

**India and the quest for equality:
Constitution, caste and legal reforms**

Democracy and Rule of Law Seminar, 6 December 2011

Venue: Seminar room 2, Faculty of Law, Magnus Lagabøtes plass 1 (4th floor)
University of Bergen

Chair: Henriette Sinding Aasen

11:00 Welcome and coffee

11:15 Sudhir Krishnaswamy:

India's Basic Structure Doctrine: Constitutional Innovation or Mistake?

11:45 Comment by Eivind Smith

12:00 General discussion

12:15-13:00 Lunch

13:00 Dag Erik Berg:

Equality, Inequality and the scope of the 'Creamy Layer' in India's Constitutional law

13:25 Hugo Stokke:

Affirmative action in a comparative perspective

13:35 Sudhir Krishnaswamy:

Empirical analysis of reservation and public employment: Karnataka public service commission

13:45 Jayna Kothari:

Constitutional equality and disability in India

13:55 General discussion

14: 20 Break

14:30 Kathinka Frøystad:

Combating caste slur in the public sphere

14:55 Comment and final reflections by Sudhir Krishnaswamy

15:10 General discussion

15:30 End of seminar

ABSTRACTS 6.12: INDIA AND THE QUEST FOR EQUALITY

SUDHIR KRISHNASWAMY:

The Basic Structure Doctrine: Constitutional Innovation or Mistake?

The Indian Supreme Court in *Kesavananda v State of Kerala* (1973) held that Parliament could not amend the basic features of the Constitution. By expanding the scope of judicial review to include constitutional amendment albeit on narrow grounds the Indian court had stepped into unknown territory in constitutional law and theory. The intellectual justification for such a view was thin and the best available view was that of Prof Dietrich Conrad who argued that the European constitutional tradition (French and German to be precise) distinguished between amending and constituent power. At the time, *Kesavananda* was viewed as an outrageous mistake that deserved immediate correction or a minor error that would waste away with time.

In 2011 we can say with assurance that neither of these possibilities materialized. The basic structure doctrine has emerged as an independent novel form of constitutional judicial review with a distinct constitutional basis, grounds and standards of review that applies to all forms of state action. Increasingly, other jurisdictions like Canada, Israel, Germany and the United States have contended with the scope of judicial review over constitutional amendments. In this context, the basic structure doctrine is the most elaborately, if not always rigorously, developed doctrinal framework for constitutional lawyers and theorists to turn to rework assumption about the relationship between constitutionalism and democracy.

DAG ERIK BERG:

Equality, Inequality and the scope of the ‘Creamy Layer’ in India’s Constitutional law 2005-08

The paper focuses on a constitutional contingency with considerable implications for India’s egalitarian policies; it emerged with the Supreme Court judgement, *M. Nagaraj* 2005 and was temporarily “resolved” in *AK Thakur* 2008. The matter in dispute was whether affirmative action – known as “reservation” – should be practiced in matters of promotion for the Scheduled Castes and Scheduled Tribes. The 93rd Constitutional amendment had changed Article 16 in the Constitution of India regarding “equality of opportunity” and to include the right to “reservation” in matters of promotion for SCs and STs.

This paper examines the argument in *M. Nagaraj* and the resulting possibilities for India’s egalitarian policies with a particular focus on the two powerful concepts developed by the judiciary in India. First, India’s Supreme Court has developed a so-called Basic Structure Doctrine to evaluate changes in the Constitution based on what they regard as its essential features. In *M. Nagaraj*, the constitutional amendment was challenged using this “doctrine.” Second, the central social concept used in the debate was the creamy layer. This is a deeply laden concept, which has been introduced in India’s constitutional law to address inequalities among groups that are eligible to reserved posts in government positions. The significant implication created by *M. Nagaraj* was that this judgement could imply that creamy layer concept should also be applied to the Scheduled Castes and the Scheduled Tribes – in contrast to earlier rules. In making this analysis, I argue how the creamy layer concept shows a dynamic of social atomism that Iris M. Young hinted at in her discussion regarding the redistributive paradigm. For Young, the inequality/equality code was the basis for the

redistributive approach. In this paper, I argue that creamy layer is a concept that creates a critical focus on individuals in the context of equality. Indeed, the concept obviously evokes value-judgements and evokes societal norms in a legal discussion characterised by technical jargon.

KATHINKA FRØYSTAD:

Combatting caste slur in the public sphere

The prohibition against discrimination on the ground of caste in the Constitution of India did not succeed in putting an end to the distressing forms of caste discrimination that occurred across the country. Recognizing the need for more fine-tuned legal measures, the Constitution has thus been supplemented with a series of legislative acts over the decades that have passed since Independence – some state-specific, others country-wide. At present caste discrimination is primarily targeted by the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* throughout the country. Alongside the many offences it specifies as illegal, the SC/ST Act states that any person not belonging to the SC/ST category who ‘intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view’ will be punished with imprisonment or a fine. This clause includes verbal and written caste discrimination, and in this talk I examine some of the caste insults that have reached the courts in the recent years as well as the public debates that these proceedings have generated. I argue that the growing restrictions against public caste slur have been met with surprisingly wide acceptance. The State efforts to promote recognition (in the sense of Honneth) by limiting the circulation of ideas that perpetuate caste discrimination have largely been appreciated – in my experience even among upper-caste people who frequently express hostile ideas about SCs and STs themselves. The particular instances in which this clause have been put into use have certainly been debated, but the most vocal outcries about ‘censorship’ in India typically concern religion-related regulation – especially when affecting art, scholarship and new media. In this way the attempt to combat public caste slur is virtually shielded by the heated controversies over religion-related regulation.

SPEAKERS 6.12: INDIA AND THE QUEST FOR EQUALITY

Dr. Sudhir Krishnaswamy is Professor of Law at the Azim Premji University in Bangalore, South India, where he is the Director of the ‘Law, Governance and Development Initiative.’ Professor Krishnaswamy has his doctoral degree at the University of Oxford 2008. He has taught constitutional law at National Law School, Bangalore, and he was Professor of Law at the National University of Juridical Sciences, Kolkata before he joined Azim Premji University in 2011. He has worked with government at various levels, including the Prime Minister’s Committee on Infrastructure and in a commission on governance in Bangalore. He will be visiting fellow at Columbia Law School, New York, fall 2012. Sudhir Krishnaswamy is the author of *Democracy and constitutionalism in India: a study of the basic structure doctrine* (OUP India, 2009).

Eivind Smith is professor of public law at the University of Oslo. His main fields of research are domestic and comparative constitutional and administrative law. In addition to questions related to the borderline between public and private law, he has published extensively on inter alia procedural and substantive administrative law (including the main Norwegian textbook on the subject), ”independent” administrative bodies, governance and political responsibility, constitutional cultures, the relationship between law and democracy, judicial review of legislation, freedom of speech, constitutions as political instruments and the relationship between Parliament and the executive.

<http://www.jus.uio.no/ior/english/people/aca/esmith/index.html>

Dr. Dag Erik Berg recently defended his PhD thesis “Dalits and the Constitutional State. Untouchability, Dalit Movements and Legal Approaches to Equality and Social Justice for India’s Scheduled Castes” at the University of Bergen. Berg has been a PhD candidate at the Department of Administration and Organization Theory and is currently associated fellow at the UiB Global. He has specialised in issues regarding law and society in India with a particular focus on the Dalits question in the context of India’s constitutional history, drawing on political theory, discourse analysis and ethnographic research. His MPhil thesis addressed controversies in India regarding the relevance of caste in international human rights organisations, particularly the United Nations’ World Conference against Racism in 2001. This work resulted in an online publication with Sciences-Po, Paris, 2007.

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Hugo Stokke, researcher at CMI, is a political scientist specialising in human rights research, including international labour standards, affirmative action and ethnic discrimination, child labour and human rights monitoring as well as the theoretical foundation of human rights. He has worked extensively in the Asian region covering a number of countries both in South Asia and in Southeast Asia. He worked for three years as an Associate Expert with the ILO in the Asian region and has been on regular missions to the region since then. Stokke is currently engaged in work on international organisation with a focus on the ILO, human rights in European Union foreign policy/development assistance and affirmative action as a means of responding to structural discrimination among groups in society. He was the editor of three volumes of the Human Rights in Development Yearbook series (1997 - 2000) and was a member of the advisory board of Internasjonalt Politikk, a Norwegian journal on international affairs. He has also done a series of reviews and evaluations of human rights (and human rights-related) organisations and the bilateral human rights aid policies and projects of several European donors, covering human trafficking, minority rights, human rights commissions and legal institutions, among others. His geographical area of interest covers select countries in

South and Southeast Asia, recently Nepal, parts of the Balkans and occasionally Africa.
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Jayna Kothari is Founder of the Centre for Law and Policy Research (“CLPR”), a non-profit research organisation based in Bangalore. She practises as an advocate in the Supreme Court and the Karnataka. In her research, Jayna Kothari has specialised on disability, the UN Convention on Rights of Persons with Disabilities and its impact on domestic disability law in India. In 2008, she was a visiting fellow at Sidney Sussex College and the Centre of International Studies, University of Cambridge. Her book *The Future of Disability Law in India* is forthcoming (OUP India, 2011).

Dr. Kathinka Frøystad is Associate Professor at the Department of Social Anthropology, University of Bergen. She has previously taught at University of Oslo and been a research fellow at the International Peace Research Institute, Oslo (PRIO). Kathinka Frøystad has conducted fieldwork and research in India since the early 1990s, particularly in Uttar Pradesh, North India. She has published widely on topics pertaining to ethnicity, caste, class and Hindu nationalism. She is the author of *Blended Boundaries. Caste, Class and Shifting Faces of 'Hinduness' in a North Indian City* (OUP India, 2005). As well as addressing issues regarding freedom of speech, her recent research has revolved around spiritual transformation amongst the urban middle classes and its relation to the economic and political changes that have marked India since the early 1990s. Website: <http://www.uib.no/persons/Kathinka.Froystad>