intercourse. He proposes that Article 15 of the Constitution of India is the repository of Swaraj (self rule)\textsuperscript{841} for the Indians. He bases his thesis on the reading of Gandhi, Joseph Raz and his pupil John Gardner. Khaitan emphasis that Swaraj has been an important source of inspiration for the freedom movement and continues to be a foundational principle for the Constitution of India. Gandhi associates very diverse meanings with the concept of Swaraj. Sometimes he uses it to refer to the national independence and on some other occasions he relates it with

\textsuperscript{839} Id. at para 79.

\textsuperscript{840} Supra note 784.

\textsuperscript{841} The political history of Swaraj in the Indian context comes from the call of the Indian National Congress for the Purna Swaraj for the Indians from the British rule, on 26th January, 1930. It marks as a turning point in the Indian freedom struggle and the importance of this day was recognised by the provisional government in India under Jawaharlal Nehru, and accordingly 26th January, 1950 was chosen as the day when India declared itself as a republic.
the spiritual freedom of the individual. He uses it as synonym to liberty, autonomy, political freedom of individual, nation’s economic freedom, individual’s freedom from poverty, self-realisation, self-rule, freedom from alien rule and so on. During the partition of British India, amidst the communal riots in Bengal and Punjab, when two nations, India and Pakistan were taking birth in the bloodbath of humanity, Gandhi left New Delhi, the centre of power for the new government and went to Calcutta, which was worst hit by communal riots then. Later when certain members of the newly constituted Constituent Assembly met Gandhi, he gave them his verbal talisman. It is pertinent to quote Gandhi himself on his talisman for the rulers of independent India, its people:

“I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and your self melt away.”

While national self-rule was, by and large, achieved with independence from colonial government in 1947, the struggle to guarantee swaraj to individuals continues. Much of Parts III and IV of the Constitution can be viewed as means to achieve the goal of restoring to an individual ‘a control over his own life and destiny’.

The most fundamental premises on which the ‘right to autonomy’ or swaraj is based, is the right to shape one’s own life according to one’s own desires, without any fear of oppression, stigma, hatred from anyone in the society, including the state. For example, a transgender person need not fear the loathing of her peers at office, while cross-dressing; or woman need not fear the social stigma while having an extra-marital relation; or a gay adult should not fear the law (Section 377) while deciding to have sexual intercourse with adults of his choice in the privacy of his house. As Raz puts it:

844 Supra note 784 at 422.
“Autonomy is an ideal of self-creation, or self-authorship; it consists in an agent's successful pursuit of willingly embraced, valuable options, where the agent's activities are not dominated by worries about mere survival. Autonomy in its primary sense is to be understood as the actual living of an autonomous life; autonomy in its secondary sense is to be understood as the capacity to live autonomously. To be autonomous, agents have to meet three conditions: they must possess certain mental capacities, they must have an adequate range of valuable options, and they must enjoy independence from coercion and manipulation. Autonomy should be distinguished from self-realisation, as autonomous persons may choose not to realize their capacities. Autonomy itself, in an environment that supports autonomy, is not similarly optional, as living autonomously is the only way of flourishing within an autonomy-supporting environment.”

Autonomous beings have an adequate range of valuable life options available to them. The primary duty of the state is to secure swaraj for all its citizens. Systematic discrimination diminishes the quality of our lives by denying us access to an adequate range of valuable options, in all the things that matter most for our lives: housing, jobs, education, healthcare and partners.

The Supreme Court of India has gone onto the issue of personal autonomy and right against discrimination in the case of Anuj Garg v. Hotel Association of India where it has held personal autonomy to be at the core of right to non-discrimination (Article 15). To quote Justice S.B. Sinha in this judgment:

“49. The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et. al. The bottom-line in this behalf would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.”

846 Supra note 784 at 423.
847 AIR 2008 SC 663.