

Constitutional Law and Public Administration in India

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Week- 04

Lecture-06

Rights Against Discrimination – II

Article 16 is also part of the doctrine of equality under the Constitution of India. Article 16 declares that no individual shall be disqualified for or discriminated against in any government occupation or position solely based on religious belief, ethnicity, class, gender, ancestry, birthplace, residency, or a combination of these factors. It also authorizes parliament to enact legislations requiring residence in that Union Territory or State before appointment or employment in that Union Territory or State. While domicile or residency may be required for employment in a particular Union Territory or State, no government can discriminate in public employment, which means equal opportunity in public employment is to be given by the Constitution and is to be protected by the Constitution. At the same time, the question of reservation in jobs and position for the backward sections arises. There are four exceptions to the rule of equality in public employment and they are that, one, the Parliament can prescribe residency as a ruling or as a condition for employment of appointment. And as per the public employment requirement as to Public Employment (Requirement as to Residence) Act, 1957, there was till this law was prevalent in 1974. In certain states, this residence requirement can be brought about.

Secondly, the state can provide for reservation for backward classes, who are not adequately represented in the state census. So, reservation in public employment is an exception to the rule under Article 16. Thirdly, a law can provide that the incumbent of any office related to religious denominations, institutions or members of governing body should belong to a particular religion or to a denomination, which means it is not open employment, especially in religious and other denominations. It can be given to those members who are, of a particular caste, family etc. So, these are some things that are applicable to public temples. The state is permitted to make reservation up to 10% of its appointment in favour of economically weaker sections of the community. And that is how certain exceptions come into place under Article 16. Equally, Article 16 has its own set of controversy, especially with the Mandal Commission Report in 1992, where, in 1979 Morarji Desai government appointed the second backward classes commission under the chairmanship of B. P Mandal.

The Commission was appointed under Article 340 of the Constitution to investigate the conditions of socially and educationally backward sections of the community and suggest measures for their advancement. The commission submitted its report in 1980 and identified as many as 3,743 castes as socially and educationally backward in the country. They constituted nearly 52% of the population, but this is 52% excluding SC and STs, that is, scheduled caste and scheduled tribes. The Commission recommended a reservation of 27% in government jobs for these other backward classes, so that a total reservation of all SC, ST and OBC amounts to around 50% of government employment. It was after nearly 10 years in 1990 that Sri V. P Singh government declared reservation of 27% for OBCs. And in 1991, the Narasimha Rao government introduced two changes. One, they set preference to poorer sections among OBCs in the 27%. This is the economic criteria adoption the government brought in and reservation of another 10% of jobs for other economically backward sections of the community were not covered by the existing scheme of reservation. This resulted in the most famous case called the Mandal case of 1992, wherein the scope and extent of Article 16 sub clause 4, which provides for reservation of jobs for backward classes was examined thoroughly by the Supreme Court of India. The court rejected the additional 10% reservation for other economically backward sections of the community, but constitutionally upheld the 27% reservation for OBCs with certain conditions. However, it resulted in a protest called the Mandal Commission protest because a lot of people felt that they were left out from the category of 3743 socially and educationally backward sections of the community. This is the background to Article 14, 15 and 16. However, while talking about the Article 14, 15 and 16, it will be pertinent at this point of time to understand and note that Article 13 of the Constitution very clearly states that there cannot be any law that is inconsistent with or in derivation of fundamental rights and equality is a fundamental right. So, there cannot be a law in deprivation of the same. And hence, many attempts to understand Article 14, 15 and 16 in terms of the rule of equality have been made through our Constitutional history. For example, how do we look at Article 14 in terms of the non-arbitrary rule? Non-arbitrary rule very clearly means that administrative orders have to be reasoned orders. If they are not reasoned, they may amount to be arbitrary in nature and character. So, reasons must be stated why a particular decision is taken by a bureaucrat or an officer in government. And when the reasons are substantial in character, it amounts to good governance. So, public administration is bound by the rule of equality, the rule of non-discrimination and reasons for order are very important. If those reasons are absent, it would amount to a violation of Article 14. There are certain instances or examples of equality principles that must be applied and followed by all government agencies.

If there is a government university or a college, whether it can practice arbitrary admission processes or processes that are not fair or transparent. Generally, the educational department would be duty bound to follow an objective criterion for admission, wherever the demand is more than the number of seats that are available. So, admissions to even

government aided institutions or government supported institutions have to follow a transparent non-arbitrary fair manner of admission process. This condition cannot be compromised that is laid out by the rule of equality and hence there are several issues during the process of admission, and several court cases and challenges that have been taken from time to time. Reservation in educational employment or educational institutions is also provided for under the Constitution and hence the kind of admission through reservation has been challenged on many occasions as being violative of the Constitution. But what is necessary to look into is where arbitrariness comes in. Suppose the government is awarding contracts or what is known as government procurement; and while they award this contract, they are not doing it in a fair transparent manner, and it results in favoritism or nepotism.

The rule of tendering or fair procedure of procurement is not followed, it would be challenged as being arbitrary exercise of power and hence to strike down that kind of executive administrative action, the challenge would be on article 14 saying that the rule of equality, the rule of equal opportunity in public procurement has not been followed. So, anything in terms of regulating public administration, in limiting the power of public administration, in limiting the exercise of arbitrariness, Article 14 has been the Constitutional challenge that has been taken from time to time.

Another example could be allotment of government lands. Sometimes the government makes allotments. For example, there is a developmental authority that acquires land and then divides the land among the citizens, especially in urban areas or in the industrial areas. Whenever the government does allotment of land, it is the instrumentality of the state through any kind of authority or a body or an institution that is representing the government and the government ought to represent the will of all sections of the community and not just one section of the community. So, anything that is done to favor a particular caste, a community, a religion or anyone from a very sensitive political consideration or a background will result in exercise of arbitrary power. Now, these are instances where politicians or political parties or governments of the day engage in vote bank politics or schemes for furthering their own cause. To check such kind of arbitrariness where only one party is favored and the other has been annoyed and disadvantaged because of that kind of a governmental action, The rule of equality becomes the intervening factor for the court to come. One thing that we must understand is that there is always power or huge power in the. Wand without a doubt, with every power comes responsibility.

Lord Acton, a British historian, quoted that power corrupts and absolute power corrupts absolutely. Where there is power, there is obviously some kind of discretion in public administration. And that discretion sometimes is abused, because of the tendency of human beings to be pulled and pushed towards different sides because of so many considerations. The considerations could be family, it could be society, it could be caste, it could be religion, and to a larger extent, it could be empowered through a force or authority of some

superior bodies. So, to check those pulls and actions, the rule of equality has been a very important factor.

There is a tendency of public administration to be biased. The rule of bias is a rule of public administration, it is a rule of public policy which should not be exercised. Now, biases can be of several kinds viz., personal bias towards individuals, subject matter bias, and when someone thinks he is involved or belonging to a town, city, or village, then also there is a tendency to be biased. And when there is some kind of bias, it will result in infringement of the rule of equality. There is clear evidence in our Constitutional history of the biases that have been applied from time to time. Article 14 does to a larger extent in terms of good governance, bringing in what we call as the principles of natural justice that must be followed in public administration.

It is highly necessary to be very objective and follow the natural justice principle in administrative action, ensuring good governance. And anything that is done in contravention of the principles of natural justice would be alleged to be in a mala fide manner, not bona fide. Bonafide means in a good faith, and malafide means in bad faith. The rule of equality very closely touches what we call the doctrine of fairness and the doctrine of good faith. Not only should one act fairly but must behave in a manner that ought to be fair. So, it is not fairness in terms of just the substantive nature of the order, there must be procedural fairness. Fairness has two components namely, the actual fairness and the procedural fairness. Hence, good faith is a principle that applies to all activities of governmental action. And this is the rule that must be applied from time to time. It is often wondered why the rule of equality has the rule of fairness and good faith. It is for the simple reason that very often than not, it comes to notice that certain classes of citizens and communities and society tend to have special treatment sometimes. Caste politics in India is a reality.

And you recognize the caste to be so strong that the leaders and the politicians of the same caste tend to favour their own class of individuals. Because finally, they are looking at being voted again into power. And hence, special treatment to certain castes who have occupied the seat of power has always been the tendency of policymakers sometimes. And this has been more aligned to legislative actions, which have extended to executive actions as well. So, the court has been a very good observant of these kinds of misuse and abuse of power and trying to grant special status and privilege and immunities to certain kinds of individuals in the society.

And that is where the limit has been something that has been checked by the application of Article 14 in the Constitution. There have been many instances of arbitrary actions in the government that have been taken to the court. For instance, suppose you are applying for a passport and you have been denied that passport without any reason, not based on any kind of rule book, rule of law is not followed, but it is the biases of the officer that has been

applied in denying your passport. Can such an action be challenged in the court of law as being violative of Article 14? Absolutely. Similarly, there have been a lot of wrong actions which have been taken by so many agencies in the government, where the application of the principles of fairness, good faith and equality have not been applied.

Can all of these then result in an action as to the violation of fundamental rights? The answer should be found in Article 14. If we look at privileges or resources as being granted by the government. Now, very often they are not because there is political pressure and political compulsions. Issues like water sometimes have been discriminated against. The government allocates water only to certain sections in the community, certain villages, certain privileges, certain people who can afford it sometimes or certain institutions who can afford it and not give it equally to every individual.

Various uses of water are the basic essence of life and any discrimination of the use of water simply cannot be barred under democratic Constitutional values of principle. The underlying principle of Article 14 is that any governmental action must be clear in terms of what objective it tends to serve and any discrimination that the government will attempt to enact or follow will be struck down as being arbitrary and violating Article 14. Going forward, we will witness various governmental initiatives. These could be initiatives that require a certain amount of certainty and a certain amount of uniformity in its application. This is particularly in case of disinvestments or allowing investments or allowing businesses.

A lot of businesses in India may find governmental actions to be arbitrary and favoring only one group of individuals and not favoring or giving equal opportunity to deliver. So, when governments have applied the rule of bias towards businesses or businessmen and trying to promote a certain category of individuals to make profits, those sections of the community have to be checked and the government also has to check its action in applying the rule of fairness in promoting businesses as well.

The rule of equality is about equal pay for equal work and this very clearly brings in gender justice to a larger extent and gender justice is a critical and important component of equality and it is not equality only in educational institutions at the time of admission, it is equality in public employment at the time of joining service; and it could be equality to be treated at the time of promotions as well. So, administrative actions that violate equality come under the scrutiny of the court and any such actions that are based either on a statute or some kind of an administrative executive action which is something that violates the principles of the Constitution are set aside by the courts and the courts have a very clear rule of intervention wherever unequal treatment has been applied, where inequality is practiced, where the actions are poorly unjustified, unconstitutional or tend to be arbitrary. Therefore the so called exclusionary exercise of administrative action are definitely not

something that the courts are going to entity. There are many such instances and cases of intervention by the courts.

This could be in terms of the issues of granting aid to certain kinds of institutions, granting coal licenses and resource licenses. In terms of interpretation of law which sometimes tend to be one-sided or arbitrary, it is quite acceptable as a democratic value, as a Constitutional value that citizens have a legitimate expectation from the government to act fairly. This is a legitimate expectation. Naturally, if you are a person with authority, with authority comes responsibility, with responsibility comes the duty to act fairly and the duty to act in a non-arbitrary manner. The doctrine of legitimate expectation is that any kind of governmental action is non-arbitrary, it is fair, and it is non-discriminatory as well.

Why is the rule of equality so stressed upon and why we speak about it so much in terms of Constitutional values is often questioned? One reason is that India is quite a big nation, it is a big country with a lot of pressure on population, growth, and employment; and government employment is often preferred by citizens as being secure. Government employment has its own privileges. Secondly, in terms of aspiration, there are different state governments and different kinds of activities that happen across the country. India has a vast economic and a social fabric. So, getting into government contracts, getting into government largesse, getting the government to give you licenses is quite huge for people and that is the trajectory of growth in many businesses as well.

So, government is a mechanism for growth, government is a catalyst for growth, and sometimes government is the growth itself. Without the licenses, permissions or without partnerships with the government, businesses cannot flourish. And hence, the government is not only giving employment to citizens directly, but it is also giving businesses an opportunity to make profits and make market conditions quite suitable to the economy. It is widely common that disparity may be practiced. Disparity in terms of who to be employed, when to be employed, disparities in terms of which companies should be allocated what kind of resources etc.

There is a huge amount of disparity in seeking the government grants, because approaching the government in India itself becomes a challenge like who can approach and what can be done so. There is a lot of quid pro quo, unlike a mutual personal favor, and when this happens, this is one form of corruption. Corruption is not only to be named in terms of money exchange. Subjectivity can also creep in from time to time. People's legitimate expectation for the government to act in a fair manner is critical and important. That is something that everyone looks up to in government. It is also noticed that we as citizens have the right to claim equality. And the claim of equality is against illegality. So, any practice of inequality is nothing but illegality. Inequality and therefore illegality violates the principles of the Constitution. It violates the directive principles of state policy, which the states are duty bound to follow. And equality is rooted as the foundation basic feature

of the Constitution for which any kind of compromise is not permitted. This also stems from the fact that the government has the policy discretion to make from time to time.

There are certain policy considerations, and the government may be forced to make certain policy exemptions. Say, tax exemptions, sometimes it must be made for a certain section of the community. So, there are those kinds of parameters that can be justified, obviously, as the exceptions to equality because again, we must accept that the rule of equality is not an absolute rule, exceptions are apparently not only recognized in the Constitution, but also can be justified as reasonable exceptions or reasonable classifications. However, the term here becomes very important. If there is a public policy justification for that kind of reasonable classification, then the courts may allow you to deviate from the absolute rule of equality whenever it is found necessary and whenever it is found intelligible to do so in terms of our practices.

So, speaking of intelligible differentia; this is the rule of law, intelligible differentia can be practiced making the distinction in terms of the classification. If you have an intelligible differential treatment to be given to a group of individuals within that group you want to divide and classify them, then with proper public policy consideration, it can still be done so. So, that also has been merited through various cases that have been pronounced by the court from time to time. Looking at Article 16 of the Constitution of India, one will understand that the rule of equality which is basically laid down by Article 14 is extended to Article 16 of the Constitution as well. However, in Article 16, it is specifically for equality of opportunity in public employment.

The term equal opportunity in public employment is quite subjective in nature and can differ in terms of its interpretation. It is the duty of the state while it tries to ensure equality to remove any forms of discrimination that may exist to create equal opportunity not only to the backward sections of the community, but also to every person who may be seeking public employment. However, Article 16 has been referred to as this article that talks about affirmative action, which means that the state must go and do positive obligation. They must use Article 16 to render social justice. They must provide for a quota, a benefit to a particular section which is considered backward or maybe a minority group. And through affirmative action in public employment, for the elevation of backwardness and to protect the interest of minorities, Article 16 can be used by the state. And hence, Article 16 sometimes is also called positive discrimination. But the word discrimination is not positive in any other sense. So, whenever Article 16 is used, it is used for some kind of affirmative action in providing for some kind of reservation in public employment. Of course, the state in India is a great opportunity for public employment.

So, a lot of people look up to the state services for many reasons because there is security of tenure, there is doctrine of pleasure under the Constitution of India, which states that one can only be removed by the rule of law. And the state provides opportunities and

employment in various sections of governance and public administration. But that is not all. The Constitution and the provisions of Article 16 apply to even public sector undertakings, which are government companies and government corporations. So, a government post is usually some kind of a preferred position for many youths in the country.

It is the duty of the government to make suitable conditions of employment to achieve the purpose of the Constitution. Public employment is not just public employment, we must understand that it is also public service. This is often something that is lost in terms of the loyalty to the state. Public service means that such a person is not a government servant, but you are a public servant. And this means that, when you are going to be taken by the state, you must fulfill certain minimum educational qualifications required for that even post. Certain kinds of post would require physical purposes, mental stability, or a certain sense of moral integrity that must be stated and proved before being inducted into public employment. Also, public employment may differ in terms of its terms and conditions. So, it is not going to be uniform. Central public employment will be slightly on a different term and condition and may differ from state to state. In terms of the period of employment, in certain states, the superannuation is at 58. It has not been extended to 60. In certain states, it has been extended to 62. Whereas central government employees may have 65 as superannuation age. For example, judges of the Supreme Court retire at 65, judges of the High Court retire at 62. So, these are differential employment terms that may exist in public employment.

Equality is not spoken in respect of those terms and conditions. But, there should be equal opportunity. This is specifically what Article 16 speaks about. It is interesting to note that while this clause was applicable in judgments like the *Indira Sawhney v. Union of India* case, a Supreme Court judgment of 1993, it was confined only to initial appointments. The court said that there cannot be reservation in the matters of promotion. However, today, such kinds of reservations have been extended. And that has become a matter of Article 16. Article 16 can be invoked for issues like salary, when equal pay for equal work. Article 16 has also been invoked for leave, provident fund, gratuity, and other purposes, which look at the term equality in its larger context. There are many cases that have been decided under Article 16. However, there is a positive obligation on the state that it cannot discriminate between two individuals, or two classes of individuals based on caste. Caste cannot or should not be the sole criteria of public employment, neither religion, sex, birth, color, etc.

The Constitution also provides for what is called compassionate employment. While the Constitution does not expressly say so, the Constitution has been used to seek compassionate employment. If a person who is in public service or who as a public servant dies during service, compassionate employment is generally provided to a member of the family. But it must be kept in mind that compassionate employment can be claimed as a

matter of right. Hence, the rules and conditions of public employment will be extended to compassionate employment as well.

Coming to the different case studies in which this has been done, most cases of government employment have been challenged under Article 16, including issues of voluntary retirement schemes that have been promoted by certain entities of government from time to time. So, a voluntary retirement scheme is an interesting thing that happened in the 1990s, where to reduce the number of people and the final pay burden of the state, a lot of people were given this offer to retire on their own by giving a golden handshake. And who is entitled to the VRS is a matter of rule and sometimes it is a matter of discretion. And where equality has not been applied, they have challenged the same way for the court of law and the court had to look into the matter as well.

Article 16 can also be invoked in matters of transfers of public servants. It has been often used because very often the rules of transfer are not adhered to. Transfers are generally taken as a punitive action against officers, with ulterior motives. Hence, Article 16 has been used because equality means rule of law that must be followed in all sections of the community. Article 16 has also been used for determining seniority, because it is a very important element of getting very decorated positions in government. So, the decision on seniority list, on promotions and senioritis, all have been taken in, if suppose there is a grievance and have been treated through the mechanisms of invoking the provisions of Article 16 of the Constitution of India. Revision of pay keeps happening with a lot of pay commissions. And sometimes, there is no equal treatment on the revision of pay. Those aspects also have been taken due note under the provisions of the Constitution.

Moving to Article 17, which talks about abolition of untouchability, it is very important to understand that this article tries to clearly state that the practice of untouchability is forbidden. There are also special legislations under which any such practice of untouchability in any sections of the community shall be a pernicious offence. It is a known fact that untouchability unfortunately was a kind of a stigma and a practice in this country for a long period of time. However, the parliament enacted the Untouchability Offences Act of 1955. And the principal object of Article 17 gets reflected under this Act called the Untouchability Offences Act of 1955. Untouchability created several social disabilities, because untouchability meant that a section of the community had to be segregated from another section.

To a larger extent, there were social boycotts, like two different water wells that had to be used. This was nothing but a form of caste discrimination in the country. The living conditions of untouchables during some of the early days were very pathetic. They were denied a lot of basic civil liberties and civil rights. The Constitutional recognition of the ban on the practice of untouchability conveys a very important message of social equity and equality in the country. The term social equity is used because it is important that

resources like water are equitably distributed to all sections of the community, irrespective of their caste, creed or culture. So, that becomes the central point and theme of the rule on untouchability. Importantly the practice of untouchability is an offence, not only of the state or state entities, it is an offence that can be also committed by a private citizen or private individual. And hence, this law under Article 17 that says, the practice of untouchability is forbidden, applies to private individuals as well.

So, as per Article Section 17 everyone irrespective of his caste, race, creed, or place of birth has every reason to be treated equally before the law and has every reason to gain equal protection of the law. The Constitution of India through Article 17 clearly send this message that when it comes to morality, when it comes to health or public order, everyone as a citizen of India has the right to be treated equally. So, the race, the color of your skin, ethnicity, your origin, your backwardness, you're being a tribal, does not matter. So, equality then becomes a very important element of the proposition of law.

Article 18 of the Constitution of India talks about abolition of title, no citizen of India shall accept any title from any foreign state, except with the previous sanction of the government of India. And no title not being of military or academic distinction shall be conferred by the state. No person who is a citizen of India while he holds any office, except without the consent of the President, shall accept any title from any foreign state. No person holding any office of profit or trust under the state shall without the consent of the President accept any present embodiment or gift from any foreign state. So, abolition of title is also very, very important.

However, the government of India comes up with different kinds of awards like Bharat Ratna, Padma Vibhushan, Padma Bhushan, and Padma Shri. These are called the national awards. And these awards are not amounting to any kind of a title within the meaning of Article 18 of the Constitution of India. This was decided in the case of Balaji Raghavan who was the General of India in the year 1996 by the Supreme Court of India. National Awards like Bharat Ratna or Padma Vibhushan, Padma Bhushan, and Padma Shri, are not like suffixes and affixes nor prefixes.

Though these national awards are granted and the person receiving is addressed as, say, Padma Shri etc., they are not really titles. Hence, the reason why there is abolition of title is it has some kind of historical reasons or significance. The in India had this title called the Maharaja or Raj Bahadur or Rai Bahadur. The Diwans had titles, the kings had titles, ministers had titles. These titles are no longer given; a lot of these provinces and territories were brought into mainland India. And it was important to give the declaration that once you have given this territory to India, you no longer are the Maharaja of that kingdom. And that is the reason the abolition of titles becomes very significant.