

Right to Equality

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Equality as a fundamental principle governing rule-making and rule-application plays a central role in most modern constitutions and international human rights instruments.¹ Egalité was one of the proclaimed goals of the French Revolution; and in the first clause of the 1789 Declaration of the Rights of Man and of the Citizen it is declared that “Men are born and remain free and equal in respect of rights.” The Fourteenth Amendment to the United States Constitution, which was adopted to entrench the outcome of the Civil War, but has since been applied to areas other than race, stipulates that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The International Covenant on Civil and Political Right adopted in 1966, stipulates in Article 26 that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The philosophical issue

Equality is a major component of most theories of justice. For some philosophers, the very touchstone of justice is equality. Aristotle tells us that “Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal”. And the concept of justice advocated by John Rawls was summed up as follows:

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¹ P.G. Polyviou, *The Equal Protection of Laws*, (1980).

“First principle - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar set of liberty for all.

Second principle - Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity”.²

Equality, as Professor Laski says, does not merely mean absence of special privileges. It means that adequate opportunities are laid open to all. Every citizen according to this right has the inherent right to enjoy all the facilities provided by the state, or to occupy any position of honour or eminence in the service of the State. Bentham's maxim, “Each to count for one, nobody for more than one.” supports the idea of equality. Besides, equality is the underlying theme in the central doctrine of AV Dicey's Rule of Law, which second proposition states ‘Equality before law and equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.’

The principle of equality is implicit in the concept of human rights, as belonging to all human beings, and therefore to all equally. The assurance of equality in the enjoyment of rights occupies a central place in international human rights law, as well as in the constitutional law of many states.³ The principle of equality is recognized in the UN Charter, which affirms that one of the organization's purpose is to “achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴ The idea of basic equality connotes that, for normative purposes, the range of humans is not subject to any fundamental differentiation along the lines of the differentiation that some people maintain between humans and animals. We humans are all basically alike.

Types

1. Formal Equality

Formal equality is a belief that, for fairness, people must be consistently or equally treated at all times.⁵ Formal equality appears as a written set of laws and rules in legal instruments. Formal equality operates on the idea that all

² JOHN RAWLS, A THEORY OF JUSTICE, at 302, (1971).

³ LOUIS HENKIN et al., HUMAN RIGHTS, Foundation Press, New York, at 1025-1026, (1999).

⁴ UDHR, Article 1(3); Vide also Article 13(b) and 55(c), as well as in the UDHR Article 2, and in all of the comprehensive Human Right Convention.

⁵ <https://study.com/academy/lesson/formal-equality-vs-substantive-equality-in-the-workplace.html>.

people should be treated as the same. It applies equally to all human beings without due regard to practical exigencies. Therefore, its practical application has probability of yielding unequal results among unequal. One example happens when positions open to all (qualified) candidates available for hire. This means any person with a fair application has a chance of getting the job.

2. Substantive equality

It requires that laws themselves take account of meaningful differences between persons: who in fact are equal be treated equally, but that unequal circumstances be treated differently. Substantive equality goes beyond the basics of recognizing the equality of everyone and identifies differences among groups of people with the long-term goal of greater understanding.⁶ This version of equality itself possesses differing not embodying substantive values but merely requiring non-reasonable differentiations between persons; egalitarian conception of society and accordingly demanding redistribution in order to ensure true equality; or a somewhat meaning, as requiring that persons be treated with equal respect.⁷

3. Structural equality⁸

By structural equality is meant constitutional not prescribe or oblige certain substantive outcomes but rather require that legislation be enacted, executive measures decisions reached a certain way, and where one objective provision is to prevent inequalities. Thus, the democratic nature dictates a “one person, one vote” standard, and candidates have every reasonable opportunity to the electorate. And the adversary nature suggests that all citizens have a “right to counsel” in serious controversies.

4. Complementary equality⁹

By complementary equality is meant aspects of substantive rights guaranteed in constitutions that have a distinctive egalitarian thrust. The “Fundamental Rights” provisions of the Constitution contain some express references to “non-discrimination”, which is the equivalent of equality. Thus, laws regulating the guaranteed “liberty to exercise the rights” of free expression, assembly and association must “contain no political, religious or class discrimination”;

⁶ *Ibid.*

⁷ M. Forde, *Equality and Constitution*, IRISH JURIST, (New Series, Vol. 17), at 300, (Winter 1982).

⁸ *Ibid.*, at 302.

⁹ Forde *Supra* note 7, at 305.

and, in guaranteeing religious freedom, the State undertakes, inter alia, not to “make any discrimination on the ground of” religion, and, in providing aid for schools, not to “discriminate between” schools managed by different religious denominations.

Equal Protection: USA

Virtually no legislation applies universally and treats all persons equally; all laws classify or “discriminate” by imposing special burdens or by conferring special benefits on some people and not other.¹⁰ The US Constitution guarantees ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’¹¹ This provision aimed to abolish slavery and establish civil and legal rights for black Americans as equally as the white Americans. It granted citizenship to all persons born or naturalized in the US, including former slaves, and guaranteed ‘equal protection of laws’.

Equal protection clause, primarily meant for doing away the evils of racial discrimination and segregation, later became the basis for several landmark Supreme Court decisions over the year. The cases like *Plessy V Ferguson*¹² and *Brown V Board of Education*¹³ are concerned with racial segregation between blacks and whites. In *Plessy V Ferguson*, Supreme Court advanced ‘separate but equal’ doctrine for assessing the constitutionality of racial segregation laws. In declaring separate-but-equal facilities constitutional on intrastate railroads, the Court ruled that the protections of 14th Amendment applied only to political and civil rights (like voting and jury service), not “social rights” (sitting in the railroad car of your choice). The majority opinion goes like ‘Separate treatment did not imply the inferiority of African-Americans but merely was a matter of state policy.’ The separate-but-equal doctrine, which segregated blacks from white people in all social life, continued to exist until it was overruled by *Brown V Board of Education*. The unanimous decision of the case states, “... in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.”¹⁴ Therefore the case actually

¹⁰ CONSTITUTIONAL RIGHTS & CIVIL LIBERTIES, at 1054.

¹¹ US Constitution 14th Amendment passed by Congress in June 13, 1866 and ratified in July 9, 1868, Sec. 1.

¹² 163 US 537, 16 S.Ct. 1138, 41, L.Ed. 256 (1896).

¹³ 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

¹⁴ Key Excerpts from the Majority Opinion in *Brown V Board of Education*.

established the racial equality and guaranteed equal protection to political and civil rights and social rights equally. The decision clearly has established that law and constitution know no-class and 'Constitution is color-blind and neither knows nor tolerates classes among citizens'¹⁵. Further in *Loving V Virginia* (1967)¹⁶, by declaring Virginia's anti-miscegenation law unconstitutional, the Supreme Court ended prohibitions on interracial marriage and dealt a major blow to segregation.

Regarding gender equality, *Reed v Reed*¹⁷ opened the door for challenging discriminatory laws. It marked the first time in history that the Supreme Court applied the Equal Protection Clause to strike down a law that discriminated against women.

Equality in India

The constitution of India guarantees the Right to Equality through Article 14 to 18. Article 14 iterates, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'¹⁸It clearly outlaws discrimination in a general way and guarantees equality before law to all persons. However some specific provisions against discriminatory behaviors are covered in subsequent Articles. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 guarantees to citizens equality of opportunity in matters relating to employment or appointment to any office under the State. Article 17 abolishes "untouchability" and forbids its practice in form, and Article 18 abolishes titles, other than a military or academic distinction.

In Indian judicial system, a concomitant development of the 1970s is the expansive interpretation of the right to equality.¹⁹ Towards the end of 1973, Bhagwati J, in *E.P. Royappa v State of Tamilnadu*²⁰ expounded on the concept of equality inscribed in Article 14 as follows:"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 of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to 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

¹⁵ Key excerpts of dissenting opinion of Justice Harlan in *Plessy V Ferguson*.

¹⁶ 388 US 1, 87 S.Ct, 1817, 18 L.Ed. 2d 1010 (1967).

¹⁷ 404 US 71, 92 S.Ct 251 (1971).

¹⁸ THE CONSTITUTION OF INDIA, Art. 14.

¹⁹ Anand M. Bhattarai, *Access of the Poor to Justice: The Trials and Tribulations of ESC Rights Adjudication in South Asia*, NJA LAW JOURNAL, Special Issue, National Judicial Academy, Hariharbhawan, Lalitpur, at 6, (2012).

²⁰ AIR SC 555, (1974).

unequal both according to political logic and constitutional law and is, therefore, violative of Article 14.”

In *Madhu Limage V Superintendent, Tihar Jail, Delhi*²¹, it was held that difference Indian and European prisoners in the matters of treatment and diet violates Article 14. In another instance, the government once announced a liberalized pension scheme for retired government servants but made it applicable to those who had retired after March 31, 1979. This provision was held to be discriminatory as violating Article 14 in *D.S. Nakara v Union of India*²², as all pensioners form one class for the purpose of revision of pension and division of pensioners into two classes on the basis of date of retirement is not based on any rational principle. Similarly, a gender-discriminatory law was struck down in *Air India v Nergesh Meerza*²³ case. In this case a regulation providing for termination of service of an air-hostess in Air India International on her first pregnancy has been held to be arbitrary and abhorrent to the notions of a civilized society.

The scope of Article 14 extends to the tax laws too. Tax laws must pass the test of Article 14. However, taxing statutes enjoy more judicial indulgence because picking and choosing within limits is inevitable in taxation. The courts adopt a more tolerant attitude towards a tax law. The Supreme Court in *State of Andhra Pradesh & Anr V Nalla Raja Reddy & Ors*²⁴ declared void land revenue imposed at a flat rate on land without taking into account the quality or productivity of land.

Right to Equality: Nepal

The notion of equality has taken its root and advanced in Nepal ever since the inception of Government of Nepal Act 2004 (1948). The level of defacto realization of equality is a matter of research, however the de jure provision kept on advancing and becoming more luculent in a fashion that the equality provision is more progressive in existing constitution than that in the previous one. The equality provision of existing Constitution of Nepal is consistent with and its wordings are much inspired by provision of ICCPR Article 26.

The existing Constitution of Nepal guarantees Right to Equality in Article 18. The provisions of Sub-Articles 1 to 5 of Article 18 guarantee general as well as specific equality along with privilege of affirmative action. Article 18(1) reads, ‘All citizens shall be equal before law. No person shall be denied the equal protection of law.’ Two concepts are involved in it, viz; ‘equality before law’ and ‘equal

²¹ AIR 1505, (1983)

²² AIR SC 130, (1983)

²³ AIR SC 1829, 1853, (1981).

²⁴ AIR 1458, SCR (3) 28, (1967) .

protection of law'. The first concept 'equality before law' is equivalent to the second corollary of the Dicean Rule of Law. It is the negative concept which ensures that there is no special privilege in favor of anyone, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. The second concept 'equal protection of law' is positive content. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country irrespective of difference of circumstances. Simply, what it postulates is that like should be treated alike in similar situation. The provision of Article 18(1) corresponds to the equal protection clause of the 14th Amendment of the US Constitution and Article 14 of the Indian Constitution.

Sub-Articles (2) and (3) prohibit discrimination of all kinds in application of general laws and by the State to citizens on any grounds. Proviso of Sub-Article (3) leaves the room for affirmative action for the protection, empowerment and development of the citizens including the socially or culturally backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, Muslim, oppressed class, Pichhada class, minorities, the marginalized, farmers, labours, youths, children, senior citizens, gender, persons on pregnancy, incapacitated or helpless, backward region and indigent Khas Arya. Sub-Article (4) guarantees equal pay for same work irrespective of gender. It reads, 'No discrimination shall be made on the ground of gender with regard to remuneration and social security for the same work.'

Sub-Article (5) which reads 'All offspring shall have the equal right to the ancestral property without discrimination on the ground of gender.' is the most progressive provision. The word 'offspring' is gender-neutral and thus the provision ensures gender justice in matters of ancestral property. It would not be an over-exaggeration to call this provision an historic achievement achieved through long struggle of gender-equality in Nepal. In, fact, this sole provision suffices the existing Constitution of Nepal to stand best alone and among the most constitutions of democratic countries including USA and India.

Landmark cases on Right to Equality

1. *Iman Singh Gurung V. Government of Nepal et al.*²⁵: In this case, Section 1(3)(D) of the contemporary Military Act, 2016 B.S. which prevented Iman Singh Gurung from seeking justice through the regular court system was declared to be inconsistent with the equality provision guaranteed by Article

²⁵ NKP Decision Number 4597, Vol 7 at 10, (2049).

11(1) of the Constitution of the Kingdom of Nepal, 2047 B.S. and was declared void by the court. Through this case, Supreme Court reaffirmed that every citizen, irrespective of their post and position, can seek legal remedy from the ordinary court of land.

2. *Man Bahadur BK V Nepal Governmnet et al.*²⁶: the Supreme Court declared No.10(A) of Chapter of Miscellaneous of MulukiAin, 2020 B.S. as it was inconsistent with the constitutionally guaranteed Right to Equality.
3. *MeeraDhungana V Mininstry of Law, Justive & Parliamentary System et al.*²⁷: The Supreme Court issued a directive order to the government to enact within 1 year, imparting equality of women in the ancestral property of parents, after consultation with the concerned stakeholders and organizations. SC declared No.16 of Chapter of Partition inconsistent with Right to Equality.
4. *Reenabajracharya V Nepal Airlines Corporation et al.*²⁸: SC declared Rule 16(1)(3) of Royal Nepal Airlines Corporation Service Regulation 2031 void ab initio as the provision is against the Right to Equality.
5. *BaburamPaudel V Government of Nepal et al.*²⁹: SC interpreted that while using discretionary power it should not be used arbitrarily upon whim and caprice, equal should be treated equally.
6. *MeeraDhungana V Ministry of Law, Justice & Parliamentary System et al.*³⁰: This case criminalizes marital rape. Criminalization of marital rape is consistent with emerging trend of human rights. Whether rapists are intruders or kin, they must be subject to equal treatment by criminal law.

Conclusion

Equality is the prerequisite of justice in every legal system. It has been recognized as one of the fundamental principles of modern democracy and government based on the rule of law. Quoting Judge Lauterpacht: "The claim to equality before the law is in a substantial sense the most fundamental of the rights of a man. It occupies the first place in the most written constitutions. It is the starting point of all liberties."³¹ However, mere presence of de jure equality does not suffice to fully realize de facto equality in real world unless the related ideas like identity right, property right and liberty are guaranteed. This fact is vividly clarified by several landmark cases in USA, India and Nepal.



²⁶ NKP Vol 1 at 110 (2049).

²⁷ NKP Decision Number 6013, Vol at 462, (2052).

²⁸ NKP Vol at 376, (2051).

²⁹ NKP Vol 1 at 143 (2049).

³⁰ Writ no. 55, D.D. 2059/01/19 (2058 B.S.).

³¹ Sir HerschLauterpacht, *An International Bill of the Rights of Man*, at 115, (1945).