

Equality: Legislative Review under Article 14

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I. Introduction

This chapter will provide an analytical overview and limited evaluation of the grounds of *legislative* review under the general constitutional guarantee of the right to equality under Article 14. It will exclude legislative review for other reasons (such as for violation of other constitutional rights or because of lack of legislative competence). Also outside its immediate focus are the (woefully underdeveloped)¹ antidiscrimination provisions in Articles 15(1), 16(2), and 29(2)—they are referred to only when they illuminate the content of Article 14. Other chapters in this Handbook deal with administrative review, affirmative action, and gender equality.

Within the context of Article 14, my focus will only be on *legislative* review. What this entails is not quite as straightforward as might first seem. To begin with, I use ‘legislative review’ to mean review *of* legislative acts *by* judges, rather than review *by* the legislature. In its adjectival form, ‘legislative’ could characterize at least three distinct things. First, it may be a qualifier that describes an action based on *who* the actor is—anything that is done by the legislature is, in this sense, legislative (actor-sensitive). This will include not only primary statutes but also non-statutory actions of a legislature, such as the adoption of resolutions and procedural rules, or orders punishing someone for its contempt. It will not include executive ordinances.

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¹ India has tended to focus on affirmative action rather than antidiscrimination. See Tarunabh Khaitan, ‘Transcending Reservations: A Paradigm Shift in the Debate on Equality’ (2008) 43(38) *Economic and Political Weekly* 8; Tarunabh Khaitan, ‘The Architecture of Discrimination Law’ in Vidhu Verma (ed), *Unequal Worlds* (OUP 2015) (forthcoming).

In the second sense, an action can be described as legislative depending on *how* it was done (process-sensitive). Legislation is a particular mode of decision-making, which usually includes consultation, review in standing committees, debate and deliberation, and voting.² Often, legislative decisions have to be made democratically—ie by democratically elected representatives through an open, fair, and democratic process. There may, however, be occasions when a statute is enacted by a legislature without any consultation, committee review, debate, or deliberation,³ and therefore may not be described as adequately legislative in this second sense. Colonial statutes are less ‘legislative’ than post-independent statutes, and (because of inadequate media and civil society oversight) State statutes tend to be less legislative in this process-sensitive sense than central ones.⁴ Ordinances issued by the political executive suffer from this lacuna even more deeply. Thus, one could ask not only whether an act is legislative, but also the extent to which it is so. Whether an action has been legislative in the procedural sense is likely to be relevant to the *standard* of review applied, rather than constitute a *ground* of review.

In the third sense, the adjective describes actions based on *what* they entail (product-sensitive). In this sense, what makes an act legislative is its substance. A legislative act comprises *general* rules enacted to guide specified conduct.⁵ In this sense, it may be distinguished from rule-application, which is an essentially administrative exercise looking at particular cases. ‘Legislation’ then is enacted not just by the legislature but also by the

² In *Malpe Vishwanath Acharya v State of Maharashtra* (1998) 2 SCC 1 [16]-[17], the Court noted the extensive consultation that preceded the legislation. See generally, Jeff King, ‘Deference, Dialogue and Animal Defenders International’ (*UK Constitutional Law Blog* 25 April 2013) <<http://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/>> accessed 25 November 2014.

³ 27% of the bills passed in the Lok Sabha in 2009, PRS Legislative Research has calculated, were discussed for less than five minutes in the House.

⁴ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [22], [25]: Fazal Ali J said that a legislation copied verbatim from a pre-constitutional ordinance could not have borne the Constitution in mind. See also, Goutham Shivshankar, ‘Naz and the Need to Rethink the Presumption of Constitutionality’ (*Law and Other Things* 13 December 2013) <<http://lawandotherthings.blogspot.co.uk/2013/12/naz-and-need-to-rethink-presumption-of.html>> accessed 14 November 2014.

⁵ *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41.

executive (especially in the form of secondary rules using authority delegated by statutes, but also as ordinances and policy documents). Even judges legislate (less controversially) when they determine the procedural rules that ought to govern their own functioning.⁶

These three senses have respectively been characterised as actor-sensitive, process-sensitive and product-sensitive understandings of the term ‘legislative’. Delineating these three senses of the term is helpful for the discussion that is to follow. My focus in this paper remains on the *grounds* of legislative review, particularly in the actor-sensitive and product-sensitive sense. However, a full story of legislative review under Article 14 will need to consider the *standards* of review debate as well.⁷

This chapter will explore the two doctrines that have evolved to test the constitutionality of a measure when faced with an Article 14 challenge: the ‘classification test’ or the ‘old doctrine’ (which I have labelled ‘unreasonable comparison’) and the ‘arbitrariness test’ or the ‘new doctrine’ (labelled ‘non-comparative unreasonableness’). I will show that (a) the classification test (or the unreasonable comparison test) continues to be applied for testing the constitutionality of classificatory rules (whether or not legislative in character); (b) it is a limited and highly formalistic test applied deferentially; (c) the arbitrariness test is really a test of unreasonableness of measures which do not entail comparison (hence labelled non-comparative unreasonableness); (d) its supposed connection with the right to equality is based on a conceptual misunderstanding of the requirements of the rule of law; and (e) courts are unlikely to apply it to legislative review (in the actor-sensitive sense). The way forward is

⁶ See Constitution of India 1950, art 145(1). Cases involving review of judicial rules are rare, and will not inform the discussion in this chapter.

⁷ In general, the standard of review in India has been low and the burden of proving unconstitutionality always falls on the complainant.

to beef up the classification doctrine to realize its true potential, and abandon the arbitrariness doctrine with respect to actor-sensitive legislative review.

Writing about Indian constitutional law poses a difficult methodological problem—a staggering judicial output, contradictory and precedent-blind decisions in constitutionally significant cases by benches of two or three judges, and under-reasoned judgments make the scholastic task very difficult.⁸ In this chapter, I will focus primarily on Article 14 cases decided by a bench of five or more judges. These cases constitute a more manageable dataset, tend to give more attention to doctrine and precedent, and are constitutionally recognized as being more authoritative than cases decided by benches of lesser strength.⁹ This focus is but a guideline—it is impossible to ignore some other significant cases.

II. The Traditional Narrative

Traditionally, many commentators and judges have told a story about the transformation of Article 14 along these lines: in its early years, inspired by the US jurisprudence under the Fourteenth Amendment, the Supreme Court—led primarily by Das J—devised the classification test to determine a law’s compliance with Article 14.¹⁰ Effectively, this entailed the Court asking two questions: (i) whether the classification made by the law in question was based on an intelligible differentia, and (ii) whether the classification had a reasonable nexus with the object the law sought to achieve. The obvious assumption behind asking these questions was that the right to equality under Article 14 is engaged only when the law makes a classification (or, arguably, when it fails to make a classification). The essence of the right

⁸ Tarunabh Khaitan, ‘Koushal v Naz: A Legislative Court and the Recriminalisation of Homosexuality in India’ (2015) 78(4) *Modern Law Review* 672. See also, Chintan Chandrachud, ‘Constitutional Interpretation’ (this Volume), discussing *panchayati adjudication*.

⁹ See Constitution of India 1950, art 145(3).

¹⁰ On Das J’s role in the consolidation of the classification test, see PK Tripathi, *Some Insights into Fundamental Rights* (Bombay University Press 1972) 52f.

to equality was assumed to be comparative. The next stage in the story involves the characterisation of this inquiry as ‘old’, ‘doctrinaire’, ‘positivist’, ‘narrow’ etc—an image of a pedantic, unreconstructed, slightly reactionary and decidedly unfashionable old man is presented. The traditional narrative then projects the elevation of the administrative law standard¹¹ of ‘non-arbitrariness’ to a distinct ground of constitutional review under Article 14 in the 1970s as a fresh, progressive, development that unfettered Article 14 from its older doctrinaire confinement.¹² There have of course been discordant voices which have challenged this dominant narrative forcefully. Even so, the story has come to acquire significant currency, not least because of its frequent parroting from the bench.¹³ And yet, the old doctrine refuses to go away.¹⁴

The reason for its stubborn persistence is down to the fact that the old doctrine is conceptually distinct from the new doctrine, and cannot be subsumed simply as an instance of the latter. The following subsections will explain that the main analytical difference between the two doctrines lies in the fact that the classification doctrine is essentially *comparative*, whereas the arbitrariness doctrine is not essentially so. What this means is that there must be some comparatively differential treatment between two persons or two classes of persons before the classification doctrine is even engaged. The arbitrariness doctrine, on the other hand, can be invoked for any sufficiently serious failure to base an action on good reasons. To put it differently, the classification doctrine interrogates *unreasonable comparisons*, whereas the arbitrariness doctrine’s unique contribution is to bring *non-comparative*

¹¹ The constitutionalisation of administrative law has done considerable damage to both constitutional law and administrative law in India. See generally, Farrah Ahmed and Tarunabh Khaitan, ‘Constitutional Avoidance in Social Rights Litigation’ (Oxford Journal of Legal Studies, forthcoming 2015).

¹² *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3.

¹³ *Om Kumar v Union of India* (2001) 2 SCC 386 [59]: The non-arbitrariness ‘principle is now uniformly followed in all Courts more rigorously than the one based on classification’.

¹⁴ *Subramanian Swamy v Central Bureau of Investigation* (2014) 8 SCC 682 [58].

unreasonableness within the ambit of Article 14. Let us now understand each of these doctrines better, in the context of legislative review.

III. Unreasonable Comparison

The classification doctrine—meant to attack unreasonable comparison between persons or classes of persons—is founded upon a highly deferential, remarkably limited, and formalistic equal treatment principle governing State action. Each of these features is worth emphasising. To begin with, it is based on an equal *treatment* principle governing State *action*. Only a State *action* which either classifies persons or fails to classify them can be attacked under this doctrine. The ‘failure to classify’ aspect of the doctrine should not be read to include all omissions. Only when the State fails to classify *when performing some act* is the doctrine attracted. In the absence of any relevant State action, no *treatment* has been meted out to anyone. It is an action-regarding doctrine, which makes essential reference to something *done*. Note that this comment applies only to the classification doctrine. The alternative, a non-action regarding equal *situation* principle which could have tackled an unequal state of affairs rather than merely unequal treatment, plays no role in the way the old doctrine operates. It may well be that the right to equality and non-discrimination guaranteed by the Constitution (including the provisions on affirmative action) taken as a whole does entail both equal treatment and equal situation principles. But as far as the classification doctrine is concerned, it only incorporates an equal treatment principle.

Secondly, the doctrine relates to *State* action alone, primarily governing vertical relationships between an individual and the State (although, the relationship between two State bodies is technically within its ambit). What remain outside its scope are horizontal relationships between private persons. Due to the historically extensive State ownership and funding of

industry, the Court has been able to apply the mandate of Article 14 to State-owned or funded airlines, universities and banks.¹⁵ As the Indian State continues to liberalize and roll back, the number of institutions governed by Article 14 will continue to decrease. At first blush, the text of Article 14—‘The State shall not deny...’—seems to invite this vertical interpretation. However, the second part of the clause requiring the State to not deny ‘equal protection of the laws’ could easily have been interpreted to impose some sort of duty on the State to protect persons from horizontal violations of the right to equality, at least in the limited way recognized by the US Supreme Court in the landmark case of *Shelley v Kraemer*. In that case, the US Court held that the judiciary, as a constituent part of the State, cannot enforce racist covenants in private housing contracts prohibiting the sale of a property to blacks.¹⁶ In a comparable case, the Indian Supreme Court came to the opposite conclusion and in the absence of a law prohibiting discrimination in the housing sector upheld a discriminatory private arrangement as constitutionally valid.¹⁷ What’s more, even the more explicitly horizontally worded provisions such as Article 15(2), which the founders unambiguously intended to have horizontal effect, have received little judicial notice.¹⁸

Thirdly, the classification doctrine entails an *equal* treatment principle. We cannot confidently say the same for the arbitrariness doctrine. Like other fundamental values such as liberty, fraternity, and dignity, the meaning and scope of equality is contested. Many different

¹⁵ *Ajay Hasia v Khalid Mujib Sehravardi* (1981) 1 SCC 722; *Air India v Nargesh Meerza* (1981) 4 SCC 335; *Javed Abidi v Union of India* (1999) 1 SCC 467; *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228.

¹⁶ *Shelley v Kramer* 334 US 1 (1948). See also, Nicholas Bamforth, ‘The True “Horizontal Effect” of the Human Rights Act 1998’ (2001) 117 Law Quarterly Review 34.

¹⁷ *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632. There was, of course, a material difference between the *Shelley* and *Zoroastrian Housing* cases. In *Shelley*, the target of the discriminatory covenant was a disadvantaged racial minority. In *Zoroastrian Housing*, it was a religious minority which wanted to exclude those belonging to other religions. The role which this distinction might have played in the reasoning of the Supreme Court is debatable, but it is possible for the Court to distinguish *Zoroastrian Housing* if a *Shelley* type case comes before it.

¹⁸ *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 427, 29 April 1947 (RK Sidhwa); *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 651, 657, 661 (29 November 1948) (KT Shah, S Nagappa, BR Ambedkar).

conceptions of equality—formal, substantive, results-oriented, opportunity-focussed, treatment-based—have been proposed. What is common to all these conceptions is that equality entails comparison.¹⁹ One can only be equal *to* someone or something, and one can meaningfully talk only of equality *between* at least two entities. It is conceptually sensible to talk of a person as being free or dignified, without invoking any relationship that she may have with another. It is nonsensical, however, to speak of a person being equal without referring to at least one other being. Fraternity is perhaps even more deeply relational, inasmuch as it requires the existence of some form of a community. In requiring the presence or absence of some form of classification, the classification doctrine is an egalitarian doctrine. To give but one example, Mukherjea J found the mere existence of two different criminal procedures to attract Article 14—the fact that both procedures constituted fair trial and would not have violated any constitutional right independent of the right to equality was quite irrelevant to this determination.²⁰ The conception of equality that informs the classification doctrine may be weak, formalistic and misguided, but it is a principle of *equality*.

Fourthly, this doctrine is highly *deferential* in the sense that the Court gives a lot of weight to the State's claim about what the facts are, how they ought to be evaluated and whether they breach certain norms. To give one extreme, but not entirely atypical, example, in *Air India*, the Court found a government declaration to the effect that different wages for air hostesses and assistant flight pursers was not based on sex as 'presumptive proof' which 'completely conclude[d] the matter'.²¹ In some recent cases, the Court seems to have invoked the 'strict

¹⁹ This claim does not entail the corollary that *discrimination* necessarily involves comparison. In fact, the essential competitiveness of equality is precisely the reason that has led some scholars to see equality and non-discrimination as distinct ideals. See generally, Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 *Modern Law Review* 175.

²⁰ *Anwar Ali Sarkar* (n 4) [49].

²¹ *Nargesh Meerza* (n 15) [67].

scrutiny’ or the ‘proportionality’ standard, but there are good reasons to think that in many of these cases these invocations are merely rhetorical cloaks for the continued use of a highly deferential standard of review.

Finally, and perhaps most significantly, I have claimed that the old doctrine is *limited* and highly *formalistic*. The doctrine is limited because it asks only two of the whole range of questions it could ask about a classificatory rule. We have seen that these questions are: (i) whether the classification made by the rule is based on an intelligible differentia, and (ii) whether this differentia has a rational nexus with the object that the rule seeks to achieve. The doctrine is formalistic because these two questions are largely content with the *prima facie* formulation of the rule, and ignore its real world impact on persons and groups.

The apparent limitations and formality of the doctrine will become clear once we examine the whole range of questions that *could* be asked—and that judges in other jurisdictions often do ask—about a classifying rule. Before we proceed, however, it is important to note that despite its apparent limitations and formality, many Indian judges have often *misapplied* the test to reach the right outcome. In its current form, the test poses a difficult dilemma to a conscientious judge: if she prioritizes fidelity to law unjust outcomes come about; on the other hand if she prioritizes fidelity to justice between parties, she often has to distort and misapply the doctrine, incurring a legality cost. The dilemma is of course not unique to Article 14 cases, and judges do occasionally (and sometimes justifiably) fudge legal doctrine to arrive at the just conclusion.²² But when this happens all too frequently, it is time that legal doctrine evolved. Bhagwati J was responding to these infirmities in the old doctrine when he (mis)prescribed the arbitrariness doctrine as a cure.

²² Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) ch 10.

But we are getting ahead of ourselves. Let us go back to the possible inquiries that can be conducted with respect to a classificatory rule. The list that follows is not meant to suggest that all of these questions ought necessarily to be asked by judges when testing the constitutionality of a classificatory rule under Article 14. It is provided simply to demonstrate the questions that judges do not currently ask (except, sometimes, by stealth) and thereby to demonstrate the limitations and formality of the current doctrine.

It may also be noted that some of these questions go into the *ground* of review, others concern setting the appropriate *standard* of review and the incidence of the *burden* of proof. Whether the classification makes an intelligible differentia, for example, concerns the ground of review in the sense that the answer to this question (along with the answers to other ground-related questions) directly determines the constitutionality of the rule. A different question, say whether the differentia is presumptively impermissible (perhaps because it is based on a ground specified in Article 15), may primarily relate to how anxiously the Court ought to review the rule or how weighty the State's justificatory burden ought to be to save the rule.

For any classificatory rule, we can usually identify at least four distinct elements:

- (i) Right: Is the right to equality engaged?
- (ii) Differentia: What classes does the rule create?
- (iii) Objective: What end does it seek to achieve?
- (iv) Impact: What consequences does it subject each of these classes to?

To give an example, let us imagine a rule which says that ‘A contract of employment shall stand terminated if the employee becomes pregnant’.²³ First, the right to equality is clearly engaged because of the differential comparative treatment of the two classes. The differential created by this rule is between those employees who become pregnant and those who don’t (or can’t). Its objective is not evident from the rule itself, but let us assume that the admitted objective is to avoid the expense and inconvenience involved in organising replacement cover for the pregnant employee for the period that she needs to go on maternity leave. Finally, the immediate and direct impact of the rule is that the employment of pregnant employees is terminated. This, however, only presents a relatively superficial analysis of the classificatory rule. For each of these elements of the rule, further questions may be asked.

1. The Right

With respect to the first element, it is clear that if the rule makes a classification, the right to equality is engaged. But sometimes it is also engaged when, even if the rule does not make any classification on the face of it, it has a disproportionate impact on different classes of persons (ie the classification is made not by the rule’s formal requirements but because of their operation in the real world). Courts across the democratic world have recognized this as the principle prohibiting disparate impact or indirect discrimination, although Indian courts have been slow to update the doctrine in this regard. In our pregnancy example, the rule makes a direct classification on the basis of pregnancy. But it also makes an indirect classification based on sex, since it is only women who can become pregnant and will therefore be disproportionately affected by the rule. Another example of an indirectly discriminatory law would be one that requires bike-riders to wear a close-fitting hard helmet. Such a law, even though neutral on its face, will have a disproportionate impact on those Sikh

²³ A similar rule was struck down by a three-judge bench in *Nargesh Meerza* (n 15).

men who believe it is their religious duty to wear a turban. The law may yet be justified given its objectives—the point simply is that its operation makes a classification between Sikh men and other people. We will return to the issue of impact in due course.

Furthermore, with regard to the first element, we could ask not only whether the right to equality is engaged but also whether any other right or value is engaged. This inquiry is possible because equality is a parasitic right—its engagement often entails the engagement of another interest, which may sometimes be an important right or value. The rule may not in fact ‘violate’ this other right or value, the mere fact that it is engaged could be relevant—inequality with respect to a fundamental right is surely a more serious matter than inequality with respect to a mundane interest. Let me provide an example to make things clearer. In *Anwar Ali Sarkar*, the classifying rule dealt with criminal trials. It was common ground that neither of the two rules constituted a violation of the right to fair trial, but the fact that the differential treatment was connected with a key fundamental right ought to be an important consideration.²⁴ Another example may be seen in *Re the Kerala Education Bill* reference, where the classification engaged (although it was held not to violate) the freedoms granted to religious minorities.²⁵ In *Subramanian Swamy*, the classification was sensitive to the significant value of corruption-free governance.²⁶ These cases are clearly different from a classificatory rule of the sort in the *In Re Natural Resources Allocation* reference,²⁷ which engaged the fairness of the method of allocation of natural resources: an important State interest, but one that does not constitute a fundamental value or right of the sort engaged in the other three mentioned cases. The European Court of Human Rights has been particularly sensitive to this parasitic dimension of equality, since Article 14 of the European Convention

²⁴ *Anwar Ali Sarkar* (n 4).

²⁵ *Re Kerala Education Bill* AIR 1958 SC 956.

²⁶ *Subramanian Swamy* (n 14) [63].

²⁷ *Re Natural Resources Allocation* (2012) 10 SCC 1.

of Human only guaranteed that ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination’. It was only in 2000 that Protocol 12 to the Convention expanded the protection against discrimination to cases where fundamental rights were not engaged. Prior to this Protocol (and even today for members who haven’t ratified it), the engagement of another fundamental right by the rule was a jurisdictional prerequisite before Article 14 could be invoked, and therefore went into the ground of review. The Indian Article 14 (quite sensibly) never had this jurisdictional restriction, so Indian courts did not feel the need to make this inquiry. However, the engagement of equality with another fundamental right could be a reason to invoke a higher standard of review.

2. The Differentia

For the second element—differentia—at least two further inquiries may be made: its intelligibility and its normative permissibility. One could ask whether the differentia is clear or vague, ie whether there could be reasonable disagreement over whether a person falls within one group or another. This is probably what the courts seem to inquire into when they ask if the differentia is *intelligible*. Most cases concerning the delegation of excessive and unguided power by the legislature to the executive are best understood as cases where the intelligibility of the differentia has not been established—in other words, a *failure* to classify cases where the discretion should be exercised and those where it shouldn’t also violates Article 14.²⁸

One could also evaluate the differentia normatively. Most liberal societies have come to accept that there are certain types of differentia that should not, barring exceptional circumstances, be used as a basis of legal classification. This is in fact what seems to have

²⁸ Contrast *Anwar Ali Sarkar* (n 4) and *Special Reference No. 1 of 1978* (1979) 1 SCC 380.

been the founders' intention behind the non-discrimination clauses in Articles 15(1), 16(2) and 29(2)—to render the specified differentia (based on sex, race, caste, religion and other similar personal status) presumptively impermissible. It is often said that these non-discrimination guarantees merely instantiate the violations of the right to equality under Article 14.²⁹ This may well be true, but it is hard to believe that the drafters formulated these provisions simply as illustrations of Article 14, and that they add nothing to what Article 14 is capable of doing on its own. This scepticism is strengthened by legislative history. In the earlier drafts of the Constitution, a prototype of Article 15(1) was all there was under the guarantee of the right to equality. Article 14, in its generality, was added later.³⁰ Surely, the non-discrimination clauses must have *some* content independent of Article 14. In particularly spelling out certain differentia as impermissible, the drafters must have had their presumptive unacceptability in mind.

Bose J probably also had the normative acceptability of certain differentia in mind when he exhorted the courts to ask whether the classification would 'offend the conscience of a sovereign democratic republic', viewed in the background of our history.³¹ Although this normative inquiry did not become part of the crystallized doctrine, Bose J was surely right. We generally accept that differentia based on certain personal characteristics—usually constituting a valuable fundamental choice (such as religion) or which lying outside one's effective control (such as caste)—are normatively irrelevant.³² A law that classifies the sellers of tea and those of coffee into two different groups and imposes differential tax liabilities on them is clearly less problematic than a law which imposes differential tax liability on Hindus and Muslims (this, incidentally, is exactly the effect of the income tax law's recognition of

²⁹ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 217 [262].

³⁰ *Constituent Assembly Debates*, vol 3 (Lok Sabha Secretariat 1986) 410, 29 April 1947.

³¹ *Anwar Ali Sarkar* (n 4) [95].

³² John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167.

the Hindu Undivided Family as a separate legal person, allowing it to claim tax deductions not available to non-Hindus). The obvious corollary is that there should be a higher standard of review for these special cases of classification: an implication that Indian courts have failed to recognize.³³

3. The Objective

Further inquiries can also be made with respect to the third element—the *objective* of the rule. One set of questions concerning the objective relate to its genuineness. Is the stated or apparent objective masking another, more sinister, one? This consideration was clear in Sastri CJ's judgment in *Anwar Ali Sarkar*, where he held that if the law is 'designed' to be administered in a discriminatory way, or is actually 'administered' (rather than merely 'applied' once in a while) in a discriminatory way, it will be caught by Article 14, which does not allow 'colourable legislative expedient'.³⁴ This dictum, however, sits uncomfortably with the judicial reluctance to inquire into legislative motives in the context of Article 14.³⁵

Apart from this evidential inquiry into its genuineness, one could also inquire into the normative legitimacy and the importance of the objective. An objective to establish a theocratic state will not be constitutionally legitimate (employing *constitutional* rather than *popular* morality standards).³⁶ The objective of administrative efficiency is legitimate, but less weighty than (say) the pursuit of universal healthcare. Next, we can also ask whether there is a rational connection between the impugned measure and the objective in question.

³³ Tarunabh Khaitan, 'Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 *Journal of the Indian Law Institute* 177; Tarunabh Khaitan, 'Reading *Swaraj* into Article 15: A New Deal for all Minorities' (2009) 2 *NUJS Law Review* 419.

³⁴ *Anwar Ali Sarkar* (n 4) [12].

³⁵ In *Re Kerala Education Bill* (n 25), for example, the Court refused to inquire into whether the Bill was designed to target Christian schools.

³⁶ *Naz Foundation v Union of India* (2009) 160 *DLT* 277 [79]—although the judgment of the High Court has been overruled, the constitutional morality point is eminently sensible.

As part of this inquiry, judges have often inquired into the over-inclusiveness and under-inclusiveness of the measure in seeking the stated objective, although they have generally been tolerant of a considerable degree of misfit.³⁷ We could further ask after the extent to which the measure is likely to achieve this objective. It may sometimes be the case that the objective is very weighty, but a classificatory measure achieves it to such a small degree that any benefits may be outweighed by the harm of classification. Lastly, we could ask if the same objective could be pursued (to a comparable degree) using means that do not restrict fundamental rights. If it can be, it is not necessary to use the rights-infringing means. Foreign courts typically ask these deeper nexus questions when conducting a proportionality analysis.

4. The Impact

With respect to impact, one could inquire into the *immediate* impact of the rule (in our pregnancy example, the termination of employment), and *further* material and expressive, if less direct, implications of the classifying rule on individuals as well as on the groups they belong to. The severity of these impacts may also be looked into. Take for example the rule in the *Air India* case, whose immediate impact was to retire air hostesses at 35 (with the possibility of annual extensions up to 10 years), whereas assistant flight pursers retired at 58.³⁸ The Court's typically formal inquiry ignored the impact analysis altogether. These are the impact-related questions that could be asked:

First, the immediate impact of this rule is on those air hostesses who lose their job at the age of 35. Compulsory retirement at an age when one is in the prime of one's life, especially in light of the fact that the right to livelihood is a fundamental right flowing from Article 21, makes this a particularly severe impact.

³⁷ See *Special Reference No. 1 of 1978* (n 28) [134]-[136]; *Ram Krishna Dalmiya v Justice SR Tendolkar* AIR 1958 SC 538 [16].

³⁸ *Nargesh Meerza* (n 15).

Secondly, one could inquire into the further impact of the rule on the individuals concerned. Given that these air hostesses are likely to have spent most of their adult lives in this profession, they are unlikely to have the skills for a different type of job. At an age when most people are busy climbing the career ladder, they are faced not just with unemployment but unemployability. They are likely to lose all financial independence and, if they are married, become dependent on their spouses. The rule therefore has very serious implications for their ability to lead an autonomous life.

Thirdly, the impact is not limited to the individuals concerned, but also on women as a whole. The rule reduced the already limited employment opportunities available to women, even educated, middle-class women who are likely to have been air hostesses. It contributed to the forced dependence of women on their fathers, husbands and sons and contributed—in a small but significant way—to the continued tyranny of patriarchy. It is this implication which makes the rule discriminatory on the grounds of sex, since it has a disproportionate (and serious) impact on women as a group. The air hostesses argument that the real discrimination is sex-based, ‘which is sought to be smoke-screened by giving a halo of circumstances other than sex’ was considered (and dismissed on flimsy grounds) only in the context of the Equal Pay Act 1976 and not tested on Article 14.³⁹

Finally, one could ask what social meaning a rule such as this expresses.⁴⁰ The rule in question sent a social message that the right place of adult women is in their homes rather than in the formal economy and that it is appropriate to objectify young women for enjoyment the (mostly male) gaze of air passengers. This message was strengthened by the fact that pregnancy and marriage also incurred possible loss of employment for air hostesses

³⁹ *Nargesh Meerza* (n 15) [64].

⁴⁰ Tarunabh Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 32 *Oxford Journal of Legal Studies* 1.

in that case. The rule echoed (and, to some extent, concretized) the idealisation of the role of Indian women as mothers, wives, and daughters; a phenomenon which has adverse implications for their financial independence and autonomy. Given that these patriarchal assumptions are already entrenched in our society and that they sustain the social evil of patriarchy, these expressive implications are very significant.

These questions concerning the impact of the classifying rule concern its operation in the real world and its effect on real lives. The old doctrine completely ignores the impact question, and is therefore thoroughly formalistic.

5. A Summary

We can now summarize all the possible questions a court *could* ask with respect to a classificatory rule:

- (i) *Right*: Is the right to equality engaged by the rule?
 - a. Does the rule have a disproportionate impact on different classes of persons?
 - b. Was another fundamental right, principle or value engaged?
- (ii) *Differentia*: What classes does the rule create?
 - a. Is the differentia intelligible?
 - b. Is the differentia presumptively impermissible?
- (iii) *Objective*: What end does the rule seek to achieve?
 - a. Is the apparent objective genuine?
 - b. Is the objective legitimate?
 - c. Is the objective sufficiently weighty?
 - d. Is there a rational connection between the impugned measure and the objective?
 - e. To what extent is the impugned measure likely to achieve the objective?

f. Is the measure necessary to achieve the objective?

(iv) *Impact*: What consequences does the rule subject each of these classes to?

a. What immediate consequences does the rule prescribe for the individuals addressed by it?

b. What are the further material consequences the rule is likely to have for:

- those particular individuals directly addressed by the rule?

- any group to which (most of) the affected persons belong?

c. What are the likely expressive consequences of the rule?

d. How serious are these impacts?

6. Reassessing the Old Doctrine

Some of these questions relate to the ground of review, others concern the appropriate standard of review and the burden of proof. Of all these possible questions a court could ask when inquiring into the constitutionality of a classificatory rule, with respect to a classificatory rule, the traditional classification doctrine only asks the following three:

(i) Is the right to equality engaged,

(ii) a. Is the differentia intelligible, and

(iii) d. Is there a rational connection between the impugned measure and the objective?

Any classificatory rule satisfies the first question by definition, and at any rate the Court does not ask it probingly (say, by inquiring into (i) a). The only real inquiry is therefore into (ii) a and (iii) d—these together constitute the two limbs of the classification test.⁴¹ It may well be defensible to focus only on these two questions. It is certainly not my case that a court ought to inquire into all of the other questions in all, or even in any, case. But choosing which

⁴¹ Tripathi complains that even these two inquiries have sometimes been confused. Tripathi (n 10) 58-59.

questions ought to be asked is an interpretive choice, one that calls for public justification. Unfortunately, no such justification has been forthcoming, either from the Court or from scholars who defend the doctrine in its current form. The inquiry under the classification test, at least in theory, remains extremely limited. It is also formalistic because it completely ignores the actual impact of the rule on individuals as well as groups. The focus remains on the formal elements of the rule—differentia and rational nexus. Since the classification doctrine does not invite inquiry into any of the other potentially relevant questions listed above, some judges have been tempted to cheat by somehow incorporating these other dimensions into the two available to them.⁴²

For example, Gupta J's dissent in the *RK Garg* case was really based on the finding that the rule engaged (and breached) another important principle: that dishonesty ought not to be rewarded. Since he could not directly access this additional dimension independently, he sought to fit it within both elements of the available test. He claimed that the classification between dishonest and honest tax payers was not intelligible, and that this differentia did not have any rational connection with the objective (to unearth black money).⁴³ As the majority judgment clearly showed, he was wrong on both counts. The classification was clear and intelligible, what Gupta J was trying to do was to update the intelligibility test and turn it into a normative inquiry, by asking if a reasonable fair-minded person would find it intelligible.⁴⁴

A similar attempt to fudge the tests to get the desired result was more successful in *Subramanian Swamy*. In this case, the objective of the rule requiring prior governmental sanction for an inquiry into allegations of corruption against senior bureaucrats was to shield them from harassing lawsuits so that they could exercise their discretionary powers without

⁴² See Tripathi (n 10) 59f.

⁴³ *RK Garg v Union of India* (1981) 4 SCC 675 [26]-[31].

⁴⁴ *RK Garg* (n 43) [31].

fear.⁴⁵ There was much that was wrong with the rule, but inasmuch as lower-ranking bureaucrats do not wield wide discretionary powers, the classification between senior and junior officers was clearly intelligible and rationally connected with the stated objective. The Court struck down the rule holding that there was no intelligible differentia.⁴⁶ The Court could not have found absence of intelligibility in a classification between higher and lower ranking officials unless it was asking it in the normative fashion that Gupta J had done decades ago. The problem in this case, like the *RK Garg* case, was that another important value—the importance of corruption free administration—was involved. The right way to go about it would have been to recognize the entanglement of this value with the right to equality and use that as a basis to conduct a more demanding review. It conducted a strict review anyway, but instead of justifying it on proper bases and developing the limited doctrine on Article 14, it tried to force a square peg in a round hole—thereby exacerbating doctrinal confusion.

The Supreme Court has itself recognized, ‘the rule of equality before the law of Article 14’ cannot be equated with ‘broad egalitarianism’.⁴⁷ Even so, the rule in Article 14 need not remain so astonishingly limited, formalistic, and confused. It is high time the doctrine evolved. The Court needs to consider all the questions it *could* ask under the classification doctrine, and take a considered view on which of these it *should* ask in particular categories of cases.

IV. Non-Comparative Unreasonableness

The ills of the old doctrine have been long recognized. It was in response to these ills that the ‘new’ doctrine was developed. This second doctrinal test to determine the constitutionality of

⁴⁵ *Subramanian Swamy* (n 14) [63].

⁴⁶ *Subramanian Swamy* (n 14) [68].

⁴⁷ *Sanjeev Coke v Bharat Coking Coal* (1983) 1 SCC 147 [17].

a measure under Article 14 is called the ‘arbitrariness test’. In a much-quoted paragraph in *Royappa* (which incidentally concerned executive action and could have been treated as a matter of administrative law), Bhagwati J famously railed against the classification doctrine and ‘emancipated’ the principle of equality from its confinement by holding that mere ‘arbitrariness’ will suffice to constitute a violation of Article 14.⁴⁸ The ‘new’ doctrine laid down in *Royappa* has been affirmed by several subsequent judgments.⁴⁹ But controversies continue to dog the doctrine, especially with respect to its application to legislative review. It seems that Bhagwati J diagnosed the disease correctly, but prescribed the wrong medicine. Before we delve into it deeper, note that the new doctrine created a new *ground* of review under Article 14. It is in the context of a *standard* of review that the distinctions between reasonableness, proportionality, strict scrutiny, and similar concepts become moot.

The content of the arbitrariness doctrine remains unclear. This should hardly be surprising, given the indeterminacy of the term ‘arbitrary’. Non-arbitrariness was a particularly ill-advised choice of a test if the purpose of the new doctrine was, as Pal J writing extra-judicially thought it was, ‘to crystallize a vague generality like Article 14 into a concrete concept’.⁵⁰ Strictly speaking, arbitrariness is not the same thing as unreasonableness. Sometimes, it is reasonable to be arbitrary. At other times, one can be unreasonable without being arbitrary. A decision is reasonable if it is supported by legitimate and relevant reasons of sufficient weight. A choice between two or more options is arbitrary only when there is no relevant ground to prefer one option over the other. A decision based on relevant but illegitimate reasons, or one based on insufficient reasons, would not be arbitrary.

⁴⁸ *EP Royappa* (n 12) [85].

⁴⁹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Ajay Hasia* (n 15).

⁵⁰ Ruma Pal, ‘Judicial Oversight or Overreach’ (2008) 7 SCC J 9, J16.

Consider a rule that fixes the age of consent for sex to be 16 (rather than, say, 15 or 17). Such a law is clearly arbitrary. In fact, it is impossible to fix any single age as the age of consent for all persons without it being arbitrary, for the simple reason that different persons reach sexual and emotional maturity at different ages (the main relevant consideration in determining the age of consent). The only non-arbitrary way to fix the age of consent would be to individualize it, such that every teenager's level of sexual and emotional maturity is constantly evaluated, and only when he or she becomes sufficiently mature that a competent authority declares him or her to have the capacity to consent to sex. The clear unreasonableness of the alternative—inasmuch as it entails a serious intrusion into privacy, will lead to great uncertainty in the already unstable teenage lives and will require a cumbersome and expensive bureaucracy to administer—should leave us in no doubt that the arbitrary fixing of the age of consent for everyone at the age of 16 is reasonable.⁵¹ In *Raju*, the Supreme Court rightly accepted the constitutionality of an arbitrary age of majority in another context.⁵² The same will be true of a law fixing the age of consent at 15 or 17. Reason underdetermines where we ought to draw a line. But some lines are clearly not just arbitrary but also unreasonable—a rule that fixes the age of sexual consent at 35 will be an example.

Take another example. In *Javed*, a law disqualified anyone with more than two living children from holding any office in local government.⁵³ One of the arguments mooted before the Court was that the legislative choice of basing the disqualification on *two* (rather than one or three, for example) children made it arbitrary. This is a classic example of a rule that is

⁵¹ I am not defending this as an optimal policy choice. A better alternative is a rolling age of consent regime which only prohibits sexual liaisons involving a young person if the age gap between the parties is more than three/four years. However, even this more reasonable regime will need to arbitrarily determine who counts as a 'young person' and what gap in the ages of the parties is too much for the law to tolerate.

⁵² *Subramanian Swamy v Raju* (2014) 8 SCC 390 [63]: Article 14 will tolerate 'the inclusion of all under 18 into a class "juveniles"'.

⁵³ *Javed v State of Haryana* (2003) 8 SCC 369.

conceptually arbitrary, but not unreasonable (on the ground that the disqualification proceeded on having two rather than three children—the law may well be unreasonable on other grounds, such as excessive intrusion on privacy). The Court held the legislative choice of two children was not arbitrary.⁵⁴

We have seen that not everything that we would call arbitrary is also unreasonable. The converse is also true: an action can be unreasonable without being arbitrary. In *Anuj Garg*, for example, the impugned law prohibited women from working as bartenders. The law was not arbitrary in the sense that it lacked any basis in reason. In the context of a deeply patriarchal society where women are often seen merely as objects of male desire, and where bars tend to be overwhelmingly male spaces, the probability that the patrons will harass women bartenders is high. The problem with the decision to ban women working as bartenders was not that there was no reason backing it up, but that it was an *illegitimate* reason which further entrenched patriarchy by denying employment to women. The Court rightly held that the right response would have been to ensure the security of women bartenders rather than to reduce the already limited options that women have.⁵⁵ Thus, we have a good example of an unreasonable rule which is not arbitrary.

Another example of such a provision is to be found in the *Air India* case. One of the rules challenged in the case discriminated on the ground of pregnancy in providing for the termination of the employment contract of an air hostess if she became pregnant. It is clear why the airline had such a rule—pregnancy of employees is expensive because the airline has to find replacement services and provide maternity leave. The rule is based on relevant reasons and is not arbitrary in the conceptual sense. The rule is clearly unreasonable, for it is

⁵⁴ *Javed* (n 53) [8].

⁵⁵ *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [33], [36].

based on constitutionally unacceptable reasons. As the Court held, the rule was ‘extremely detestable and abhorrent to the notions of civilised society’ and ‘smacked of utter selfishness’.⁵⁶ The Court, failing yet again to appreciate the distinction between arbitrariness and unreasonableness, held the rule to be arbitrary and declared it unconstitutional for that reason.

What we should surmise from these cases is that what the Court means by ‘arbitrariness’ is really ‘unreasonableness’. The new doctrine has read into the right to equality a right against unreasonable State action. As a free-standing constitutional right, this is a remarkable development. Of course, constitutional law traditionally insists on reasonableness *when* an important constitutional right or value is interfered with by State action. A reasonableness inquiry usually requires an external trigger, say a restriction on the right to free expression under Article 19(1)(a), or a restriction on personal liberty under Article 21, or even a classification of persons into different groups for unequal treatment. When these key rights are restricted, the Constitution demands that the restriction must be reasonable. Thus, in constitutional law, the right against unreasonableness has traditionally been a parasitic right, piggybacking on other fundamental rights. What the new doctrine has done is elevated an administrative law reasonableness standard into a self-standing constitutional ground for review, without the need for any crutches in the form of other rights or values. This elevation may have implications for legislative review.

⁵⁶ *Nargesh Meerza* (n 15) [82].

1. Equality, Arbitrariness and the Rule of Law

Scholars have pointed out several deficiencies in the new doctrine of non-arbitrariness.⁵⁷ It has been criticized for its vagueness and for its possible implications for the balance of powers between the judiciary and the legislature. For our purposes, the most relevant criticism concerns the logical possibility of locating a free-standing right against unreasonableness within the right to equality. The problem is that the new doctrine does not require any classification to trigger its inquiry, whereas the right to equality, whatever else it might be, must essentially be comparative.⁵⁸ Seervai best articulated this criticism by suggesting that ‘The new doctrine hangs in the air, because it propounds a theory of equality without reference to the language of Art. 14’.⁵⁹ It is this claim that we must now investigate.

This is how Bhagwati J sought to establish the connection between the new doctrine and the right to equality:

[E]quality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.⁶⁰

Possibly, this passage seeks to establish a historical connection between equality and non-arbitrariness—via the rule of law. The right to ‘equality before the law’, which constitutes the

⁵⁷ HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal Law Publishing 2002) 438; Tehmtan Andhyarujina, ‘The Evolution of Due Process of Law by the Supreme Court’ in BN Kirpal and others (eds), *Supreme But Not Infallible* (OUP 2004) 193, 205-11; BN Srikrishna, ‘Skinning a Cat’ (2005) SCC J 3, J9-J11.

⁵⁸ Tripathi (n 10) 101.

⁵⁹ Seervai (n 57) 438.

⁶⁰ *EP Royappa* (n 12) [85].

first part of Article 14 has been variously attributed to the English common law and to the Irish Constitution.⁶¹ Insofar as its roots can be traced back to the English common law, the right to equality before the law can be seen to manifest itself most securely in the second principle of the rule of law that the British jurist Dicey articulated thus:

We mean in the second place, when we speak of the “rule of law”... not only that with us no man is above the law, but... that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.⁶²

This rule was, quite literally, a manifestation of equality before the law—everyone was to be subject to the same law administered by the same courts. Dicey explained further that:

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.⁶³

So far, we can see a historical connection between equality before the law and a particular aspect of the rule of law that concerns itself with *who is governed* by the law. This principle of the rule of law has little to do with arbitrariness. A legal system which exempts public officials from the operation of ordinary laws is not *arbitrary* for that reason, even as it

⁶¹ In *Anwar Ali Sarkar* (n 4) [43], Mukherjea J identified the English constitution as the source of the phrase ‘equality before the law’. In *Special Reference No. 1 of 1978* (n 28) [72], Chandrachud CJ described it as a basic principle of republicanism, and attributed its source to the Irish Constitution.

⁶² Albert Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1939) 193.

⁶³ Dicey (n 62) 193.

violates Dicey's second principle of the rule of law. It engages the right to equality because it classifies people into two groups—those who are public officials and those who are not—and prescribes starkly different consequences for each group for legal breaches. The second principle deems this unacceptable because this form of unequal treatment is unreasonable. But there is nothing arbitrary about the distinction.

The principle of arbitrariness is instead to be found in Dicey's first principle of the rule of law, concerning not who is governed but *how they are governed*. This principle, often articulated as 'the rule of law, not men', was expressed by Dicey thus:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.⁶⁴

This first principle prohibits the State's interference with any person without the authority of law. In our democratic times, it may seem to be unexceptionable. But at a time when monarchs were used to mete out favours and penalties on whim, this republican principle⁶⁵ of legality must have been revolutionary. In the *Case of Prohibitions*, the British King James I placed himself as a judge in a dispute. Standing up to the monarch, a courageous judge insisted that 'The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice,

⁶⁴ Dicey (n 62) 188.

⁶⁵ *Subramanian Swamy* (n 14) [38].

according to the law and custom of England'.⁶⁶ This insistence on legality reduces arbitrariness in the State's treatment of its subjects because of certain features that law tends to possess: law tends to be (and ought normally to be) general, published, prospective and stable.⁶⁷ These features of law, especially when it is administered by independent, professional, technically trained enforcement bodies, ensures that personal fortunes are not subject to the whims and fancies of monarchs. The second rule of law principle embodies an element of non-arbitrariness. But even this first principle of the rule of law is not interchangeable with the principle of non-arbitrariness. It only obviates one form or arbitrariness—one that proceeds from whimsical executive determination of rights and liabilities without any basis in general, published, prior law. It does not, in itself, protect a person from arbitrariness when it is embedded in the law itself.

This brief historical summary shows that the Court arrived from the right to equality to a general self-standing principle of non-arbitrariness by exploiting an ambiguity between two different principles of the rule of law (concerning equality and legality respectively) and by extending significantly the principle of legality. The connection between equality and non-arbitrariness was therefore based on a conceptual confusion between different meanings of the rule of law.

If one was less charitable, this judicial manoeuvre could be seen not simply as a misreading of the historical connections between concepts but a deliberate and unjustified appropriation of power. After all, Pal J did publicly acknowledge that rights like the right to equality were 'empty vessels' into which 'each generation pours its content by judicial interpretation'.⁶⁸

This remarkable suggestion leaves no role for constitutional text whatsoever. Rights like that

⁶⁶ *Case of Prohibitions* [1607] EWHC J23 (KB).

⁶⁷ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *The Law Quarterly Review* 195.

⁶⁸ *Ruma Pal* (n 50) J15 quoting Learned Hand J.

to equality are reduced to mere place-holders, which can be filled in, ironically, by whatever the judge arbitrarily thinks is appropriate. What makes the claim even more startling is an admittedly vague right to equality has been sought to be concretized by a similarly vague right to non-arbitrariness.

The connection between the right to equality and the new doctrine becomes even more dubious in light of our knowledge that the right against arbitrariness is in reality a right against unreasonableness. Not all forms of unreasonableness entail inequality. Torture is unreasonable, but the wrongness of torture is not due to it being inegalitarian. The same is true of a whole range of unreasonable acts—prohibition of criticism of government, ban on religious conversion, denial of access to courts, prescription of a uniform for citizens, or prohibition on the drinking of tea. All these acts are unreasonable, but their unreasonableness has little, if anything, to do with inequality. The new doctrine therefore completely ignores the text of Article 14 and the concept of equality. Equality may mean many things, but it cannot mean *anything*. An inquiry into the reasonableness of State action under the new doctrine no longer requires a prior demonstration that some form of inequality is involved, as was the case with the old classification doctrine. In the garb of the right to equality, the new doctrine tries to institute an independent constitutional right against unreasonableness.

The right against unreasonable administrative action is hardly novel. It has been a recognized right in administrative law at least since the famous British decision in the *Wednesbury* case.⁶⁹ What is remarkable about the new doctrine is that it elevates this free-standing administrative law right against (a high-threshold) unreasonableness to a constitutional fundamental right, potentially against all forms of State action. One implication of this move

⁶⁹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

is that a challenge to unreasonable State action, even if it is only an administrative action, can only be made by following the procedure prescribed for a fundamental rights claim—ie by filing a writ in a constitutional court. This constitutionalisation of administrative law ignores its common law roots, and results in a top-heavy system where constitutional courts come to arrogate all administrative review powers.

2. Legislative Review and the New Doctrine

The more relevant implication for our purpose is the potential expansion of the unreasonableness claim to legislative action. In English common law, *Wednesbury* unreasonableness was available only against administrative acts. As a self-standing constitutional right in India, it can at least theoretically, extend to legislative action. Let us recall the different senses in which we understood the term ‘legislative’ at the start of this chapter. It is abundantly clear that the Supreme Court has been applying the right to reasonableness to straightforwardly administrative acts.⁷⁰ But does it apply to primary legislation enacted by a legislature and to delegated legislation or ordinances enacted by the executive?

Let us first deal with whether the new doctrine can be applied to legislative enactments by legislatures. There are five relevant Supreme Court rulings on the issue: *McDowell*,⁷¹ *Malpe Vishwanath*,⁷² *Mardia Chemicals*,⁷³ *Re Natural Resources Allocation* (hereinafter, the *2G Reference*),⁷⁴ and *Subramanian Swamy*.⁷⁵ The evolving doctrinal position appears to be that

⁷⁰ *EP Royappa* (n 12); *Ajay Hasia* (n 15). Affirmed in *State of Andhra Pradesh v McDowell & Co* (1996) 3 SCC 709 [43].

⁷¹ *McDowell* (n 70).

⁷² *Malpe Vishwanath Acharya* (n 2).

⁷³ *Mardia Chemicals v Union of India* (2004) 4 SCC 311.

⁷⁴ *Re Natural Resources Allocation* (n 27).

⁷⁵ *Subramanian Swamy* (n 14).

the new doctrine does not apply to legislation enacted by a legislature, but one cannot yet assert this with too much certainty.

In *McDowell*, a three-judge bench refused to test a legislative provision under the new doctrine. Recognising the distinction between testing the reasonableness of a measure *if* it restricts a fundamental right and testing its reasonableness *per se*, Jeevan Reddy J said ‘[i]t is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted’.⁷⁶ The corollary was that ‘[n]o enactment can be struck down by just saying that it is arbitrary or unreasonable. Some other constitutional infirmity has to be found before invalidating an Act’.⁷⁷ Statutes violate Article 14 only in the context of a classification.⁷⁸ However, in *Malpe Vishwanath*, another three-judge bench held that a statutory provision had become arbitrary (unreasonable) due to changed circumstances with the passage of time since its enactment.⁷⁹ The third case in our quintet is *Mardia Chemicals*. Here, yet another three-judge bench struck down a statutory provision as unreasonable.⁸⁰ None of these cases involved any classification. It would have seemed that *McDowell* was dead.

McDowell was nonetheless resurrected by a five-judge bench in its opinion in the *2G Reference* case. The Court quoted extensively from it with approval, and concluded that ‘A

⁷⁶ *McDowell* (n 70) [43].

⁷⁷ *McDowell* (n 70) [43]. Reddy J confuses *grounds* of review (such as the classification or the arbitrariness doctrine) with possible *remedies*. Striking down an unconstitutional provision is but one possible remedy. Often, radical reinterpretation or reading down of a provision to make it constitutionally compatible will suffice: *Githa Hariharan* (n 15) [9]; *Daniyal Latifi v Union of India* (2001) 7 SCC 740 [33]; *Naz Foundation* (n 36) [132]. Rarely, a court may even be justified in simply making a declaration of unconstitutionality and leaving it for the legislature to fix the infirmity: *Malpe Vishwanath Acharya* (n 2) [31].

⁷⁸ *McDowell* (n 70) [43]-[44].

⁷⁹ *Malpe Vishwanath Acharya* (n 2) [27], [31].

⁸⁰ *Mardia Chemicals* (n 73) [64]. See Abhinav Chandrachud, ‘How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of *Mardia Chemicals v Union of India*’ (2008) 2 *Indian Journal of Constitutional Law* 179.

law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity'.⁸¹ The trouble is that the *2G Reference* did not involve legislative review, and therefore its resurrection of *McDowell* remains obiter.

Finally, another five-judge bench in *Subramanian Swamy* was pressed to confirm that arbitrariness is not available as a ground for legislative review. Because the impugned provision was found to violate the classification doctrine in any case, the Court's observations on the new doctrine again amount to obiter dicta. Even so, the Court rules out its application indirectly, but setting out the list of grounds that are available to review legislation:

The fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution.⁸²

Thus, the Court suggests that there are only two grounds to challenge legislation (or, at least legislation that has been enacted by the traditional legislative process). These grounds are unreasonable classification and excessive delegation. I have already argued that excessive

⁸¹ *Re Natural Resources Allocation* (n 27) [105].

⁸² *Subramanian Swamy* (n 14) [49].

delegation doctrine is best understood as the flip side of the classification doctrine. It is simply a *failure* to classify when classification is warranted: the legislature fails to indicate the distinction between cases where the delegated power ought to be exercised from those where it ought not to be. The implication of the *2G Reference* and *Subramanian Swamy* is that the new doctrine is not available for legislative review. The judicial trend is one of hostility to the application of the arbitrariness doctrine to legislation (enacted by a legislature). The doctrine can, however, be clarified only after this hostility forms part of the ratio of a case decided by a constitutional bench.

What about legislation by the executive? It isn't clear whether the review of ordinances is any different in this regard from that of primary legislation. But there is some jurisprudence on the review of secondary legislation enacted by the executive under powers delegated by a statute. The most important authority on the point is the *Air India* case, where a rule requiring the termination of the services of an air hostess on her pregnancy was struck down as arbitrary.⁸³ The authority of the case, however, is hardly clear. The case involved a clear classification between employees who become pregnant and those who do not. Although the Court found the rule to be arbitrary per se, it also went on to hold that pregnancy discrimination was an instance of sex discrimination, and therefore unconstitutional—thereby admitting the classificatory nature of the rule.⁸⁴ What complicates matters further is that *McDowell* specifically confined the exclusion of the new doctrine to 'an Act made by the legislature. [It expressed] no opinion insofar as delegated legislation is concerned'.⁸⁵ The *2G reference* opinion, however, misread *McDowell*: 'cases where legislation *or rules* have been

⁸³ *Nargesh Meerza* (n 15) [82].

⁸⁴ *Nargesh Meerza* (n 15) [84]-[87].

⁸⁵ *McDowell* (n 70) [46].

struck down as being arbitrary in the sense of being unreasonable ... only on the basis of “arbitrariness” ... have been doubted in McDowell’s case’.⁸⁶

But *McDowell* quite explicitly refused to doubt the application of the unreasonableness test to delegated legislation. This doctrinal messiness is a result of the lack of clarity over the distinctiveness of *legislation* (in the product-sensitive sense) from the *legislature* (in the actor-sensitive sense). The question of the applicability of the ‘arbitrariness test’ to review of legislation needs settling.

V. Conclusions

The following conclusions emerge: (a) the ‘classification test’ (or the unreasonable comparison test) continues to be applied for testing the constitutionality of classificatory rules; (b) it is a limited and highly formalistic test applied deferentially; (c) the ‘arbitrariness test’ is really a test of unreasonableness of measures which do not entail comparison (hence labelled non-comparative unreasonableness); (d) its supposed connection with the right to equality is based on a conceptual misunderstanding of the requirements of the rule of law; and (e) courts are unlikely to apply it to legislative review (at least in the actor-sensitive sense). Article 14 has become a victim of the weak ‘old’ doctrine and the over-the-top ‘new’ doctrine. The former needs expansion and substantiation, the latter relegation to its rightful place as a standard of administrative review.

⁸⁶ *Re Natural Resources Allocation* (n 27) [106] (emphasis added).