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Equal Opportunity Commission Bill: An Analysis

*Pushan Dwivedi**

Introduction

The paper attempts a legislative analysis of the Equal Opportunity Commission Bill¹ included in the report “Equal Opportunity Commission: What, Why and How?”² by the expert group headed by Professor Madhav Menon. The expert group was set up by the Ministry of Minority Affairs on 31st August, 2007 to “examine the structure and functions of an Equal Opportunity Commission”. The Menon report emanated from the Sachar Committee report³ which first envisaged the concept of an equal opportunity commission “to look into the grievances of a deprived groups” in course of its study of the state of the Muslim community. It was of the opinion that an attempt to resolve the growing inequities in the country required state action to provide for equality of opportunity and prevention of depravedness arising from factors beyond the control of such deprived groups.

The recommended Bill attempts to advance the existing set of equal opportunity-based norms imbibed in Part III, more specifically under Article 15 and Article 16 of the Constitution of India. An attempt to enact constitutional norms automatically results in location of the statute in constitutional law orbits.⁴ The few other instances of

* IV Year, BA LLB (Hons.) student at National Law School of India University, Bangalore.

¹ Equal Opportunity Bill (2008) [hereinafter referred to as Bill].

² *Equal Opportunity Commission: What, Why and How* (2008), available at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_w_wh.pdf (last updated 14th October, 2013) [hereinafter referred to as Menon Committee Report].

³ Social, Economic and Educational Status of the Muslim Community in India: A Report (2006), available at <http://www.zakatindia.org/images/Sachar-Report-05-March-2012.pdf>.

⁴ Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 (1) VA. L.R. 1, 3 (1993).

enactment of equal opportunity-based norms such as the Equal Remuneration Act⁵ and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act⁶ had been grounded in Part IV of the constitution. The Bill's invocation of state action, to horizontally enforce an advanced, progressive conceptualisation of non-discrimination, stretches the limits of the existing judiciary-induced jurisprudence of the equal protection provisions. However, an analysis of the Bill drafted by the Menon report reveals that the Bill has been directly located within the judicial frame of reference with regard to the constitutional law orbit referred earlier. Thus situated, the resultant enforcement would be far removed from the original progressive intent of removing, and arguably compensating, for the increasing social inequities since the contemporary judicial frame has not yet evolved to the required levels.

This legislative comment would attempt to discern the drafters' intents and motives in formulating a theoretically flexible yet functionally restrained Bill. The enquiry would subsequently opine on the reason for the absence of engagement with the contending rights to associational freedoms. The first segment provides an overview of the enforcement mechanism of the Bill, focussing on the lack of an express anti-discrimination law and its implications. Then a legisprudential analysis of the framing of the Bill is provided based on the possible repercussions of the legislature conceding its role of providing a functional interpretational framework to the judiciary and the motives behind such concession. Next an interpretation of the extent of regulation of the EOC in the housing sector and the nature of such regulation within the functional interpretational framework provided by the judiciary is made. After this a comparative study with the Fair Housing Act of the United States is made.

⁵ Equal Remuneration Act 25 of 1976 [hereinafter referred to as ERA].

⁶ Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1 of 1996 [hereinafter referred to as PDA].

Structural Analysis

The Equal Opportunity Commission Bill provides for an inclusive definition of ‘discrimination’ under Section 2 (k)(i)⁷ which includes discrimination on the basis of sex, caste, language, religion, disability, descent, place of birth, residence and race. The Bill has also differentiated between direct and indirect discrimination which forms part of its focus on ensuring substantive equality of opportunity.⁸ However, it does not itself prohibit discrimination. The drafters have grounded enforcement of anti-discriminatory provisions⁹ in Article 15 and Article 16 of the Constitution, which have fewer number of prohibited grounds of discrimination.¹⁰ This leads to ambiguity with respect to the prohibited grounds of discrimination itself.

Similarly, the Bill poses problems with the jurisdiction. Under Section 3(i)¹¹, the Bill restricts the ambit of enforcement to the

⁷ Section 2 (k)(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008:

“Discrimination’ means any distinction, exclusion or restriction made on the basis of sex, caste, language, religion, disability, descent, place of birth, residence, race or any other which results in less favourable treatment which is unjustified or has the effect of impairing or nullifying the recognition, enjoyment or exercise of equality of opportunity, but does not include favourable treatment given in fulfillment of constitutional obligations towards Scheduled Castes, Scheduled Tribes, backward classes, women and children.”

⁸ ¶2.5, Equal Opportunity Commission: What, Why and How(2008) available at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_w_wh.pdf.

⁹ See Sections 23(a), 37 and 39(b) of the EQUAL OPPORTUNITY COMMISSION BILL, 2008.

¹⁰ Preamble, EQUAL OPPORTUNITY COMMISSION BILL, 2008:

“Whereas discrimination on grounds only of religion, race, caste, sex or place of birth is constitutionally prohibited and equality of opportunity for all citizens in matters of public employment is constitutionally guaranteed as part of the Right to Equality (Articles 15 and 16)”.

¹¹ Section 3(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008:

“Discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth is expressly forbidden by the Constitution itself. Arbitrariness is against the spirit of equal opportunity. There is therefore no need for a separate anti-

definition of state as interpreted by the courts under Article 12 of the Constitution, by tying up the legal obligation to practise non-discrimination to the equal protection clauses of Part III. In this manner, the jurisdiction of the EOC would be within the limits of judicially-interpreted state action¹². On the other hand, Section 3(vi)¹³ moves on to provide a more comprehensive and wider definition of “state” to include enterprises which could not have carried on their activity without the delegation, license or authorisation by State, thereby granting the commission jurisdiction over such entities.

The reluctance of the drafters in providing a statute-based anti-discrimination law along with delineating a congruous ambit of jurisdiction is unique in comparison to other related statutes mandating non-discrimination such as the Equal Remuneration Act, 1976 and the Persons with Disabilities Act, 1995. Sections 4 and 5 of the ERA provide for clearly delineated obligations on part of the employer to not discriminate in either remuneration or recruitment on the basis of sex. PDA classifies different types of protection, including that of non-discrimination and reservation, under specific chapters.

The drafters in both, ERA and PDA, did not depend on judicial interpretation to extend constitutional obligations to cover private enterprises. Such autonomy was facilitated by the grounding of the enforcement provisions such as the obligation of non-

discrimination law to afford equal opportunity to citizens against the State or State-sanctioned private enterprises”.

¹² State action doctrine, conceptualized in the Civil Rights Cases 109 U.S. 3 (1883), restricted the guarantees of equal protection clause solely to acts executed or whose execution was sanctioned by the State.

¹³ Section 3(vi), EQUAL OPPORTUNITY COMMISSION BILL, 2008:
“Private and autonomous enterprises which could not have carried on the activity concerned excepting through delegation, licence or authorization by State under the laws in force, shall be deemed to be ‘State’ for the purposes of anti-discrimination and equal opportunity laws and the Commission will have jurisdiction over them”.

discrimination in the statute itself as opposed to its location within a strict constitutional orbit.

Delegated Legislation and Constitutional Market Place

There exist numerous incentives for drafters to have included an apparently conflicting set of provisions. First, the location of a statute within a tight constitutional orbit allows the proposing party to better negotiate the passing of the Bill since conflicting legislative interests are felt to be mediated in a neutral fashion if the statutory dynamics adhere to contemporary judicial precedents on the subject matter. In addition, it allows the legislature to delegate the need of taking hard policy decisions on to the judiciary. Consequently, this also provides a safe harbour from judicial invalidation in future as the judiciary is more likely to adjudicate based on pre-existing set of judge-made laws. The discernment of such incentives is not merely to state that the legislative drafting may be responsive to judicial decisions but to emphasize a covert delegation of the legislative mandate onto the judiciary.¹⁴

Such an approach to the framing of a statute presents its own set of difficulties. In case of the EOC, grounding of the obligation to non-discriminate in the equal protection clauses leads to the “accordion” problem wherein the statute is susceptible to changing interpretations based on judicial expansion or contraction of the constitutional protection of discrimination.¹⁵ This phenomenon is evident in both the jurisdictional ambit of the Bill and prohibited grounds of discrimination. *First*, Section 3 (i) might lead to the EOC having jurisdiction over a smaller number of entities as opposed to the wider ambit provided for under Section 3 (vi). This is so because the enforcement mechanisms of EOC are contingent on the applicability

¹⁴ Lupu, *supra* n. 4, at 19, 21-23.

¹⁵ Lupu, *supra* n. 4, at 26.

of Article 15 and Article 16 which are enforceable only within the ambit of state under Article 12. Therefore, a judiciary-induced contraction of ‘state’ under Article 12 would directly influence the enforceable jurisdiction of EOC. Such nature of susceptibility is induced due to the absence of a specific law prohibiting discrimination. On the other hand, the ERA and PDA are immune from any judicial interpretations of Part III due to the enactment of specific provisions respectively, prohibiting discrimination in the corresponding fields. As stated before, the anti-discrimination provisions of the ERA and PDA have been grounded in the directive principles of state policy.

Secondly, the ambit of the prohibited grounds of discrimination under Article 15 has also been subject to re-interpretation by the judiciary.¹⁶ In *Naz Foundation v. Government of NCT of Delhi*,¹⁷ the Delhi High Court included sexuality as one of the prohibited grounds of discrimination stating that “*discrimination on the basis of sexual orientation is itself grounded in stereotypical judgements and generalisations about the conduct of either sex*”¹⁸. Further, *Naz* provided for extending scope of Article 15 to other analogous grounds based on a purposive interpretation and stated that “*personal autonomy is inherent in the grounds mentioned in article 15. The 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*”¹⁹ even though such extension of Article 15 was not necessary for decriminalisation of Section 377 of the Indian Penal Code, 1860 which could have been obtained through a reasonability test under Article 14 itself. While *Naz* is a seminal judgement in Indian constitutional jurisprudence, it is yet to gain the legitimacy of the apex court. Further, it is noteworthy that *Naz* was decided *after* the

¹⁶ Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2(3) NUJS L. REV, 419 (2009).

¹⁷ *Naz Foundation v. Government of NCT of Delhi*, (160) 2009 DLT 227 (“Naz”).

¹⁸ *Id.* at ¶99.

¹⁹ *Id.* at ¶112.

publication of the report. The drafters were not in a position to predict the outcome, especially relating to the reasoning employed in *Naz* which led to the broad reading of the prohibited grounds under Article 15. A contradictory or narrower reading would have placed the extension of equal opportunity norms espoused by the Bill at odds with judicial case-law, resulting in sub-optimal enforcement of the Bill. This serves to prove that sole dependence on judicial interpretation in the constitutional market place may lead to contradictory results, such as the lack of consistent and unambiguous identification of the constitutionally prohibited grounds of discrimination under Article 15. Location of the Bill in the constitutional law orbit which has been prescribed through case-laws may result in uncertainty and inadequate guidance to officials and lower court judges, leading to unproductive allocation of power or invidious ways.²⁰ More importantly, the enterprises themselves would have uncertainty with regard to the exact nature and extent of prohibited grounds of discrimination.

Equal Opportunity and the Housing Sector

The Menon Committee report included housing as one of the priority areas for protecting deprived groups.²¹ This stems from a valid identification of the problem of ghettoization spreading in major metropolitan areas.²² In view of the onerous mandate upon EOC to protect equal opportunity in all spheres of life²³ and housing being identified as one of the areas where discriminatory practices continue

²⁰ Lupu, *supra* n. 4, at 26.

²¹ ¶4.7, Equal Opportunity Commission: What, Why and How(2008) available at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_w_wh.pdf.

²² Tarunabh Khaitan, Discrimination By Housing Societies – Possible Legal Responses, available at <http://indianmuslims.in/discrimination-by-housing-societies-possible-legal-responses/>.

²³ Equal Opportunity Commission: What, Why and How, 3(2008) available at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_w_wh.pdf.

to be practised against deprived sections of the society,²⁴ the commission would be obligated to extend its jurisdiction to the housing sector under Section 22. However, it is submitted that the proposed legislative framework is incapable of accounting for the various issues present in the regulation of the housing sector.

Regulation of the housing sector with regard to discrimination through the EOC would also suffer from the accordion problem. As discussed earlier, the scope of the EOC is defined by the constitutional restraints imposed by judicial interpretations of Article 12. The prohibition on private entities to discriminate on grounds enumerated under Section 3(i) or Section 2 (k)(i) would be difficult to sustain in view of the present judicial interpretation of the Constitution. Apart from *Naz*, there are not many decisions which provide for a wide interpretation of the nature and extent of application of Article 15 and Article 16 which are the grounding provisions of anti-discrimination obligation under the Bill.

However, it would be wrong to identify this issue as an instance of the legislative intent being circumvented due to judicial intervention for there exists ambiguity with regard to the legislative intent itself. Although, enforcement of the non-discrimination norms in housing would also involve private individuals and not just private enterprises, there is no mention of an individual being subject to such enforcement in the Act. Even with regard to employment of incentives and disincentives, the Bill allows the inclusion of only “enterprise” in “public services and non-state sector”.²⁵ Further, the regulating by-laws of the commission in the form of the Equal Opportunity Practices Code have been termed to be in the nature of

²⁴ Statement of Objects and Reasons, EQUAL OPPORTUNITY COMMISSION BILL, 2008: “Discriminatory practices reportedly continue to exist in education, employment, housing and other areas where women, dalits, tribals, disabled persons, minorities and other “deprived sections” are sometimes denied of equal opportunity”.

²⁵ Section 37, EQUAL OPPORTUNITY COMMISSION BILL, 2008.

“*Standing Orders*” binding on establishments under the Industrial Disputes Act.²⁶ Part I of the Menon Committee report has also repeatedly made use of the term “*enterprises*”.²⁷ Indeed, the need to bring about equality of opportunity has been limited to private enterprises only. More importantly, there has been no discussion in either the report or the proposed Bill regarding the justification for violation of the right of property owner to discriminate between prospective buyers/tenants.

I submit that the express inclusion of only enterprises and formulation of the enforcement mechanisms in the form of industry-based “standing orders” is indicative of an express exclusion of the EOC jurisdiction upon private property owners, notwithstanding the wide ambit under Section 3(vi). The majority of opportunity costs being incurred by the “*deprived groups*”²⁸ of the society due to discrimination in housing emanates from the prejudices of the private property owner. Therefore, the exclusion of private owners from the realm of housing regulation undermines the effort to curb discrimination “*in all walks of life*”.²⁹

Apart from the extent of discrimination practised in the housing sector, the Bill also fails to cover the entire spectrum of

²⁶ Section 39(b), EQUAL OPPORTUNITY COMMISSION BILL, 2008:

“The Equal Opportunity Practices Code’ is binding law in the same way as the ‘Standing Orders’ are binding on establishments under the Industrial Disputes Act, though the methods of its enforcement in case of violation will be as prescribed under the Act/Rules”.

²⁷ ¶4.6, Equal Opportunity Commission: What, Why and How(2008) available at http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/eoc_wwh.pdf.

²⁸ Section 2(g), EQUAL OPPORTUNITY COMMISSION BILL, 2008:

“Deprived group’ means a group of persons who find themselves disadvantaged or lacking in opportunities for reasons beyond their control or suffer from impaired ability to make good existing opportunities to access rights and entitlements available under law or schemes of the government”.

²⁹ Section 23 (b)(i), EQUAL OPPORTUNITY COMMISSION BILL, 2008.

discrimination practised in the housing sector due to the grounding of prohibited grounds of discrimination within Article 15 and Article 16. It is submitted that the extent of discrimination in housing opportunities is not restricted to the grounds of sex, religion, caste and place of birth.³⁰ A sizeable number of groups are deprived of housing opportunities on various other factors such as food preferences, dress preferences, sexual orientation, age, marital status, gender identity, pregnancy etc.³¹ Article 15 and Article 16 do not cover the wide range of analogous grounds of discrimination which deprive housing benefits to substantial social groups.

This begs the question as to the extent of exclusion that may be constitutionally prohibited in the personal realm of the individual. This is especially relevant in the Indian scenario, wherein communal living has been a part of the social fabric prior to communalisation of violence and of opportunity. In this regard the state interest in ensuring diversified access to housing attains priority because of two reasons. *First*, the discriminated group lose out on opportunity cost of utilising the housing and related benefits such as access to better educational facilities and employment opportunities due to factors beyond their control such as caste, sex etc. *Secondly*, the motivation of the sellers/landlords in practising such discrimination emanates from non-economic factors (as the buyers/tenants in such instances are willing to pay the market price), thereby undermining the argument of preservation of ‘economic’ freedom of the sellers/landowners to that extent. Instead, the freedom to sell/lease/rent over property rights in such cases focuses upon the issues of associational freedoms. For instance, a Jain housing society may be compelled to exclude non-vegetarians on account of their shared belief in vegetarianism. This

³⁰ Tarunabh Khaitan, *Transcending Reservations: A Paradigm Shift in the Debate on Equality*, 43(38) ECONOMIC AND POLITICAL WEEKLY 8, 9 (2008).

³¹ Tarunabh Khaitan, *Vegetarianism, Tolerance and Discrimination*, THE HINDU, May 26, 2008, available at <http://www.thehindu.com/2008/05/26/stories/2005052653861000.htm>.

may disproportionately impact the housing opportunity of a particular minority group. An extension based on *Naz* would classify such deprivation as indirect discrimination on account of the producing a disproportionate impact on a vulnerable group.³² However, the need to exclude in this specific context is central to the core beliefs of Jainism in vegetarianism. Any prohibition on the exclusion on specific minorities would illegitimately infringe on the right to associational freedoms of the Jains. More importantly, the question arises if a Jain household is constitutionally bound to include specific groups at the cost of infringing upon its religious and cultural beliefs.

The religious, cultural and linguistic minorities protection clauses in Part III of the Constitution are also based upon the constitutional obligation for the protection of such core beliefs. Parallel reasoning may be applied to other forms of secular associations in order to decide if the exclusion is derivative of the “*freedom of conscience and expression*” of the association to the extent that the exclusion functions to protect its integrity.³³ However, certain “integrity-protecting” exclusions would be prohibited by the Indian Constitution, such as discrimination against the socially backward classes under Article 17.

Comparative Analysis with the Fair Housing Act

A comparative study of other anti-discrimination laws may prove to be instrumental in identifying alternate mediation methodologies available in other jurisdictions. The Fair Housing Act of the United States³⁴ provides a much wider field of enforcement to its anti-discrimination provisions. The anti-discrimination obligation

³² *Supra* n. 16 at 430.

³³ Stuart White, *Freedom of Association and the Right to Exclude*, 5(4) J. POL. PHIL. 373, 385 (1997).

³⁴ Fair Housing Act, 42 U.S.C. Sections 3601-3619 of Title VIII, Civil Rights Act, 1968.

applies to all public and private enterprises. In addition, it is binding on individuals which make use of any government services. On the other hand, however, Section 803 (B)³⁵ exempts all single-family

³⁵ [42 U.S.C. SECTION 3603] EFFECTIVE DATES OF CERTAIN PROHIBITIONS:

(B) Nothing in section 3604 of this title (other than subsection (c)) shall apply to -
(1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further*, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented

(A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and
(B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604 (c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(C) Business of selling or renting dwellings defined

For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or

households from the obligation of non-discrimination, provided the single family households do not make use of any salesmen/brokers or advertisement services or any other external services while attempting to benefit from the extension of use of their property to other persons. The exemption is known as the 'Mrs. Murphy's exemption'. The exemption essentially allows all individual property owners, owning not more than four-unit buildings, to discriminate based on his or her First Amendment right to not associate. A holistic reading of the exemption clause would indicate that the legislature intended to protect the liberty of individuals whose usage of property was not commercial in nature. The added qualifications of not making use of any external services like broker-ship or advertisement while trying to interact with potential tenants has effectively narrowed down the benefit of this exemption to a narrow segment of private property owners. Yet, the exemption is significant in the fact that it draws a very tangible limit on state intervention which is based on the public and private nature of individual activities. Hence, Mrs. Murphy's exemption clause essentially prohibits horizontal application of non-discrimination norms over property usage which is private in nature. On the other hand, when the ambit of a private activity becomes enlarged to the extent that it acquires a public dimension, the protection of associational freedoms along with individual property rights gives way to non-discrimination.

The reasoning process drawn above resonates with Article 15 (2) which expressly prohibits discrimination in places of public nature. Judgments such as *Vishaka v. State of Rajasthan*³⁶, and *Society for Unaided Private Schools of Rajasthan v. Union of India*³⁷ have also validated

sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

³⁶ AIR 1997 SC 3011.

³⁷ (2012) 6 SCC 1.

state intervention over private actions which acquire a public dimension. In this regard, the judicial precedents in temple entry cases may be seen as analogous to the issue of constitutionally protected exclusion. Article 25(2)(b) does not prohibit implementation of social welfare reforms in Hindu religious institutions “*of a public character*”. Herein, the regulation again seems to be predicated upon the degree of public dimension attached to the religious institution, which has been affirmed in different temple entry cases.³⁸

Thus, the question arises if the Bill would allow for prohibition of discriminatory practices (both direct and indirect) in private property usage of the nature of a public act or function. It is submitted that Section 3 (vi) proposes a paradigm similar to Section 803 of the Fair Housing Act, which coupled with the location of the EOC Act within a judiciary-regulated constitutional orbit, would lead to the legitimate expectation for the enforcement of such non-discrimination norms based on the public nature of a private act.

Conclusion

In the west, there has been a surge of opinion that the legislature should be the leading protagonist in bringing about reforms in law, including re-interpretation of the Constitution to extend upon the existing rights of the citizens.³⁹ The equal opportunity commission would have been a manifestation of a legislative effort towards progressive interpretation of the Constitution in the Indian context. The idea, conceptualised on the basis of tangible evidences of direct and indirect discrimination towards deprived minority groups in various spheres of life such as housing, required a purposive

³⁸ See *Sri Venkataraman Devaru v. State of Mysore*, AIR 1958 SC 255; *Rev. Stanislaus v. Madhya Pradesh*, AIR 1977 SC 908.

³⁹ Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

interpretation of Article 15 and Article 16 to allow for the horizontal application of prohibition to discriminate.

The expert group, however, has failed to rise to the challenge of performing the required re-interpretation of the Constitution. This is apparent in the absence of an express anti-discrimination law to assist the functioning of the commission along with the ambiguity in clearly delineating the entities obligated to practise non-discrimination. Such reluctance stems from the usage of constitutional standards as a convenient method of escaping for a legislature “*committed in principle to a constitutional cause yet uncomfortable with the details at the margin of application of these principles*”.⁴⁰ Such tendencies lead to a circumvention of democratic participation in policy making through the elected representatives, wherein the extension of constitutional norms emanate through the elitist group of lawyers and judges. In addition, surrendering of its role, in extension of constitutional principles, by the legislature may also result in certain constitutional values, such as freedom of speech and associative expression, being undermined. Although an empirical study to establish the lack of free speech jurisprudence is beyond the scope of this paper, I am of the opinion that the conspicuous absence of any engagement with associational freedoms in the Menon Committee report is a result of the under-developed state of free speech and expression-based jurisprudence in the Indian judicial framework. In any case, the ethos of deliberative democracy is undermined if representative institutions concede their role in constitutional growth, for it may lead to decline in discourse on conflicting interests based upon different conceptions of constitutional freedoms and restrictions.

⁴⁰ Lupu, *supra* n. 4, at 52.