WHAT IS DISCRIMINATION AND WHY IS IT WRONG?

ABSTRACT-

The ratification of international human rights covenants and the subsequent broadening of national legal protections against unequal treatment have significantly advanced the field of discrimination law worldwide. Several attempts have been made to reduce inequalities between groups and stem discrimination. The Indian Constitution recognises equality as a cardinal principle and encumbers the State with the responsibility of promoting equality and shunning discrimination. The rise of greater awareness about the problems surrounding discrimination, however, has made the use of the term 'discrimination' very controversial. This article argues that this controversy stems from a fundamental misunderstanding of the concept of discrimination. The term discrimination is a tricky one lacking a clear definition. While several attempts have been made in the past, there is no one clear understanding of what discrimination entails. In order to find the meaning of discrimination this article seeks to understand why discrimination is wrong. What is the injury caused by discrimination? It is argued that a foray into the jurisprudential objections to discrimination will help provide a better understanding of the meaning of discrimination. On the basis of such an inquiry this article seeks to enumerate the essential components of discriminatory conduct. It is argued that understanding what such essential components are will help further our understanding of the fundamental question of ‘what is discrimination?'.

keywords- discrimination, equality, liberty, protected grounds, disadvantage

I. INTRODUCTION-

The concepts of discrimination and equality have gained much traction in the late 20th and early 21st centuries. The desire to build a more egalitarian society inspired many nation states- including formerly colonial States facing a fresh wave of immigration from their former colonies as well as newly independent States which were newly introduced to democracy- to adopt policies which would achieve this aim. Such policies are included under the umbrella term of 'discrimination law'. Nevertheless, after several decades of evolution and implementation of discrimination law, its success seems to be contested.[1] While several States have managed to include egalitarian objectives in their legal framework and have had some success in implementing them, deep and pervasive inequalities continue to persist in most societies.[2] India is not an exception to this norm. While the Indian Constitution provides for a robust mechanism for protection of fundamental rights including the right to equality,[3] inequality and societal discrimination are deep-rooted in the Indian society.[4]

Over time, the development of discrimination law has led an increasing number of people to become aware of their rights and claims of discrimination. What is noteworthy however is that these claims are often contradictory. A prime example would be the adoption of affirmative action policies by a State for its disadvantaged and underrepresented populations. While such an act would be considered by the beneficiaries as an essential step to reduce discrimination, it is often perceived by those left out from its ambit as discriminatory.[5] Affirmative action is also not the only context where such a conflict takes place. Such a conflict can be seen in many other arenas as well.

One of the reasons for such a perceived conflict is the fact that the idea of discrimination itself and what it entails is subject to several varying interpretations.[6] Any claim of 'discrimination' is often met with much hostility as it is presumed to originate from malice and wrongful intention. Indeed, most members of the general population would consider discrimination a moral wrong steeped in malice.[7] Attributing primacy to the perpetrator's

[1] *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* 5 (Marie Mercat-Bruns, David B. Oppenheimer & Cady Sartorius eds., 2018).
[2] Sandra Fredman, *Discrimination Law* 43 (3rd ed, 2022).
[3] India Const. arts. 14–16.
[4] *The Routledge Handbook of Exclusion, Inequality and Stigma in India* 1 (NMP Verma & Alpana Srivastava eds., 2020).
[5] Barry Gross, The Case Against Reverse Discrimination, in *Morality in Practice* 259, 255 (James P. Sterba ed., 4th ed. 1998).
[6] Michael Connolly, *Discrimination Law* 1 (2d ed. 2011).
[7] Id.

intention generates a narrative of 'blame-worthiness', which frequently makes assertions of discrimination on any grounds, such as caste, gender, race, or religion, across various social spheres like education, employment, or any form of social affiliation, unpalatable. However, while discrimination continues to be considered rooted in wrongful intention and prejudice in the lay understanding of the term, discrimination law globally provides a very different perspective. In such a situation the idea of discrimination and what it entails needs to be studied. This article plans to embark on such a study. The first part of this article will discuss the different conceptions of discrimination. The differences of view-points regarding what discrimination entails will be highlighted in this part. In order to understand the concept of discrimination better the second part will delve into why discrimination is considered to be wrong and the principles on which discrimination law is based. The final part will elaborate upon the essential constituents of discrimination and try to provide an analysis of the meaning of discrimination in discrimination law.

II. WHAT IS DISCRIMINATION?

The idea of discrimination steeped in the language of prejudice, irrational bigotry and hostility has long been contested by legal scholars.[8] Conversely, it has been proposed that "Discrimination is not a simple result of prejudice or hostility, but instead reflects a far more complex interplay of past and present discrimination, social and economic factors, and economically rational decisions"[9]. Discrimination seems to be viewed in a different light by lawyers as compared to the lay understanding of the term.[10] While the lay understanding of discrimination requires intentional and mala fide difference in treatment based in malice towards a particular person or group, legal scholars do not consider such intention to be an essential or even important component of what constitutes discrimination. Nevertheless, a legal definition of discrimination has been elusive despite several attempts.

According to Thompson discrimination is "Unfair or unequal treatment of individuals or groups based on an actual or perceived difference; prejudicial behaviour acting against the interests of those people who characteristically tend to belong to relatively powerless groups within the social structure …Discrimination is therefore a matter of social formation as well as individual or group behaviour."[11] While this definition provides an interesting perspective, it

[8] Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751, 752 (1991).
[9] Id at 763.
[10] Tarunabh Khaitan, *A Theory of Discrimination Law* 4 (2015).
[11] Neil Thompson, *Anti-Discriminatory Practice* 50 (6th ed. 2016).

continues to give credence to an intention-based conceptualisation of discrimination. On the contrary, the most neutral definition found in law is that discrimination means classification.[12] However, not all forms of classification are prohibited. The Indian Constitution while prohibiting discrimination on several grounds[13] also permits special provisions for women and children[14] as well as special provisions in the form of reservation for the benefit of certain classes[15]. The Indian Supreme Court has held that equals should not be treated unlike and unlikes should not be treated alike whereby permitting classification between unlikes but demanding consistent treatment between alikes.[16] Therefore, it emerges that only certain forms of classification are considered wrong and are deemed wrongful discrimination.

It has been argued that discrimination can be considered to be unlawful either under the harm or the unfairness principles.[17] While the harm principle implies a strong connection between stigma, denied opportunities, social and historical factors of disadvantage causing secondary citizenship and different treatment, the unfairness principle demands a weaker connection between these factors relying rather on the inherent unfairness of classifications based on group memberships (like caste, sex, race etc.).[18] A combined reading of the harm and unfairness principles provides a definition of discrimination which would not only proscribe hostile and prejudiced classifications but also ones which have an unfair impact. It has indeed been argued that the forms of discrimination which are prohibited by the law may be unintentional and indirect.[19] The law considers the impact of the act or omission on the victim rather than the intent of the actor to the extent that the actor may not be at fault but will still be responsible to remedy the discrimination.[20] Nevertheless, not all acts of classification, or acts which have an impact on the victim, are considered discriminatory. For example, the requirement by an employer that all employment candidates should have a particular educational qualification may not be discriminatory if such qualifications are required for doing the job even though such a requirement fulfils both the conditions mentioned above i.e. it classifies job applicants and has adverse impact on victims who do not possess such a qualification. Therefore, the question arises as to what makes discrimination wrong. Answering

[12] Deborah Hellman, *When is Discrimination Wrong?* 7 (2008).
[13] India Const. art. 15(1).
[14] India Const. art. 15(3).
[15] India Const. arts. 15(4), 15 (5) and 16(4).
[16] *Gauri Shanker v. Union of India*, (1994) 6 SCC 349 para 7 (India).
[17] John Gardner, *Liberals and Unlawful Discrimination* 9 Oxford J. Legal Stud. 1, 2 (1989).
[18] Id.
[19] Khaitan, *supra* note 10 at 2.
[20] Id.

this question will help better define what discrimination entails. This question will be discussed in the next section.

III. WHY IS DISCRIMINATION WRONG?

Discrimination feels instinctively wrong. It has been argued above that the unlawfulness of discrimination is derived under the harm or the unfairness principles. But what are the jurisprudential foundations of such a claim? This Section will endeavour to ascertain the theoretical underpinnings of discrimination law. The Indian Constitution lays down certain foundational values, including equality, liberty, and dignity. Discrimination can be seen as contrary to these values. Additionally, the basic notion of distributive justice also demands the elimination of discrimination. This section will analyse the 'wrongness' of discrimination based on these principles. These principles include-

a. EQUALITY-

Equality is the most traditionally accepted basis of anti-discrimination legislation and policies. This is true to such an extent that discrimination law is often referred to as equality law.[21] Nevertheless, equality itself is a contested ideal and has been interpreted in different ways. The conceptualisation of equality has been influenced heavily by the Aristotelian formulation of equality that proposes that 'likes should be treated alike and unalike cases unalike in accordance with their unalikeness'[22]. It has been contended that the initial segment of this principle of equitable treatment leads to formal equality, whereas substantive equality finds its justification in the latter segment, which permits differential treatment.[23]

Formal equality is based in equal treatment. It is argued to be the 'narrowest form' of equality.[24] Membership of social groups is considered to be irrelevant and strict legal equality is demanded.[25] Formal equality entails equality before the law and prohibits overt discrimination. Formal equality upholds and ensures consistency.[26] Nevertheless, it has been contended that equal treatment may not always be appropriate.[27] Equal application of laws can

[21] Titia Loenen, *The Conceptualization of Equality and Non-discrimination as Legal Standards: From Formal to More Substantive Equality* 28 (2024).
[22] Aristotle, *The Nicomachean Ethics* bk. V, ch. 3, 1131a20–24 (David Ross trans. 2009).
[23] Loenen, *supra* note 21 at 38**Error! Bookmark not defined.**.
[24] Mark Butler, *Equality and Anti-Discrimination Law: The Equality Act 2010 and other anti-discrimination protections* 26 (2016).
[25] Id.
[26] Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l J. Const. L. 712, 717(2016).
[27] Id.

often be counterproductive and have unequal results.[28] Equal treatment may, in the light of prior disadvantage lead to reinforcement of such disadvantage. Anatole France brilliantly illustrates this irony by exclaiming, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread".[29] While formal equality requires consistent treatment, this may lead to exertion of "conformist pressures"[30] which require the assimilation to the existing dominant norm.[31] Social norms set based on standards of dominant groups may not be appropriate for other groups.[32] Formal equality is also subject to "levelling down" criticisms.[33]

Substantive equality, on the other hand, overcomes these limitations. It focuses on equality of outcome rather than of treatment and allows differential treatment of differently placed individuals. In allowing different treatment it takes into consideration the continued impact of prior unequal treatment.[34] It also provides for accommodation of the needs of differently placed people in light of group differences.[35] Such a conceptualisation closely mirrors the "priority view" propagated by some theorists.[36] The Indian Supreme Court has time and again emphasised the importance of a substantive interpretation of equality.[37] However, the exact meaning and contours of substantive equality are unclear. Sandra Fredman, in her seminal work has contributed to enhancing our understanding of substantive equality by constructing substantive equality as a four-dimensional concept. She states that "Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation, and violence based on a protected characteristic. Third, it should enhance voice and participation, countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change".[38] Therefore, substantive equality has four aspects firstly redressal of disadvantage, secondly addressing recognition harms caused by stigma and stereotyping, thirdly increasing representation and

[28] Connolly, *supra* note 6 at 5.
[29] George Brandes, *Anatole France* 15 (1908).
[30] Fredman, *Substantive Equality Revisited, supra* note 26 at 719.
[31] Loenen, *supra* note 21 at 51**Error! Bookmark not defined.**.
[32] For example, employment norms which give preference to candidates with professionally educated parents or which prefer candidates who come from urban areas may not 'fit' members of Scheduled Caste or Scheduled Tribes.
[33] Loenen, *supra* note 21 at 51**Error! Bookmark not defined.**.
[34] Cathi Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. Afr. J. on Hum. Rts. 253, 259 (2007).
[35] Id.
[36] Derek Parfit, *Equality and Priority* 10 Ratio 81, 101 (1997).
[37] *B.K. Pavitra v. Union of India,* (2019) 16 SCC 129 para 107 (India).
[38] Fredman, *Substantive Equality Revisited, supra* note 26 at 727.

participation of marginalised groups and, finally, the transformative angle implying structural change by the accommodation of differences.[39]

Consequently, it can be seen that substantive equality seeks to provide an all-round framework of equality. One question that nevertheless remains is 'equality of what?'. This question has been answered in different ways. The most prominent of them are the conceptions of equality of opportunity and the equality of results. Additionally, Ronald Dworkin has argued for equality of resources. The principle of equality of opportunity recognises systemic impediments and endeavours to create a level playing field.[40] The 'neutralization' view emphasises equal access to the same opportunities without restrictions.[41] Social goods should be allocated so that they would not a priori exclude any section of the community on the basis of irrelevant grounds (like group membership).[42] Equality of results goes one step beyond mere equality of opportunity. This principle not only justifies but even requires unequal treatment when such treatment is necessary to achieve equality of results.[43] Therefore, equality of results entails a more just redistribution of benefits which goes beyond mere equal treatment.[44] What it requires is a redistribution of resources.[45] Provisions regarding affirmative action, including reservations can be justified under this conception of equality.[46] Dworkin, on the other hand argues that the principle of equal concern, which is a precondition to the political legitimacy of the State requires the State to aim at equality of resources.[47] He lays down two principles that would guide the actions of the government. Government must function in ways that would ensure: First, that citizens' fates are insensitive to their background group membership i.e. they should not be endowment sensitive and second that their fates should be ambition-sensitive i.e. sensitive to their choices.[48] Therefore, while the background of an individual should not be allowed to play any role in the determination of their entitlements, the choices that they make would have an impact on the same. This concept recognises the agency of the individual, which is not demonstrated in other formations.[49] Equality of resources is achieved when no one can

[39] Id.
[40] Andrew Mason, *Equality of Opportunity and Differences in Social Circumstances*, 54 Phil. Q. 368, 385 (2004).
[41] Id.
[42] Bernard Williams, The Idea of Equality, in *Philosophy, Politics and Society* 110, 125 (Peter Laslett & W. G. Runciman eds., 2d ser. 1964).
[43] Fredman, *Substantive Equality Revisited, supra* note 26 at 729.
[44] Gardner supra note 17 at 1.
[45] Fredman, *Substantive Equality Revisited, supra* note 26 at 729.
[46] Elvira Dominguez-Redondo and Erica Howard, Introduction in *Affirmative Actions and the Law: Efficacy of National and International Approaches* 6 (Erica Howard, Elvira Dominguez-Redondo & Narciso Leandro Xavier Baez eds., 2021).
[47] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 2 (2002).
[48] Id.
[49] G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 Ethics 906, 933 (1989).

reasonably envy the property assigned or held by another.[50] Individuals would continue to possess different levels of resources, but the distribution of the same would be such that no one would prefer another's bundle. From the above analysis, it can be seen that different conceptions on equality can lead to substantively different understandings of the topic.

This article opts for a substantive rather than a formal understanding of equality. Additionally, this article will look at the synthesis of equality of opportunity, results, and resources for a better understanding of what equality entails. Having discussed the idea of equality it is time to analyse how it can serve as a foundational principle for prohibiting discrimination.

A contention has been made that "Legal prohibitions of discrimination are a specific articulation of equality as a legal standard to protect (members of) groups deemed in need of particular protection"[51]. It has been further argued that an act is discriminatory when it does not treat individuals with equal concern.[52] Discrimination is typically understood as a specific type of equality issue.[53] Any act (or law or policy) which fails to treat people as equals is considered to be discriminatory.[54] This view is articulated in several international instruments, and national jurisdictions generally treat equality as the bedrock of anti-discrimination legislation.[55] In India Articles 14, 15, and 16 form the equality code of the Constitution and prohibit discrimination.[56]

Nevertheless, an equality-based understanding of discrimination has several limitations. Firstly, even opting for a substantive understanding of equality does not adequately protect against levelling-down. Equal treatment does not preclude equally bad treatment. It does not set standards for treatment.[57] An even more substantial limitation of an equality-based critique of discrimination is that egalitarians fail to distinguish between group inequality and individual inequality. A reliable account of the association between individuals and groups cannot be provided by them. While anti-discrimination legislation can rectify specific instances of

[50] Dworkin *supra* note 47 at 139-140.
[51] Loenen, *supra* note 21 at 79**Error! Bookmark not defined.**.
[52] Deborah Hellman, Equality and Unconstitutional Discrimination, in *Philosophical Foundations of Discrimination Law* 51, 52 (Deborah Hellman & Sophia Moreau eds., 2013).
[53] Id.
[54] Id.
[55] Fredman, *Substantive Equality Revisited, supra* note 26.
[56] India Const. arts. 14–16.
[57] Loenen, *supra* note 21 at 50**Error! Bookmark not defined.**.

individual disparity, its inherent constraints prevent it from addressing intergroup inequalities.[58]

An alternative account of discrimination law which seeks to overcome these limitations is based on liberty, which shall be discussed below.

b. LIBERTY-

Liberty has been posited as providing a better foundation for discrimination law than equality.[59] Sophia Moreau contends that the "interest that is injured by discrimination is our interest in a set of what I call deliberative freedoms"[60]. The term "deliberative freedoms" according to Moreau means the liberty to make decisions free from "normatively extraneous features of us"[61]. Therefore, for example, consideration given to group membership like caste, gender, race etc. in making employment decisions rather than qualifications or performance would be a normatively extraneous factor. It is contended that these traits (like group membership) should not, in a liberal society have any bearing on an individual's choices on how to pursue or live their life. Discrimination law therefore prevents the restriction of opportunities whether it may be in the field of education, employment, housing or in any other field on the basis of these traits.

Discrimination forces individuals to factor in their group membership and the disadvantage derived from it as a cost while making deliberations about their life choices.[62] A prohibition of discrimination entailed by discrimination law allows an individual to have the liberty to deliberate upon their life choices without having to count such traits as 'costs'.[63] Consequently, discrimination constitutes a 'personal wrong' against the victim by restricting their right to 'deliberative freedoms'.[64] Anti-discrimination statutes thus ensure universal deliberative autonomy by mandating that duty-bearers like employers refrain from implementing adverse actions that curtail such freedom.[65]

This justification of discrimination law evades some of the limitations of the egalitarian formulation seen above. By providing an individual-based foundation it does not get caught in

[58] Khaitan, *supra* note 10 at 249.
[59] Id at 130.
[60] Sophia Moreau, *What Is Discrimination?* 38 Phil. & Pub. Aff. 143, 147 (2010).
[61] Id.
[62] Id.
[63] Id.
[64] Id.
[65] Id.

the trap of defining the relation between individuals and groups. It also prevents 'levelling down' as any compromise with deliberative freedoms is an affront to liberty irrespective of the positions and status of others. A liberty-based account only permits unidirectional change which increases the liberty of one individual to meet that which is enjoyed by another and not vice versa.[66]

Nevertheless, such an argument also has some limitations. Sophia Moreau herself in her later work has revised her position to acknowledge that people lose out not only on the deliberative freedoms but also on the primary goods themselves because of discrimination.[67] For example, in the case of employment discrimination, people lose out not only on the deliberative freedom to consider applying for or accepting a job but also the job which in itself is a valuable primary good, the loss of which can cause severe monetary damage as well as damage to status and further opportunities. Indeed, such a loss of a primary social good can be considered to be the main 'harm' caused to such an individual with the parallel loss of freedom being its secondary manifestation.

It can also be argued that in judging the extent of deliberative freedom possible for an individual in any given circumstance a comparative analysis is necessary.[68] For example, an individual can claim that her deliberative freedom to apply for and occupy a post is unfairly restricted only if another who does not share her 'traits' in reality has such a freedom. However, if the desired post is not available to anyone irrespective of their 'traits', then such claim cannot be made. The scope of potential deliberative freedoms of one individual is contingent upon the existing spectrum of such freedoms, which is itself determined by the freedoms enjoyed by the "best off" members of the society.[69] Moreau has contested this comparative perspective by arguing that "although it is true that we are all entitled to these deliberative freedoms to an extent roughly equal to others, this is only because each of us has an independent entitlement to the freedoms in question"[70]. While Khaitan admits this comparative nature of discrimination, he distinguishes between 'comparative' and 'egalitarian' principles.[71] Such a distinction however appears to be rooted in the 'strict' definition of equality. Such a strict definition places equality above and in tension with all other values. This researcher, however, is not partial to

[66] Id.
[67] Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* 11 (2020).
[68] Deborah Hellman, *Two Concepts of Discrimination* 102 Va. L. Rev. 895, 912 (2016).
[69] Khaitan, *supra* note 10 at 113.
[70] Moreau, *supra* note 60 at 17460.
[71] Khaitan, *supra* note 10 at 113.

such an understanding of equality but prefers to read equality in conjunction with other principles like liberty. Hence, while providing a compelling justification for discrimination law, the side-lining of the comparative nature of discrimination leads to certain limitations on the liberty-based justification of discrimination law.

Another account of discrimination law can be provided by the reliance on the principle of dignity explored below.

c. DIGNITY-

It has been argued that the 'injury' or 'harm' caused by discrimination is to the 'dignity' of the individual.[72] Discrimination on the basis of any trait or group membership like gender, caste, race, etc derives its wrongfulness from demeaning the group that is discriminated against.[73] It has been argued that while there may be many grounds on which classification may be done (like eye colour or the first letter of one's name[74]) it becomes demeaning when it relates to a protected characteristic and treats protected groups adversely. Not all classifications are demeaning. Discrimination is distinguished from mere classification by its capacity to demean.[75] By demeaning someone you deny their equal moral worth. Equal dignity is essential if equal moral worth is to be protected.[76]

Nevertheless, such a view of dignity also appears to be comparative in nature. The emphasis here is on 'equal' moral worth rather than on an individual's 'moral worth' in itself. Hellman admits this comparative nature of dignity.[77] She considers equality to be a foundational value.[78] Similarly, Reaume chooses a "dignity- based construction of equality rights"[79]. It can thus be maintained that equality and dignity should be considered jointly, not in isolation. It should be remembered that a substantive account of equality studied above acknowledges the importance of protection from recognition harms,[80] which can be said to be based on dignity.

[72] Denise Réaume, Dignity, Equality, and Comparison, in *Philosophical Foundations of Discrimination Law* 7, 8 (Deborah Hellman & Sophia Moreau eds. 2013).
[73] Hellman, *supra* note 12 at 29.
[74] Id.
[75] Id.
[76] Réaume, *supra* note 7272.
[77] Hellman, *supra* note 12 at 48.
[78] Id.
[79] Réaume, *supra* note 72 at 2272.
[80] Fredman, *Substantive Equality Revisited, supra* note 26 at 727.

Two further influential theories of distributive justice also provide an interesting account on why discrimination is wrong and justify anti-discrimination legislation. These are discussed below.

d. THEORIES OF DISTRIBUTIVE JUSTICE-

Distributive justice fundamentally examines the principles governing the apportionment of the fruits of social cooperation.[81] John Rawls' "theory of Justice as fairness" and Amartya Sen's "capability approach" are two of the most influential of such theories.

John Rawls' theory of Justice as Fairness-

John Rawls' theory of Justice as Fairness in well-ordered societies rests on the contention that social institutions should be arranged in a manner which would align with the principles which he denotes as the "Two Principles of Justice".[82] His theory of social justice primarily applies to social institutions, which he refers to as the "basic structure", rather than individuals, and concerns itself with the distribution of "(social) primary goods"[83]. In a just society these 'primary goods' would be allocated in accordance with the two principles of justice. The two principles of justice are–

> "(1) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> (2) Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[84]

Consequently, it is apparent that whereas the initial principle safeguards 'basic liberties', ensuring that economic necessities do not compel individuals to relinquish them, the subsequent principle, referred to as the "difference principle", mandates the restructuring of economic systems for the benefit of the least advantaged members of the society. Therefore, the difference principle establishes an economic system which makes the least advantaged class

[81] Valerian Rodrigues, *Justice as the Lens: Interrogating Rawls through Sen and Ambedkar*, 5 Indian J. Hum. Dev. 154, 155 (2011).
[82] John Rawls, *A Theory of Justice* 52 (1971).
[83] Id at 54.
[84] Id at 266.

better off than other alternatives.[85] The difference principle effects a reform of the existing systems in order to attain this objective.[86]

It has been argued that Rawls "believes that talents and attributes may be housed in persons, but they are social attributes to be harvested for society as a whole"[87]. The implication is that an individual's entitlement to profit from their skills is counterbalanced by society's justification in distributing the benefits derived from those skills across the population. While not requiring a strict redistribution of wealth, it requires that the interests of the worst off are not ignored. Therefore, those who are privileged to benefit from a higher social and economic position by birth are prevented from usurping social resources to the detriment of those who are the "least advantaged".

It has been contended that the difference principle has the capacity of "unleashing fraternity"[88] by focusing on the needs of the least advantaged. Indeed, Rawls himself admits this tendency of the difference principle towards fraternity. According to Rawls, the difference principle protects fraternity by providing for "long-term expectations of the least advantaged under conditions of fair equal opportunity"[89]. The Indian Constitution acknowledges Fraternity as a foundational value.[90] The inclusion of Fundamental Duties[91] in the Indian Constitution can indeed be seen as a manifestation of such recognition of fraternity. It can be argued that the difference principle would require the protection of the interests of the "least advantaged" by prohibiting discrimination. Discrimination law would therefore be a part of the "basic structure" in a Rawlsian society.

While providing for an incisive theory of distributional justice, Rawls' theory of Justice as Fairness has some limitations. Amartya Sen has argued that the Rawlsian theory focuses exclusively on 'just institutions' rather than on 'just societies'.[92] It ignores the importance of actual behaviour in the conceptualisation of 'nyaya', which is the comprehensive concept of realised justice.[93] He further argues that "we have to seek institutions that promote justice rather

[85] Samuel Freeman, Rawls on Distributive Justice and the Difference Principle, in *The Oxford Handbook of Distributive Justice* 13, 13 (Serena Olsaretti ed., Oxford Univ. Press 2013).
[86] Id.
[87] Dipankar Gupta, Po*sitive Discrimination and the Question of Fraternity: Contrasting Ambedkar and Mandal on Reservations* 32 Econ. & Pol. Wkly. 1971, 1972 (1997).
[88] Id at 1973.
[89] Rawls *supra* note 82 at 1758282.
[90] India Const. pmbl.
[91] India Const. art. 51A.
[92] Amartya Sen, *The Idea of Justice* 57 (2009).
[93] Id at 20.

than treating institutions as themselves manifestations of justice"[94]. Furthering this critique, Cohen contends that the difference principle should extend beyond the basic structure to encompass individual conduct, thereby ensuring a reduction in societal inequalities.[95]

Sen further contends that the "primary goods" concept does not consider the fact that different people, for a myriad of different reasons have varying opportunities to convert these goods into what they can actually do.[96] By this understanding Rawls relies on a more formalistic view of equality. Sen provides an alternative conception of distributive justice based on what he calls the "capabilities" approach, which is studied below.

Amartya Sen's capabilities approach-

Amartya Sen has argued that the primary goods approach does not consider the variations amongst people of means they possess to convert these goods into a "good living"[97]. The conversion of primary goods into the capability to do valuable things is determined by factors like inborn characteristics as well as disparate acquired features and varying environmental surroundings.[98] The capacity of a person to convert primary goods depends on their biological, social and economic factors.[99] Sen therefore advocates for a shift in focus from primary goods to an actual assessment of capabilities. He argues that the inequalities in capabilities should be the central focus in the assessment of social disparities.[100] He therefore relies on a substantive understanding of equality by requiring that society should provide opportunities to individuals to convert primary goods into a good living. In order to do so policies would have to be adopted which would redistribute social resources in a manner allowing equal capabilities.

Sen distinguishes between capabilities and actual achievements and states that the claims of individuals on society are best seen in terms of freedom to achieve rather than actual achievements.[101] The actual achievements of individuals may differ provided that they are granted equal capabilities. He also distinguishes between capabilities and resources. While the former focuses on the actual ability individuals of to do different valuable things, the latter is

[94] Id. At 82.
[95] G A Cohen, *Rescuing Justice and Equality* 295 (2008).
[96] Sen supra note 92 at 261.
[97] Id at 66.
[98] Id.
[99] Id.
[100] Id.
[101] Id.

restricted to material objects that a person possesses. He proposes a "fundamental shift in the focus of attention from the means of living to the actual opportunities a person has"[102].

Elizabeth Anderson has argued that the capability approach is better than the resource-based approach because it "focuses on ends rather than means, can better handle discrimination against the disabled, is properly sensitive to individual variations in functioning that have democratic import, and is well-suited to guide the just delivery of public services, especially in health and education"[103]. While Anderson explicitly mentions discrimination on the basis of disability, the capability approach provides an equally sound basis for policies to prevent discrimination on other grounds (like gender, race, caste, and tribe). Discrimination on the basis of protected characteristics adversely affects the capabilities of members of disadvantaged groups from accessing primary goods like education, employment, etc. Discrimination law can therefore be justified by the capabilities approach as a policy which seeks to equalise the capability of the disadvantaged members of society to attain access to such primary goods.

This approach has however been criticised as too individualistic, which prevents it from fully identifying "the good life" and analysing political mechanisms for achieving it. Such individual focus takes away the importance of groups in social life and diverts attention from collective political actions. An additional criticism levelled on Sen is that his approach is at an abstract idealistic level well removed from making substantive changes in the world.[104]

Notwithstanding the above limitations, the capabilities approach provides a significant insight inasmuch as it reflects on the varying capacities of individuals in converting primary goods. Rather than focusing on a formal equality standard it aims to undo any inequalities in capabilities.

An attempt has been made above to understand why discrimination is wrong. Discrimination violates certain fundamental values, like equality, liberty, and dignity. The egalitarian approach constructs discrimination as a wrong because it fails to treat individuals with equal concern. On the other hand, a liberty-based account considers the effect of discrimination on the deliberative freedoms of individuals. A dignitarian approach would

[102] Id.
[103] Elizabeth Anderson, Justifying the Capabilities Approach to Justice, in *Measuring Justice* 81, 81 (Harry Brighouse & Ingrid Robeyns eds., 2010).
[104] Frances Stewart & Séverine Deneulin, *Amartya Sen's Contribution to Development Thinking*, 37 Stud. Comp. Int'l Dev. 61, 70 (2002).

consider the impact of discrimination on the dignity of an individual and its demeaning effects. It is argued that rather than looking at discrimination from the prism of any of these principles, a more holistic understanding of the wrong of discrimination can be found by taking all of them together.

A dignitarian approach essentially relies on equality as much as it is the lack of 'equal' moral worth which makes discrimination wrong.[105] Similarly, equality and liberty can be considered to be two sides of the same coin. Both the egalitarian and libertarian approaches provide only an incomplete foundation of discrimination. Instead, it is argued that an approach grounded in equal liberties, which recognises the effect of discrimination on dignity provides a sound basis for defining the 'wrong' inherent in discrimination. The theories of distributive justice seen above can be regarded as instrumental in dealing with the problem of discrimination by undertaking structural change to address the same. Therefore, a holistic understanding of all the above views helps us answer the question- 'Why is discrimination wrong?'.

Now that we have discussed why discrimination is wrong it would be easier to define what discrimination means.

IV. THE CONSTITUENTS OF DISCRIMINATION-

The previous section argued that discrimination violates the right to equal liberty and impinges on the dignity of the individual on the basis of extraneous factors. A prohibition on such a violation in the form of discrimination law is therefore necessary and is further justified on the basis of principles of distributive justice. On the basis of our description of why discrimination is wrong, we can now get a better understanding of what discrimination entails. For an act to constitute discrimination there are certain essential ingredients. These can be considered to be the constituting factors of discrimination. These are studied below.

a. PROTECTED GROUNDS AND PROTECTED GROUPS-

As seen above, not all classifications are considered suspect. Discrimination is said to occur only when the distinction is on "protected grounds" or "personal grounds".[106] Protected grounds are the "normatively extraneous features"[107] which have been discussed above. They are traits and characteristics like membership of a gender, caste, sex, race, etc. However, other

[105] Réaume, *supra* note 72 72.
[106] Khaitan, *supra* note 10 at 29.
[107] Moreau, *supra* note 60.

traits like eye-colour can also classify the society into groups. Nevertheless, a classification based on such traits will often not be considered to be discriminatory. The social and historical context determines which forms of classification have a demeaning effect, and such grounds for classification are prohibited by discrimination law. The Indian Constitution recognises religion, race, caste, sex and place of birth as protected grounds on the basis of which the State is prohibited from discriminating amongst citizens.[108] A corollary to protected grounds is protected groups. Protected grounds effectively segregate society into distinct groups. Those groups which have historically been distinguished to receive disadvantageous treatment on the basis of protected grounds are considered to be protected groups. The relatively advantaged groups created by such distinctions on the basis of protected grounds are called cognate groups.[109]

Discrimination law applies asymmetrically so that it generally applies only to protected groups.[110] While members of cognate groups also do derive some form of protection from malicious discrimination, discrimination law focuses on protected groups.[111] This is the reason why certain forms of differential treatment including affirmative action, are justified[112] under discrimination law even if it disadvantages members of cognate groups.

b. RELATIVE DISADVANTAGE-

It has been argued above that historical and social factors determine whether a kind of classification on a particular ground is to be considered a suspect classification. In order for a classification on the basis of a protected ground to be suspect under discrimination law, the protected group related to that ground must face a "relative disadvantage". Such disadvantage must be "abiding, pervasive and substantial"[113]. A history of disadvantage is typically a key factor in classifying a group as protected group.[114] As seen above, grounds like eye colour or support for a particular team in a sport[115] also classify the society into groups. However, discrimination, unlike mere classification, results in the perpetuation of asymmetrical group relations. In order to amount to discrimination, the classification and differential treatment

[108] India Const. art. 15.
[109] Khaitan, *supra* note 10 at 29.
[110] Loenen *supra* note 2121.
[111] Khaitan, *supra* note 10 at 145.
[112] Id at 81.
[113] Id at 35.
[114] Fredman, *Discrimination Law, supra* note 2 at 245.
[115] Khaitan, *supra* note 10 at 31.

therefore must- (i) be related to "suspect criteria"[116] , (ii) must negatively impact vulnerable groups (iii) such vulnerable groups are determined with consideration to social and historical factors causing relative disadvantage.[117]

The relative disadvantage of the group does not need to be attributed to the action of the person accused of discrimination. It is also not necessary to demonstrate that such disadvantage is caused due to past discrimination of such an actor or even a result of a past social or human action.[118] What needs to be demonstrated is the relative disadvantage of a protected group as compared to the cognate group. In India, the relative disadvantage faced by Scheduled Castes, Scheduled Tribes, OBCs, women etc is well documented.[119] This disadvantage leads to the Constitutional recognition of such groups as protected groups.[120]

c. IMPACT OF THE ACT-

It was argued in the beginning of this article that what makes an act discriminatory is not the intention of the doer but rather the impact of the act on the victim. It is argued that an act which categorises based on protected grounds and subsequently causes adverse impact on members of protected groups, thereby perpetuating their disadvantage, would be deemed discriminatory.

For better understanding of such a definition, it needs to be divided into smaller parts. Firstly, it must be clarified that the term 'act' used above includes both positive acts and omissions[121] having adverse impact. Secondly, such an act must have an adverse impact on the protected group. An act lacking such a negative impact or one where the impact is positive (for example in cases of affirmative action the impact, though classificatory is positive rather than negative with regard to protected groups) cannot be called a discriminatory act. Thirdly, as mentioned above, while discrimination law is not agnostic to malicious discrimination against cognate groups, the paradigmatic discrimination is restricted to where the negative impact is borne by protected groups.[122] Finally, the act (including omission) must perpetuate

[116] See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[117] Loenen *supra* note 2121.
[118] Khaitan, *supra* note 10 at 34.
[119] Int'l Inst. for Population Scis. & ICF, *National Family Health Survey (NFHS-5), India Report 2019–21* (2022) https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf (last visited on October 15 2026).
[120] India Const. art. 15.
[121] Omissions generally apply to cases where duty-bearers fail to provide reasonable accommodations as prescribed by the law. Reasonable accommodations as a concept have evolved primarily in order to prevent discrimination on the basis of disability.
[122] Khaitan, *supra* note 10 at 145.

the disadvantage faced by the protected group. Therefore, an act which has an adverse impact without aggravating existing disadvantage does not fall within the definition of discrimination.

d. RELATION BETWEEN THE IMPACT OF THE ACT AND MEMBERSHIP OF PROTECTED GROUP-

The final constituent for an act to be considered discriminatory is the evaluation of the relationship between the negative impact of the act and the membership of a protected group. What needs to be demonstrated for an act to be considered discriminatory is not a causal relationship between its adverse impact and group membership but rather a correlation between such adverse impact and the membership of the protected group.[123] To put it plainly, belonging to the group and the disadvantage that comes with it ultimately result in detrimental effects on the individual even if direct causation is not shown.

It is necessary to give an example to clarify this point. In India, the Scheduled Castes are a Constitutionally recognised protected group who face disadvantage on the basis of the protected ground of caste.[124] An example can be taken in the field of employment discrimination faced by this group. Let us presume that a Scheduled Caste employee is dismissed or retrenched from service. The question that assumes importance is whether such a dismissal is discriminatory. Three potential scenarios can be relied upon to illustrate what kind of correlation is implied in discrimination law. In the first example let us presume the dismissal is triggered or caused by a discriminatory animus and dislike against Scheduled Caste employees. In such a case, such a dismissal is an example of simple direct discrimination based on the protected grounds of caste. The discrimination in this case is obvious and evident. It also fulfils all the other aforementioned conditions i.e. it is on the basis of protected grounds (caste), it adversely affects members of protected groups and exacerbates the disadvantage faced by them. There is also a causal relationship between the membership of the protected group and the discriminatory act in as much that the dismissal can be directly attributed to the membership of the group. This kind of scenario is what is foreseen in the traditional layperson's malice-based definitions of discrimination. But as has been argued in the first part of this article, discrimination is not restricted to such scenarios alone. On the contrary, it is argued that a large

[123] Id at 35.
[124] India Const. art. 15.

part of discrimination occurs in situations where malice cannot be so easily attributed.[125] Nevertheless, the discrimination in such a scenario is easily established.

In the second scenario, such an employee who belongs to a Scheduled Caste violates the terms of employment or commits certain transgressions, which result in his expulsion. In such a case, the dismissal would not be correlated to the membership of the protected group or based on protected grounds. Rather, it is based on the actions of the employee. Therefore, no finding of discrimination can be merited in such a case.

Finally, let us consider a more complex scenario where the employer is forced to let some employees go because of business failures and financial difficulties. The employees retrenched happen to all be, or are in a substantial proportion, the members of the protected group of Scheduled Castes. The question that arises is whether such a dismissal of disproportionately high number of employees belonging to Scheduled Castes as compared to employees from other cognate groups would be discriminatory. Prima facie, no traces of discrimination are visible. No malice is demonstrated. But a deeper evaluation might paint a different picture. The principle that is generally followed during retrenchment is that of 'last to join is the first to be let off'. In such a situation, if an employer has a historical record of refusing to hire Scheduled Caste candidates but has only recently commenced doing so, it follows that all Scheduled Caste candidates will inherently lack seniority. Therefore, the prior discriminatory denial to hire by the employer would be responsible for the disproportionate impact of the seniority clause on Scheduled Caste employees in as much that such employees do not possess the necessary seniority because of such prior discrimination. In such a scenario it is argued that the retrenchment procedures of the employers should be deemed to be discriminatory because of the correlation between the membership of a protected group and the adverse impact of the act. Thus, it can be observed that even if a classification is ostensibly not based on a "protected ground"—in this instance, seniority rather than caste—the correlation between group membership and the adverse impact of the act renders such a classification discriminatory.

The essential ingredients for an act to be considered discriminatory are now laid out. Having considered the above points it can be concluded that discrimination is "any act (or omission) which either classifies on the basis of protected grounds so as to intentionally and maliciously disadvantage members of protected or cognate groups or which leads to a disproportionately adverse impact on members of a protected group and which has the effect

[125] India Const. arts. 15(1) and 16(1).

of perpetuating the disadvantage suffered by such a group, where such an adverse impact is correlated to the membership of the group".

Such a definition is very different from the lay understanding of discrimination, which focuses on the intention of the discriminator. By providing such a broad definition the law acknowledges persisting structural inequalities suffered by members of certain groups and seeks to prevent the perpetuation of such disadvantages. The 'wrong' that is involved is not the 'wrongful intention' of the discriminator but rather the 'wrongful impact' on the individual affected.

V. CONCLUSION-

While the development of anti-discrimination legislation has been effective in both educating people about their rights and in reducing instances of overt and malicious discrimination, wide group-based inequalities and disparities continue to persist. The success of discrimination law in curbing inequality is therefore seen to be limited. One of the reasons for this is a fundamental misunderstanding of what discrimination is. This article has made a modest attempt to tackle this tricky question of what discrimination entails. In today's day and age, the topic of discrimination has become a controversial one. However, it is contended that much of the controversy originates from a mistaken understanding of what discrimination entails. The conceptualisation of discrimination rooted in mala fide intention is the basis of such a misunderstanding. By undertaking a thorough review of existing literature on the subject it has been argued in this article that the term discrimination is held to have a rather different meaning in discrimination law as compared to the lay understanding of the term. In order to better understand what discrimination implies this article conducts an inquiry into the wrongfulness of discrimination. It examines the egalitarian, libertarian, and dignitarian objections to discrimination. It also evaluates how the principles of distributive justice can be relied upon for a justification of discrimination law. Based on such an inquiry this article concludes that rather than having a single-axis interpretation of wrongfulness of discrimination all of these approaches should be combined to give a holistic understanding of the injury caused by discrimination. On the basis of such an understanding, this article seeks to elaborate on the essential ingredients of discrimination. By doing so, this article seeks to provide a definition of discrimination rooted in the injury caused to the aggrieved parties. By acknowledging the enduring structural inequalities faced by certain groups, this definition seeks to avert the perpetuation of such disadvantages. The limitation of this article is that the application of such

a definition to actual instances of discrimination is not sought by this article. Further research can be done to test the adequacy of such a definition by undertaking such an application of this definition to real life incidents and cases.