Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15

Shreya Atrey[1]

Abstract

In the world's largest democracy, which frequently prizes itself for its "diversity", how has intersectional discrimination been excluded from the ambit of Article 15 of the Indian Constitution to date? This article is interested in examining this inscrutability. The motivation is to explore how intersectionality needs to manoeuvre the foundational roadblock of the constricted view of discrimination as based only on a single ground. Through the example of sex discrimination, the article examines how the interpretation of the general constitutional guarantee of non-discrimination contained in clause (1) of Article 15 has restricted the prohibition of discrimination to a single ground, preventing the recognition of intersectional discrimination. However, as this article argues, a legitimate interpretation of clause (1) neither makes it a closed list of grounds nor limits it to single ground discrimination; but instead is concerned with finding the basis of discrimination in enumerated or analogous grounds. The final analysis thus offers a qualitative reconstruction of Article 15(1) by linking the basis of discrimination to grounds, incorporating the possibility of accommodating multiple grounds in a discrimination claim.

Introduction

This article seeks to understand how intersectional discrimination has fallen by the wayside of Article 15 of the Indian Constitution. The aim is to examine the jurisprudence relating to the interpretation of clause (1), especially the phrase "*on grounds only of* religion, race, caste, sex, place of birth or any of them" (emphasis added), and whether it admits intersectionality. This devolves into two inquiries: first, how discrimination law jurisprudence in relation to

1 Hauser Postdoctoral Global Fellow, Centre for Human Rights and Global Justice, NYU School of Law. DPhil (Oxon), BCL (Dist) (Oxon), BA LLB (Hons) (NALSAR). This article has benefitted from the generous comments of the participants at the Contemporary Issues in Indian Public Law Workshop organised by Oxford Law Faculty and Melbourne Law School at the National Law University, Delhi in April 2015. The author is particularly grateful to Sandra Fredman, Tarunabh Khaitan, Nick Bamforth and Carolyn Evans for their extensive thoughts on developing the article. All oversights are those of the author.

Article 15 has foreclosed the routes to recognising intersectional discrimination; and secondly, how Article 15(1) can be reimagined to address intersectional discrimination. Section one of this article examines the case law which reveals the increasing impossibility of bringing a multi-ground claim of discrimination under clause (1). It specifically considers case law which has developed clause (1) in a way which adopts a particularly narrow view of prohibiting only single-ground discrimination. Section two then seeks to demonstrate the possibility of addressing multi-ground claims, i.e. based on more than one ground, under Article 15(1). I argue that a legitimate interpretation of "on grounds only of" relates to finding the *basis* of discrimination by linking the discriminatory act or effect to grounds. Once this is recognised, it becomes evident that the phrase can accommodate not just a broad and contextual understanding of single ground discrimination but also complex and intersecting forms of multi-ground discrimination. The cumulative result of these suggestions can be explained with the help of an example: I may be denied admission into a school because: (i) I could not complete the admission test in the time allotted and hence received a mark below the qualifying mark; or (ii) although I received a good mark, the qualifying mark for women was higher than that for men; or (iii) I could not appear in the qualifying examination because it excluded me as a Muslim woman from making an application; or (iv) the school's uniform policy ended up excluding me as a Muslim woman who wore a jilbab. While (i) may not necessarily devolve into a discrimination claim *per se* since the causal basis is not anchored in a ground (like race, caste, religion, disability, gender etc.), (ii) can be easily framed as a discrimination issue based on sex or gender. This article argues that claims like (iii) and (iv), wherein the causality is directly or indirectly linked to multiple dimensions of the claimant's identity (in this case, gender and religion) are also covered in the non-discrimination guarantee of Article 15(1) of the Indian Constitution. The article thus seeks to present a prelude to reading in intersectionality in Article 15(1) by expanding its scope from single to multi-ground discrimination.

There are two caveats as to the scope of this article. First, the survey is confined to constitutional jurisprudence in relation to Article 15, especially in relation to sex discrimination. The wherewithal of Article 15 is often subsumed within or confused with the right to equality under Article 14; or the entire provision is sometimes overshadowed by the varied and abundant reservation jurisprudence under Article 15(4) and (5). As the basic constitutional text on non-discrimination, it is important to locate intersectionality primarily within Article 15(1) rather than the right to equality under Article 14, even as the latter remains foundational and complementary.[2] The effort is then to delineate the distinct contribution of the non-discrimination guarantee that is incorporated in Article 15(1), which in turn is crucial

2 In that sense, it is useful to note that claims like (iii) from the example above *have* in fact been brought before the courts, by Hindu or Muslim women, arguing religion-based sex discrimination as violating the right to equality under Article 14. But seldom have such cases been argued on multiple grounds in relation to the general non-discrimination guarantee under Article 15(1). The focus of these cases remained on whether the sex-based classification under religious or personal laws was "reasonable" or "non-arbitrary" under Article 14, or otherwise permissible under Articles 25 or26 relating to freedom of religion under the Constitution. See *Githa Hariharan v Reserve Bank of India* AIR 1999 SC 1149; *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945; and *Danial Latifi v Union of India* (2001) 7 SCC 70.

in addressing intersectional discrimination. This redefined focus on Article 15(1) provides a clearer understanding of discrimination, intersectional or otherwise. But this aspiration cannot all be realised here. Questions such as having a formidable test or touchstone for assessing discrimination, the possibility of reading in analogous grounds, defining the level of scrutiny and burden of proof, establishing a test for justifications etc., all deserve more elaborate treatment than what can be provided here. The focus of this article is narrow – to examine how Article 15(1) has come to be given a particularly limited interpretation especially in the context of sex discrimination and what can be done to change this focus to prepare the way for recognising complex forms of discrimination. I hope the analysis is instructive for other jurisdictions who are committed to addressing intersectionality à la discrimination law but are grappling with the preliminary problem of a quantitative view of discrimination limited to a single ground.

Secondly, it is useful to note that in the Indian context, none of the forms of multiple, additive, combination, compound, overlapping or intersectional discrimination (other than single ground discrimination) have been recognised. In this sense, wherever I indicate the absence of Indian jurisprudence having engaged with intersectional discrimination, I am necessarily indicating the absence of recognition of any concept of discrimination on more than one ground. However, I use the term intersectional discrimination from the outset, to explain the possibilities or hindrances in recognising the concept as such (distinct from multiple or combination discrimination), which I believe explains both comprehensively and correctly, the true nature of discrimination suffered on two or more grounds. Thus, the claim for admitting multiple grounds in a discrimination claim under Article 15(1) is being specifically made for recognising intersectional discrimination. In this sense, this is an exploratory article which hopes to envision a case of intersectional discrimination by opening up the possibility of admitting multi-ground claims in discrimination.

It is useful to set the reference point of intersectional discrimination which this article is preparing ground for in suggesting multi-ground discrimination claims. Intersectional discrimination represents the qualitative sense of invoking the quantitative idea of multi-ground discrimination. This qualitative understanding is relevant to the extent that it explains the alternative to rejecting the limited quantitative view of Article 15(1) as prohibiting only single-ground discrimination. Intersectionality theory understands identity as a result of unique and shared characteristics of intersecting grounds like race, sex, gender, disability, class, age, caste, religion, sexual orientation, region etc. Intersectionality emerged as the practical and legal application of the theoretical characterisation of black women's identities shaped by their race, class and gender. It was first translated in the legal realm by Kimberlé Crenshaw in her 1989 piece which highlighted that any real commitment towards eliminating racism and patriarchy cannot ignore those located at the intersections of both, i.e. Black women.[3]

3 Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum,* Vol. 4, 1989, p. 166.

Black women's experiences were seen as defined by the intersection of blackness and femaleness – this meant that they shared some experiences of discrimination with white women and Black men, but also reflected experiences of being both Black and female, in a unique way.[4] The appreciation of both unique and shared dimensions of Black women's experiences of race and sex characterised the method of intersectionality in discrimination law.

This is how intersectionality theory explains the nature of discrimination based on more than one personal characteristic or one identity of individuals; and the term "intersectional discrimination" is used to accurately signify this qualitative dimension of discrimination suffered when multiple identities intersect. It is different from other forms of discrimination like multiple, additive, combination, compound or overlapping discrimination. Multiple discrimination usually refers to discrimination based on more than one ground, such that discrimination needs to be proved in succession based on each ground individually.[5] Additive discrimination means the sum of discrimination based on multiple grounds, for example, the net discrimination suffered as a Dalit woman is the sum of discrimination against Dalit men and against women. Similarly, the idea of combination discrimination is used to convey some concoction or confluence of discrimination based on two or more grounds (but often confined to two grounds only).[6] Overlapping discrimination may be described as based on *any* of the implicated grounds such that, say, a claim of race and sex discrimination could be imagined as spheres of race and sex discrimination which may operate separately, collide or subsume one another.[7] Compound discrimination is mainly used for claims where two or more grounds combine together to form a single compound ground.[8] Intersectional discrimination on the other hand, defined by explanations of uniqueness and sharedness, cannot be captured in these other common understandings which take a fragmented, cumulative or mathematical view of multi-ground claims. It is towards this qualitative understanding of intersectional discrimination that this article hopes to throw open the doors of Article 15(1).

This article seeks to show that the judicially imposed limitation on Article 15(1) as prohibiting only single ground discrimination is ill-conceived. If discrimination does not come about in discrete packets of experiences based on a single ground, its legal basis must be broadly

4 *Ibid.*

5 For example, see the decision of the UK Court of Appeal in *Bahl v The Law Society* [2004] EWCA Civ 1070.

6 This approach may be seen as characteristic of the US discrimination jurisprudence which sees multi-ground claims as combinations of "sex-plus" and "race-plus" categories of discrimination. See, for example, *Judge v Marsh* (1986) 649 F Supp 770. In the UK, the Equality Act 2010 in Section 14 also limits combination discrimination to two grounds.

7 Eaton, M., "Patently Confused: Complex Inequality and *Canada v. Mossop", Review of Constitutional Studies*, Vol. 1, 1994, p. 231; *Mossop v Canada (Attorney General)* [1993] 1 SCR 554 (SCC) 582, per Lamer CJ; and *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), Para 34 per Nkabinde J.

8 Shoben, E.W., "Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination" *NYU Law Review*, Vol. 55, 1980. See *Corbiere v Canada* [1999] 2 SCR 203.

conceived to allow real and diverse experiences to be recognised when based on more than one ground.[9] If this has not been the case, it is useful to examine what impedes it.

1. "On Grounds Only Of" as Excluding Intersectionality

This section examines the discrimination law jurisprudence under Article 15 and how it relates to intersectionality. The purpose is to consider the case law as bearing on the central inquiry: how has discrimination law under Article 15 debarred intersectionality? There are no test cases which directly aid this examination. Thus, the effort is to identify legal principles in existing case law which together arrest the possibility of recognising intersectional discrimination. I argue that there are at least three discernible threads pertaining to: (i) the misinterpretation of "only" in the text of Article 15(1); (ii) the misapplication of Article 15(3) which allows protective discrimination in favour of women; and (iii) the overreach of reservation jurisprudence under Article 15(4) and (5) to limit the scope of clause (1). Pursued consistently by the Supreme Court, these approaches can mislead to the point of either excluding intersectional discrimination from the ambit of clause (1) or justifying it as ameliorative and hence non-discriminatory under clauses (3) to (5).

a. "On Grounds Only Of" as the Basis of Discrimination

Clause (1) of Article 15 of the Indian Constitution provides that, "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Early Article 15 jurisprudence indicates an interpretation of the phrase "on grounds only of" as linking the basis of discrimination to grounds, i.e. signifying the special sense of causation in discrimination. Unlike other areas of law where causation explains the link between cause and effect,[10] the speciality of discrimination law is in linking the cause and effect through the device of "grounds". Thus, for example, it is not enough in discrimination law to show that an employer had a policy which lead to the dismissal of a pregnant female employee; it must be shown that the dismissal is linked to grounds, in this case, that of sex or pregnancy. This is true for both direct discrimination, where discrimination is explicitly based on certain grounds, as well as indirect discrimination where discrimination is the result of neutral policies which are applied to everyone but have a particularly discriminatory impact on some based on their personal characteristics of race, sex, gender, caste, sexual orientation, disability, religion, age etc.

Whilst this strand of thought is visible in early jurisprudence, subsequent cases seem to have substantially drifted away from this perspective. It is then useful to recall the initial context in

---

9 Harris, A.P., "Race and Essentialism in Feminist Legal Theory", *Stanford Law Review,* Vol. 42, 1990; Spelman, E., *Inessential Woman: Problems of Exclusion in Feminist Thought,* Women's Press, 1990; and Grillo, T., "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House", *Berkeley Women's Law Journal*, Vol. 10, 1995.

10 Hart, H.L.A. and Honoré, T., *Causation in the Law*, Oxford University Press, 1985, p. 4.

which such a qualitative, rather than quantitative, interpretation of Article 15(1) was made and accepted. The phrase "on grounds only of" has been borrowed from Section 298(1) of the pre-constitutional Government of India Act 1935.[11] The provision stated that:

> *No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be 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 meaning of "on grounds only of" in Section 298(1) came to be considered by the Bombay High Court in *Punjab v Daulat Singh*.[12] The case involved a challenge to the validity of Section 5 of the Punjab Alienation of Land (Second Amendment) Act 1938 which purported to insert a new Section 13A in the Punjab Alienation of Land Act 1900. The impugned provisions imposed restrictions on certain agricultural tribes acquiring, holding or disposing of property. The question before the court was whether the restrictions were based "on the ground of descent alone".[13] In determining this appeal, the Court had to decide upon the applicable test of discrimination. The dissenting opinion of Beaumont J in the court below had opined that the correct test should be to consider the scope and object of the impugned Act, so as to determine the ground of discrimination. The Bombay High Court rejected this test and accordingly the contention that descent was not the only, or even the primary, ground on which the restrictions were enacted.[14] Lord Thankerton, writing for the majority held that:

> *[I]t is not a question of whether the impugned Act is **based only on one or more of the grounds** specified in Section 298(1), but whether **its operation may result** in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the **reaction** of the impugned Act on the personal right conferred by the sub-section.*[15] *(emphasis added)*

Thus, Lord Thankerton rejects the *object and purpose* test for discrimination and lays down the test of discriminatory *result or effect* flowing from a prohibition or restriction based on grounds. Two observations follow. First, both the tests seem to consider Article 298(1) and

11 The Government of India Act 1935 was passed by the colonial government and it came to form the basis of the Constitution which was drafted between 1947 and 1950. It introduced features like quasi-federalism, direct elections, establishment of Federal Court etc., which were later retained in the Indian Constitution. Although it did not include a bill of rights, provisions like Section 298(1) provided the cue for developing other provisions like the non-discrimination guarantee in Article 15(1), by incorporating the language used in the colonial legislation.

12 *Punjab v Daulat Singh* (1946) 73 IA 59, (1946) FCR 1.

13 *Ibid.*, Paras 15–17, 20.

14 *Ibid.*, Para 20.

15 *Ibid.*

particularly "on grounds only of" as an exercise of finding the *basis* of discrimination as embedded in grounds – whether proclaimed or in effect.[16] Secondly, Lord Thankerton implicitly accepts that the basis of discrimination can be single or multiple grounds ("it is not a question of whether the impugned Act is *based only on one or more of the grounds* specified in Section 298(1)"). This is an illuminating admission. So long as any discriminatory effect ensues on the basis of one or more grounds, the provision or the statute will be deemed discriminatory. The *Daulat Singh* decision marks the earliest indication of: (i) both direct and indirect discrimination being prohibited under clause (1); (ii) when based on one or more grounds. Thus, a reasonable interpretation of *Daulat Singh* perforce suggests that the phrase "on grounds only of" signifies the basis of discrimination to be one or more grounds under Section 298(1).[17]

Lord Thankerton's test was endorsed in *Bombay v Bombay Education Society*.[18] The case related to the policy of restricting admission to English speaking pupils, specifically of Anglo-Indian and European descent, in the English medium schools of Bombay. This was contended as in breach of Articles 15(1) and 29(2) for denying admission on the ground only of religion, race, caste, language or any of them.[19] The government responded that the restriction was not discrimination based only on the ground of religion, race, caste, language or any of them "but on the ground that such denial will promote the advancement of the national language and facilitate the imparting of education through the medium of the pupil's mother tongue."[20] This object and purpose based justification was denied by the Court as an incorrect test in light of *Daulat Singh,* and the Court proceeded with applying Lord Thankerton's test in that "[w]hatever the object, the immediate ground and direct cause for the denial" dictates the inquiry.[21] Considering also that the immediate grounds of discrimination in this case were multiple and crosscutting, identified by the Court as descent, language and religion, it becomes clear that the formulation in *Bombay Education Society* supports, following *Daulat Singh*, at least three things: (i) reference to "ground" as the causal basis ("on grounds only of") upon which discrimination occurred; (ii) the causal basis being defined by grounds under Article 15(1), viz. religion, race, caste, sex, place of birth or any of them; and (iii) the possibility that the causal basis could lie in multiple grounds.

---

16 In this way, Lord Thankerton's test also recognises the possibility of what could have been developed as the category of indirect discrimination based on result or effect of certain actions or policies. Recognition of indirect discrimination still remains wanting in India.

17 Seervai, H.M., *Constitutional Law of India*, 2001, p. 558.

18 *Bombay v Bombay Education Society* (1955) 1 SCR 568, pp. 581, 583–584.

19 Article 29(2) of the Constitution of India provides that: "[n]o 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."

20 See above, note 18, p. 582.

21 *Ibid*., p. 583.

b. "On Grounds Only Of" as the Sole Basis of Discrimination

Subsequent case law did not follow the interpretive cues from *Daulat Singh* and *Bombay Education Society*, but instead, reduced Article 15(1) to prohibiting discrimination only on one ground, that too interpreted in a highly isolated way. This reductionist turn was brought about by interpreting the permission of protective discrimination for women under Article 15(3) as supporting discrimination based not only on sex but also on "other grounds" and/or "several considerations".[22] The line of reasoning went thus: since clause (1) prohibited discrimination only on a single ground, discrimination resulting from more than one ground or coupled with other considerations should not be considered pernicious and can in fact be justified under clauses (3), (4) and (5). Following this change of course, the State has since readily cited discrimination on more than one prohibited ground as a justification for a breach of Article 15(1).

Early Calcutta High Court jurisprudence paved the way for interpreting the word "only" in a restrictive way to limit the protection from sex discrimination. In *Mahadeb v Dr BB Sen*,[23] the Court considered Order 25, Rule 1, Sub-rule 3 of the Civil Procedure Code which provided that:

> *On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property in India.*

In examining whether this provision was discriminatory against women on the basis of sex, Mukharji J opined that:

> *The word "only" in [Article 15(1)] is of great importance & significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution. Equality of sex as embodied in the constitutional guarantee of Article 15(1) of the Constitution draws only this limit that sex by itself alone will not be a ground of discrimination by the State. Superadded to sex, if there are proprietary considerations, then the discrimination cannot be said to be on the ground of sex alone.*[24]

Applying this reasoning, Mukharji J held the provision to be non-discriminatory because it was based not just on sex but also on the "important consideration of 'sufficient immoveable

---

22 Article 15(3) of the Constitution of India provides that: "[n]othing in this article shall prevent the State from making any special provision for women and children."

23 *Mahadeb v Dr BB Sen* AIR 1951 Cal 563.

24 *Ibid.*, Para 28.

property in India.'"[25] According to him "[p]ossession of sufficient immoveable property in India is not a consideration bearing on sex at all."[26] What went unappreciated in this isolated understanding of sex discrimination was how other identities and statuses like economic capacity, property ownership and poverty intersected with women's subordinate position to entrench their sex-based disadvantage and create new forms of disadvantage based on these other "considerations". In adopting this artificial view of sex discrimination where the category of "sex" operated in isolation rather than in association with women's complex identities of race, religion, caste, disability and socio-political and economic contexts,[27] the Court misses the nature and complexity of discrimination against women, including the fact that forms of disadvantage intersect and intensify discrimination.[28]

The Calcutta High Court in *Anjali Roy v State of West Bengal*[29] continued the trend of understanding sex discrimination as solely based on the ground of sex *and no other ground*.[30] The case involved an order which restricted the admission of women into a male-only honours college. The High Court held that the restriction did not constitute discrimination within the meaning of Article 15(1). The holding was premised on the interpretation of Article 15(1) as:

> ***What the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article*** *(…) the discrimination which is forbidden [in Article 15(1)] is only such discrimination as is based* ***solely on the ground*** *that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex* ***and on no other ground. A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.***[31] *(emphasis added)*

All three sentences above convey different meanings. In the first sentence it appears that multi-ground discrimination is also caught by the prohibition in Article 15(1); while the second sentence indicates that it is only single-ground discrimination which is prohibited by Article 15(1); and finally the third sentence seems to go a step further than the second and indicates that discrimination on multiple grounds is not caught by Article 15(1). The Court's

25 *Ibid.*, Para 29.

26 *Ibid.*

27 Gedalof, I., *Against Purity: Rethinking Identity with Indian and Western Feminisms,* Taylor and Francis, 1999; Nabar, V., *Caste as Woman*, Penguin, 1995, Chapter 1; and Dietrich, G., "Women and Religious Identities in India after Ayodhya" in Bhasin, K., Said, N. and Menon, R. (eds.), *Against All Odds: Essays on Women, Religion and Development from India and Pakistan*, Kali for Women, 1994.

28 MacKinnon, C.A, "Problems, Prospects, and 'Personal Laws'" *International Journal of Constitutional Law*, Vol. 4, 2006, p. 190.

29 *Anjali Roy v State of West Bengal* AIR 1952 Cal 825.

30 *Ibid*., p. 839.

31 *Ibid.*

final ruling seems to be based on none of them. The Court held that no "discrimination was made against the appellant only on the ground that she was a woman"[32] and the restriction was "due to the introduction of a comprehensive scheme for the provision of education facilities to both male and female students."[33] The Court further elaborated:

> *The cardinal fact is that she was not refused admission merely because she was a woman, but because [of] a scheme of better organisation of both male and female education (…) which covered development of the Women's College as a step towards the advancement of female education, and also relieving the pressure on the [men's college] which was a mixed college.*[34]

Thus, in the final analysis, the basis of the Court's decision is not sex coupled with another ground which justified discrimination, but sex coupled merely with other organisational considerations which defeats a finding of sex discrimination. In this way, the Court not only bars multi-ground discrimination but also interprets justificatory considerations as "grounds" to bar both single and multi-grounds claims – by using the term "ground" as in common parlance meaning merely a reason or justification for discrimination rather than the specific sense of discrimination in clause (1) (as personal characteristics of individuals defined by religion, race, caste, sex, place of birth or any of them). What comes of this view is that discrimination based on sex and other considerations, including other enumerated grounds, is justified and not caught by clause (1). Only discrimination that is based *solely* and *directly* on sex is captured by clause (1). What is clearly thrown out of the window is the first assertion of the Court that: "[w]hat the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article." This is made clear in subsequent cases where the government continues to use other mere considerations as grounds for justifying a breach of Article 15(1) on the basis that they are promoting the interests of women under Article 15(3).

In the case of *Dattatraya Motiram More v State of Bombay*,[35] the Supreme Court examined the provisions of the Bombay Municipal Boroughs Act which reserved seats for women in elections. The provisions were challenged as being in violation of the right to equality under Article 14, the prohibition of discrimination under Article 15 and the right to equality of opportunity in matters of public employment under Article 16 of the Constitution. The Court construed Article 15(3) as a proviso to Article 15(1) and thus validated the reservation of seats as protective discrimination in favour of women. The decision further explained the scope of Article 15 as follows:

32 *Ibid*., p. 830, Para 17.

33 *Ibid*.

34 *Ibid.*

35 *Dattatraya Motiram More v State of Bombay* AIR 1953 Bom 311. Reaffirmed in *Vijay Lakshmi v Punjab University* AIR 2003 SC 3331.

> *It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is* ***only on one of the grounds*** *mentioned in Article 15(1). If there is a discrimination in favour of a particular sex, that* ***discrimination would be permissible provided it is not only on the ground of sex****, or, in other words, the classification on the ground of sex is permissible provided that classification is the* ***result of other considerations****.*[36] *(emphasis added)*

This statement is in stark contrast with the earlier jurisprudence in *Daulat Singh* and *Bombay Education Society*. But, in line with *Mahadeb* and *Anjali Roy*, it signifies the change in the apex Court's stance for supporting: (i) reading the text of Article 15 to mean prohibition of discrimination *only* on one of the enumerated grounds; (ii) not covering discrimination which is not just on one ground but also a result of other grounds or considerations; and thereby (iii) necessarily allowing such discrimination to be justified as protective and favourable to women under Article 15(3). The final point, continuing on from *Anjali Roy*, reinforced the idea that once the measure is advanced by the government as for the protection of or for the benefit of women, the Court validated it under clause (3). What is interesting to note is that this is applied equally to measures which denied an opportunity to women, viz. attending a particular honours college open only to men (*Anjali Roy*) and those which provided them with special status and rights, viz. reservation of seats for women in local municipality elections (*Dattatraya*). In both the cases, the logic of serving the interests of women through clause (3) comes heavily couched in the language of protectionism, viewing women as the weaker sex, thus, reinforcing the very stereotypes discrimination is meant to combat.[37] The lack of scrutiny of the protective aim of the government seems to be justified on the basis that the discrimination was based not *just* on sex. In this way, *Anjali Roy* and *Dattatraya*, despite their very different contexts, heralded the same trend; that discrimination on more than one ground or discrimination based on other considerations incidental to a prohibited ground is not prohibited by Article 15(1). This trend continued in later jurisprudence, which has affirmed that:

> *[W]hile Article 15(1) would prevent a State from making any discriminatory law (inter alia)* ***on the ground of sex alone****, the State, by virtue of Article 15(3), is permitted, despite Article 15(1), to make special provisions for women, thus clearly carving out a permissible departure from the rigours of Article 15(1).*[38] *(emphasis added)*

---

36 *Ibid*., Para 7.

37 As MacKinnon observes: "[d]espite the sometimes positive outcomes, the language of inferiority [in cases like *Dattatraya*] is often problematic in these cases and is not abating." MacKinnon, C.A, "Problems, Prospects, and 'Personal Laws'" *International Journal of Constitutional Law*, Vol. 4, 2006, p. 189.

38 *Government of Andhra Pradesh v PB Vijaykumar* AIR 1995 SC 1648, Para 14. This was confirmed in *Yusuf Abdul Aziz v Bombay* 1954 SCR 930.

Whilst the second part of this reasoning may not be faulted in that it construes clause (3) as a proviso for clause (1), thus keeping open the possibility of special provisions in favour of women; what is faulty is that it is premised on the first part which interprets the ambit of clause (1) to be limited to a single ground alone, that too a very restricted reading of that ground which is isolated from the context and other identities it operates in association with. This construction of clause (1) effectively overthrows intersectionality, which proposes a complex understanding of disadvantage based on multiple and intersecting contexts and identities related to grounds, by using it as a justification for discrimination which can be validated under clause (3) rather than seeing it as a form of discrimination *per se*. Although discrimination in the name of protection has been read down and is now subjected to heightened forms of scrutiny after the Supreme Court decision in *Anuj Garg v Hotel Association of India*,[39] the possibility that multi-ground discrimination may be justified still persists.[40] These apprehensions culminated in *Air India v Nergesh Meerza*,[41] the contours of which have not been entirely challenged to date.

c. "On Grounds Only Of" as "Only and Only" a Single Ground of Discrimination

In *Air India v Nergesh Meerza*,[42] air hostesses working with Air India challenged the constitutional validity of the Air India Employees Service Regulations (Service Regulations). The challenge related to three particular conditions under the Service Regulations which provided that an air hostess was to retire from service upon one of the following occurring: (i) on attaining the age of 35 years (extendable at the discretion of managing director to 45 years); (ii) on marriage if it took place within four years of the service; or (iii) upon first pregnancy. The air hostesses contended that these conditions violated Article 14 under both the prevailing tests of equality – treating likes alike and non-arbitrariness. They argued that the Service Regulations: (i) were based on unintelligible distinctions between similarly situated classes of female air hostesses and male assistant flight pursers; and (ii) the termination of services upon first pregnancy or marriage within four years was manifestly unreasonable and wholly arbitrary. Further, they claimed a violation of Article 15 on the basis that air hostesses were particularly selected for discrimination mainly on the ground of sex or disabilities arising thereof.[43] Air India argued that there was no infringement of Article 14 as: (i) the two classes were defined by intelligible differentia having regard to the nature of job functions, the mode of recruitment, qualifications, promotional avenues and the circumstances of retirement, and Article 14 would

39 *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1.

40 This is especially so in relation to discrimination against women in religious or personal laws where courts have consistently held that "[i]f there can be found *any rationale* behind *any general or customary law* making such a discrimination between a male and a female in favour of the male based not solely on the ground of sex, then such a law cannot come within the sweep of Article 15." See *Nalini Ranjan Singh v State of Bihar* AIR 1977 Pat 171, Para 8-A.

41 *Air India v Nergesh Meerza* 1982 SCR (1) 438.

42 *Air India v Nergesh Meerza* (2008) 3 SCC 1.

43 See above, note 41, Para 19.

not be attracted since it applied only to discrimination between the members of the same class *inter se*; and (ii) the bar on pregnancy and marriage was justified based on public interest and practical considerations of costs involved in recruitment and training. Further, Article 15 was not infringed since the recruitment of the air hostesses was sex based recruitment but not merely on the ground of sex alone as it was "swayed by a lot of other considerations".[44]

Applying the test of reasonable classification, the Court found the distinction between the two classes (male and female) to be consistent with Article 14.[45] The Court then proceeded to examine if the service conditions were nonetheless, discriminatory on grounds of sex under Article 15. While Air India contended that any discrimination under the service conditions was made not only on the ground of sex, but also in due regard to a lot of other considerations; the air hostesses rebutted this by arguing that the real discrimination was on the basis of sex which was "sought to be smoke screened by giving a halo of circumstances other than sex."[46] The Court was persuaded by Air India and held that owing to several elaborate differences in service conditions of air hostesses and assistant flight pursers (highlighted in relation to Article 14 above), it could not be said that these were distinctions made "on the ground of sex only". The Court relied upon the principles cited in previous cases like *Yusuf Abdul Aziz* and explained thus:

> *[W]hat Articles 15(1) and 16(2) prohibit is that discrimination should not be made* ***only and only*** *on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination* ***on the ground of sex coupled with other considerations****.*[47] *(emphasis added)*

The Court then applied its second test of equality (non-arbitrariness),[48] and ultimately found two of the three conditions relating to pregnancy and age to be against Article 14, but upheld the condition of termination upon marriage within four years of service.[49] The last condition was upheld on the basis of family planning, improving health and maturity of the employee with growing age and hence ensuring the success of marriage, as well as the economic costs of training the crew.[50]

Since this case was argued as a claim of sex discrimination which also devolved upon marital status, age and pregnancy – all of which can qualify as "considerations" incidental to sex, or

44 *Ibid.,* p. 455.

45 *Ibid.,* p. 472.

46 *Ibid.,* p. 473.

47 *Ibid.,* p. 441.

48 *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3, p. 38.

49 See above, note 42 Para 83.

50 *Ibid*., Para 82.

even as analogous grounds,[51] the reasoning that discrimination can only be caught by clause (1) when *only and only* made on the ground of sex is as myopic as is incorrect. It strips the prohibition of sex discrimination of any necessary content and stands as a rejection of discrimination, whether single ground or intersectional, by failing to account for the intersectional nature of sex discrimination, which does not operate in isolation of other identities like age and marital status and the socio-political and economic contexts of the society. This isolated reading of sex discrimination not only limits the ambit of what counts as discrimination based on "sex", but also the possibility of classifying discrimination as intersectional, i.e. based on multiple intersecting enumerated or analogous grounds. In the first sense, what appears heavily in the *Air India* case is the fact that gendered aspects of sex discrimination may not be seen as discriminatory *per se*. This view also stifles the possibility of understanding the category of "sex" or "gender" contextually, to go beyond formalistic constructions of men and women and to address and correct the social constructs of these categories.[52] As Indira Jaising asserts:

> *Discrimination is always on the basis of sex in its gendered state. The use of the word 'only' in this Article has enabled the courts to segregate sex from gender and uphold blatantly discriminatory legislation.*[53]

In the second sense, the Court's analysis in *Air India* is a striking example of how principles of equality and non-discrimination can be construed to ignore and in fact justify discrimination which cannot neatly fit into a transfixed and non-interactive category of sex discrimination. In this way, the Court's reading of the phrase "on grounds only of" stands for dismissing both a contextual and intersectional analysis of discrimination under Article 15.

In a third way, the Court's reasoning also feeds off the trend of using protectionism under clause (3) to deny discrimination under clause (1). The fact that the Court yields to arguments such as allowing female air hostesses to mature by delaying their marriage prospects to ensure successful marriages is based on a patronising view of sex and gender and an appropriation of women's personal autonomy.[54] It views women as incapable and in need of direction from the state. In the same vein, while striking down the pregnancy condition, the Court reinforces the stereotypes associated with women's reproductive roles by adopting a

---

51 *Naz Foundation v Government of NCT* 2009 (160) DLT 277.

52 Nussbaum, M.C., "India: Implementing Sex Equality Through Law", *Chicago Journal of International Law,* Vol. 2, 2001, p. 49.

53 Jaising, I., "Gender Justice and the Supreme Court" in Kirpal, B.N. et al (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford India Paperbacks, 2000, p. 294. Similarly, Martha Nussbaum has argued that the constitutional interpretation in some sex discrimination cases has driven a wedge between sex and gender through the use of the word "only". Nussbaum, M., "India, Sex Equality, and Constitutional Law" in Baines, B. and Rubio-Marin, R. (eds.), *The Gender of Constitutional Jurisprudence*, Cambridge University Press, 2005, p. 180.

54 See above, note 42, Para 82.

stance of protecting "the most sacrosanct and cherished institution"[55] of Indian womanhood, i.e. pregnancy, and not because it is pernicious per se for the state to regulate women's choices or to reinforce stereotypical roles of women.[56] Thus, even if the right decisions are reached in discrimination cases, the uninspiring reasoning embedded in state protectionism genuinely diminishes the possibility of worthwhile sex discrimination jurisprudence, let alone a credible treatment of intersectional discrimination.

The development of jurisprudence since *Air India* has shown progress in certain respects. Incidents of sex or gender will no longer be ousted from the prohibition of sex discrimination or justified as protective discrimination without scrutiny.[57] The decision in *Anuj Garg v Hotel Association of India*[58] is seminal in this respect. The case involved a constitutional challenge to a statutory provision which prohibited employment of any woman in premises in which liquor was consumed in public. In declaring the provision unconstitutional, the Supreme Court denied an interpretation of the Constitution based on "romantic paternalism"[59] of the State which reinforced "incurable fixations of stereotype morality and conception of sexual role."[60] The Court thus proposed that the test to review protective discrimination under 15(3) should be one of heightened scrutiny such that the consequences and effects of legislation are examined and not just its stated aims. Thus, the Court acknowledges that protective aims cannot be justified without proper scrutiny, and certainly cannot be justified when they override women's freedom, personal autonomy and dignity.[61] *Anuj Garg* sets right the acontextual view of sex discrimination as one based on the biological category of sex under clause (1) and the unquestioned protectionism of the state under clause (3).[62]

However, what remains to be addressed is the problematic approach of justifying discrimination based on more than one ground.[63] According to Kalpana Kannabiran:

---

55 *Ibid.*

56 Shenoy, D., "Courting Substantive Equality: Employment Discrimination Law in India", 2013, available at: http://www.kentlaw.iit.edu/Documents/Institutes%20and%20Centers/ILW/Jackson%20Louis%20Writing%20Competition/Shenoy_EmploymentLawIndia.pdf.

57 *National Legal Services Authority v Union of India* (Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013), Para 59.

58 See above, note 39.

59 *Ibid*., Para 42.

60 *Ibid.*, Para 44.

61 *Ibid.,* Paras 20, 38, 41, 45, 49.

62 However, *Anuj Garg* is not the first in this regard. For example, the Madras High Court in *Vasantha R v Union of India*, 2001 II LLJ 843 struck down as unconstitutional, a provision of a law that prohibited women from working at night in factories since it was discriminatory on the sole ground of sex. See also *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India (15 April 2014).

63 Thus decisions rejecting justification of discrimination as protective when based on several considerations should be distinguished from circumstances where there is no purported protective aim.

This [approach] exemplifies the disaggregative norm of interpretation based on a reductionist reading of the constitutional fragment: "on grounds only of sex, caste, language, place of birth or any of them."[64] *(emphasis added)*

As Kannabiran further asserts:

Moving away from a disaggregated approach to understanding non-discrimination and liberty, and instead adopting a holistic cross-sectoral, intersectional approach that looks at connections and possibilities that might enrich the scope of non-discrimination, involves a shift that forces a re-examination of a range of materials hitherto inadequately explored in constitutional jurisprudence and legal research on non-discrimination.[65]

In hoping to adopt the intersectional approach described in section one and which Kannabiran alludes to, we need to strip Article 15(1) of its quantitative delimitation. Before turning to consider how this can be done, the final part of this section considers the overwhelming thrust of reservation jurisprudence under Article 15(4) and (5) and how it feeds into diminishing the scope of clause (1).

d. "On Grounds Only Of" and Clauses (4) and (5) of Article 15

The reservation jurisprudence under clauses (4) and (5) of Article 15 creates its own unique inconsistencies in the process of opening the doors of clause (1) to intersectional discrimination.[66] Reservation jurisprudence is the epicentre of discrimination law and thus it is useful to study its impact on the general non-discrimination guarantee in clause (1).[67] This part briefly touches upon a small but significant part of this vast reservoir of reservation jurisprudence – how intersectionality informs the process of classification and sub-classification of classes for reservations.

64 Kannabiran, K., *Tools of Justice: Non-Discrimination and the Indian Constitution*, Routledge India, 2012, p. 337

65 *Ibid*., p. 460.

66 Clauses (4) and (5) of Article 15 of the Constitution of India provide that: "(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. (5) Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

67 For a comprehensive exploration of reservations in India, see Galanter, M., *Competing Equalities: Law and the Backward Classes in India*, Berkeley, 1984.

Clauses (4) and (5) allow the State to make special provisions for the advancement of socially and educationally backward classes, including for Scheduled Castes or the Scheduled Tribes listed in the First Schedule of the Constitution. The Supreme Court has consistently reiterated the test for identifying which backward classes qualify for reservation as one which cannot *solely* be based on enumerated grounds because it would run afoul of clause (1).[68] However, considering the text of clauses (4) and (5) which begin with "[n]othing in this article", it is clear that the reservations are meant to justify and validate something which may be discriminatory under clause (1). The judicial test for determining the classes for reservations thus renders the constitutional drafting as confusing and redundant. The literal interpretation of the opening words of clauses (4) and (5) ("nothing in this article") has been largely overlooked and reservations continue to operate on the premise that the selection of classes is *not* to be made on the basis of a single ground.[69] But the allowance for intersectional discrimination to be justified when *ameliorative* because it is for the advancement of certain classes under clauses (4) and (5) should not also lead to a presumptive justification of *hostile* intersectional discrimination under clause (1).

Even as clauses (4) and (5), like clause (3), are framed as non-obstante clauses, special provisions permissible under these clauses have a narrower compass than the general non-discrimination guarantee in clause (1). They are specific in as much as they relate only to the State's prerogative for making special provisions for identified classes. It is settled that these clauses do not confer *rights* as such and are discretionary tools for the government to be pursued towards the broader goal of promoting substantive equality.[70] Thus, to interpret this discretionary power under clauses (4) and (5) to confine the scope of a broad right would be counterintuitive under the constitutional scheme. In agreeing with the formula for reservations to be based on an intersectional criteria, one should not also assume that intersectional discrimination is therefore acceptable and not caught by the general non-discrimination guarantee under clause (1).

Furthermore, once having recognised an intersectional basis of extending special provisions under clauses (4) and (5) such that classes are selected not *solely* on the basis of a single ground, the rejection of intersectionality *within* reservations is an even more curious anomaly.[71] This concern relates to the rejection of sub-classification within the Scheduled Castes and Scheduled Tribes List to extend reservations or special measures to those most

68 *Janki Prasad Parimoo v State of J & K* AIR 1973 SC 930; *Makhan Lal v State of J & K* AIR 1971 SC 2206; *ABSK Sangh (Rly) v Union of India* AIR 1981 SC 298; and *Triloki Nath Tiku v State of J & K* AIR 1969 SC 1.

69 *Pradeep Jain v Union of India* AIR 1984 SC 1420; *Anant Madan v State of Haryana* AIR 1995 SC 955; *Jagdish Saran v Union of India* AIR 1980 SC 820; *Chitra Ghosh v Union of India* AIR 1970 SC 35; and *Narayan Sharma v Pankaj Kumar Lekhar* AIR 2000 SC 72.

70 *EV Chinnaiah v State of AP* AIR 2005 SC 162; and above, note 17, p. 556.

71 *Ibid., EV Chinnaiah v State of AP*; *Indra Sawhney v Union of India* AIR 1993 SC 477, Paras 81–82; and *Kerela v NM Thomas* AIR 1976 SC 490.

deserving of it.[72] Even if the entire class is considered deserving of reservations, given the limited quotas available, it is prudent to micro-classify to identify the most deserving even within this broad constitutional classification of Scheduled Castes and Scheduled Tribes certified by the president under the First Schedule of the Constitution.[73] This possibility is recognised in relation to backward classes for permitting sub-classification:

> *[T]here is no constitutional or legal bar to a state categorising the backward classes as backward and more backward (…) It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes.*[74]

Sub-classification, if permitted, would be subject to the general equality jurisprudence which allows classification which is rational, relevant, based on intelligible differentia, and with a nexus between the differentia and the object to be achieved.[75] Given these governing principles, the rejection of sub-classification in relation to Scheduled Castes and Scheduled Tribes remains an unprincipled and unsubstantiated overture in Indian discrimination jurisprudence.[76]

The treatment of intersectionality in classification and sub-classification of classes for reservations under clauses (4) and (5) thus presents a curious case and does not appear to be based on an understanding that intersectional discrimination may be prohibited under clause (1). But it reinforces the inconsistencies in the interpretation of clause (1) within the scheme of Article 15. The recurring theme is that of recognising multiple grounds for justifying rather than rejecting intersectional discrimination.

---

72 However, note that sub-classification in backward classes is permissible per *Indra Sawhney v Union of India* AIR 1993 SC 477 and see *EV Chinnaiah v State of AP,* above note 70.

73 Sociological and anthropological literature is replete with references to entrenched sub-classification and hierarchies within Dalits and other backward classes. Accepted in *Indra Sawhney v Union of India* AIR 1993 SC 477, Para 88. See also Dumont, L., *Homo Hierarchicus: The Caste System and its Implications*, Paladin, 1972; Moffatt, M., *An Untouchable Community in South India: Structure and Consensus,* Princeton University Press*,* 1979, p. 3; and Sudhakar Rao, N., "The Structure of South Indian Untouchable Castes: A View" in Shah, G., (ed.), *Dalit Identity and Politics: Cultural Subordination and the Dalit Challenge*, Sage Publications, 2001, p. 74–96. See also Mendelsohn, O. and Vicziany, M., *The Untouchables: Subordination, Poverty and the State in Modern India*, Cambridge University Press, 1998, p. 19.

74 See above, note 71, Para 92A.

75 See Jain, M.P., *Indian Constitutional Law*, LexisNexis, 2012, p. 1005; See *EP Royappa v State of Tamil Nadu,* above note 48; and *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar* (1959) SCR 279.

76 For a detailed discussion of this see Anup, S., "Judicial Discourse on India's Affirmative Action Policies: The Challenge and Potential of Sub-Classification", Doctoral Thesis, University of Oxford, 2013.

2. Re-envisioning "On Grounds Only Of"

Having considered the unfavourable outlook of Article 15(1) jurisprudence towards multiple grounds of discrimination, this section proceeds to consider how this jurisprudence can be reconstructed to admit multiple grounds in a discrimination claim under Article 15(1). I seek to demonstrate that for each of the governing principles and practices discussed above, the case law is either wrong in principle, or has been wrongly interpreted to exclude multiple grounds in a discrimination claim. This section is divided into two parts which consider the meaning of the phrases used in clause (1) – "on grounds only of" and "or any of them".

a. "On Grounds Only Of" as Signifying Causation

In this part, I argue that no popular theory of constitutional interpretation: textual, original, or transformational can lead to the interpretation of "on grounds only of" as indicating a prohibition of discrimination on a single enumerated ground only. The purpose is to reset the normative boundaries of the constitutional guarantee from being quantitatively limited to one which recognises discrimination as having roots in certain kinds of personal characteristics identified as grounds.

The principal objection to Article 15 jurisprudence which is affirmed and applied in *Air India*, is its interpretation of Article 15 as prohibiting discrimination *only* on one of the enumerated grounds. It is important then to dissect the meaning of "only" as employed in the phrase "on grounds only of". Two preliminary remarks are necessary. First, it is useful to observe that the title of Article 15 does not use the word "only". It simply states: "[p]rohibition of discrimination on grounds of religion, race, caste, sex or place of birth". Although titles may not be conclusive in determining the scope of a provision, they are still a relevant "internal aid" in clarifying the meaning in case of ambiguity.[77] If this is the case, then the absence of "only" in the substantive provision should not make the scope of the guarantee any narrower than that of the title. Secondly, there is internal inconsistency in case law as to the meaning of "only" in Article 15(1).[78] Besides referring to a single ground in a discrimination claim, "only" has also been understood as prohibiting discrimination on *enumerated* grounds but no more, such that Article 15(1) signifies a closed list of grounds (i.e. religion, race, caste, sex, place of birth).[79] The Delhi High Court decision in *Naz Foundation v Delhi Administration*[80] introduced the ground of "sexual orientation" as an analogous ground under Article 15(1) and thus has

77 *Krishnaih v State of Andhra Pradesh*, AIR 2005 AP 10.

78 Saraswati, S.N., *Right to Equality in the Indian Constitution: A Gandhian Perspective*, Concept Publishing Company, 2002, p. 170.

79 *Ranjit Kuman Rajak v State Bank of India* 2009 (5) Bom CR 227 (rejecting disability as a ground); *MX v ZY* AIR 1997 Bom 406 (rejecting HIV-status as a ground); and above, note 64, p. 30.

80 *Naz Foundation v Delhi Administration* WP(C) No.7455/2001, High Court of Delhi (2 July 2009).

challenged the view that Article 15(1) is an exhaustive list of grounds.[81] Citing decisions from the Canadian Supreme Court[82] and South African Constitutional Court,[83] the Court found that:

> *[T]here will be discrimination on an unspecified ground if it is based on attributes [and] characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.*[84]

The analysis was directly based on *Anuj Garg*[85] where the Supreme Court had held that personal autonomy was inherent in the grounds mentioned in Article 15 such that: "[t]he grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual."[86] Similar reasoning has been pursued by the Equal Opportunity Commission in India in defining "deprived groups" and "deprivation index" to bring disability within the fold of clause (1).[87] Whilst the decision in *Naz Foundation* was reversed in *Koushal*,[88] the latter Supreme Court decision did not speak to the *Naz Foundation* reasoning on analogous grounds and ruled on a different ground of parliamentary supremacy in upholding the criminalisation of sodomy.[89] There is still therefore interpretive wiggle room and maybe even declaratory force in the *Naz Foundation* reasoning supporting the view that Article 15(1) is not a closed list of grounds.

At the very least, the efforts made in recognising sexual orientation and disability as grounds protected under clause (1), indicate the need for constitutional reinterpretation of the word "only" as signifying an open list of grounds for protection. However, this does not mean that "only" can be interpreted to mean discrimination on just *one* ground since Article 15 can now operate as an open list. In fact, both these quantitative views of Article 15(1) lack a justifiable basis. Yacoob J of the South African Constitutional Court, writing extra-judicially, supports such a bipartite reconstruction in his remarks made on the Indian Constitution:

---

81 *Ibid.*, p. 84, Para 104. See also *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No. 400 of 2012, Supreme Court of India (15 April 2014).

82 *Egan v Canada*, (1995) 29 CRR (2nd), Para 176-177; *Vriend v Alberta*, (1998) 1 SCR 493, Para 90; and see *Corbiere v Canada,* above note 8. Citizenship, sexual orientation, marital status and Aboriginal residence/off-reserve band member status are the grounds which have been declared analogous under the Canadian Constitution.

83 *Prinsloo v Van Der Linde*, 1997 (3) SA 1012; and *Harksen v Lane*, 1998 (1) SA 300.

84 See above, note 80, p. 83–84, Para 103.

85 See above, note 39, Paras 33, 45.

86 *Ibid.,* Paras 51, 112.

87 See above, note 64, p 13.

88 *Suresh Kumar Koushal v Union of India* (2013) Civil Appeal No. 10972.

89 *Ibid*., Para 32.

> *It goes without saying that a poor Dalit deaf lesbian woman in a wheelchair is far more vulnerable and in greater need of constitutional protection than a female university teacher who has all her faculties and who is part of the "dominant" classes. If this is not recognised, constitutional jurisprudence could suffer. And there is no need to limit protection to the grounds expressly mentioned in the Constitution.*[90]

It is also useful to note that nothing in the drafting of the Constitution indicates an original intent for interpreting Article 15(1) to exclude multi-ground discrimination of the kind referred to by Yacoob J. Reference to the Constitutional Assembly Debates (CAD) demonstrates that there was nothing in the discussions which construes Article 15(1) as either restricting the number of grounds in a claim, or considers it to be a closed list. In fact, there is no discussion on the usage or implication of the word "only" in the CAD. However, there are signs that a causative understanding of "on grounds only of" is supported in the CAD. The drafting history of Article 15 indicates that a drafting suggestion to insert "on mere grounds of" (instead of "on grounds only of") was not opposed (however this was not put to vote since it was not put forward as an amendment).[91] In fact, the initial wording of Article 15 did not contain "only" in its text. References to the draft text of Article 15 by various members did not always use the word "only" or touch upon its consequence.[92] To this extent, there is no indication that discrimination based on multiple grounds was meant to be excluded from the ambit of Article 15(1).

---

90 Yacoob, Z.M., "Societal Morality to Constitutional Morality", *The Hindu*, 30 December 2011, available at: http://www.thehindu.com/opinion/lead/societal-morality-to-constitutionalmorality/article2758601.ece.

91 Deshmukh suggested this proposition: [t]hat the State shall not make nor permit any discrimination against any citizen, on mere grounds of religion, race, caste or sex." Explaining that, "[t]he idea is if you put it like that, that would cover all cases". However, since there was no formal amendment suggested, this was not put to vote. *Constituent Assembly of India Debates, Vol III*, 29 April 1947, available at: http://parliamentofindia.nic.in/ls/debates/vol3p2.htm.

92 See, for example, "Article 15 forbids discrimination on the ground of race, religion, caste or community", statement made by Nagappa, *Constituent Assembly of India Debates*, 21 November 1949, available at: http://parliamentofindia.nic.in/ls/debates/v11p7m.htm. See also the statement made by Shri Kamalashwari Prasad Yadav, "[t]here was a time, Sir, when the whole of Asia was looking to Japan but today the eyes of the whole of Asia are fixed towards India. They are watching if we are making any discrimination or not in our treatment to the citizens on the ground of religion, caste, language and race; they are keenly watching the progress we are making towards achieving our ideals", *Constituent Assembly of India Debates, Vol. XI*, 25 November 1949, available at: http://parliamentofindia.nic.in/ls/debates/vol11p11.htm; statement made by Shrimati Renuka Ray, "[q]uite rightly, it has been laid down that the State shall not discriminate against any citizen on grounds of religion, race or sex", *Constituent Assembly of India Debates, Vol VII*, 9 November 1948, available at http://164.100.47.132/LssNew/constituent/vol7p5.html; and statement made by Tajamul Husain, "the State shall not discriminate against any citizen on the grounds of religion, caste, etc.", *Constituent Assembly of India Debates, Vol VII*, 9 December 1948, available at: http://parliamentofindia.nic.in/ls/debates/vol7p23.htm.

Further, textual (literal) and transformative (purposive) interpretations affirm a causative understanding of the phrase "on grounds only of" in clause (1). These are the two central tools of interpretation pursued in tandem in constitutional cases.[93] The dual emphasis on the words themselves and their transformative context is the key to constitutional interpretation in India.[94] It is thus appropriate to use both the letter and spirit of the Constitution to discern the legitimate meaning of the phrase "on grounds only of" in clause (1). According to the Oxford English Dictionary, the word "only" can be used widely, and amongst its most popular uses include: (i) as an adverb meaning "[s]olely, merely, exclusively; with no one or nothing more besides; as a single or solitary thing or fact; no more than. Also, with a verb or verb phrase: no more than, simply, merely"; (ii) as an adjective with an attributive sense of being "unique" in character, or "alone" and; (iii) as a preposition meaning "except for".[95] Restating the language in clause (1): "no one shall be discriminated on grounds only of", it is clear that "only" cannot possibly be an adjective in this sentence. This interpretation falls foul of the basic canons of English language where an adjective is used for naming an attribute of the immediately succeeding noun.[96] Further, it could not have been used as a conjunction meaning "except for, but" since that would totally inverse the meaning of the non-discrimination guarantee. Thus, the only possibility is of it being used as an adverb here. The question that remains is whether as an adverb it has a quantitative or a qualitative meaning. Does "only" in the phrase "on ground only of" signify "solely", "singularly", "uniquely", "merely", "exclusively" in a qualitative sense or a quantitative one?

As an adverb, the positioning of "only" in a sentence matters:

> *The traditional view is that the adverb only should be placed next to the word or words whose meaning it restricts: I have seen him only once rather than I have only seen him once. The argument for this, a topic which has occupied grammarians for more than 200 years, is that if only is not placed correctly the scope or emphasis is wrong, and could even result in ambiguity. But in normal, everyday English, the impulse is to state only as early as possible in the sentence, generally just before the verb. The result is, in fact, hardly ever ambiguous.*[97] *(emphasis omitted)*

This explanatory statement is useful. It indicates that although there is free rein in using "only" as a limiting adverb either before or after the object it seeks to limit, it should not be

---

93 *Anwar Ali Sarkar v The State of West Bengal* [1952] SCR 284, per Bose J; and above, note 80, Para 114. See also *Maneka Gandhi v Union of India* AIR 1978 SC 587; and *CPIO, Supreme Court of India v Subhash Chandra Agrawal* Special Leave Petition (C) No 32855 OF 2009.

94 See *S H Sheth v Union of India* (1976) 17 Guj LR 1017, 1040; and *KP Varghese v Income Tax Officer Ernakulam* AIR 1981 SC 1922.

95 "Oxford English Dictionary Online", Oxford University Press, available at: http://ezproxy-prd.bodleian.ox.ac.uk:2355/view/Entry/131463?result=3&rskey=52TAQb&.

96 Aarts, B., "Adjective" in *Oxford Dictionary of English Grammar*, Oxford University Press, 2014.

97 Butterfield, J., *Oxford A-Z of English Usage*, Oxford University Press, 2013, p. 133.

absurd or ambiguous in common usage. In its current positioning in clause (1), the word "only" may qualify the immediately succeeding *list* of grounds or the term *grounds* just preceding it. But the fact that it is placed before rather than after "of" in the phrase "on grounds only of" diminishes the possibility of it limiting the list of grounds as such. On the other hand, if "only" was meant to be used as "solely" or "merely" in the sense of limiting the number of grounds upon which a discrimination claim be based, it is clearly misplaced in the phrase "on grounds only of". Had the phrase been "only on grounds of" the adverb would have correctly limited the number of grounds since it would appear before "on", signifying the limitation on the number of grounds to be relied upon in a claim. In its current positioning it cannot logically stand for meaning "solely" or "merely" as a limitation on the number of grounds used in a claim.

A student of the English language would then strip the phrase "on grounds only of" of any quantitative sense. She would use "only" as referring to "simply", "merely", "exclusively" or "just" such that it relates to the inadequacy or inappropriateness of certain grounds being the basis of discrimination under clause (1), but leaving open the possibility of justifying such discrimination as well. In the legal semantics of discrimination law this would mean that discrimination is prohibited when *based on*, *for the reason of* or *because of* these grounds: religion, race, caste, sex, place of birth.[98] In the context of sex discrimination, Gardner explains that, "[i]n most jurisdictions, sex discrimination is defined (…) as differential treatment 'on grounds of' sex or 'by reason of' sex or 'because of' sex or 'based on' sex."[99] Although he goes on to establish a case of causation in direct discrimination,[100] the jurisdictions he cites have used these phrases to cover both direct and indirect forms of discrimination.[101] It is then important that the emphasis on "basis" of discrimination should not be equated with the model of direct discrimination based on discriminator's intention or animus but to be connected with the idea that the effect or impact of discrimination is suffered because of certain grounds, whether or not a defendant actually so intended and whether the legal test requires the presence of defendant's intention to discriminate on a ground.

Whilst early US and UK discrimination jurisprudence recognised only direct discrimination, it has gradually moved away from relying on intention or motive-based models of discrimination and readily accepts indirect discrimination, which too is based on grounds albeit in a

98 See, for example, the US Civil Rights Act 1964, Section 703a; the UK Sex Discrimination Act 1975, Section 1 and 2; the UK Race Relations Act 1976, Section 1; the UK Disability Discrimination Act 1995, Section 5; the UK Equality Act 2010, Section 13 and 19; the Canadian Charter of Rights and Freedoms, Section15(1); and the Constitution of the Republic of South Africa 1996, Section 9(3).

99 *Ibid.*; Gardner, J., "On the Ground of Her Sex(uality)" *Oxford Journal of Legal Studies*, Vol. 18, 1998, p. 179.

100 *Ibid.*

101 See UK Equality Act 2010, Sections 13 and 19; Canadian Charter of Rights and Freedoms, Section 15(1); and Constitution of the Republic of South Africa 1996, Section 9(3) above, note 98. See also *Griggs v Duke Power Co.* 401 US 424 (1971).

different way than direct discrimination.[102] The common basis of both forms of discrimination is that discrimination ensues on the basis of certain grounds and the causal phrases are taken to reflect this understanding. This exactly resembles Lord Thankerton's test in *Daulat Singh* for determining discrimination such that causation speaks either to what is proclaimed or is the effect of the impugned provision, and is also similar to SR Das J's opinion in *Bombay Education Society*. This interpretation is most clearly visible in the text of the non-discrimination guarantee under Section 9(3) of the South African Constitution which declares that:

> *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.*[103] *(emphasis added)*

The phrase "on one or more grounds" does not only indicate a multi-ground view of discrimination but also links unfair discrimination to the list of grounds, indicating that it is grounds *on which* discrimination must ensue to qualify as discrimination as such. Similar sense is conveyed by the phrase "based on" in Section 15(1) of the Canadian Charter of Rights and Freedoms, "because of" in Section 13 of the Equality Act 2010 and "in relation to" in Section 19 of the Equality Act 2010.

Thus, in finding the *basis* of discrimination through "on grounds only of", there is an emphasis on the causative element in discrimination, i.e. something is discriminatory *because* it is based on certain grounds.[104] The causal link itself can be either direct or correlative.[105] Thus, to prove discrimination it is not only necessary to show a causal link between the wrongful act and its discriminatory consequence but that the act and consequence flow from certain kinds of identities recognised as "grounds" or "personal characteristics".[106] "[O]n grounds only of" should then be interpreted as an adverb signifying the qualitative basis of discrimination in grounds connecting the discriminator's act or omission (law, rule, criterion, policy, practice, decision) which disadvantages the claimant adversely *based on* (whether directly or indirectly) certain kinds of identities (referred to as grounds or personal characteristics in discrimination law).

b. Giving Meaning to "Or Any of Them"

Besides the misinterpretation and misapplication of "on grounds only of" in clause (1), a fundamental flaw in the Indian discrimination jurisprudence is the partial reading of the

102 Khaitan, T., *A Theory of Discrimination Law,* Oxford University Press, 2015, pp. 159–162.

103 South Africa Constitution, Section 9(3).

104 Anderson, C.L., "Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA", *Mississippi Law Journal*, Vol. 82, 2013, p. 68.

105 See above, note 102, pp.165–167.

106 The causal link can be either direct or correlative. See above, note 102, pp.165–167.

clause. The case law at no point engages with the complete clause which ends with "or any of them". The partial reading strips the prevailing jurisprudence of normative force. Re-interpreting clause (1) while reckoning with its full wherewithal including the phrase "or any of them", stands as a clear indication of clause (1) covering multi-ground discrimination within its ambit.

There is no discussion in the CADs as to the meaning of the concluding phrase "or any of them" in Article 15(1).[107] However, the current jurisprudence leaves these words redundant in the context of Article 15(1). Given that the principles of constitutional interpretation proscribe any interpretation which renders some of the words or text as surplus, it is important to reinvigorate Article 15(1) jurisprudence to give the phrase "or any of them" its full and contextual meaning. This is supported by Kannabiran, who suggests that:

> *[A] re-examination of article 15(1) leads us to conclude that the phrase "or any of them" enables a consideration of intersectionality in non-discrimination jurisprudence that need not any more be limited to* ***one*** *of the stated indices alone. Article 15(1) could also be interpreted to mean that discrimination is prohibited on a single ground or on a combination of grounds, listed in the clause and not listed, with the court then bearing the responsibility of examining discrimination on one ground in conjunction with other factors.*[108]

The placing of "or" in clause (1) is dispositive in this matter: "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth *or* any of them" indicates that the basis of discrimination can be any of the grounds, alone or in some combination. Once having interpreted "on grounds only of" as finding the basis of discrimination, "or" can only logically allow for multiple grounds to be the basis of discrimination. Given that "or" may mean "and/or" in legal semantics, either construction leads to the recognition of discrimination on more than a single ground under clause (1).

Conclusion

The purpose of this article has been to address a preliminary roadblock in the interpretation of Article 15(1) to encompass intersectional discrimination. This roadblock relates to the quantitative interpretation of clause (1), especially the phrase "on grounds only of", as limiting the possibility of finding discrimination to be based on more than a single ground of discrimination. I have traced the trajectory of constitutional thought which has led to this and argued that such a quantitative delimitation to the general non-discrimination guarantee is: semantically inaccurate; historically unsupported in constitutional drafting; and ill-conceived within the contours of discrimination law. The phrase can instead be reinterpreted as signifying the *basis* of discrimination in grounds of discrimination, whether single or multi-

107 Shiva Rao, B., *The Framing of India's Constitution*, Indian Institute of Public Administration, 1968, pp. 182–192.

108 See above, note 64, pp. 460–461.

ple. Surpassing this interpretative hurdle is the first step to admitting the possibility of finding intersectional discrimination in Article 15(1). But the task of constructing discrimination jurisprudence which accommodates intersectionality cannot be accomplished with a single stroke. This article has sought to open the possibilities for considering how multi-ground claims which represent intersectional discrimination may become a part of Article 15. Removing its quantitative veneer thus clears the decks for improving our exploratory vision of intersectionality in discrimination law.