

Constitutional Law and Public Administration in India

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Lecture-04

Right to Equality – II

Nelson Mandela, the leader who fought apartheid in South Africa and fought for rights and equality once stated, that if poverty, injustice, and inequality persist in the world, none of us can truly rest in peace. Poverty, injustice, and inequality is the concern for unrest across the world. Inequality could be social or economical in character or nature. It is only fair for human beings in society to expect that the population is treated fairly and without any bias by the government. It is important that the constitution not only speaks and ensures equality, but also tries to promote the theories of equality along with equity. Now there is a very important distinction between equality and equity.

Equality is a principle where everyone irrespective of whatever background, income or wealth or power you have, shall have the right to be treated equally before the law and are entitled to the equal protection of the law. Equity on the other hand would demand that suppose there is an elder, how much of food an elder should get and how much of food a minor should get, or a child should get. Now elders may have more appetites, the government must provide more, a child may want less. This does not mean that the child and the adult should be treated equally, especially these government schemes. Equity would demand to look into the difference upon your need, equity depends upon your abilities or the circumstances surrounding you and a person will be treated fairly based on his or her needs and circumstances.

Equity demands that sometimes there is a need for special protection for children, which adults do not require. Both components are interwoven in the constitution of India. Some of the important cases that one would want to reflect upon under Article 14 of the constitution, which talks about equality before the law and equal protection of the law is *Kesavananda Bharati v. State of Kerala* case. This is the basic structure doctrine case and *Navtej Singh Johar v. Union of India*, a 2018 case. In *Navtej Singh Johar*, the Court looked at section 377 of the Indian Penal Code. The Indian Penal Code is an 1860 legislation, and it was made by the Britishers at that point of time and did what they thought was right. The Indian Penal Code continued to exist even post-independence. The issue that was taken up in *Navtej Singh* was the issue on the rights of homosexuals. Currently, there is a pending

matter of the Supreme Court of India on the coordination of marriages in the common section on which judgment is expected soon. However, in *Navtej Singh* the issue was on whether consensual sex among adults between the same sex should be treated as unnatural sex under section 377 of the Indian Penal Code. The court said that the right to equality means the LGBTQIA+ community has the right to be treated fairly and equally as any other people or persons in each society. So just because someone belongs to this community, they cannot be discriminated against and there cannot be a law that punishes you for consensual, adult relationships. And hence the court in this case faced the question whether unnatural sex also includes consensual adult homosexuality which was dealt with by Section 377? The Supreme Court said that if the LGBTQIA+ community is punished under section 377, this would breach the right to equality. To some extent today the challenges of modern-day application of the right to equality are quite interesting, considering the two sides of the story in terms of one, what we call as conservatism, which is antithesis to what we call as liberalism. There is a constitutional challenge on balancing both the extreme sides of the society, which could be a generational gap, it could be a gap of thoughts and ideologies, it could be a kind of a social transformation that has been sought in the constitution on the grounds and based on equality.

It is the duty of governments under Article 14 to eliminate disparities that exist in our society. The disparities would be based on say, social convention. One of these disparities could be based on long standing customs, like untouchability or race discrimination. Race discrimination hits the rule of equality quite deep, and it unfortunately still exists in some pockets of the country where the rule of equality will have to be followed. The rule of equality is a natural law theory. There is a theory that every individual expects fair and equal treatment without any kind of discrimination from everyone in the society, but more pertinently and more prominently from the state. So, be it the farmers, street vendors or women in India, every person should enjoy his rights and liberties guaranteed to them with equality status that is guaranteed by the constitution of India. Article 14 does speak about social discrimination; it also talks about economic discrimination. It is the abolishment of social and economic discrimination of the citizens that is attempted by the protection guaranteed under Article 14.

However, the exceptions to equality are to be considered with importance. It is normally and very popularly stated that Article 14 also deals with what is called the rule of law. It is a very important component of good governance. The rule of law is the most important pillar which says that only the law will prevail and not the men who administer the law. It is the rule of law and not rule by men. The popular British jurist A.V. Dicey, brought in the element of rule of law while he was trying to look at issues on equality. According to him, that there are three elements of the rule of law and that rule of law assumes absence of arbitrary power. Arbitrariness is a very important issue in terms of the principles required. If power given to you is exercised in an arbitrary manner, such arbitrariness

means a process where you do not apply the principle of objectivity, you are quite subjective and you tend to choose one or the other just because it is your will and wish. A.V. Dicey says any exercise of arbitrary power shall be punished by law and it shall be something that should be taken quite seriously by law as arbitrariness affects the rule of equality, it is against the rule of law. Secondly, according to Dicey, it is important that everyone should be treated equally before the law, be it citizens or non-citizens, officials, or non-officials, poor or the rich, or high or low. Every person is subject to the law of the land and the law of the land shall apply to everyone equally which is an important aspect. There are also exceptional situations when privileges or immunities can be granted. But any such privilege or immunity should be granted by law and not by men. Third and most importantly, the rule of law principle says that the rights of individuals under the constitution shall be defined and enforced by the courts of law. So, the courts of law have the duty and obligation to implement rule of law. The courts of law are the ones who are going to be the custodian of the fundamental rights. They are the ones who shall protect as well as provide remedies for the infringement of the rights.

The Supreme Court of India, from time to time has held that Article 14 is the basis of rule of law in India. This is the basic feature of the constitution. To any extent, Article 14 cannot be changed, like it was held in the case of *Kesavananda Bharati v. State of Kerala*, that there is something called the basic structure of the constitution that cannot be amended. The right to equality is one of the basic features of the constitution and cannot be subject to any amendment. It is now important to think what a few exceptions to the rule of law and the rule are of equality.

Under Article 361, the President of India and the Government of State enjoy certain kinds of amenities. The president and the Governor of the States are the chief executive officers of the respective government. The President of India is the chief executive of the central government, the Governor of any state is a chief executive of the State government. They are called as the first citizens of the State and their respective governments, the President and the governors have been granted with certain privileges and amenities. These privileges or amenities are also granted to certain sections in the community like members of parliament, members of legislative assembly, that they cannot be arrested during the parliamentary sessions or when the sessions of the assembly are taking place. The first example of such privileges or amenities is that when the President and the Governor are in office, that is they are not departed from the tenure and are not former presidents or governors, they are still in office and they shall not be answerable in any court of law in the exercise and performance of their powers and duties in office.

In their personal matters, they will be answerable, but in their official capacity, if they are performing any duties or any functions, then they shall not be answerable in any court of law. Secondly, there shall not be any criminal proceeding against the President or the Governor in any court during the term of their respective offices. There shall not be any

process of arrest or imprisonment of the President or the Governor in the tenure of their office and no civil proceedings shall be instituted during the term of the President and the Governor. These are certain privileges that are granted to the President and the Governor and Article 361A says that no person shall be liable for any civil or criminal proceedings in any court in respect of publication in a newspaper or by radio or television of a substantially true report of any proceedings of either House of the Parliament or the House of Legislature of the State. So, 361 is a privilege and immunity granted to the press people for true reporting of what is happening in the House of Parliament or the House of Legislature.

Under Article 105, no member of the Parliament shall be liable, in any court for anything that was done by the member of Parliament or by any member during any parliamentary committees. They shall not be liable for any of these proceedings before a court of law. Under Article 194 the same privilege is granted to MPs that are granted to the members of legislative assembly. These are certain kinds of exceptions that are there and sometimes there could be certain legislations that can be kept out of judicial review, and they cannot be challenged in the court of law as they are evaluating Article 14, Right to Equality. So, when Article 31c was created as an exception to Article 14, it seems the Supreme Court agreed that sometimes you should allow certain exceptions in the case of land reform movement, in the case of change of right to property and certain legislations may not be able to guarantee those rights as well.

The United Nations agencies, diplomatic missions of different other governments also are granted with certain diplomatic immunities as per international law. Sovereign territories that exist in India or sovereigns of different other countries, be it a ruler, a king, an ambassador, or a diplomat, all of these enjoy immunity from criminal and civil proceedings in the country. So, these are certain examples of where exceptions to the rule of equality are found as privileges and immunities are granted. So, these could be certain kinds of privileged class of individuals who are not going to be treated the same as a normal Indian citizen would be treated in terms of criminal or civil proceedings. These are necessities that are created by international conventions at times. These are necessities to protect the dignity of the office of the president of the governor or the members of parliament or members of legislative assembly so that it is something that is not being misused by opposition parties. Constitutionalism on the growth of these kinds of exceptions have come into existence and the courts have upheld those kinds of exceptions as well.