AN ANALYSIS ON 'EQUALITY' AS A RIGHT

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'Equality' as a right is wholly unnecessary for what it protects would be protected otherwise too

ABSTRACT

In the rule of law, all person are equal before law, all of them shall be provided with equal protection of law; all the person of the country shall be under the ordinary law of the land and ordinary courts; the law shall be supreme and there shall be no arbitrariness. No one is above law, irrespective of his post or position. The right of equality conferred by Article 14 is not an absolute right. The state may enforce independent laws for different classes of people on the basis of the following classifications – [1] object and purpose; [2] geographical atmosphere; [3] special protection to the weaker classes of people for providing them social, educational, political or economic justice; [4] special courts and procedure; [5] tax-legislation; [6] demand of the time; [7] national/public interest, progress and development.

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I. Introduction

The constitution promises 'equality before law' to all citizens and prohibits discrimination on grounds of religion, caste, sex or place of birth. Equality of opportunity in public employment is guaranteed. Practice of untouchability is prohibited and made an offence. Conferring of title is also prohibited. This is especially significant in view of title like Nawabs, Rajas and Rai Sahibs which made distinctions of status before Independence.

In first foremost thing which need to understand the theme of the equality under the Indian Constitution. We have been reading this that there are phases in **Article 14 [*Equality[1] before law – The State shall not deny to any person equality before the law[2] or the equal protection of the laws[3] within the territory of India***]. One signifies general minimum equality that it is a principle of legal philosophy which is Supreme; it's not a rule of human races. And equal protection of laws conveys that law can very well treat individual differently if on what similarly situated are treated likewise. And then, there are possibilities of different sets of Laws regarding the subject topic. It has also been told that one is drawn from US constitution and another is drawn from Dicey's principle of rule of Law[4]. And so, what is the salient feature of the equality article under the Indian Constitution is an elaborative provision which are there in the parts, it does not start with or end with Article 14. The concept of Rule of Law will find in the preamble of the Constitution of India, which talks about the Equality of status and of opportunity. Art. 14 is the first Fundamental Right which talk about 'Equality', according to it,

[1] Black's Law Dictionary, Page 616 (9TH Edition) - Equality1 means the quality or state of being equal; esp., likeness in power or political status.
[2] Black's Law Dictionary, Page 616 (9TH Edition) - Equality before the law2 means the status or condition of being treated fairy according to regularly established norms of justice; esp., in British constitutional law, the notion that all persons are subject to the ordinary law of the land administered by the ordinary law courts, that officials and others are not exempt from the general duty of obedience to the law, that discretionary governmental powers must not be abused, and that the task of superintending the operation of law rests with an impartial, independent judiciary
[3] Black's Law Dictionary, Page 617 (9TH Edition) - Equal protection of the law3 means the 14th Amendment guarantee that the government must treat a person or class of persons the same as it treat other persons or classes in like circumstances. In today's constitutional jurisprudence, equal protection means that legislation that discriminates must have a rational basis for doing so. And if the legislation affects a fundamental right (such as the right to vote) or involves a suspect classification (such as race), it is unconstitutional unless it can withstand strict scrutiny.
[4] According to the concept of Rule of Law, if you, me or any human beings whether he is prime-mister, constable, or clerk who does an act which is not justified legally, also imposing some responsibility and treat similarly. Rule of law says that there is no particular government organisation which is supreme, in-fact there is always be supremacy of law.

we have to prohibit the unequal treatment[5] along with this we have to demand those Laws which afford the equal treatment. At that place there are five Articles – 14,15,16,17,18 and it communicates that a very elaborate scheme of quality protected by the Constitution which is also transformative in nature, Article. 17 – Abolition of Untouchability[6], Because with one shot of practice which has been in office for centuries had been made Unconstitutional i.e. a complete transform. If it is Elaborative in nature, then the nation had been clearly asked what to perform then the interference made by the Judiciary. If we all are aware, what necessitate, to do intervention from the out-side institute should be somehow in India with this understanding has not been reached. There are instances where judiciary had attempted to clarify. *for example – Judiciary had categorically indicated that Strict Scrutiny Test had no role/no place under the Indian Constitution, which is a well-recognized legal principle of an administrative state for examining state action relating to Affirmative Policy which related to affirmative policy wherein there is high onus on the nation to justify affirmative policy*.

The constitution must strictly scrutinize and what shall be the examination whether the policy of the government is not travelling to work against equality in a disproportionate manner. Thus, the onus is high along the state, whereas in the state itself has intrusted responsibility to provide for affirmative policy under Article 15 therefore, strict scrutiny test has no part to act as. In the case law **Saurabh Chaudhary v. Union of India**[7] "*the strict scrutiny test or the intermediate scrutiny test applicable in the United States of America… cannot be applied in this case. Such a test is not applied in Indian Courts. In any event, such a test may be applied in a case where a legislation ex-facie is found to be unreasonable*", Similarly in the case law **Anuj Garg v. Hotel Association of India**[8] "*on a harmonious construction of the two judgements, the Supreme Court must be interpreted to have laid down that the principle of 'strict scrutiny' would not apply to affirmative action under Article 15(5) but a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny*".

The court has mistakenly applied Strict Scrutiny Test, and no hesitation in also making this observation that it is the US constitution and forming of the US constitution which the considerable number of years gave legal authorization of this regulation. And besides, it is the

[5] No unequal treatment i.e. negative approach
[6] "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.
[7] (2004) 5 SCC 618
[8] Appeal (civil) 5657 of 2007

US constitution, which has all along made up of with century violated separate but equal, held in case law **Brown v. Board of Education of Topeka**[9]. Thusly, we can very well visualize equality doctrine under the Indian Constitution are the different play of law together.

II. The classification test as only for examining applicability of equality law.

Classification test came from the Latin state. Whether education of judge an important role in judges meeting, classification test, it is a good example, because judges of that time are more educated with the English law, American law and therefore they thought consistence to the part of Article 14. So, elaborative scheme under five articles, in this sub- part –

i. Indicate the minimum role of judiciary intervention

ii. Equality principle in the Indian Constitution has a different flavour where in reservation policy, affirmative action is to considered to be integral part of the equality doctrine where in injunction is considered to be a factor for promoting quality after Article 17, it is the instruction to the state abolished untouchability and instruction to the state that make that offence punishable

iii. And, there is a reason why Article 17 is featuring in sub-part of Article 14.

Equality is appearing to be a concept which is completely away from truth. It is greatest untruth practicing in the right. French constitution says every man is equal. So, when you say right to equality, any attempt to look at individual with this idea that everyone is born equal and free, would not in other words equality demand the question should be answered. Equality is an abstract concept but when we look at the implementation of this right it does not only talk about treating similarly situated alike but it also says those who are differently situated must be treated differently because if you treat differently situated alike that would result into inequality and when it comes to Indian Constitution, there are interesting illustration for the same, Article 17 all about abolition of "untouchability". Article 17 in very explicitly way address the issue of historical in justice and also symbolises the transformative character of the Indian Constitution because it had been accepted the practice all day until 1950s; and in one stroke it has been made Unconstitutional. Then what does this inverted comma signify, is it simply a grammar or more than that. Now, untouchability within inverted comma, no denial that

[9] 347 U.S. 483 (1954)

communicate a particular kind of practices which goes against the idea of equality not every level of untouchability. But at the same time not every kind of untouchability

for example – someone is suffering from communicable disease and is putted in isolation wall, then that would not amount to a violation of Article 17. Only for those who are in- connection with social injustice.

In fact, Article 17 is an important argument in the case law of **Indian Young Lawyers Association vs The State of Kerala**[10] by disallowing the women in the temple, not about Article 15 (1). But, also about Article 17 that it also connected with the untouchability which brings the issue of religious fact in the institution.

III. Equality is an abstract concept

So, therefore there is need of requirement, need to look at the possibility of involving different mechanism for attempting equality in the constitution. Somehow, we have adopted for the American principle as well as Dicey's Rule of law from the Iris constitution i.e. equal protection of law & equality before the laws. So, one is generic in nature, that it promises the Rule of law in the country. And the second, is taken from the 14th amendment of the American constitution when it says that similarly situated are treated alike and it is this test which has replaced our understanding of equality in the early eras. How can we understand equality with the help of test of classification and what is the test of classification is all about identify the Intelligible Differentia[11] and connecting into the objective of the law?

IV. Intelligible Differentia

The nexus with the object of the law. **Anwar Ali Sarkar v. The State Of West Bengal**[12], the court has said that it is the examination of Intenlligible Differentia nexus for equalising the application of equality doctrine that whether it followed or not. Now, this test of classification

[10] WRIT PETITION (CIVIL) NO. 373 OF 2006

[11] For example - Intengillible Differentia in a school, class 5th to 12th students having examination of science and also distributed the same question paper. Mean to say – class 5th student attempting the same question paper which class 12th student is attempting then, Does it fair for him? The answer is No because it is necessary to make different question paper for the class 5th student and for the class 12th student.
In other words – if we create a two group then there must be a REASON on which they should be differentiate. Thus, in this case Intelligent is the reason which must clear why we differentiate the class 12th student form the class 5th student.

[12] AIR 1952 Cal 150

adopted on the basis of the suggestion that there are two rules, and the court needs to address while applying the test of classification –

i. Problem of over exclusiveness and under exclusiveness because language has its own limitation and therefore with what objectively intelligible differentia is connected with the object how this correspondence is happening. In the case law **Chiranjit Lal Chowdhuri vs The Union Of India And Others**[13], *case where there is miss-management in a society, the govt. decided to take over the case. The true history of government intervention for bringing corporate governance in India. Now, in this case it was argued that this is not the only society also, the court said that the very uniqueness with this society is good reason for government to consider this case in isolation. This is the case of under exclusiveness. There are case where mismanagement is true but judiciary is not agreeing the invalidate the state action. The world is complex and there is a limitation and therefore with what objectivity classification has been done and how does classification is connected with object.*

ii. Second it says that, the court needs to differ with the rationality presented by the state so, that the onus was always on the petitioner who is challenging the constitutionality of the state action. Rationally which the state is presenting that should acquire the court and there is question is to what extent the court can independently examine the legislator clam and also it says that certain classification should be excluded that, if classification shall be presumed to be unconstitutional, when the state does, those level of classification then the degree of secretary by the court should be very mild. In order the invalidate the state action the review done by the court should not be an ordinary one because classification based on that area is presumed to be unconstitutional.

Illustration *– classification is done in the name of caste, race, colour. If classification is done I these grounds then it is to be presumed that they are unconstitutional and in relation to distinguish between American constitution and Indian constitution because under the Indian constitution, sudden classification is very well authorised by the constitution that is Article 15(4) and Article 16(4), classification is done in the name of socially and educationally backward classes of the citizens what is not in the case of United State.*

[13] 1951 AIR 41

And, that's why the very difference need to be questioned on such cases the Court says the classification that sudden category of classification is such that ought not be violated. They are of such category that they are not violated where is based on hostility/discrimination. For example, section 377 of IPC, classification based on discrimination intend the question has always been raised in the context of interpretation Article 15(4) that to what extent test of classification should be applied for giving effect… what can be offered? The way it has been applied it has effectively charged the language of Article 14. Within the territory of India provided the state action confers on the requirements for the test of classification. The second part been added through judicial interpretation. State shall not deny in this regard because the classification test has its own deficiency. It works on certain assumption that equality is to be addressed if valid classification is made.

V. Article 14 now reads as that state can deny and of a state deny such it would not violation of equality.

In what circumstance if it is all about complying with the classification and therefore we can very well say that classification test works on assumption. What is the assumption that quality is addressed if it complies with the valid classification? …can we say equality is all about comparison because classification is all about comparison. *If I say all there who are in the class, they are not allowed to attain the lecture on Tuesday, only those who are grouped together and the one who left out*. So, classification test strikes out the very root of unreasonable classification and the moment we say it unreasonable classification then the principle under equality article be applicable only when state is performing certain action. Because classification is all about over text of part of the state bringing in vertical relationship i.e. state and individual. So, classification test is all about examining the applicability of equality article in relation to state and individual. That's why the test of classification is rational one. Classification test currently over looked on the real impact in formulating evaluation of classification test.

Illustration – *US judgement validate "equal but separate" which has been rejected only in 1954 Brown v. Board of Education of Topeka, on the ground that it confirms the test classification that if separate school. Therefore, school reject for onus and look at American relation that what equality doctrine in 200 years.*

In 1954, they realise that "equal but separate" in conformity of equality article because it perpetuating the equality article with test of classification in two formalistic way –

i. Is there any intelligible differentia?

ii. Is there any nexus between intelligible differentia and the object?

The answer to both the question is Yes, equality principle is made but equality is all about this? The answer is No, one has also looked at the real impact because intelligible differentia is not about grouping individual together. It is also about transformative character of grouping because grouping is not in accordance with it. If it is the case of normative feature, then the test of classification which would be ordinally approached because of the norm laid down in the constitution. Such cannot be constitutionally sanctioned, religion, caste, gender could be ground to classify, but Article 15(1) bring the normative permissibility to classify. In the absence of Article 15, how does Article 14 bring in… as long as there is intelligible differentia, but Article 15 bring sudden constitutional norms that even if impunity appears to be valid classification. It can't be constitutionally approved because it goes against the norm laid down in the constitution and that's why it is said that classification test is too formalistic. In the classification test, there is not exercising the normative feature. In the case law **Dr. Subramanian Swamy v. Director, Cbi & Anr**[14] "*successfully challenge this amendment in the prevention of corruption act, what was its level that sanction to be obtained for prosecuting the senior officer. When no sanction is required for junior officers… the court invalid that amendment on the ground of corruption. So, the court at the normative correction of the difference and the differentiation cannot be validated through the valid test of classification*". Why junior officer and senior officer in two groups?

VI. Equality it is not incorporated in India and it… somehow started relating test of classification

The equality does realise that equality is not only about classification and refuses to address the concern of the equality which is the larger outline of the organization. Thus, there is an institution that the court has also started to challenge the very significance of intelligible differentia. In other words, the government has designed whether the sorting is done in person in whole or not? The court does look into the reasonableness behind this, similarly obtained in

[14] WRIT PETITION (CIVIL) NO. 38 OF 1997

the case law **Dalbir Singh And Others v. The State Of Punjab**[15], "*government had come up with the regulation at large in which addressed only to government employ, including public employ's admission to the college and government said that it is to help the government employ. The court didn't entertain this argument, that apparently appears to be a good classification in regard to the government employee. Should not include with the private employee, in the case of intelligible differentia but the court said that aspect at the object and so why the only available to the government employ is object is all about passing on education then why on this? The court said that this character of meaning classification was not permitted."* Thus, classification test does not comprehensively address the mild under the equality article and that's why court revisited the test and court held in 1972, **E.P. Royappa v. State of Tamil Nadu**[16], came to ***the new doctrine of equality***.

VII. The new doctrine of equality abolishes test of arbitrariness

The equality is not all about classification, it's not only about grouping few individual together and forgetting. Equality is all about examining the absence of arbitrariness in state action. It is not merely about the test of classification. On performing certain this by the state and then testing whether it is performed as per the classification. The equivalence is also an absence of arbitrariness, similarly held in *E.P. Royappa*, Article 14 is dynamic in nature, therefore it must not be ***Cribbed, Cabined, and Confined*** under the philosophical system should not be in away hierarchy the bringing of the Article 14 which is likewise known as new doctrine of equivalence. This test of arbitrariness, brought in a very instring inquiry that what is the attribute of this test, How the state action called as arbitrariness? –

i. Whether it is reasonable care test?

ii. Or, it should be a proportionality test?

And also, can it be supposed that every arbitrariness action is unreasonable because every arbitrariness action is not unreasonableness. At the same time, we can't say that all visible activity is non-arbitrary. Then, what should be the arbitrariness. Somehow the court has gone bad to clarify on this, as two case law mentioned above, are the best object lesson. Saurabh Chaudhary v. Union of India is the good example where *the test of classification appears to be excessive but not arbitrariness* while in the case law Anuj Garg v. Hotel Association of India

[15] 1962 AIR 1106
[16] AIR 1974 SC 555

it appears to be when the decision is arbitrary but then it is reasonable, *not allowing female employ to work in the Bar*. Seeming to be sort of reasonableness approach, but then it is arbitrary. Hence, it is really hard to get this distinction that when the action called arbitrariness and when the same activity is called reasonable why? … Because certain elements of discretion are always invested with the government at the challenge is more where the inquiry comes in with regard to analyzing the value of the legislative activity.

VIII. Can legislative action be challenged along the basis of the arbitrariness?

It is not in the question because the administrative decision always invokes the element of discretion and hence it can be just whether discretion is exercised in a test. Hence the legal philosophy which has delegated the discretionary power because if discretionary power is delegated then, it is exercised in pursuant to the law, there it can't be called as arbitrary or if it is in the pursuit of public advantage. Thus, when it comes to administrative decision not very hard to evaluate the arbitrariness, but what about the legislature action,

for example *– Can it be really argued that the law on triple talaq violates arbitrariness i.e. Equality campaign is an arbitrary law because it looks at trade of particular community arbitrariness; if dignity is all about the destination. That's why it should not be for other community, So, it can challenge or the law of arbitrariness and particularly when we look at the rights, which are available to to Muslim women, but from century they are much more advance to the rights which are available to Hindu i.e. In the issue of inheritance, spousal relationship, divorce, re-marriage, rights to Muslim women and more advantage and not having conservative of social conduct. Now-a-days, apparently answer became, No, because you can't attribute had intended for the law in other words arbitrariness is the mala-fide intended. Thus, we can't say, arbitrariness that on a lawmaker because the law didn't belong to party it belongs to the sevens. And if the answer is No, there are introducing a condition of applicability of the fact of arbitrariness which is not the case with classification test. Classification test informally applies whether it is legislative activity or administrative activity. Simply there are instances when arbitrariness in a direction it was applied i.e. Indirect applicability of the same, Similarly in the* ***Mithu v State of Punjab***[17]*, the court stated that it is mandatory death sentence [S.303 of Indian Penal Code, 1980] when a life convicted when it commits murder in unconstitutional because it takes away the discretionary power if the*

[17] (1983) 2 SCC 277 151

judiciary and death judgment of conviction should be presented in the curiosity of the rare event. Once more, similarly held in Mardia Chemicals Ltd. Etc. Etc vs U.O.I. & Ors.[18]*, Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr*[19] *these are the case law which is generally cited were in court has fallen down the legislative activity.*

Plainly along the ground of arbitrariness again the court has gone bad to elucidate on what are the salient feature on which arbitrariness should be looking at. The courtyard and the answer to this inquiry is the very way in ***Mohd. Ahmed Khan v. Shah Bano Begum***[20], triple talaq case, when the court stated that proportionality could be a factor to judge arbitrariness that if the action is disproportionate could be a factor of arbitrariness. Thus, how the journey takes place classification to arbitrariness to very proportionate. The subject topic of further research is whether scrutiny under the public law getting nearer to the administrative law because proportionality will totally base on the administrative law.

IX. Especially the way law is developing in relation to Article 14 v. Administrative discretion.

Applicability of principle of natural justice under Article 14, **Udai Ram Sharma And Others Etc vs Union Of India And Others**[21] application of legitimate expectation under article 14 all there are well principle related to administrative law, now, applicability of the principle under Article 14 in relation to legislative action, thus, under article 14 what we observe that equality is not examined solely in the light of law it if not just equality of legal philosophy. It is also equality of result; this Article 15 and Article 16 conveys the substantive characteristic of equality in a wider sense. They don't let the cat out of the bag near the equality in law if is not that always should be treated every one's equality, that's what the only intent to attain. It is also more or less equality of fact mean to say difference which are there that must also address and there any understood of equality in India only with article 14 would come. Evidently, a question come in that, how do we make a relationship between individualism in the establishment when it states a social justice because understanding of the equality must be produced only when we get a correspondence between two because when we look at article 14 apparently appears in a case of right confused to a person. Hence, individual by the court, but when we looked at equality of result, substantive equality the over the emphasis on the

[18] Transfer Case (civil) 92-95 of 2002
[19] 1966 SCR (3) 744
[20] 1985 (2) SCC 556
[21] 1968 AIR 1138

individual right brings in the challenge? That's the smart set is so structured that bringing in institutionalized hindrance, there are actual hindrance in the society of Institutional race[22]. Equality under Indian constitution hasn't been seen too formalistic pattern if develop on the understanding only with formalistic pattern, then we would be missing out a bit voluminous aspect of quality which is there in the constitution and thus, there is debate between institutional identity v. Group identity when we look at article 15 (1) and article 16 (2) served state can't discriminate on the ground of religious belief. Caste, gender, and so on, because this clear that institution is in normative limitation otherwise what could be valid classification this article said it unconstitutional. But when anti-discrimination one in hand and on the other hand, when you have a provision of affirmative action.

X. How do we await at the larger aim of equality?

If individual by the court then the group identity should not be taking on a role. Only if the group identity is a reason to deprive the opportunity of the individual into play when we acknowledge that if the group identity which as a cause of denying the opportunity could be education, economic, social. And if in the group identity which recognize cause then group identity also reason to remedy of violation because what we are talking about there are possibly impersonal and other is the characteristic of individuality which is very personal. When it is impersonal, then other are personnel one. And then, it is what personal character which are recreated on other personal character confused upon the sovereign choice of the individual that why we say it immutable characteristics. Thus, at that place is a valid ground on which state shall not discriminate. The ground which is designated in article 15 (1) and article 16 (1), that's why state shall not discriminate because of immutable ground and the other characteristic is which is personnel in bringing them, so there is an argument that the state policy which operates against the personal characteristic violates the rights of the individual, [reservation is the anti-merit]. Where does the reservation policy appear to be driven by group identity and group identity is a resolution of the institutionalized hierarchy which is being produced by the society

[22] From the ancient time, the biological facts may help to remind us just how new the political concept of equality really is. When we look at social species of animals, we discover that there is always a rank order. There may be "an alpha-male or an alpha-female", and all other individuals of the group fall somewhere below them in the rank order. The scientific revolution of the 18th century helped to promote new ways of thinking about equality. From the perspective of "Newtonian essentialism". It was only a small step from Newtonian essentialism to the moral proposition that all human beings are essentially equal, and therefore should have equal rights. Equality is not a characteristic of an object but based on some characteristics certain objects have in common. Hence, equality should not be viewed as a characteristic of a state, but rather as something that results from some property that the units that enjoy equality have in common, i.e. a common descriptive property

that structural hierarchy which is created by the society. And why this group identity issues? Why we should not suffer the same parameter which we inquire for judging equally in all because the parameter which we applied for assessing the equity of the individual. Why this not sufficient to come up to the injustice which results of structural hierarchy. Unfairness is not associated with anything which is changeless. It refers to societal approach; opportunity is being trusted. Equality of fact is that such desired is the violation equality in back. why this ordinary [rational test] is not good enough? Because is it too individualistic and thus it turns down to admit the well group which is existing, secondly, if too argues that we are seeing at the society an integral unit whereby our looking differences which are made but we are looking at one integral structure. Fairness test is too abstract because we are generalizing the trend of test of classification made by the nation but when we await at the equality from fairness approach alone than individualism. Which are prevailing can very easily be missed because too much always on fairness will neglect the factor of injustice, what is prevailing any mechanism to address theta injustice must not be based on individual approach because affirmative action address valid kind of injustice *for example* – I*t is the injustice of domination where then is undue concentration of force, there is injustice of subordinate alps, when it's not about power about state the social structural it as the such a way that material resource are desired to good group*. Hence, injustice of all above things Article. 14, ensures, fairness & equality. So, from the case law **State of Bombay v. S.N. Bansara**[23], we get the old doctrine – which gives two factors test i.e. Intengillible Differentia and Rational Nexus [Object]. And also, if we add Reasonableness in these two test Intengillibe Differentia & Rational Nexus then, it forms new doctrine that's why new doctrine target arbitrariness. In other words, if anything is arbitrary in nature then it opposes the equality thus, equality and arbitrariness are sworn enemies. And also because of this we have the concept of golden tringle between Art. 14/ Art. 19/ Art. 2.

[23] 1951 AIR 318