

Right to Equality/ASR

Rule of law-Introduction

- Edward Coke has originated the doctrine of rule of Law. “Rule of law” is essentially embodied in Article 14 of the Constitution.
- The concept of Rule of Law is that the *state is governed, not by the ruler* or the nominated representatives of the people but *by the law*.
- The *King is not the law but the law is king*
- *No man is above law*
- *Every person is subject to the jurisdiction of ordinary courts of law irrespective of their position and rank.*

Dicey/Propounder modern rule of law

- According to Professor A.V Dicey, for achieving rule of law three principles of postulates must be followed which are as follows:
- Supremacy of law
- Equality before law and
- Predominance of Legal Spirit

Supremacy of law

As per the first postulate, rule of law refers to the *lacking of arbitrariness or wide discretionary power*

Equality before law

- *Equal subjection of all classes to the ordinary law of land. French legal system of Droit Administratif was also criticized by him as there were separate tribunals for deciding the cases of state officials and citizens separately.*

Predominance of Legal Spirit

Thirdly, that *the rule of law should emanate not from any written constitution but from the “common law”, which he call it as predominance of legal spirit as foundation of constitutional law of any country.///No deprivation of rights and liberties by an administrative action except by law*

MODERN AGE

- In modern age, the concept of rule of law oppose the practice of conferring discretionary powers upon the government.
- **discretionary power would lead to arbitrariness**
- The Supreme Court has declared that rule of law to be one of the 'basic features' of the Constitution (*Indira Nehru Gandhi v Raj Narain, AIR 1975 SC*)
- The two great values which emanate from the concept of Rule of law in modern time are:
 - no arbitrary government: and
 - upholding individual liberty.

Introduction –

- Articles 14 to 18 of the Constitution guarantee the right to equality to every citizen of India. **Article 14 embodies the general principle of equality before law and prohibits unreasonable discrimination between persons.**
- **Article 14 uses two expressions “equality before the law” and “equal protection of the law”.**
- **The first expression ‘equality before law’ is of English origin and the second expression has been taken from the American Constitution.**

Expressions -do not convey the same meaning

- While 'equality before the law' is a somewhat negative concept implying the absence of any special privilege in favour of individuals and the equal subject of all classes to the ordinary law.
- "Equal protection of the law" is a more positive concept implying equality of treatment in equal circumstances.

Limitation-1

- Article 359(1) provides that where a proclamation of emergency is in operation the President may, by order, declare that the right to move any court for the enforcement of such rights conferred by Part III (except Arts. 20 and 21) shall remain suspended. Thus, if the President of India issues an order, where a Proclamation of Emergency is in operation, enforcement of Article 14 may be suspended for the period during which the Proclamation is in force.

Limitations-2&3

- **Article 361 lays down that the President and the Governors are exempted from any criminal proceeding during the tenure of their office.**
- **Under International law, foreign sovereign and ambassadors enjoy full immunity from any judicial process. This is also available to enemy aliens for acts of war.**

IDENTICAL TREATMENT IN UNEQUAL CIRCUMSTANCES WOULD AMOUNT TO INEQUALITY

- *– The equal protection of laws guaranteed by Article 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not mean that every law must have universal application for, all persons are not, by nature, attainment or circumstances in the same position. The varying needs of different classes of persons often require separate treatment.*
- *In fact, identical treatment in unequal circumstances would amount to inequality.*

Article 14 applies where equals are treated differently

- *Thus, what Article 14 forbids is class-legislation but it does not forbid reasonable classification.*
- *Article 14 applies where equals are treated differently without any reasonable basis. But where equals and unequals are treated differently, Article 14 does not apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation*

Test of Reasonable Classification

- *While Article 14 forbids class legislation, it does not forbid reasonable classification of persons, objects and transactions* by the legislature for the purpose of achieving specific ends. *But classification must not be “arbitrary, artificial or evasive”*. *It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.*

Classification to be reasonable must fulfil the following two conditions: -

- 1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and**
- 2. The differentia must have a rational relation to the object sought to be achieved by the Act.**

Note: A **child below the age of 7** is totally exempted from criminal liability since it is presumed that a child below 7 cannot form guilty intention. Between 7 to 12 ,it depends on his mental maturity. Above 12, treated as an adult for ascertaining criminal liability

Child below 7

- However, if a child irrespective of age commits a tort (Tort is a civil wrong other than a breach of contract or breach of trust) is liable.
- The reason for this is in case of criminal liability, the consequence is punishment to the offender. However, in case of civil liability, generally the consequence is payment of compensation, which can be paid by the parents
- Another difference between a crime and a civil wrong is that in case of crime, the focus is on accused, whether he committed a crime. However, in case of a civil wrong, the focus is on the victim, whether his right is infringed

Nexus between the basis of classification and the object of the Act

- *There must be a nexus between the basis of classification and the object of the Act which makes the classification*
- *Thus, the Legislature may fix the age at which persons shall be deemed competent to contract between themselves. No contract can be made to depend upon the stature or colour of the hair. Such a classification will be arbitrary.*

Joseph Shine v. Union of India (2108)

- Adultery no longer a crime: The Supreme Court in a landmark ruling on September 27, 2018 struck down the 158-year-old Section 497 that criminalised adultery and said that women must be treated at par with men. Adultery law came under sharp criticism for treating women as possessions rather than human beings. The court underlined that Section 497 treats women as properties of their husbands and is hence manifestly discriminatory. CJI Justice Dipak Misra said that there can't be a social license to destroy the institution of marriage and added that the law violates Right to Privacy to some extent.

Shayara Bano versus Union of India(2017)

- **Declaring Triple Talaq unconstitutional**: In a landmark judgement, Supreme Court of India declared in the case *Shayara Bano v. Union of India and others* that the practice of 'talaq-e-bidat', also called the 'instant triple talaq', is unconstitutional by a 3:2 majority. While Justices Nariman and Lalit held that instant Triple Talaq is unconstitutional and violative of Article 14 (Right to Equality), Justice Joseph struck down the practice on the ground that it goes against Shariat and the basic tenets of the Quran. The verdict unequivocally established that this practice runs in defiance of the principles of equity, international human rights law and also asserted that "triple talaq is not a basic and integral part of Islam".

Indian Young Lawyers Assn. v. State of Kerala (2018)

- **Lifting ban on entry of women (aged 10-50) inside Sabarimala Temple:** Sabarimala temple in Kerala is a Hindu pilgrimage center in Periyar Tiger Reserve in Kerala, the Ayyappan temple in Sabarimala clocks about 45–50 million devotees every year. Saying that "Devotion cannot be subjected to gender discrimination", the Supreme Court on September 28, 2018, removed a ban that prevented women between 10 and 50 years of age from entering Kerala's Sabarimala temple.

CAA

- The act offers asylum to non-Muslim illegal immigrants from three countries - Pakistan, Bangladesh and Afghanistan.
- It amends India's 64-year-old citizenship law, which currently prohibits illegal migrants from becoming Indian citizens.
- It also expedites the path to Indian citizenship for members of six religious minority communities - Hindu, Sikh, Buddhist, Jain, Parsi and Christian - if they can prove that they are from Muslim-majority Pakistan, Afghanistan or Bangladesh. They will now only have to live or work in India for six years - instead of 11 years - before becoming eligible to apply for citizenship.
- The government says this will give sanctuary to people fleeing religious persecution.
- Opponents say that faith cannot be made a condition of citizenship.
- But others protesting - particularly in border states - fear being "overrun" by new arrivals from the three neighbouring countries
- Refugee seeks asylum/ If granted asylee /amnesty=political

Modern concept of equality: Protection against arbitrariness

- *In E.P. Royappa v. State of Tamil Nadu(1974) the Supreme Court has challenged the traditional concept of equality which is based on reasonable classification and has laid down a new concept of equality. Bhagwati, J.,* delivering the judgment on behalf of himself, Chandrachud and Krishna Iyer, JJ. propounded the new concept of equality in the following words – “Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positivistic point to view, *equality is antithesis to arbitrariness.*

EQUALITY AND ARBITRARINESS ARE SWORN ENEMIES

- *In fact, equality and arbitrariness are sworn enemies*; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. *Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law* and is therefore violative of Article 14”.
- *The conclusion is that if the action of State is arbitrary it cannot be justified even on the basis of doctrine of classification.* Where an act is arbitrary, it is implicit in it that it is unequal and therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.

Ajay Hasia v. Khalid Mujib (1981)

- *In Ajay Hasia v. Khalid Mujib, the Regional Engineering College made admissions of candidates on the basis of oral interview after a written test. The test of oral interview was challenged on the ground that it was arbitrary and unreasonable because high percentage of marks were allocated for oral test, and candidates were interviewed only 2 or 3 minutes. the Court held that allocation of 33⅓ percent of the total marks for oral interview infected the admission procedure with arbitrariness.* It was observed that allocation of more than 15 per cent marks to interview will be arbitrary and unreasonable.

Air India v. Nargesh Meerza(1981)

- In *Air India v. Nargesh Meerza*, Supreme Court struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostesses as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary. **Regulation 46 provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within four years of service or on first pregnancy, whichever occurred earlier. The Court held that the termination of service on pregnancy was violative of Article 14 of the Constitution**

Basis of Classification

- *The constitutionality of every statute depends on whether there is a basis for the classification made in the statute. The basis of classification may be different, e.g., geographical, vocational, difference in time, difference in nature of persons, trade and callings or occupations, etc. Let us discuss certain broad classifications*

a) Geographical basis

- **Geographical basis – The words “within the territory of India” used in Article 14 do not mean that there must be a uniform law throughout the country. A law may be applicable to one State and not to another. A State may be divided into several geographical regions and a law may be applicable to one and not to others depending on particular circumstances.**

Discrimination by the State in its own favour

- *The State as a person constitutes a different class as, compared with private citizens. In Sagir Ahmad v. State of Uttar Pradesh, a monopoly created by the State in its favour was held not to violate Article 14. In Baburao v. Bombay Housing Borad, a law which exempt the factories run by the Government but applied to other factories was held not to be discriminatory.*

Discrimination by the State in its own favour

- *Similarly, it has been held that the Government as a banker can be given special facilities for realisation of its dues which may not be available to other bankers.*
- *And again a longer period of limitation may be allowed to Government for enforcing its claims as compared to private person in respect of similar claims.*
- As per the Limitation Act 1963, the statutory period of limitation that is allowed for possession of immovable property or any interest is 12 years in the case of private property and 30 years for public property, from the date the trespasser occupies the property

Article 14 and Taxation Laws

- *The State has wide power in selecting persons or objects it will tax and a statute is not open to attack on the ground that it taxes some persons and objects and not others.*
- *The legislature has ample freedom to select and classify persons, districts, goods, properties, income and object which it would tax, and which it would not tax.*

Article 14 and Taxation Laws

- ***A taxation law will be struck down as violative of Article 14 if there is no reasonable basis behind the classification made by it, or if the same class of property, similarly situated, is subject to unequal taxation.***
- ***Perfect equality in taxation is impossible and unattainable.***

D) Special Courts and Special Procedure

- Under Article 246(2) Parliament by law is empowered to set up Special Courts and to provide special procedure for the trial of certain 'offences' or 'classes of offences'. Such a law will not be violative of Article 14, if it lays down proper guidelines for classifying 'offences', 'classes of offences' or 'classes' of cases to be tried by Special Court. But the special procedure prescribed by such a law should not be substantially different from the procedure prescribed under an ordinary law.

E) A single individual may constitute a class

- Chiranji Lal v. The Union of India(1961), is the leading case on this point. The facts of the case were that owing to mismanagement in Sholapur Shipping and Weaving Company Limited the management threatened to close down the Mill. The Government of India passed the Sholapur Spinning and Weaving Co. (Emergency Provision) Act empowering the Government to take over the control and management of the company and its properties by appointing their own directors. *The Act was challenged by a stakeholder of the company on the ground that a single company and its shareholder was being denied equality before the law, because the Act treated him differently vis-à-vis other companies and their shareholders. The Supreme Court held the Act valid.*

Chiranji Lal v. The Union of India(1961)

- **The Supreme Court held the Act valid. It said that a law may be constitutional even though it applies to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to other, that single individual may be treated as a class itself, unless it is shown that there are other who are similarly circumstanced. In the present case the Sholapur Company formed a class by itself because the mismanagement of the Company's affairs prejudicially affecting the production of an essential commodity and had caused serious unemployment amongst labourers.**

NO DISCRIMINATION ON GROUNDS OF RELIGION, CASTE ETC. (Article.15)

- *Article 15 provides for a particular application of the general principle embodied in Article 14. When a law comes within the prohibition of Article 15 it cannot be validated by recourse to Article 14 by applying the principle of reasonable classification.*
- *The guarantee under Article 15 is available to citizens only.*

Article.15(1st & 2nd Clauses)

- **The first clause of Article 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex, place of birth or any of them.**
- **The second clause prohibits citizens as well as States from making such discrimination with regard to access to shops, hotels, etc.**
- **It is to be noted that while clause (1) of article 15 prohibits discrimination by the State; Clause(2) prohibits both the State and private individuals from making any discrimination.**

Clause 1 (cases)

- In **Nainsukhdas v State of UP(1953)** a law which provided for elections on the basis of separate electorates for members of different religious communities was held to be unconstitutional.
- In **State of Rajasthan v Pratap Singh (1960)** the Supreme Court invalidated a notification under the Police Act of 1861 which declared certain areas as disturbed and made the inhabitants of those areas to bear the cost of additional police stationed there but exempted all Harijans and Muslims. *The exemption was given only on the basis only of 'caste' or 'religion' and hence was contrary to Article 15(1).*

Article.15(2nd Clause)

- **Article 15 (2) declares that no citizen shall be subjected to any disability, restriction or condition on grounds only of religion, race ,caste ,place of birth or any of them with regard to (a) access to shops, public restaurants, hotels and places of public entertainment or (b) the use of wells, tanks, baths, roads, and places of public resort**
- **A ‘place of public resort’ means places which are frequented by the public like a public park, a public road, a public bus, ferry, public urinal or railway, hospital etc.**

Article.15 (Clauses 3rd &4th)

- The third clause empowers the State to make special provisions for the protection of women and children.
- *The fourth clause enables the State to make special provisions for the protection of the interests of the Backward Classes of citizens and is, therefore an exception to Article 15*

Article.15 (Clause 3)

- Under Article 42 women workers can be given special maternity relief and a law to that effect will not infringe article 15 (1).
- Again, it would not be violation of Article 15 if educational institutions are established by the State exclusively for women.
- In *Dattatraya v State (1953)* the Supreme Court held that the reservation of seats for women in a college does not offend against Article 15 (1)
- The provision of free education for children or measures for prevention of their exploitation would also not come within the inhibition of Article 15(3).³⁸

Article.15 (Clause 4)

- The fourth clause enables the State to make special provisions for the protection of the interests of the Backward Classes of citizens and is, therefore an exception to Article 15.
- *High Caste girl marrying an ST boy-Is she entitled to Reservation benefit:-* In *Dr. Neelima v. Dean of PS studies AP Agricultural University(1993)* & *Meera Kanwaria v Sunita(2006)* it has been held that if a female of high caste Hindu marries a person belonging to SC or ST -- she is not entitled to take the benefit of reservation under Articles 15(4) &16(4). of the Constitution.

EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT

- **Articles 16(1) &(2) applies only in respect of employment or office under the State.**
- **Article 16(1) guarantees equality of opportunity for all citizens in matters of ‘employment or ‘appointment’ to any post under the State.**
- **Clause(2) says that no citizen shall on ground only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of employment or office under the State.**

Article 16(4) & (4-A)

- *Clause (4) enables the State to make provision for the reservation of posts in government jobs in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State.*
- *Clause (4-A) (added by 77th Amendment Act,1995) empowers the State to make any provision for reservation in matters of promotions for SC and STs which , in the opinion of the State, are not adequately represented in the services under the State.*

Article 16(4-B)

- **The Constitution (81st Amendment) Act 2000, has added a new clause (4-B) in Article 16 which seeks to end the 50% limit for SCs &STs and other Backward classes in backlog vacancies which could not be filled up due to the non availability of eligible candidates of these categories in the previous year or years. (CARRY FORWARD)**

THE MANDAL CASE (Indra Sawhney v Union of India)(1993)

- *The majority opinion of the Supreme Court (9 Judge Constitution Bench 6:3) on various aspects of reservation provided in Article 16 (4) may be summarized as follows:-*
- *1. Backward class of citizen in Article 16(4) can be identified on the basis of caste and not only on economic basis.*
- *2. Article 16(4) is not an exception to Article 16(1) It is an instance of classification. Reservation can be made under Article 16(1).*

3. Backward Classes in Article 16(4) are not similar to as socially and educationally backward in Article 15(4):-

- The majority held that the backward class of citizens contemplated in Article 16(4) is not the same as socially and educationally backward classes referred to in Article 15(4). **Article 16(4) is much wider. Clause (4) of Article 16 does not contain the qualifying words “socially and educationally” as does clause (4) of Article 15.** The “backward class of citizens” in Article 16(4) takes in SC’s and ST’s and all other backward classes of citizens including the socially and educationally backward classes.

3. Backward Classes in Article 16(4) are not similar to socially and educationally backward classes in Article 15(4):-

- **Thus, certain classes may not qualify for Article 15 (4) but they may qualify for Article 16(4). Accordingly, the court overruled the Balaji case on this point in which it was held that the backward class of citizens in Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15 (4).**
- The Court held that it is not necessary for a class to be designated as a backward that it is situated similarly to the SC's and ST's.

THE MANDAL CASE

- 4. Creamy layer must be excluded from backward classes:- the majority held that while identifying the backward classes the socially advanced person –the creamy layer –among them should be excluded.
- 5. Article 16(4) permits classification of backward classes into backward and more backward classes.
- 6. Backward class of citizens cannot be identified only and exclusively with reference to economic criteria.
- 7. Reservation shall not exceed 50%. (If a member of SCs/STs is selected in open competition on the basis of merit they will not be counted against the reserved quota)

THE MANDAL CASE

- 7. Reservation shall not exceed 50%. (However, in extraordinary situations it may be relaxed in favour of people living in far flung and remote areas of the country who because of their peculiar conditions and characteristics need a different treatment).
- 8. Reservation can be made by an executive order (It need not be made by Parliament or Legislature).
- 9. No reservation in promotions (the reservation is confined to initial appointments)

NOT ADVISABLE TO APPLY THE RULE OF RESERVATION(certain services & posts)

- **For example technical posts in research and development organization, departments, institutions in specialties and super specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly in the case of posts of the higher education e.g., Professor (in Education), Pilots in Indian Airlines and Air India, scientists and Technicians in nuclear and space application.**

Reservation does not apply for single posts

- *In State of Karnataka v. Govindappa (2009), the respondent was appointed as a lecturer in History in an aided private college. The college had applied for approval of the post but the Government refused the approval on the ground that the appointment was made in violation of Roster policy and he was appointed on in a post reserved for a SC post. The respondent contended that there was only a single post of lecturer in History in the college, therefore, the reservation would not apply. His claim was rejected by the Government. (Supreme Court said that in order to apply the rule of reservation there has to be plurality of posts).*

ABOLITION OF UNTOUCHABILITY (A.17)

- In Asaid Project Workers Case (PUDR 1982 case) the Supreme Court held that the fundamental right under Article 17 are available against private individuals and it is the constitutional duty of the State to take necessary steps to see that these FRs are not violated.
- Article 15 (2) also helps in the eradication of untouchability . Thus on the grounds of untouchability no person can be denied access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks, bathing Ghats, roads and places of public resort.

ABOLITION OF UNTOUCHABILITY (A.17)

The Protection of Civil Rights Act, 1955, prescribes punishment which may extend to imprisonment upto six months and also with a fine for any one, on the ground of “untouchability”. Religious disabilities like –preventing any person from entering any place of public worship or from offering prayers therein (S. 3) or social disabilities like access to any shop, public restaurants, hotels or places of public entertainment (S. 4) and refusing to admit persons to hospitals (S. 5) and refusing to sell goods or render services to any person (S. 6) .

ABOLITION OF TITLES(ARTICLE 18)

Article 18 prohibits the State to confer titles on any body whether a citizen or a non-citizen (*Military and academic distinctions are exempted*). Clause (2) prohibits a citizen of India from accepting any title from any foreign state. Clause (3) provides that a foreigner holding any office of profit or trust under the State cannot accept any title from any foreign State without the consent of the President. Clause (4) *provides no person holding any office or profit or trust under the State shall accept, without the consent of the President any present, emolument or office of any kind from or under any foreign STATE.*

Balaji Raghavan v Union (1996)

- **The Supreme Court held that the National Awards such as Bharat Ratna, Padma Bhusan and Padma Sri are not violative of the principle of equality. The Court said that National Awards do not amount to “titles” within the meaning of Art.18 and therefore not violative of Art.18. The theory of equality does not mandate that merit should not be recognized. The Court held that it is necessary that there should be a system of awards and decorations to recognize excellence in performance of duties including (fundamental) duties.**