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# Formal and Substantive Equality

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MANDAR GOVINDRAO LATPATE<sup>1</sup>

## ABSTRACT

*This research paper delves into the crucial concepts of formal and substantive equality in the context of Indian society and its constitution. Formal equality, which advocates equal treatment for all, and substantive equality, which emphasizes equitable outcomes based on individual needs, are examined. The paper explores how the Indian constitution addresses these two forms of equality and the importance of striking a balance between them. It highlights the limitations of formal equality and the necessity of substantive measures to address societal disparities effectively. The study employs a doctrinal research methodology, drawing from secondary references such as articles, books, newspapers, and opinion pieces. In conclusion, the research underscores the significance of substantive equality in promoting fairness and equal opportunities for marginalized groups.*

**Keywords:** *Formal Equality, Substantive Equality, Indian Constitution, Equality of Opportunity, Merit, Discrimination, Marginalization, Human Rights, Special Measures, Balance.*

## I. INTRODUCTION

India is a country with a huge diversified cultural and traditional perspectives and beliefs. The aspects like poverty, historical view of class present in society were the problem creators from the ancient India; it builds the base of discrimination in the society which leads us to lots of problems like discrimination against women on the basis of physical capacity, discrimination of poor people on the basis of availability of resources, brutal treatment for the LGBTQ community by addressing their sexual orientation and etc. these types of problems in a democratic state have one fair solution which is equality. Equality is the idea of justice and fairness in society. It is the principle which provides the objective that everybody should be treated equally no matter who they are, what is their religion, sex, class, race and etc. It provides strength to democracy, encourages the thought of diversity and it increases the skill set of society and also equality is a solution of so much of problems in society as his ideas like “equality of opportunity” and “equality of outcome” as formal and substantive equality respectively provides different types of remedies for different problems.

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<sup>1</sup> Author is a student at National Law University, Nagpur, India.

Formal equality says “like should be treated alike”<sup>2</sup> that means every decision or provision in country should be equal for everybody but substantive equality says object should be treated as per his need because there are so much of disadvantaged groups and unconsidered peoples which needs more attention than others, so for those, substantive equality promotes the ‘positive discrimination’<sup>3</sup>. Because of these different approaches in these two equalities there is very big debate on which one is important and which one is more useful for society? and this debate in all over world value the relevance of substantive equality as compared to formal equality.<sup>4</sup>

Janya Kothari mentioned in her book “there is so much of opportunities to development in disability laws and other things related to it because there is no guarantee to prevent discrimination which takes place on the basic of disability among the peoples”.<sup>5</sup> such questions and some doubt about stand of constitution on the basis of formal equality is the main problem to stop substantive approaches in society.<sup>6</sup>

### **(A) Objectives**

The aim and objective of this research paper is trying analyses formal and substantive approach of equality on society and constitution. The objectives are as follows-

- To study and understand the formal equality.
- To study and understand the substantive equality.
- To analyses the stand of constitution on formal and substantive equality
- To analyses the important of balance between formal and substantive equality

### **(B) Research questions**

1. What is formal equality?
2. What is substantive equality?
3. What is the stand of Indian constitution in context with formal and substantive equality?
4. Why there is a need of balance between formal and substantive equality?

### **(C) Research methodology**

The method of research for this project is of doctrinal method. The content in this project has

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<sup>2</sup> Aristotle, *Ethica Nicomachea*, 112, 117, 1131a-1131b, in J.L. Ackrill and J.O. Urmson (eds), W. Ross translation (Oxford University Press).

<sup>3</sup> Oxford Dictionary, s.v. "Discrimination," <https://www.oxforddictionaries.com/definition/discrimination>.

<sup>4</sup> Book, *the future of disability law* by janya kothar

<sup>5</sup> *The future of disability law* by Janya Kothari

<sup>6</sup>Department for Communities and Local Government, "Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, a consultation paper" (2007), 61.

not been plagiarized. The author of this research paper has used secondary references in this research project like articles, books, newspapers and opinion pieces etc. This research deals with all the questions and problems

## II. FORMAL EQUALITY

Formal equality means treating everybody equally, regardless of their aspects is called formal equality<sup>7</sup>. Formal equality of opportunity is the idea that people shouldn't be denied the chance to pursue specific objectives because of arbitrary personal qualities like colour, socioeconomic status, gender, religion, or sexual orientation. This equality just promotes the view of equality of opportunity and because of that this equality maintain the principle of merit in democratic countries. Formal equality at work is represented by a set of written guidelines that specify how each individual should be treated equally inside an organisation. One instance is when positions become accessible to employ for all (qualified) applicants. This implies that everybody who submits a legitimate application has a possibility of being hired. Dicey's "rule of law" was the source of the phrase "equality before the law."<sup>8</sup> The phrase "equality before law" has a very clear view which states that everyone is treated equally by the legal system, whether they be royalty or commoners.<sup>9</sup> The best illustration of formal equality of opportunity relates to legal equality. Formal Equality of Opportunity, however, is but that, it doesn't care about the details of unwritten laws or personal discrimination. Consider the example of a racist company who never promotes the fact that they only hire people of colour as an example. Although the job postings for these positions are officially available to everyone, the employer will never hire a non-white person. Other employers might be sexist, anti-Semitic, or homophobic, for example. Formal equality of opportunity can only get us so far because there is something wrong with this kind of discrimination, but it is not a fault of the formal laws. This don't recognize any difference between the peoples because this equality believes in no discrimination, it also stops the irrational and unfair decisions based on erratic criteria and it prevents harm from such decision makings in society. On other hand formal equality distracts us from real nature of substantive equality, as it promotes equality which can be called true equality on the basis of application but when it comes to the outcome there will be the unequal results. It creates division between rights and equality which made for human welfare, which results into the both

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<sup>7</sup> Gautam Bhatia, "A critique of the supreme court's Maratha judgment-I: Equality" *Indian constitution law and philosophy*, may, 06, 2021.

<sup>8</sup> Paul Craig, "The Rule of Law", <http://www.parliament.uk> available at <<https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>> (Last visited June 16, 2021)

<sup>9</sup> Interactive Constitution, "14<sup>th</sup> Amendment Citizenship Rights, Equal Protection, Apportionment, Civil War Debt" *National Constitution Centre*, available at <<https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv>>

principles to operate separately not in correspondence to each other. In addition, formal rules cannot use proper names, according to formal equality of opportunity. The separation of workplaces and educational institutions along these lines, as well as laws that single out John Smith as a target of particular benefits or drawbacks, are incompatible with formal equality of opportunity. But there are various issues with the definition of formal equality of opportunity. What constitutes a regulation as suitably general can be questioned. According to one interpretation, formal equality of opportunity would entail the availability of all positions to all individuals. This is improbable, though. Young children should not be permitted to vote, and we do not believe they should be permitted to apply for bartender positions. Additionally, it may be illegal for those with serious mental disabilities to vote and apply for certain jobs. The restriction of applications to only individuals who meet certain requirements, such as a driving licence for a taxi driver, doesn't seem to be particularly problematic. However, it becomes simpler to discriminate indirectly.

### **III. SUBSTANTIVE EQUALITY**

Substantive equality is equality of outcome, which believes if everybody is not same then they should not be treated as same. it is not equality if everyone is treated equally, regardless of their prior disparities. Assume there are six individuals: A, B, C, D, E, and F. A resides in a city. B resides in a remote area. C is poor. D has money. E comes from a higher caste. F belongs to a lower caste. It won't be equality if all six of them receive the same treatment while ignoring the drawbacks of some of them.<sup>10</sup> This equality recognizes the difference between all peoples to categorise those into different groups and provides protections, required fair treatment to those disadvantaged groups who truly needs it. The substantive equality is form of equality which prevents the object from marginalisation in majority sphere of life. And it is the need of society, for example there two males from military u can told them to run a certain distance in certain time but if there is one woman and one men u can not tell them to run same distance in same time. This phenomenon proves the important substantive equality and tells that if there is a discrimination by nature then u should agree with the substantive approach of equality in support of positive discrimination for welfare of human society.

A key component of human rights law is substantive equality, which is concerned with fair results and equal opportunity for underprivileged and marginalised individuals and groups in society. According to academics, substantive equality is a product or result of the strategies

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<sup>10</sup> The Concept of Equality- Author: Shashwat Baranwal from WBNUJS, Kolkata.

employed by governments and commercial actors to address and avoid systemic inequality<sup>11</sup>. In order to achieve equality for fundamental human rights, opportunities, and access to goods and services, the law must take factors like discrimination, marginalisation, and unequal distribution into consideration, according to the concept of substantive equality. In order to help or improve the lives of those who are less fortunate, special measures must be put in place in order to attain substantive equality. These steps are intended to guarantee that they receive the same opportunities as everyone else.

#### **IV. STAND OF CONSTITUTION ON FORMAL EQUALITY**

All the democratic countries and their constitutions in world value the importance of equality. Because democracy believes that equality is fundamental right of every human being. So, the constitution gives some rights to the peoples to enjoy their freedom and equality. These rights are: Right to vote<sup>12</sup>, Article 14<sup>13</sup>, right to protection of life and personal liberty<sup>14</sup> and such so much of laws in Indian constitution wants to give the equal surrounding for every Indian. Article 14 of American constitution, right to vote<sup>15</sup> and etc. acts from America. voting right<sup>16</sup> and other such rights in Canada. In addition, Special measures are described as "securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms" in Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). And so much of such legal acts and theories all over world promotes the formal view of equality to maintain the principle of merit in society.

As we notice the approach of formal equality says everybody is equal. We can't agree with this in whole manner of thought but when it comes to law making and policy making the first preference of almost all democratic countries are formal approach of equality, because this approach stops the irrational and unfair decisions based on erratic criteria.

#### **V. STAND OF CONSTITUTION ON SUBSTANTIVE EQUALITY**

Society believes in equality but it doesn't mean that equality should be equal for everybody, it should be equal for everybody but in the context of outcome and result. This view of equality

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<sup>11</sup> *R v Kapp* 2008 SCC 41 and *Z v Z* (no 2) (1997) 2NZLR 258 (CA).

<sup>12</sup> Under sec 62 of the Representation of People's Act (RPA).

<sup>13</sup> INDIA CONSTI. Art 14.

<sup>14</sup> INDIA CONSTI. Art. 21.

<sup>15</sup> Sec 2 of the Voting Rights act of 1965.

<sup>16</sup> Sec 33 of constitution of Canada.

promotes the positive discrimination, which is also accepted in law making and policy making in democratic countries. It is the secondary priority in policy making but important to cover all aspects related to disadvantaged groups and give them equal attention in policy making in that country. As, in India, right to equal pay<sup>17</sup> for women stops the discrimination of women on the basis of physical capacity. article 334 of the constitution talks about of special reservation to ST and SC<sup>18</sup>. Right against domestic violence<sup>19</sup> promotes the view that women are not an object. Right against dowry <sup>20</sup> also helps the women in context to discrimination, violence and inequality. Right of special protection of minority<sup>21</sup> helps them to protect their religious thoughts, to protect their language, to celebrate the cultural activities and also the special education can be given or taken on the basis of their religious and cultural thought. The right of abolition of untouchability<sup>22</sup>. This idea of formal equality is just not followed by India, it is also accepted by other countries as article 46<sup>23</sup> of America, supports the people to be educate and try to make them socially strong which are economically and socially weak. Such acts and also accepted by the other democratic contraries in world.

## **VI. NEED OF BALANCE BETWEEN FORMAL APPROACH OF EQUALITY AND SUBSTANTIVE APPROACH OF EQUALITY**

The formal equality gives us equal surrounding, when it comes to nationality, we can feel same because there is formal equality provides equal belongness to everyone. It gives equal chance to speak, to educate, to have religious practice and all to everybody to enjoy their equality. Such as substantive equality gives different application on the basic of positive discrimination which provides equal chance to everybody because when there is social prohibition on your rights because your weak social condition then you needed some special rights to protect your basic rights. So, we can say that these two equalities can operate together.

Formal equality doesn't believe in the comparison which is very important approach in some provisions, rights and acts. For example, right to vote, here we cannot do any comparison between two voters on the basis anything and also, we cannot say he is weak so we should give him two chances to vote. So here, formal equality plays important role. But on other hand when it comes to election there should be representative from every class and state. Because these

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<sup>17</sup> INDIA CONSTI. Art 39(d).

<sup>18</sup> INDIA CONSTI. Art 334.

<sup>19</sup> Section 498-a into the Indian penal code.

<sup>20</sup> Dowry prohibition act, 1961.

<sup>21</sup> INDIA CONSTI. Art 29.

<sup>22</sup> INDIA CONSTI. Art 17.

<sup>23</sup> Constitution of America.

approach of substantive equality in this process gives equal chance to the both disadvantaged and advantaged groups to speak out their problems and as being the part of government, they can strike out them.

## **VII. CONCLUSION**

Based on the extensive research conducted, it becomes evident that both substantive and formal equality concepts are integral to the functioning of the contemporary Indian Legal System. However, it is concerning that there is currently limited recognition and awareness of the distinctions between these concepts in our society. Thus, the primary aim of this research is to shed light on these diverse ideas and disseminate this knowledge widely.

Equally important is the need for today's youth to grasp these concepts fully. This understanding is crucial to prevent any deviation from our ultimate goal: achieving equality in society.

Through meticulous research, it becomes increasingly clear that the concept of substantive equality embodies a proactive approach towards achieving equality, ultimately resulting in more effective outcomes. Therefore, it is with confidence that the researcher concludes that there should be a greater emphasis on the application of substantive equality over formal equality. This shift can lead to more impactful and meaningful progress in our ongoing pursuit of a just and equal society.

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