

A brief containing arguments along with supporting case law on the issue of 'discrimination' dealt under Article 25 of the Constitution of Islamic Republic of Pakistan is attached herewith for guidance of all.

The issue in hand involves the matter relating to taxability of judicial allowance of lower judiciary. Brief has been prepared in response to Hon'ble Supreme Court of Pakistan's remarks/observations, during the hearing of the case, regarding treatment of judicial allowance of lower judiciary at par with that of superior judiciary in terms of clause (56) of Part I of Second Schedule to the Income Tax Ordinance, 2001.

The brief elaborates the concept of reasonable classification on the basis of intelligible differentia and indepth answers the question regarding 'discrimination' on this account in negative.

All field formations may benefit from the line of arguments in any pending/future issue regarding discrimination.

Case law Analysis on Article 25 of the Constitution

1. Article 25 of the Constitution provides for equality before Law and entitlement of equal protection of Law. This Article has been subject to judicial scrutiny and the Supreme Court of Pakistan has upheld that state is not prohibited to treat its citizen on the basis of reasonable classification (I.A. Sherwani and others). **1991 SCMR 1041**
page 1081-P
- 1.2 Equal protection of law does not envisage that all the persons are to be treated alike in all circumstances but contemplates that persons similarly situated or similarly placed are to be treated alike.
- 1.3 The said judgment also decides that reasonable classification is permissible which is founded on reasonable distinction or reasonable basis, therefore, we have to analyze that whether exception under clause (56) of Part-I of the

Second Schedule to the Income Tax Ordinance 2001 is based or founded on reasonable basis or reasonable distinction?

1.4

In the said judgment the Supreme Court has also opined that there cannot be one standard of universal application to test reasonableness of classification; meaning thereby reasonableness has to be seen by considering various aspects on which classification has been based. However, the Supreme Court cautions that classification should not be arbitrary, irrational or without reasons.

1.5

For classification to be reasonable it must be based on intelligible differentia thereby persons grouped together can be differentiated from the persons left out on intelligible basis and differentiation must have rational nexus to the object sought to be achieved by such classification. If classification is based on some special circumstances or special reasons which are related to some but not related to others it

would be reasonable classification. However, the classification may not be scientifically perfect or logically complete rather it has to be seen and judged by examining the overall nature and reasons.

2. A Larger Bench of Supreme Court in the case of Muhammad Shabbir Ahmad Nasir has followed the aforesaid judgment.

1997 SCMR 1026

pages 1040-1941

- 2.2 In this case, the issue before the Hon'ble Supreme Court was reduction in Personal Allowance of employees in Federal Secretariat in BPS-17 and above as against no such reduction against the posts in BPS 1-16, therefore, it was contended to be in violation of Article-25.

- 2.3 The Supreme Court in the light of judgment in I.A. Sherwani's case upheld grouping by the Government of its employees in BPS 1-16 into one category distinct from the other category serving in BPS 17-22 and such grouping cannot

be challenged on the grounds of irrationalness or unreasonable classification. The Supreme Court held that categorization of employees on the basis of low paid and high paid employees was reasonable classification and did not suffer from any arbitrariness.

3. The 5 Members Bench of the Supreme Court in another and subsequent judgment in the case of M/s Ellahi Cotton Mills Limited has again reiterated the same Principle.

1997 PLD 582

Some important words and phrases have also been defined in the said judgment, which are also relevant to decide the issue before this Bench, are reproduced here for ready reference:

- (a) **Reasonable:** *is a relative generic term difficult of adequate definition. It, inter alia, connotes agreeable to reason; comfortable to reason; having the faculty of reason; rational; thinking; speaking, or acting rationally; or according to the dictates of reason; sensible; just; proper and equitable or to act within the Constitutional bounds.*

(Head Note V)

(b) **Discrimination---***Validity---Tests of the vice of discrimination in a taxing law are less rigorous--
-If there is equality and uniformity within each group founded on intelligible differential having a rational nexus with the object sought to be achieved by the law, the Constitutional mandate that a law should not be discriminatory is fulfilled*

(Head Note I)

(c) **Policy of a tax---***in its operation may result in hardships or advantages or disadvantages to individual assesseees which are accidental and inevitable but simpliciter such a situation will not constitute violation of any of the fundamental rights.*

(Head Note J)

(d) **Classification---Reasonableness---**

*Reasonable classification does not imply that every person should be taxed equally---
Reasonable classification is permissible provided same is based on an intelligible differentia which distinct persons or things that are grouped*

(Head Note Ss)

together from those who have been left out and that differentia must have rational nexus to the object sought to be achieved by such classification-- No standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances.

The requirement of reasonable classification is fulfilled if in a taxing statute if the Legislature has classified persons or properties into different categories which are subject to different rates of taxation with reference to income or property and such classification would not be open to attack on the ground of inequality or for the reason that the total burden resulting from such a classification is unequal. The question, as to whether a particular classification is valid or not, cannot be decided on the basis of advantages and disadvantages to individual assesseees which are accidental and inevitable and are inherent in every taxing statute.

Meaning thereby that SC has consistently maintained that Article-25 does not prohibit grouping or classification of persons on the basis of some intelligible criteria. Hardship of one group due to classification on reasonable basis which is not arbitrary will not form the basis to invoke Article 14 of the Indian or Article 25 of the Pakistan constitution and therefore is permissible.

Case law Analysis on Article 14 of the Indian Constitution

Supreme Court of India has been analyzing Article 14 of the Indian Constitution which is parametric to Article 25 of Constitution of Pakistan and there are several judgments which may be helpful in understanding the true import of the discrimination clauses in the constitution. For reference purposes a few are highlighted as under:

4. *7 Member Bench analyzed the "Special Court's Bill 1978"* on touchstone of Article-14 of the Indian Constitution. The said judgment has analyzed the case law existing on the subject and has also held that classification needs not to be constituted by an exact or specific exclusion or inclusion of persons or things. The Courts should not insist on the elusive exactness and classification should not be palpably arbitrary.

Special reference
by the President of
India to the Indian
Supreme Court
under Article-
143(1) in advisory
jurisdiction
Reported as
1979 AIR 478
Para 74 of the
judgment

Findings and basis of examination as given in para 74 of the judgment, are summarized as under (*only relevant extract*):-

- (a) *The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.*

- (b) *Classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.*
- (c) *The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation.*
- (d) *By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality.*

- (e) *Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.*
- (f) *The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive.*
- (g) *Two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.*
- (h) *It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public.*

5. Indian SC in another case held that classification will be reasonable if it satisfies the test of social conduciveness. As per this test if a classification is conducive to the functioning of modern society, then it is certainly reasonable and rationale. Transport and Dock Workers Union Vs Mumbai Port trust
(2011) 2 SCC 575
6. Indian Supreme Court in another judgment has upheld classification on the basis of educational qualification to be reasonable basis for classification and satisfies the doctrine adumbrated in Article-14. Chandravathi P.K. Vs C.K. Saji
AIR 2004 SC 2717 (2728)
7. The Indian Supreme Court in another judgment while interpreting Article-14 opined that only persons who are in like circumstances should be treated equally and to see who are in like circumstances, classification is permissible if it is based on intelligible differentia. Ewanlangki-ERYambai Vs Jaintia Hills District Council
AIR 2006 SC 1589
8. In another case Indian Supreme Court held that no parity can be claimed by the Bank Employees J.K. Sawhney Vs Punjab National Bank

of various ranks with that of the Executive Director and CMD etc as the service conditions of the Executive Directors or CMD is not at par with that of remaining Bank Employees; meaning thereby that different service conditions, mode of appointment, level of responsibility can also be basis of classification which would not be arbitrary.

2010
(169)DLD743

9. In another judgment the Indian Supreme Court has examined the claim of grade one employees (draftsman) with Supervisors on touchstone of Article-14 and it has been held that the crucial factor to be established is not only functional parity of the two cadres but also the mode of recruitment, qualification and responsibilities attached to the two offices.
- T. Venkateswarula
Vs Executive
Officer T.T.
Devasthanams
AIR 2009 SC 763
10. In another case Indian Supreme Court held that in the matter of taxation, the Court permit great latitude to the legislature. The legislature can make reasonable discrimination and make a choice in respect of districts, objectives, persons, methods and even rates of taxation.
- Muftalal Industries
Vs Union of India
(1997) 5 SCC 536
(The same
principle upheld in
Ellahi Cotton Mills
case)

11. In another judgment it has been held that if a Taxing provision is objected as being discriminatory then its oppressiveness and palpable injustice or hostility by such levy has to be clearly brought out by the Petitioner. Galaxy Theatre Vs
State of Karnataka
AIR 1992 Kar 215
12. In another judgment of Indian Supreme Court, wherein the issue was granting of some incentive allowance to departmental officers as against direct recruits with higher qualification was challenged on the basis of Article 14. SC held that it does not violate Article-14 as incentive was given on the basis of reasonable classification. Food corporation
of India Vs
B.K.N.K. Sangh
AIR 2012 SC 703
13. The Supreme Court of India in yet another judgment has held that differential pay scale based on educational qualification, nature of job, responsibility, accountability, qualification, experience and manner of recruitment does not violate Article-14 of the Constitution. Secretary Dept. of
Personnel, Public
Grievances &
Pensions Vs
T.V.L.N.
Malikariuna Rao
2015 3SCC 653

Summary

14. In the light of above submissions it can safely be summarized that:

- (a) *Article-25 does not prohibit to treat citizens differently on the basis of reasonable classification.* **1991 SCMR 1041**
(1081-P)
- (b) *Classification may be due to state necessity for needs and exigencies of society.* **1979 AIR 478**
- (c) *There cannot be one standard of universal application to test reasonableness of classification.* **1991 SCMR 1041**
1979 PLD 582
- (d) *Classification need not to qualify a scientific or arithmetical or a definite criterion; it has to be seen in over all perspective, it has to be rationale and logical.* **1979 AIR 478**
1991 SCMR 1041
- (e) *Classification is justified if it is not palpably arbitrary.* **1979 AIR 478**

- (f) *Persons similarly situated or similarly placed are to be treated alike.* **1991 SCMR 1041**
- (g) *Classification means grouping/segregation due to systematic relations on the basis of common properties and characteristics but does not mean herding together of certain persons and classes arbitrarily.* **1979 AIR 478**
- (h) *Classification if it qualifies the test of social conduciveness is a reasonable classification. Social conduciveness means conducive to the functioning of modern society.* **(2011) 2SCC 575**
- (i) *Classification would be reasonable if it is based on intelligible differentia i.e., persons grouped together can be differentiated from persons left out on intelligible basis.* **1991 SCMR 1041**
- (j) *Differentiation must have rationale nexus to the object sought to be achieved by classification.* **1979 AIR 478**
1991 SCMR 1041
- (k) *Discrimination in taxing statute – test are less vigorous.* **1997 PLD 582**

- (l) *Courts should permit greater latitude to the legislation in matter of taxation so as to make reasonable discrimination and choices.* (1997)5 SCC 536
(Indian SC)
- (m) *In a taxing statute due to classification there may be some hardship or disadvantages to some persons which are accidental or inevitable it will not be considered as violation of fundamental right and such classification may not be questioned on such basis.* 1997 PLD 582
1979 AIR 478
- (n) *Classification on the basis of low paid or high paid employees placed in different grades, irrespective of functional similarity, is a reasonable classification, BPS 1-16 and BPS 17-22 can be grouped into two different classes.* 5 Member Bench –
1997 SCMR 1026
AIR 2012 SC 703
(2015) 3SCC 653
(Ind.SC)
- (o) *Classification on the basis of educational qualification is a reasonable classification.* AIR 2004 SC 2717
(2728)
- (p) *Different service condition, mode of appointment, level of responsibility can also be* 2010 (169) PLD
743

basis of classification which would not be arbitrary.

- (q) *Functional parity of two cadres is not the only the basis of classification but such classification can also be based on mode of recruitment, qualification and responsibilities attached to the officers.* **AIR 2009 SC 763**

Clause (56) of Part 1 of 2nd Schedule to the Income Tax Ordinance, 2001

15. In the light of aforementioned submissions we would put clause (56) of Part 1 of 2nd Schedule to the Income Tax Ordinance, 2001 to different tests. For facility of reference the said clause is reproduced as under:-

"(56) *The following perquisites, benefits and allowances received by a Judge of Supreme Court of Pakistan and Judge of High Court, shall be exempt from tax.*

- (1) (a) *Perquisites and benefits derived 1[from] use of official car maintained at Government expenses.*
(b) *Superior judicial allowance payable to a Judge of supreme Court of Pakistan and Judge of a High Court.*
(c) *Transfer allowance payable to a Judge of*

High Court.

(2) The following perquisites of the Judge of Supreme Court of Pakistan and Judge of High Court shall also be exempt from tax during service, and on or after retirement.

(a) The services of a driver and an orderly.

(b) 1000 (one thousand) free local telephone calls per month.

(c) 1000 units of electricity as well as (25 hm³ of gas) per month and free supply of water; and

(d) 200 litres of petrol per month.

(3) If during service, a judge dies, exemption from tax in respect of benefits and perquisites provided to widow as mentioned in sub-clause (2) shall also be available to the widow."

15.1 The said clause exempts many perquisites of superior judiciary which inter alia include the benefit derived from use of official car maintained on government expenses, superior judicial allowance, service of driver and orderly, free local telephone calls, electricity, gas and petrol etc. There is an extension of some benefits/certain perquisites to the widow if the judge dies during the service. Same or similar kind of perquisites in respect of President, Provincial Governors, Chiefs of Staffs of Armed

1991 SCMR 1041

and

1979 AIR 478

Forces, Federal Ministers etc have been provided exemption under Clauses (51), (52), (53) and (55). Thus it becomes clear that as per policy some privileges and perquisites or income have been provided exemption from tax in respect of certain persons who hold some office of senior position and keeping in line judges of the Supreme Court and High Courts have also been granted such exemption. Therefore this kind of classification qualifies to be reasonable classification on needs and exigencies of society, it is logical and rationale and is not palpably arbitrary as well.

- 15.2 This classification qualifies the test of social conduciveness. **2011 2SCC 575**
- 15.3 It is also clear that such highly placed persons like President, Governors, Chiefs of Staff, Federal Ministers and Judges of the superior judiciary form a class of their own separate and distinct on reasonable basis and intelligible differentia from the rest of the officers and the **1991 SCRM 1041**
1979 AIR 478
1997 SCMR 1026

functionaries of the government including judges of the lower judiciary.

16. Coming to the specific issue i.e. discrimination of judges of Supreme Court and High Court from the rest of the judiciary we can safely say that such classification is permissible on the basis of following factors:-

i. **Mode of Appointment** Judges of the superior judiciary are appointed as per Article 175A through a process involving Parliamentary Committee, Prime Minister and then by the President of Pakistan.

ii. **Qualification for appointment** of judges in the superior judiciary and the experience is also much different for the appointment in the lower judiciary.

AIR 2004 SC 2717
and
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iii. Superior judiciary exercises **constitutional powers** in addition to others conferred by law whereas lower judiciary exercises the powers conferred by law only.

- iv. The **level of responsibility** attached to the judges of the superior judiciary is much different from that of the lower judiciary. Therefore classification is **not palpably arbitrary.** 1979 AIR 478
- v. Classification between judges of superior judiciary and lower judiciary is **based on the principle of intelligible differentia.** 1991 SCMR 1041
- vi. The question was raised about **functional parity** of the judges of the Superior Court and the lower Courts. With due respect no such functional parity exists between the judges of superior judiciary and the lower judiciary. Even for argument sake if it is accepted that there exists a functional parity then to test reasonableness of classification it cannot be adjudged on a single factor. 1991 SCMR 1041
1979 PLD 582
1979 AIR 478
1997 SCMR 1026
AIR 2012 SC 703
(2015) 3SCC 653
AIR 2009 SC 763
17. As it is clear that classification of judges into two groups i.e. the judges of the superior judiciary and judges of sub-ordinate judiciary is based on intelligible criterion which is not palpably

arbitrary and is based on reasonable classification, which is also logical and qualifies social conduciveness test, therefore it cannot be said to violate Article 25 of the Constitution.

Narrow Interpretation of Exemption Provisions in a Taxing Statute

18. Provisions related to exemptions/grants of concession from payment of duties/taxes would be given a rigid interpretation against the taxpayer and in favor of taxing power as held by the Supreme Court in the case of M/s Hashwani Hotels Ltd. Vs FOP. **2007 SCMR 1131**
(1138)

19. The concept of exemption pre-supposes a liability and is a grant of immunity from payment of duty it would otherwise be attracted in respect of goods. Absence of liability to tax and exemption from tax are two different and distinct concepts. The former connotes that the subject was never in the tax net while the later connotes that it was in the tax net but has been permitted to escape. (Al-Samrez Enterprise Vs FOP)
1986 SCMR 1917

20. As an example we can quote from the judgment **1986 SCMR 1917**
(Al-Samrez
Enterprise Vs FOP)
(read from
P.1923)
that mere grant of exemption under section 19
of the Customs Act does not have the effect of
modifying or altering the levy of duty under
section 18 of the Act, liability for the payment of
duty that accrues under section 18 on the
importation of dutiable goods is wiped off to the
extent exempted. The two sections, therefore,
clearly operate independently and the exercise
of power under section 19 is distinct in character
and scope, so that it cannot have the effect of
nullifying the statutory provisions contained in
section 18 whereby the charge is created by the
statute itself.
21. Liberal interpretation would not be made for **2006 PTD 2331**
(2343 N)
granting exemption from levy of tax in respect
of Article, provisions of exemption notification
would not be stretched in favor of taxpayer.
22. Statutes imposing pecuniary burden – All **PLD 1988 SC 370**
(P.374B)
charges upon the subject must be imposed by
clear and unambiguous language. There is no

room for any intendment. There is no equity about the tax..... for the persons sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.

23. As a general rule grants of tax exemptions are given a rigid interpretation against the assertion of the taxpayer and in favor of taxing power.

PLD 1988 SC 370

(P.375C)