

DOCTRINE OF ARBITRARINESS AND LEGISLATIVE ACTION: A MISCONCEIVED APPLICATION

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Abstract

There has been a shift in the understanding of Article 14 of the Constitution of India which guarantees the right to equality. From the old doctrine of reasonable classification, courts have moved towards the new test of arbitrariness, according to which any state action is violative of Article 14 if it is arbitrary. While arbitrariness doctrine has been applied often to executive actions, its application to statutes is still ambiguous. This essay argues against its application to examine the validity of legislations. It presents a rejoinder to a recent article by Abhinav Chandrachud titled “How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India” wherein he argues in favour of the application of doctrine of arbitrariness to test the validity of statutes under Article 14. This essay contends that the arbitrariness test lies outside Article 14 and virtually replaces the right to equality itself by failing to read ‘arbitrary’ in the sense of ‘discriminatory’. In the presence of the reasonable classification doctrine, bringing in the extra-Constitutional test of arbitrariness is both unnecessary and undesirable. According to Chandrachud, it is only the vice of vagueness pervading the doctrine of arbitrariness that needs to be remedied and thus he makes a case for using the basic structure doctrine as the objective standard to determine arbitrariness. However, the basic structure doctrine cannot provide the required objective standards due to a number of anomalies that arise on such application. Since the doctrine of arbitrariness and the right to equality are different in scope, the application of the doctrine of arbitrariness under Article 14 is a misconceived one.

I. INTRODUCTION

Article 14 of the Indian Constitution guarantees “equality before the law” and “equal protection of the laws”. Whereas the reasonable classification test was being applied by the judiciary to test the validity of any state action under Article 14, since 1974 the new doctrine of arbitrariness has been evolved.¹ According to this approach, any arbitrary state action is violative of Article 14. While arbitrariness test has been applied often in case of executive actions, its application to statutes is still ambiguous.²

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1 *E. P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487. Though the new doctrine is considered to have evolved since the 1970s, its roots may be traced to the opinion of Bose, J. in *State of West Bengal v. Ali Anwar Sarkar*, AIR 1952 SC 75.

2 *See Dr. Subramanian Swamy v. Director, CBI*, (2005) 2 SCC 317, where the question whether arbitrariness and unreasonableness are available as grounds to invalidate a legislation was referred to a larger bench.

In a recent article, Abhinav Chandrachud argues in favour of application of doctrine of arbitrariness to legislations.³ He argues that the presumption of validity of statutes is acting as a barrier from applying this doctrine to legislations. Chandrachud cites two decisions of the Supreme Court to show that the arbitrariness test has been applied to invalidate legislations.⁴ To remove the vagueness pervading the doctrine, Chandrachud makes a case for using the basic structure doctrine as the objective standard to determine arbitrariness.

This essay presents a reply to Chandrachud, wherein we argue against the application of arbitrariness doctrine to examine validity of statutes under Article 14. We argue that it is not the presumption of constitutionality that acts as a handicap to the application of the doctrine of arbitrariness to legislations. We contend that the arbitrariness doctrine lies outside Article 14, virtually replacing the right to equality itself by not reading ‘arbitrary’ in the sense of ‘discriminatory’. We examine the application of reasonable classification doctrine by courts and argue that even with respect to the two cases relied upon by Chandrachud, bringing the extra-Constitutional test of arbitrariness is unnecessary. Even if one assumes that the arbitrariness doctrine should be accepted, we put forth certain anomalies that may arise if basic structure doctrine is used as an objective standard to define arbitrariness under Article 14. Thus, we conclude that the arbitrariness doctrine as propounded by the Indian judiciary should not be used to test the validity of legislations under Article 14.

II. PRESUMPTION OF CONSTITUTIONALITY AND DOCTRINE OF ARBITRARINESS

Chandrachud argues that the presumption of constitutionality acts as a barrier to the acceptance of doctrine of arbitrariness under Article 14 to challenge the validity of statutes. According to him, courts are required to presume that legislature enacts laws *bona fide* and thus cannot examine the motives of the legislature. Since the judiciary cannot attribute to the legislature that its laws are enacted without reason, it cannot invalidate laws on the ground of arbitrariness.

However, it is not this presumption itself which bars the application of doctrine of arbitrariness to legislative actions. If its application is otherwise justified, presumption of constitutionality will ebb away, the way it does when the validity of a statute is successfully challenged on the ground of violation of fundamental rights. For example, the presumption of constitutionality does not prevent striking down a law as violative of Article 14, where the classification made by the legislature has no

³ Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*, (2008) 2 INDIAN J. CONST. L. 179.

⁴ *Malpe Vishwanath v. State of Maharashtra*, (1998) 2 SCC 1; *Mardia Chemicals v. Union of India*, (2004) 4 SCC 311.

rational basis.⁵ When there is no classification at all in the statute, “this presumption is of little or no assistance, to the State.”⁶ This is because the reasonable classification test is a valid one, unlike the test of arbitrariness.

While this presumption limits judiciary’s power to invalidate statutes to some extent, being a rebuttable presumption it also enables judicial review of statutes.⁷ The burden to rebut the presumption lies on the person who challenges the validity of the statute.⁸ A statute can be struck down on three grounds, namely, lack of legislative competency, violation of fundamental rights, and, in case of state laws, extra-territorial operation. This presumption also does not prevent the courts from looking at ‘reasonableness’, for example, Articles 19, 21 and even 14 require the courts to examine reasonableness. Under Article 21, the procedure established by law must be fair, just and reasonable and not arbitrary.⁹ Similarly, reasonableness of the restrictions imposed on Article 19 rights can be examined. Under Article 14, the reasonable classification test requires the courts to examine whether there is any rational basis behind the classification made by the law and whether that classification has a reasonable nexus with the object of the law. The concept of reasonableness is all-pervasive within the Indian Constitution. However, the arbitrariness which Article 14 seeks to inhibit is not the same as that under Article 19 as Article 14 necessitates the presence of discrimination for the state action to be arbitrary, which is not so in the case of Article 19.¹⁰

Although it is true that the executive performs legislative functions while framing rules or regulations, the purpose of such delegated legislation is to implement the statute under which it is framed. Hence, two kinds of challenges are available and judicial scrutiny in case of delegated legislations is greater than in case of ordinary legislations. Firstly, delegated legislation can be challenged as being *ultra vires* the enabling Act, and secondly, as being *ultra vires* the Constitution.¹¹ In the first kind of challenge, the vires of subordinate legislation must be tested with regard to the framework of the Act and the purposes for which it delegates power. For example, under the power to establish and de-establish markets, rules requiring that all marketing operations be carried only under markets established under the Act were

5 See, e.g., *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *K. Kunhikoman v. State of Kerala*, AIR 1962 SC 723; *Northern India Caterers Ltd. v. State of Punjab*, AIR 1967 SC 1581.

6 *Ram Prasad Narayan Sahi v. State of Bihar*, AIR 1953 SC 215.

7 See *Rani Ratna Prova Devi Rani Saheba of Dhenkenal v. State of Orissa*, AIR 1964 SC 1195.

8 *Braharn Dutt v. Peoples’ Co-operative Transport Society Ltd., New Delhi*, AIR 1961 Punj. 24; *Duli Chand v. State of Haryana*, AIR 1979 P. & H. 81.

9 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

10 P.K. Tripathi, *The Fiasco of Overruling A.K. Gopalan*, AIR 1990 Jour. 1, 6-7.

11 *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala*, AIR 2006 SC 3480; *Vasu Dev Singh v. Union of India*, 2006 (12) SCC 753.

held to be *intra vires* as they served the purpose of regulation of marketing.¹² However, rules enabling banning of meetings where the Act authorized rule-making power only for the purpose of regulating meetings were held to be *ultra vires*.¹³ Thus, legislative policy is determinative of the validity. Since legislature would not set up a policy allowing the administrator to function in an arbitrary manner, courts may invalidate delegated legislation on grounds of arbitrariness. One should be able to advance a similar argument with regard to legislations and the Constitutional framework.¹⁴ However, this is precisely the reason why the Constitution provides an elaborate set of fundamental rights. In addition, the Constitution provides Directive Principles to guide the legislature in its function of law-making.

It is unclear why the motive of the legislature needs to be looked into at all. Under the reasonable classification test, it is possible to examine the object and the nexus between the object and the classification. If the object offends Article 14, the object can be struck down.¹⁵ What needs to be examined is the effect of the impugned provision on the right. Any further scrutiny of the intention is irrelevant. Moreover, such examination may also lead the judiciary, even if inadvertently, to trench into the arena of the legislature by examining the policy, while the judiciary must decide on the basis of principles or rights.¹⁶

III. RIGHT TO EQUALITY VERSUS NON-ARBITRARINESS

If the presumption of constitutionality permits striking down a law or examining its reasonableness, as provided for within the Constitution, why should it then be debated whether courts cannot or should not examine the reasonableness of a statute challenged as invalid on the grounds of violation of right to equality? An obvious answer is that the doctrine of arbitrariness as read under Article 14 is extra-constitutional, while the presumption allows courts to operate only within the constitutional framework. But this answer cannot suffice as Chandrachud argues in favour of the doctrine despite it being extra-constitutional. Moreover, this is not the first time the judiciary has introduced an extra-constitutional doctrine. The basic structure doctrine to examine the validity of Constitutional amendments is located beyond the Indian Constitution.¹⁷ Even the requirement of ‘due process’ as opposed

12 *RK Porwal v. State of Maharashtra*, AIR 1981 SC 1127.

13 *Himat Lal v. Police Commissioner, Ahmedabad*, AIR 1973 SC 87.

14 See M.P. Singh, *The Constitutional Principle of Reasonableness*, (1987) 3 SCC (J.) 31, 46.

15 *Bidi Supply Co. v. State of Gujarat*, AIR 1975 SC 1234; *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 696; *Deepak Sibal v. Punjab University*, AIR 1989 SC 903.

16 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82-84 (1978); Tarun Jain, *Presumption of Constitutionality, PRESUMPTIONS*, ICAI UNIVERSITY PUBLICATIONS, FORTHCOMING, available at SSRN: <http://ssrn.com/abstract=1087388> (last accessed: September 14, 2009).

17 See B.N. Srikrishna, *Skimming a Cat*, (2005) 8 SCC (J.) 3, 24. *Contra* SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009), who argues that the evolution of

to 'procedure established by law' under Article 21, to the extent it goes against the will of the Constitution-makers¹⁸ is extra-constitutional.¹⁹

The fundamental difficulty with the use of doctrine of arbitrariness is not that it lies outside the Constitution, but that it lies outside the right itself. The doctrine virtually replaces and redefines the right to equality as a new right itself, the right against arbitrariness. This proposition is different from that of operating outside the Constitution. Since fundamental rights, as enshrined in the Constitution, may not be the sole repositories of rights inherent in all citizens,²⁰ it is possible to legitimately widen their scope beyond Constitutional limits, but the right always remains. Here, however, by creating a new right, not only the doctrine but the right itself becomes an extra-Constitutional right. For example, under Article 21, while the scope of the right has been expanded by even traversing beyond the Constitution, the due process requirement still falls within the main right to life and personal liberty.²¹ Similarly, under Article 19, it is the reasonableness of the restriction imposed on the right which is examined. However, in case of Article 14, the right to 'equality' itself disappears. According to Basu, the American interpretation of equal protection clause and the earlier Indian decisions considered that the test of violation of Article 14 was the absence of reasonable classification; while under Article 19, a restriction was considered unreasonable if it was arbitrary. However, now the Court has mingled up the two concepts in broadening the sweep of Article 14.²² In India, courts have indirectly brought in due process by reading Article 14 along with Articles 19 and 21,²³ which have been interpreted to ensure the requirements of reasonableness, non-arbitrariness, justice and fairness.²⁴ In the United States, though due process and equal protection are aimed against arbitrary state action, the scope of their

the basic structure doctrine is not an act of judicial legislation and argues for the legal, moral and sociological legitimacy of the doctrine.

18 See Constitutional Assembly Debates, December 13, 1948, Vol. VII at 1001.

19 In a series of judgments beginning from *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27, *State of Madras v. V.G. Row*, AIR 1952 SC 196, etc., the Supreme Court held that Article 21 gave no protection against competent legislative action and 'law' could not be declared unconstitutional merely because it lacked natural justice or due procedure. However, *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, reinterpreted Article 21 by allowing the test of reasonableness of procedure under Article 21. However, in *A.K. Roy v. Union of India*, AIR 1982 SC 710, the Supreme Court again took a U-turn. The court did not accept that the right of being represented by a counsel though expressly denied by Article 22(3)(b) must be conceded as flowing from Article 19 which requires reasonableness of restrictions, and Article 21 which requires a reasonable procedure. Unlike in *Maneka Gandhi*, here the Court did not read the Articles together and held that the Constitution itself provided the yardstick of reasonableness in Article 22(3)(b).

20 See dissenting opinion of Khanna J. in *ADM Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

21 See, e.g., *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498; *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

22 D.D.BASU, CONSTITUTIONAL LAW OF INDIA 101 (7th ed. 2003).

23 *D.T.C. v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101.

24 *Maneka Gandhi v. Union of India*, AIR 1978 SC 579.

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application is different. Quite the contrary, our Supreme Court has, since 1974, come to hold that Article 14 is not to be confined to the doctrine of classification.²⁵

The new approach to Article 14 was propounded by Bhagwati J. in *E. P. Royappa v. State of Tamil Nadu*²⁶ wherein he stated:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits...equality is antithetic to arbitrariness...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 Article 14.”

Bhagwati J. reiterated this approach in few other cases,²⁷ before it received affirmation in *Ajay Hasia v. Khalid Mujib*²⁸ by a five-judge Bench. Courts have brought in the arbitrariness doctrine by viewing arbitrariness as antithetical to equality, thus making the right to equality synonymous to right against arbitrariness. However, as rightly stated by Seervai, inequality and arbitrariness are not the same. According to him, the new doctrine hangs in the air as it is propounded without reference to the terms in which the right to “equal protection of laws” is conferred. Courts have misunderstood the relation between ‘arbitrariness’ and ‘discrimination’. From the Supreme Court’s reasoning, it appears that ‘arbitrary’ involves a voluntary action of a person on whom the arbitrary power has been conferred. However, according to Seervai, one cannot attribute will or intention to a legislature. Whatever violates equality is not necessarily arbitrary, though arbitrary actions are ordinarily violative of equality.²⁹ The proposition that equality is antithetical to arbitrariness needs to be understood in its proper context. The antithesis of equality is discrimination and it is in this sense that ‘arbitrary’ needs to be understood.³⁰ For instance, if a quasi-judicial body takes a decision randomly, such arbitrariness violates equality by

25 D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIAN 972 (8th ed. 2007). However, the roots of the new doctrine of equality may be traced to the opinion of Bose, J. in *State of West Bengal v. Ali Anwar Sarkar*, AIR 1952 SC 75, who forges the nexus between equality on one hand and reasonableness, justice and fairness on the other.

26 AIR 1974 SC 555.

27 *Maganlal Chhaganlal Pot. Ltd. v. Greater Bombay Municipality*, AIR 1974 SC 2009; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597. In *R.D. Shetty v. International Airport Authority*, AIR 1979 SC 1628. and *Kasturilal v. State of Jammu and Kashmir*, AIR 1980 SC 1992, Bhagwati, J. spoke of the doctrine of arbitrariness for the unanimous Court of three-judge bench in each.

28 AIR 1981 SC 487.

29 H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 272-279 (3rd ed. 1983). See also T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 207 (B.N. Kirpal et al., eds., 2000), who illustrates that if all red-haired students are expelled without reason, that action is both arbitrary and unequal; if, however, all students irrespective of hair colour are expelled, it is simply arbitrary but not unequal. See also ARVIND DATAR, CONSTITUTION OF INDIA 37 (2001).

30 See *State of Andhra Pradesh v. McDowell and Co.*, AIR 1996 SC 1627; Srikrishna, *supra* note 17 at 10-11; Tripathi, *supra* note 10 at 6-7.

breaching the individual's right to be treated as an equal in the delivery of justice. If a statute provides a mechanism permitting a body to apply the law arbitrarily, again that arbitrariness violates equality. But to extend this statement and apply it as a general norm, even in arbitrary situations unconnected with equality, is to totally negate the right as was envisaged by the Constitution-makers.

Chandrachud accepts that the doctrine of arbitrariness is extra-Constitutional, but argues that it should still be applied.³¹ He argues that the doctrine of basic structure should be used as an objective standard to test the arbitrariness of a statute.³² In this context, two aspects need to be examined: whether adopting this extra-Constitutional right holds any merit beyond what the traditional approach provides, and whether basic structure as a doctrine can be used as an objective yardstick to justify the new doctrine.

IV. THE OLD DOCTRINE OF REASONABLE CLASSIFICATION

Although the doctrine of arbitrariness is extra-Constitutional, its application to legislations might still be fruitful if it would serve some greater purpose, beyond what is being already served by the existing doctrine of reasonable classification. An analysis of decisions shows that with regard to statutes whose provisions are challenged as discriminatory or arbitrary, the judiciary is still applying the old doctrine, even while sometimes claiming to have applied the new doctrine of arbitrariness.³³ In *State of Andhra Pradesh v. McDowell & Co.*,³⁴ the court categorically held that no enactment can be struck down merely on the ground of unreasonableness. Where the statute gives discretion to the executive to classify, the question does not hold much relevance because in such cases, there is not much difference between the application of the old and new doctrines.³⁵ Under both the doctrines, the Court examines whether the legislature has provided enough guidance to prevent an arbitrary exercise of power by the administrator.

Two cases have been particularly relied upon by Chandrachud where legislations were invalidated as violative of Article 14 on the application of arbitrariness doctrine. The first of these cases is *Malpe Vishwanath v. State of Maharashtra*³⁶ where the court declared provisions of the Bombay Rent Act as violative of Article 14 on the ground that the legislation had become arbitrary with

31 Chandrachud, *supra* note 3 at 190-1.

32 Chandrachud, *supra* note 3 at 189.

33 See, e.g., *Manchegowda v. State of Karnataka*, AIR 1984 SC 1151; *Karnataka STDC v. Karnataka STAT*, (1986) 4 SCC 421; *Naz Foundation v. Government of NCT of Delhi*, 160 (2009) D.L.T. 277.

34 [1996] 3 S.C.R. 721. See also *Novartis AG v. Union of India*, (2007) 4 M.L.J. 1153.

35 See, e.g., *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Babubhai and Co. v. State of Gujarat*, AIR 1985 SC 613.

36 (1998) 2 SCC 1.

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the passage of time. It is interesting to observe, however, that all the precedents relied on by the court to reach this conclusion used the old doctrine.³⁷ These cases clearly state that passage of time may obliterate the considerations of necessity and expediency, and the grounds which justified a classification may cease to be valid. Hence, the old doctrine also allows for invalidating outdated legislation on the ground of violation of Article 14.³⁸ Another interesting aspect is that even in this case, the court examined the object behind the legislation and noticed how the provision is no longer in furtherance of the same.

The next case upon which Chandrachud's comment is based is *Mardia Chemicals Ltd. v. Union of India*³⁹ where the requirement of deposit, by the borrower, of 75% of the amount claimed by the secured creditor under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was held to be unreasonable, hence, violative of Article 14. It is important to note that the concept of arbitrariness was applied here in the sense of the statute being *discriminatory*, which must be distinguished from a case where a provision is struck down as being arbitrary *per se*. The Court here observed the importance of provision of appeal in a statute which enabled drastic measures to be taken against the borrower. The Court held that in such a case, the conditions like the 75% deposit requirement, after the secured assets of the borrower have already been taken over, made the remedy illusory. This is an inherent infirmity leaning one-sidedly towards one party. The court also stated that in the absence of any other grievance redressal mechanism, the provision for appeal was equivalent to filing a suit in first instance. Hence, this is a case where an important remedy under the statute, providing for grievance redressal and justice delivery mechanism, was itself one-sided and hence amounted to an unequal remedy. The 75% condition was not struck down as merely being strict and disproportional. The Court noted that certain provisions of the statute "may also be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues...to help in growth of economy". However, considering that the provision for appeal failed to achieve its object of providing a reasonable protection to the borrower, it was struck down.

37 *State of Madhya Pradesh v. Bhopal Sugar Industries*, [1964] 52 I.T.R. 443(SC); *Narottam Kishore Dev Verma v. Union of India*, [1964] 7 S.C.R. 55; *H.H. Shri Swamiji Shri Admar Mutt v. The Commissioner, Hindu Religious & Charitable Endowments Department*, [1980] 1 S.C.R. 368; *Motor General Traders v. State of Andhra Pradesh*, [1984] 1 S.C.R. 594; *Rattan Arya v. State of Tamil Nadu*, [1986] 2 S.C.R. 596.

38 See *Motor General Traders v. State of Andhra Pradesh*, [1984] 1 S.C.R. 594, where it was held that if the continuance of a previously valid provision on the statute book will imply the creation of a privileged class without any rational basis and nexus with the object for reasonable classification of such class no longer exists by lapse of time, it can be struck down as being violative of Article 14.

39 AIR 2004 SC 2371.

It is also possible to reach the same decision without applying the arbitrariness test. The 75% condition has no rational basis, more so, considering the object of appeal is to provide the borrower an adequate and effective grievance redressal mechanism. There is no rational nexus to this object. In fact, the remedy is almost illusory for him.

Chandrachud's comment totally ignores the reasonable classification doctrine and that even in absence of arbitrariness test, an adequate remedy is available. The courts now claim that Article 14 aims to prevent arbitrariness and reasonable classification is merely a test to determine whether the impugned act is arbitrary.⁴⁰ However, the purpose of Article 14 is to prevent discrimination. Examining the reasonableness/arbitrariness of classification made by a legislation is a way to determine whether the right to equality has been violated, rather than the doctrine of arbitrariness being the end and reasonable classification being a mere means to determine so. We must however point out that reasonable classification is not the only test that must be applied under Article 14. It is merely a formula to examine the violation of right to equality, and can be replaced by a better test in the future. However, as explained above, the doctrine of arbitrariness lies outside the right to equality itself and thus redefines the right. It is not merely a formula, but has an ambit beyond the right to equality, replacing the right itself.

If an extra-constitutional doctrine is sought to be brought within the legal framework, it must assist in filling some manifest void or it must lead to some substantial benefit to the legal position already existing.⁴¹ When a constitutional doctrine can serve the same purpose, there is no need to bring an ambiguous extra-constitutional doctrine to test the validity of state action.

V. BASIC STRUCTURE AS DETERMINATIVE OF ARBITRARINESS

Chandrachud argues that the doctrine of arbitrariness lacks legitimacy because of the vagueness surrounding the test. Taking cue from *Mardia Chemicals*, he suggests that the basic structure of the Constitution should be used as the objective standard to define the test. This means that when a statute is challenged as being violative of Article 14, what needs to be examined is whether it violates the basic structure of the Constitution or not. A statute infringing the basic structure is arbitrary, hence, violative of Article 14.

⁴⁰ *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 722.

⁴¹ For example, although basic structure doctrine is extra-constitutional, it may be justified on the ground that in its absence, the legislature may virtually redraft the Constitution by amending any of its provisions. If the Supreme Court had not brought this doctrine, such a situation could not have been prevented due to the void in law in this regard. This is a justifiable exercise because without it, "there would have been no Constitution and no independent judiciary worth the name". Srikrishna, *supra* note 17 at 24.

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The applicability of basic structure doctrine to ordinary legislation has been debated before, though not in the context of Article 14. In *Indira Gandhi v. Raj Narain*,⁴² Beg J. asserted that basic structure applies to both ordinary statutes and Constitutional amendments as ordinary law-making cannot go beyond the range of Constituent power. However, Ray C.J., Chandrachud J. and Mathew J. refuted this, stating that the amending power and ordinary law-making power operate in different fields and are therefore subject to different limitations. The Constitution already imposes restrictions on ordinary law-making power, and to subject such statutes to basic structure would mean rewriting the Constitution and robbing the legislature of acting within the constitutional framework. This view was accepted in later cases.⁴³ However, in *Ismail Faruqui v. Union of India*⁴⁴ and *G.C. Kanungo v. State of Orissa*⁴⁵ the Court applied the basic structure doctrine to invalidate ordinary laws. Ramachandran argues that these two cases illustrate the perils of an easy resort to the basic structure doctrine by the courts. In these two cases, the Court did not even attempt to distinguish its views from the law laid down in *Indira Gandhi* case. Besides, the Court could have easily invalidated the statutes on other well-recognized grounds, including that of violation of Article 14.⁴⁶

Chandrachud argues that the basic structure doctrine should be used as an objective standard to determine reasonableness under Article 14. Assuming that the doctrine of arbitrariness should be applied to test the validity of legislations and it is only the vice of vagueness it suffers from that needs to be corrected, the use of basic structure as the objective standard leads to anomalous results. Applying Chandrachud's argument, what needs be seen under Article 14 is whether there is violation of basic structure or not. Equality itself is part of the basic structure.⁴⁷ If a statute is actually violative of the right to 'equality', for example by making an unreasonable classification, how is that to be examined? Does it mean that the courts should apply different meanings for 'equality' as existing under Article 14 and as under the basic structure, so that while testing the validity of the provision,

42 AIR 1975 SC 2299.

43 *State of Karnataka v. Union of India*, (1978) 2 S.C.R. 1; *V.C. Shukla v. Delhi Administration*, (1980) 2 SCC 665; *Minerva Mills (II) v. Union of India*, (1986) 4 SCC 222; *Kuldip Nayyar v. Union of India*, (2006) 7 SCC 1. However, as explained subsequently, after the decision in *Waman Rao v. Union of India*, (1981) 2 SCC 362, followed by *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861, this position has changed with regard to statutes enjoying the immunity of Ninth Schedule of the Constitution.

44 (1994) 6 SCC 360. In this case, provisions precluding legal proceedings in relation to disputed site where the Babri Masjid stood were held to be violative of the principle of rule of law, a basic feature, and thus unconstitutional.

45 (1995) 5 SCC 96. Here, provisions providing for nullification of the award of the Special Arbitration Tribunals were held to be invalid as violating the basic feature of rule of law.

46 Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 123-4 (B.N. Kirpal et al., eds., 2000).

47 *Kesavanada Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

courts must once again go back to the reasonable classification test to test whether the provision violates the ‘equality’ under the basic structure? Similarly, if a statute is challenged as violative of Article 14 because it goes against rule of law, which falls under the basic structure,⁴⁸ an anomalous situation arises. Chandrachud admits that non-observance of rule of law does not automatically imply arbitrariness.⁴⁹ In that case, is it justified to strike down a law on the grounds of non-observance of rule of law simply because rule of law falls under the basic structure, while knowing that this does not otherwise lead to arbitrariness?

It is also questionable whether bringing the basic structure doctrine would enhance or diminish the protection afforded presently by Article 14. The Constitution lays down an elaborate set of fundamental rights to test the validity of ordinary legislations. The judiciary, in order to prevent the legislature from altering the identity of the Constitution, brought the concept of basic structure. While it is true that certain parts of basic structure may not fall within the fundamental rights, on the whole, basic structure can be said to be a weaker protection than the strong protection that is offered by Part III of the Constitution. This is also evident from the following statement by Krishna Iyer J. wherein he held that every breach of equality is not a violation of the basic structure:

“What is a betrayal of the basic feature is not a mere violation of Article 14, but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice...to permit the Bharati ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralyzation of parliamentary function.”⁵⁰

The argument that the basic structure doctrine and fundamental rights protection need to be kept separate and that fundamental rights offer a stronger protection also gains some support from the law the has developed with regard to legislations enjoying the protection of the Ninth Schedule of the Constitution. Statutes mentioned under the Ninth Schedule are immune from a challenge on the grounds of violation of fundamental rights. If such laws violate the basic structure of the Constitution, they no longer enjoy the immunity offered by the Ninth Schedule and thereafter can be challenged as violative of fundamental rights.⁵¹ However, if the fundamental right which the law is alleged to violate is Article 14 itself, this distinction between ordinary laws and those getting the Ninth Schedule immunity becomes

48 *Kesavanada Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Sampath Kumar v. Union of India*, (1987) 1 SCC 124; *P. Sambhamurthy v. State of Andhra Pradesh*, AIR (1987) 1 SCC 362; *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

49 Chandrachud, *supra* note 3 at 184.

50 *Bhim Singhji v. Union of India*, (1981) 1 SCC 166.

51 *Waman Rao v. Union of India*, (1981) 2 SCC 362; *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

meaningless.

Lastly, basic structure, which is being sought to be used as an objective standard, is itself a nebulous concept. Its scope gets redefined constantly as and when issues come up before the judiciary. This position becomes even more doubtful in the light of the Supreme Court's decision in *I.R. Coelho v. State of Tamil Nadu*⁵² where basic structure was defined in terms of the fundamental rights themselves, as reflected in Articles 14, 15, 19, 20, 21 and 32.⁵³ If the judiciary starts defining the basic structure as nothing but a set of fundamental rights, then the added protection under the arbitrariness doctrine under Article 14 would be meaningless, as the protection under the various fundamental rights, as well as the power of the courts to read them together, is already available.

The difficulty in using basic structure doctrine as a standard to determine arbitrariness arises again because of the fundamental problem that the doctrine of arbitrariness misses the connection with the right to 'equality'. If without infringing any of the fundamental rights, a statute abridges the basic structure, for example, the separation of powers or the rule of law, this has no nexus with the violation of equality. If one wishes to make a case for testing statutes also on the touchstone of the basic structure, besides the fundamental rights, a different route needs to be looked for instead of exploiting the protection offered by Article 14.

VI. CONCLUSION

The doctrine of arbitrariness and the right to equality are different in scope and hence, the application of the doctrine of arbitrariness under Article 14 is misconceived. Arbitrariness cannot serve as the touchstone to decide inequality.

Chandrachud argues that it is the presumption of constitutionality in case of legislations that is preventing the courts from using arbitrariness as the test to examine the validity of statutes. However, the presumption of constitutionality of legislations is not the sole reason against the application of arbitrariness doctrine. If the doctrine were applicable, the presumption would not even serve as a handicap. The arbitrariness test is an extra-constitutional test which cannot function within Article 14. While in case of delegated legislation, the test of arbitrariness may succeed as they need to be tested on the touchstone of both the Constitution and the enabling statute, bringing such a doctrine to test validity of statutes is not feasible.

While Chandrachud argues in favour of the doctrine of arbitrariness, he ignores the reasonable classification test which serves no lesser purpose than the arbitrariness test. Bringing such an extra-constitutional doctrine is both unnecessary and

⁵² AIR 2007 SC 861.

⁵³ *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861 at 891.

undesirable. According to Chandrachud, the only vice that the arbitrariness doctrine is suffering from is that of vagueness. He attempts to cure that by using the doctrine of basic structure as providing the objective standard to determine arbitrariness. However, even assuming that the only infirmity with arbitrariness test is the lack of objectivity, the basic structure doctrine cannot provide the required objective standards due to a number of anomalies that arise on such an application.

The Constitution is a document to keep a check on all three organs, including the judiciary. If the judiciary has empowered itself to bring extra-constitutional doctrines for a better delivery of justice, this power must be subject to even a greater scrutiny and restraint. If one is talking about the legitimacy of institutions in a democracy and certainty of law, bringing ambiguous doctrines serving hardly any greater purpose, will in fact erode the legitimacy of the judiciary.