



COMMENTARY

Equality Beyond Non-Discrimination: Constitutional Approaches in India and Europe

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Abstract

This commentary undertakes a comparative constitutional analysis of affirmative state obligations in European human rights law and Indian constitutional jurisprudence, focusing on how differing historical and constitutional contexts shape the legitimacy and limits of state action in pursuit of equality. Across jurisdictions, equality is no longer confined to non-discrimination but increasingly entails duties on the State to prevent exclusion, remedy entrenched disadvantage, and secure the effective enjoyment of rights. Yet the expansion of such obligations raises persistent concerns regarding judicial legitimacy, institutional competence, and constitutional limits. The commentary argues that these tensions cannot be understood solely at the level of doctrine. Rather, they reflect divergent constitutional conceptions of equality rooted in distinct historical trajectories. In the jurisprudence of the European Court of Human Rights, emerging from a post-war liberal framework, affirmative obligations are articulated as “positive obligations” and justified as exceptional measures necessary to secure individual rights. Their scope is constrained externally through proportionality and the margin of appreciation. By contrast, Indian constitutional law, shaped by a post-colonial project of social transformation, embeds affirmative action within the equality guarantee itself, treating state intervention as integral to dismantling structural and historical injustice. Limits, in this framework, are negotiated internally through doctrinal devices rather than abstract balancing. Through close engagement with leading judicial decisions from both systems, the commentary demonstrates that the perceived elasticity of affirmative state obligations is not a product of judicial excess but a consequence of how equality is constitutionally conceived. The analysis contributes to debates at the intersection of law, history, and social justice by showing that questions of legitimacy and limits are inseparable from the cultural and constitutional foundations of equality itself.

Keywords - Equality Jurisprudence, Affirmative Actions, Positive Obligations, Post-war Liberal Constitutionalism, Post-colonial Constitutionalism

I. INTRODUCTION

Across constitutional systems, equality is no longer understood only as a prohibition on discrimination. Courts are increasingly called upon to require the State to act: to prevent exclusion, address entrenched disadvantage, and ensure that rights are meaningfully enjoyed. This shift has brought affirmative or positive state obligations to the centre of contemporary constitutional debate, particularly in contexts marked by structural inequality. At the same time, the expansion of such obligations has generated unease across jurisdictions. It raises a familiar constitutional question in a new form: where do the limits of judicial intervention lie within a democratic constitutional order? What remains insufficiently examined is how courts justify both the legitimacy and the limits of affirmative state obligations when equality itself is conceived differently across constitutional systems.

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This commentary examines these questions through a comparative constitutional lens. It asks how differing conceptions of equality shape the manner in which affirmative state obligations are articulated, justified, and constrained in post-war and post-colonial constitutional orders. The argument is not that courts should impose more or fewer obligations, but that the constitutional understanding of equality itself determines how far courts can legitimately require the State to act. That understanding, in turn, is deeply shaped by constitutional history: by whether a constitutional order emerges primarily from the experience of post-war rights protection or from a post-colonial project of social and structural repair.

Against this backdrop, a distinct comparative tension emerges. European human rights jurisprudence, particularly that of the European Court of Human Rights (ECtHR), struggles to justify positive obligations within a framework centred on individual rights, proportionality, and judicial restraint. Indian constitutional jurisprudence, by contrast, confronts the opposite difficulty: how to limit affirmative action once equality is conceived as a project of correcting structural and historical injustice.

Section I examines the jurisprudence of the European Court of Human Rights on positive state obligations in equality cases. It situates the Court's approach within its post-war liberal framework and analyses how affirmative obligations are justified through proportionality and the margin of appreciation, particularly in cases involving group disadvantage.

Section II turns to Indian constitutional jurisprudence. It analyses how affirmative state action is grounded in a post-colonial commitment to social transformation, where equality is understood as structural and substantive rather than neutral. The section also examines how Indian courts have attempted to articulate limits to such affirmative obligations.

Section III places these two approaches in comparative dialogue. It uses their contrast to highlight how differing constitutional conceptions of equality shape debates on the legitimacy, scope, and limits of affirmative state obligations.

II. POSITIVE OBLIGATIONS AND EQUALITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The jurisprudence of the European Court of Human Rights on positive or affirmative state obligations has developed within a constitutional tradition shaped by post-war liberalism. The European Convention on Human Rights was designed primarily as a safeguard against the abuse of State power. Its central concern was to prevent unjustified interference with individual rights, rather than to mandate large-scale social or economic restructuring. Within this framework, equality has traditionally been understood as an individual right secured through non-discrimination and proportional treatment, rather than as a constitutional commitment to addressing historically entrenched structural disadvantage.

A significant doctrinal shift occurred with the Grand Chamber judgment in *D.H. and Others v. Czech Republic* (ECtHR, 2007)¹⁶¹. The case concerned the disproportionate placement of Roma children in special schools for those with learning disabilities. Although the placement criteria were formally neutral, their practical effect was to exclude Roma children on a large scale. By

¹⁶¹ D.H. and Others v. Czech Republic, App. No. 57325/00, 45 Eur. H.R. Rep. 3 (Grand Chamber 2007)

recognising indirect discrimination and accepting statistical evidence as a means of demonstrating discriminatory impact, the Court moved beyond a purely formal conception of equality. It made clear that discrimination need not be intentional and that apparently neutral measures may violate Article 14 of the Convention where they disproportionately disadvantage a protected group.

The Court moved further toward recognising structural disadvantage in *Horváth and Kiss v. Hungary (ECtHR, 2013)*¹⁶². It explicitly acknowledged the long-standing marginalisation of Roma communities and accepted that historical discrimination was legally relevant to assessing present-day practices. The Court held that States have heightened responsibilities where vulnerable groups are concerned and that failure to account for known patterns of exclusion may itself amount to discrimination.

However, despite this recognition of group disadvantage, the Court continues to assess State responsibility through its established proportionality framework. Positive obligations are framed as duties to take “reasonable steps” to prevent discriminatory outcomes, evaluated through a balancing exercise between the interests of affected individuals and competing social or administrative considerations. This reveals a central tension in the Court’s approach. Proportionality is premised on the assumption that competing interests are broadly comparable and capable of being weighed against one another. Structural disadvantage, by contrast, arises from persistent institutional arrangements that systematically disadvantage certain groups over time. When such inequality is assessed through balancing alone, the depth and asymmetry of structural harm risk being understated.

This tension is reinforced by the doctrine of the margin of appreciation, which accords States a degree of discretion in fulfilling their Convention obligations in light of national conditions and democratic choice. While the doctrine serves an important function in preserving subsidiarity and limiting judicial overreach, its application in cases of structural inequality may constrain the Court’s ability to articulate robust positive obligations. In such contexts, deference to State discretion can result in acknowledgment of vulnerability without the imposition of clear constitutional duties to remedy systemic exclusion.

Taken together, *D.H.* and *Horváth and Kiss* illustrate both the promise and the limits of the ECtHR’s approach to affirmative state obligations. The Court has moved beyond formal equality and acknowledged group-based disadvantage, yet it continues to operate within a liberal adjudicative framework that prioritises proportionality, individual harm, and judicial restraint. Positive obligations therefore remain contingent and exceptional, requiring justification on a case-by-case basis rather than flowing naturally from equality as a constitutional commitment.

III. AFFIRMATIVE STATE OBLIGATIONS AND EQUALITY IN INDIAN CONSTITUTIONAL JURISPRUDENCE

The Indian Constitution emerged from a post-colonial moment marked by entrenched social hierarchy, particularly caste-based subordination, which pre-dated both constitutionalism and democratic governance. Equality, in this context, was not conceived merely as a guarantee

¹⁶² Horváth and Kiss v. Hungary, App. No. 11146/11, 2013 Eur. Ct. H.R. (2013)

against differential treatment, but as a constitutional mandate to dismantle historically produced structures of exclusion. This foundational orientation has profoundly shaped how Indian courts understand the legitimacy, scope, and limits of affirmative state action.

The Supreme Court's decision in *Indra Sawhney v. Union of India* (Supreme Court of India, 1992)¹⁶³ represents the doctrinal cornerstone of this approach. Rejecting a formal or colour-blind conception of equality, the Court held that while Article 14 guarantees equality before the law, Articles 15 and 16 expressly permit, and in certain circumstances require differential treatment to address systemic disadvantage. Reservations were not treated as exceptions to equality, but as integral to its realisation. The judgment thus established that substantive equality may demand unequal treatment where social and historical conditions render formal neutrality inadequate.

Crucially, *Indra Sawhney* also addressed the question of limits. The introduction of the fifty per cent ceiling and the exclusion of the "creamy layer" were not justified through abstract proportionality or balancing of competing interests. Instead, these constraints were articulated as internal limitations necessary to preserve the constitutional rationale of affirmative action itself. The Court's concern was not that reservations undermined equality, but that, if untethered from their structural purpose, they could cease to serve the objective of dismantling entrenched hierarchy. Limits, in this framework, emerged from within the equality principle rather than from external considerations of neutrality or administrative efficiency.

The problem of containment becomes more visible in *M. Nagaraj v. Union of India* (Supreme Court of India, 2006)¹⁶⁴, where the Court addressed reservations in promotion. While reaffirming the permissibility of affirmative action, the Court introduced additional requirements, including the need for empirical data demonstrating backwardness, inadequacy of representation, and maintenance of administrative efficiency. Unlike *Indra Sawhney*, which framed limits as intrinsic to equality's structural logic, *Nagaraj* reflects a shift toward procedural and evidentiary constraints as mechanisms of restraint. This move signals judicial unease with the potentially open-ended expansion of affirmative obligations, particularly when they extend into domains traditionally associated with executive discretion.

What *Nagaraj* illustrates is not a retreat from structural equality, but an attempt to discipline its application. The Court did not reject affirmative action as constitutionally suspect; rather, it sought to regulate its extension by imposing conditions aimed at preserving institutional balance. This reveals a distinct tension within Indian equality jurisprudence. Once equality is understood as a project of structural repair, affirmative obligations acquire strong constitutional legitimacy. Yet that very legitimacy makes it difficult to determine when corrective intervention should cease and when continued judicial supervision risks encroaching upon legislative or executive authority.

Taken together, *Indra Sawhney* and *Nagaraj* demonstrate that Indian constitutional law treats affirmative state obligations as inherent to equality, not as exceptional departures from it. At the same time, they expose a recurring difficulty: while the Constitution clearly authorises affirmative action to remedy historical injustice, it offers no clearly articulated doctrinal endpoint for such obligations. The challenge for Indian courts, therefore, is not to justify affirmative state

¹⁶³ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 (India)

¹⁶⁴ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 (India)

action, but to articulate principled limits that prevent the equality mandate from becoming indeterminate while remaining faithful to its transformative purpose.

IV. COMPARATIVE PERSPECTIVES ON THE LEGITIMACY AND LIMITS OF AFFIRMATIVE OBLIGATIONS

Sections 1 and 2 demonstrate that the European and Indian approaches to affirmative state obligations are grounded in fundamentally different constitutional understandings of equality. In the jurisprudence of the European Court of Human Rights, affirmative obligations emerge within a post-war liberal framework primarily concerned with restraining State power and protecting individual rights against interference. In Indian constitutional law, by contrast, affirmative state action is embedded within a post-colonial constitutional project that treats equality as a mandate to dismantle historically entrenched social hierarchy.

These distinct starting points shape both the legitimacy and the limits of affirmative obligations in each system. In European human rights law, equality is articulated principally as an individual entitlement enforced through non-discrimination and proportionality. Even where the Court recognises group disadvantage and historical marginalisation, affirmative obligations are framed as remedial responses designed to secure the effective enjoyment of Convention rights. Their legitimacy is therefore contingent, and their scope is constrained externally through proportionality and the margin of appreciation, reflecting a constitutional commitment to judicial restraint and subsidiarity.

Indian constitutional jurisprudence proceeds from a different conception of equality. Structural inequality, most notably caste-based hierarchy, is treated as antecedent to the enjoyment of formal rights. Affirmative state action is therefore not an exception to equality, but integral to its realisation. In this framework, legitimacy flows from constitutional purpose rather than proportional balancing. Limits are negotiated internally through doctrinal mechanisms such as the fifty per cent cap, the exclusion of the creamy layer, and heightened judicial scrutiny of implementation, rather than imposed through abstract balancing between competing interests.

Viewed together, the two systems reveal mirror-image constitutional difficulties. In Europe, affirmative obligations appear exceptional because they must be justified within a framework designed for negative liberties, where proportionality presumes commensurable interests and contained harms. In India, affirmative action appears expansive because equality is constitutionally anchored in structural repair, raising persistent questions about scope, duration, and institutional boundaries. The perceived elasticity of affirmative obligations in both systems is thus not a product of judicial excess, but a consequence of how equality itself is constitutionally conceived.

The comparison underscores that debates over affirmative state obligations cannot be resolved at the level of doctrine alone. They reflect deeper constitutional choices about history, the role of courts, and the relationship between equality and State action. Understanding these choices is essential to assessing both the legitimacy and the limits of affirmative obligations across constitutional systems.