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SCOPE OF CONSTITUTIONAL REVIEW OF PARLIAMENTARY ENACTMENTS: REVISITING THE LEGITIMACY OF THE 'ARBITRARINESS' STANDARD

A CRITICAL COMMENT ON RAJ BALA v. *STATE OF HARYANA*

—Shivam*

Abstract The Supreme Court's dicta in *Raj Bala* v. *State of Haryana*[1] ('Raj Bala') has renewed the juristic and scholarly interest in the appropriate form of equality analysis applicable to statutes. Ever since the enunciation of a seemingly 'new' standard for determining the negation or otherwise of the right to equality in the celebrated case of *E.P. Royappa* v. *State of T.N.*[2] ('Royappa'), jurists and academicians alike have struggled to put this development in perspective. Even as the controversy surrounding the doctrine was far from clear, a division Bench readily dismissed the applicability of 'arbitrariness' standard to invalidate principal legislations. Even independently of Raj Bala, the aura of legitimacy surrounding the said test remains as elusive as ever. This mystery cannot be solved without reference to the origin, scope and content of the 'arbitrariness' standard. This paper proposes to engage with these concerns.

I. INTRODUCTION

The constitutional guarantee of the right to equality has always enjoyed a privileged status in the constitutional jurisprudence of India. Soon after the

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1 (2016) 1 SCC 463.

2 (1974) 4 SCC 3.

adoption of the Constitution of India, a five-judge Bench of the Supreme Court was called upon to rule on the constitutional validity of a parliamentary enactment being assailed on the grounds of violation of fundamental rights including the right to equality under Article 14 of the Constitution.[3] It was in this case that the Supreme Court for the very first time propounded what would later on come to be called the 'classification' or 'nexus' test for determining the negation or otherwise of the right to equality. This case was a clear example of the genius and the humble beginnings of a majestic institution zealously committed to the task of protecting the fundamental rights of the people of India.[4]

The 'reasonable classification' test that was evolved as a doctrinal tool almost six and a half decades ago continues to hold its relevance and appeal in contemporary constitutional discourse. This is quite evident from the fact that it continues to be the dominant test in deciding upon violation of the right to equality enshrined in Article 14 of the Constitution.[5] Nevertheless, given the relative unease with the doctrine's undue emphasis on the distributive aspect premised on discrimination *vis-a-vis* a similarly situated and distinct class of persons, it was only a matter of time before the Supreme Court would discard a "narrow, pedantic or lexicographical"[6] interpretation of the concept of 'equality' embedded in Article 14 of the Constitution and extend the protective reach of the right even to cases where there was no occasion for comparative evaluation.

However, this seemingly 'new' development was not an 'invention' but only a 'discovery' since what the Court had sought to do was nothing more than explore and bring to light the "vital and dynamic aspect" of equality that had till then been lying "latent and submerged in the few simple but pregnant words of Article 14".[7] To buttress this submission, it would be worthwhile to take a look at the pronouncement made by a Constitution Bench of the Supreme Court at least a decade before the famous *Royappa* case wherein the Court acknowledged for the first time that the right to equality enshrined in Article 14 was not synonymous with the doctrine of reasonable classification but went much beyond it. Subba Rao J., speaking for a five-judge Bench held thus:

> "[A] citizen is entitled to a fundamental right of equality before the law and that the doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to the

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[3] Chiranjit Lal Chowdhuri v. Union of India, AIR 1951 SC 41.

[4] Upendra Baxi, *Law, Politics, and Constitutional Hegemony: The Supreme Court, Jurisprudence, and Demosprudence in The Indian Constitution*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 116 (Sujit Choudhry et al. eds., 2016).

[5] For some instances of recent application, *see* State of Maharashtra v. Indian Hotel and Restaurants Assn., (2013) 8 SCC 519; Subramanian Swamy v. CBI, (2014) 8 SCC 682; Raj Bala v. State of Haryana, (2016) 1 SCC 463; Hiral P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165; State of Punjab v. Senior Vocational Staff Masters Assn., (2017) 9 SCC 379.

[6] E.P. Royappa v. State of T.N., (1974) 4 SCC 3 ('*Royappa*').

[7] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722.

> said doctrine. Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law, and equal protection of the laws may be replaced by the doctrine of classification."[8]

Thus, Article 14 essentially embodied a guarantee against 'arbitrariness' and therefore, the test of 'reasonable classification' was itself informed by the doctrine of 'arbitrariness'. This becomes further clear from the statement of Bhagwati J. in *Ajay Hasia* v. *Khalid Mujib Sehravardi* ('*Ajay Hasia*'):

> "The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality."[9]

In *Bachan Singh* v. *State of Punjab*, Bhagwati J. reiterated his position in the following manner:

> "[T]he court pointed out in *Maneka Gandhi case* that Article 14 was not to be equated with the principle of classification. It was primarily a guarantee against arbitrariness in State action and the doctrine of classification was evolved only as a subsidiary rule for testing or determining whether a particular State action was arbitrary or not".[10]

In the light of the above, it becomes clear that whenever a Court rules against the application of the 'arbitrariness' test to parliamentary enactments, it is based on a failure to appreciate the real import of an 'arbitrariness' analysis under Article 14 that lies at the heart of 'reasonable classification' test. To suggest otherwise would mean that there is virtually no test for determination of the negation or otherwise of the right to equality guaranteed by Article 14. However, insofar as the decision in *Raj Bala* is concerned, even upon an engagement on its own terms, it fails the test of a sound precedent as becomes apparent from the sections that follow.

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[8] Lachhman Dass v. State of Punjab, AIR 1963 SC 222.

[9] Ajay Hasia, v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 ('*Ajay Hasia*').

[10] Bachan Singh v. State of Punjab, (1982) 3 SCC 24.

II. CONCEPTUALISING ARBITRARINESS

The judicial discovery of the 'arbitrariness' standard was followed by attempts to provide it its own substantive content. One of the earliest cases on this point is *Maneka Gandhi* v. *Union of India*,[11] ('*Maneka Gandhi*') wherein Bhagwati, J. held that, "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence".

Again, in *Ramana Dayaram Shetty* v. *International Airport Authority of India*[12] case, he reiterated his observations as follows:

> "The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law".

A more precise articulation was made by Verma J. in *Shrilekha Vidyarthi* v. *State of U.P.*,[13] wherein it was stated:

> "The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner, which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary".

Thus, it seems to be well-established that the principle of arbitrariness has largely been equated with the concept of unreasonableness. According to Dr. Khaitan,[14] this unreasonableness may be comparative insofar as it pertains to the 'distributive aspect' of State action but at the same time, it may also be non-comparative where one need not allege any discrimination *vis-a-vis* others. In fact, he

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[11] (1978) 1 SCC 248.

[12] (1979) 3 SCC 489.

[13] (1991) 1 SCC 212.

[14] Tarunabh Khaitan, *Equality: Legislative Review Under Article 14*, *in* THE OXFORD HANDBOOK OF INDIAN CONSTITUTION 699, 702 (S. Choudhry et al. eds., 2016).

suggests that "arbitrariness doctrine's unique contribution is to bring *non-comparative unreasonableness* within the ambit of Article 14".[15]

Proponents of comparative unreasonableness include Dr. Tripathi and Dr. Swarup. In this context, Dr. Tripathi notes, "The arbitrariness inhibited by Article 14 is the arbitrariness or unreasonableness in discriminating between one person and another; if there is no discrimination there is no arbitrariness in the sense of Article 14."[16]

Similarly, Dr. Swarup posits that, "Any order passed independent of a rule, or without adequate determining principle would be arbitrary. Here, the adequate determining principle is the valid classification. Article 14 is not really a guarantee against arbitrariness."[17]

Further, on the aspect of comparative unreasonableness, the *locus classicus* on the point is *Ajay Hasia* where it has been observed,

> "If the classification is not reasonable and does not satisfy the two conditions referred to above [(i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action], the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached".[18]

As far as non-comparative unreasonableness is concerned, *A.L. Kalra* v. *Project and Equipment Corpn. of India Ltd.*[19] is the case in point. In this case, Desai, J. held as follows:

> "One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action *per se* arbitrary itself denies equal of protection by law".[20]

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[15] *Id.*

[16] P.K. Tripathi, *The Fiasco of Overruling A.K. Gopalan*, AIR JOURNAL 1, 6 (1990).

[17] J. SWARUP, CONSTITUTION OF INDIA 401 (2nd ed. 2006).

[18] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722; *See also Maneka Gandhi*: "Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment" [The expression "State action" having not been qualified with reference to executive action (including delegated legislation) must be interpreted in relation to the definition of 'State' under Article 12 of the Constitution of India, thereby including legislative actions as well].

[19] (1984) 3 SCC 316, 328.

[20] A.L. Kalra v. Project Equipment Corpn. of India Ltd., (1984) 3 SCC 316, 328; *See also* Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212.

III. FACTUAL BACKGROUND OF RAJ BALA

This case arose out of a challenge to the constitutional validity of the Haryana Panchayati Raj (Amendment) Act, 2015 (Act 8 of 2015), *inter alia*, on the grounds that the provisions providing for varying levels of (minimum) educational competences for contesting elections to the different posts in the village panchayat were wholly unreasonable and arbitrary, and therefore violative of Article 14 of the Constitution. The Court dismissed the challenge and upheld the validity of the impugned enactment. On the question of 'arbitrariness' specifically, the Court held thus:

> "[I]t is clear that courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution. To undertake such an examination would amount to virtually importing the doctrine of "substantive due process" employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation".[21]

IV. CRITICAL APPRAISAL OF RAJ BALA

Raj Bala may have given cause for celebration to the scholars, academicians and practitioners who had held strong views against the applicability of the arbitrariness test to adjudicate upon the constitutional validity of statutes,[22] but it is very clear that it does not lay down a sound principle of law and on grounds more than one, its precedential value is seriously compromised. The different heads of criticisms have been explained as below.

A. Judicial Discipline

In *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*,[23] a Constitution Bench of this Court after a review of other Constitution Benches' decisions on this point, had laid down the following two propositions (among others):

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[21] Raj Bala, (2016) 1 SCC 463.

[22] M.P. Singh, *Decriminalisation of Homosexuality and the Constitution* 2 NUJS LAW REVIEW 361-380 (2009); Deepika Sharma & Radhika Gupta, *Doctrine of Arbitrariness and Legislative Action - A Misconceived Application* 5 NALSAR STUDENT LAW REVIEW 22-34 (2010); Khaitan, *supra* note 14.

[23] (2005) 2 SCC 673.

> "(i) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength and (ii) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration".

It is submitted that *Raj Bala* suffers from the vice of judicial indiscipline in that it was pronounced by a coram of two-judges and sought to overrule the position of law laid down by larger benches. For example, in *Ajay Hasia*, it was laid down:

> "Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution".[24]

Moreover, the decision also seems to overlook the exposition of law made by three full Benches. For example, in *State of T.N.* v. *Ananthi Ammal*,[25] Bharucha, J. had observed that, "When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down." Furthermore, *Malpe Vishwanath*[26] and *Mardia Chemicals*,[27] exemplify the application of the arbitrariness standard to primary legislation. It is disheartening that *Raj Bala* seeks to unceremoniously downplay the exposition of law made in these cases by confining them to a mere footnote.

In so far as a decision can generally be said to be given *per incuriam* when this Court acts in ignorance of a previous decision of its own or when a High Court acts in ignorance of a decision of this Court,[28] *Raj Bala* can also be said to be a *per incuriam* decision.

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[24] Ajay Hasia, (1981) 1 SCC 722.
[25] (1995) 1 SCC 519.
[26] Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1.
[27] Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311.
[28] Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court, (1990) 3 SCC 682.

B. Misreading of State of *A.P.* v. *McDowell & Co.*[29] (*'McDowell'*)

Another possible ground of criticism of *Raj Bala* may be said to be its misreading of *McDowell*. The Court primarily relied on *McDowell*, a full Bench decision, for ruling out the application of arbitrariness to statutes. It is submitted that the decision in *McDowell* was to the effect that a mere assertion of arbitrariness short of due substantiation with reference to the provisions or scheme of the Constitution will not meet the legal threshold of arbitrariness required for invalidating inconsistent enactments. Thus, it is submitted that *McDowell* did not foreclose the 'arbitrariness' challenge for good. It simply insisted on a well-founded and concrete claim premised in the provisions of the Constitution or constitutional law. In the instant case, the argument with regard to arbitrariness was well-founded (and not made in the abstract) in the sense that it was made in the context of a citizen's constitutional right to contest elections[30] (a point that was well-conceded in *Raj Bala*). Simply put, the argument was that the impugned enactment was arbitrary since it violated a citizen's constitutional right to contest in an election and given this legitimate constitutional foundation, the ratio of *McDowell* could not rule out an application of the arbitrariness standard to the instant case.

Even otherwise, *McDowell* was decided by a Bench having a total strength of three and thus cannot be invoked as an authority for overruling larger Bench decisions on this point. However, here it may be pointed out that in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012*[31] (*'2G Reference'*), the Court had arrived at the same finding as *Raj Bala*. In that sense, the *2G Reference* can also be said to be based on a misplaced understanding of *McDowell* for similar reasons. It has also been argued that the *2G Reference* did not involve legislative review, and therefore its resurrection of *McDowell* remains *obiter*.[32] It is well-settled law that a decision is an authority for what it decides and not what can logically be deduced therefrom.[33]

C. Substantive Due Process

The Court's reluctance to apply the arbitrariness doctrine while reviewing the constitutionality of statutes also stemmed from the fact that it would amount to an importation of the American doctrine of 'substantive due process' which does not merit introduction in the Indian constitutional system. This observation can be said to be correct only in part since 'substantive due process' analysis has become a part and parcel of judicial scrutiny under Article 21. Further, the

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[29] (1996) 3 SCC 709.

[30] Upendra Baxi, *Supreme Error*, The Indian Express, December 24, 2015.

[31] (2012) 10 SCC 1.

[32] Khaitan, *supra* note 14, at 718.

[33] Union of India v. Chajju Ram, (2003) 5 SCC 568.

Court's reading of *A.S. Krishna* v. *State of Madras*[34] as declarative of the fact that the doctrine of due process has no application under the Indian Constitution is disingenuous to say the least, since the Court in that case did nothing more than express doubt as to the application of the due process concept in India. In fact, it went on to examine the impugned legislation on the touchstone of due process and found it compatible with the same. On the other hand, *Municipal Committee, Amritsar* v. *State of Punjab*,[35] (another case relied upon by the Court for ruling out the application of the doctrine of due process in India) was a decision rendered much before the constitutional catharsis attributable to *Maneka Gandhi* (in the aftermath of *Gopalan*[36] fiasco) and was only a full Bench decision.

In *Selvi* v. *State of Karnataka*,[37] Balakrishnan, J., speaking for a three-judge Bench has stated in no uncertain terms that, "The standard of 'substantive due process' is of course the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of 'personal liberty'." Also, Nariman, J. in *Mohd. Arif* v. *Supreme Court of India*,[38] speaking for the majority in a five-judge Bench decision held that, "Substantive due process is now to be applied to the fundamental right to life and liberty."

Further, it is well-settled post *Maneka Gandhi* that not only the procedure contemplated under Article 21, but also the law establishing the same must satisfy the requirement of reasonableness mandated by Article 14.

More than three and a half decades later, Nariman J. sought to put the doctrinal development post-Maneka Gandhi in perspective by stating thus:

> "Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21".[39]

Thus, it follows that arbitrariness challenge would always be available in case of legislative actions assailed on the grounds of infringement of the constitutional guarantee under Article 21.

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[34] AIR 1957 SC 297.
[35] (1969) 1 SCC 475.
[36] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
[37] (2010) 7 SCC 263.
[38] (2014) 9 SCC 737.
[39] Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 737.

V. JUDICIAL EVALUATION OF ARBITRARINESS: RATIONALITY VERSUS REASONABLENESS

For all its merits and legitimate constitutional foundations, the arbitrariness test continues to elude scholars and practitioners of constitutional law alike when it comes to the appropriate form of scrutiny applicable in the context of primary legislation assailed on the grounds of non-comparative unreasonableness. The objections against such an exercise include existence of a presumption of constitutionality in favour of an enactment and lack of objective standards.[40]

For example, in *K.T. Plantation (P) Ltd.* v. *State of Karnataka*,[41] it was held:

> "Any law which in the opinion of the court is not just, fair and reasonable is not a ground to strike down a statute because such an approach would always be subjective not the will of the people because there is always a presumption of constitutionality of a statute".

The argument with respect to presumption of constitutionality can be simply rebutted by stating that the presumption is a rebuttable one and will make way once there is a clear demonstration of violation of fundamental rights. Moreover, the doctrine of strict scrutiny that has been gradually making inroads into the constitutional jurisprudence of our country reverses the presumption in select forms of classification.[42]

Notwithstanding the progressive obliteration of the qualitative differences between supreme and subordinate legislative activities, there seems to be some merit in the arguments advanced above. Hence, it is only fitting that the Courts be circumspect in invalidating statutes on the grounds of arbitrariness. This is also necessary in the light of the fact that implicit in the presumption of constitutionality are the arguments pertaining to representative legitimacy, robustness of the legislative process, and superiority of the institutional design of the legislature reinforced by the requirement of constitutional governance.

Thus, it is crucial to guard against the routine exercise of judicial review on the grounds of arbitrariness. Not only is it necessary to specify with utmost precision the category of cases in which a challenge based on arbitrariness would be available, but also the appropriate form of scrutiny applicable to such cases. It is

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[40] Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the light of Mardia Chemicals* v. *Union of India*, 2 INDIAN JOURNAL OF CONSTITUTIONAL LAW 179, 185 (2008).

[41] (2011) 9 SCC 1.

[42] Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1; Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458; Kerala Bar Hotels Assn. v. State of Kerala, (2015) 16 SCC 421.

submitted that the 'reasonableness' standard as contradistinguished from a mere 'rationality' requirement should guide the judicial practice in this regard.

The distinction between 'reasonableness' and 'rationality' is well-documented in the philosophical writings of Kant which was elaborated upon by John Rawls in his classic treatise *Political Liberalism*. According to Rawls, 'the reasonable' and 'the rational' are 'two distinct and independent' basic ideas since there is no thought of deriving one from the other. In the Rawlsian sense of justice as fairness, rationality is seen as a logical, self-serving, means-end centric, and to that extent purely economic enterprise. By contrast, reasonableness implies the idea of 'fair co-operation' and recognition of the 'independent validity of the claims of others'.[43] To put it differently:

> "Rationality is in fact a rather permissive discipline, which demands the test of reasoning, but allows reasoned self-scrutiny to take quite different forms, without necessarily imposing any great uniformity of criteria. If rationality were a church, it would be a rather broad church. Indeed, the demands of reasonableness, as characterized by Rawls, tend to be more exacting than the requirements of mere rationality".[44]

According to Georg Henrik von Wright, "rationality when contrasted with reasonableness has to do, primarily, with formal correctness of reasoning, efficiency of means to an end, the confirmation and testing of beliefs".[45] On the other hand, reasonableness is "concerned with the right way of living, with what is thought good or bad for man".[46] In more operational terms, Geoff Airo-Farulla has explained the difference as under:

> "'Reasonableness' should not be used as a synonym for 'rationality', but only in the residual sense of requiring consistency with accepted moral values and common sense, and paying due regard to the interests of others (where this is not otherwise required by more specific doctrines such as procedural fairness, relevant considerations and reasonable proportionality)".[47]

It follows from the above that while rationality requires a weak form of judicial review, reasonableness consists in a more intensive scrutiny into the *vires* of an impugned State action. By invoking the reasonableness standard, the Court may require the legislature to do something more than a technical/mechanical

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[43] J. RAWLS, POLITICAL LIBERALISM 52 (1st ed. 1996).

[44] A. SEN, THE IDEA OF JUSTICE 195 (1st ed. 2009).

[45] G.H. VON WRIGHT, THE TREE OF KNOWLEDGE AND OTHER ESSAYS 173 (1st ed. 1993).

[46] *Id.*

[47] G. Airo-Farulla, *Rationality and Judicial Review of Administrative Action*, 24(3) MELBOURNE UNIVERSITY LAW REVIEW 543, 572 (2000).

compliance with the decision-making process. It may compel the State to consider the interests of the underrepresented, marginalised, or minority stakeholders (whom it would otherwise seek to conveniently ignore) by striking down State actions that seek to foster inequality and exclusion. It is submitted that that given the profound transition in the constitutional hermeneutics of India post 1973 and the Court's progressive inclination towards demosprudence,[48] there is no normative justification left for the Supreme Court of India to shy away from enforcing the promise of 'transformative constitutionalism' that has come to become a characteristic feature of constitutionalism of the Global South.[49] Alternatively, it has been pointed out that there is a need for the renaissance of the principle of rule of law that has for long time remained consistent with violent social exclusion.[50] Hence, the Courts should be vigilant against the use of the rule of law as an academic/political trope for institutionalising decisionism. The adoption of the reasonableness standard in appropriate cases will take care of this casualty.

VI. RULE OF LAW: A NEW DEVICE FOR RESURRECTING ARBITRARINESS CHALLENGE?

Even if *Raj Bala* is somehow deemed to be a good law and it is accepted that 'arbitrariness' as such cannot be invoked as a ground for invalidating statutes, a deeper analysis would reveal that the Supreme Court does not seem to have done away with this possibility for good even in the light of the clear and categorical pronouncement in *Raj Bala*. It would seem that the Court has inadvertently opened new avenues for the resurrection of the 'arbitrariness' standard. It is submitted that the doctrine of rule of law recently endorsed as a ground for invalidating legislation in *Subramanian Swamy* v. *CBI*[51] has opened up the possibility

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[48] Baxi, *supra* note 4, at 115. [Demosprudence has been defined as "judicial review process and power that enhance life under a constitutional democracy... Unlike traditional jurisprudence, demosprudence is not concerned 'primarily with the logical that animate and justify a judicial opinion'; rather it is focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites."]; Goodyear India Ltd. v. State of Haryana, (1990) 2 SCC 71 [A Constitution is a living and organic thing, which of all instruments has the greatest claim to be construed broadly and liberally.]; Synthetics and Chemicals Ltd. v. State of U.P., (1990) 1 SCC 109 [The Constitution of India, it has to be borne in mind, like most other Constitutions, is an organic document.]; R.C. Poudyal v. Union of India, 1994 Supp (1) SCC 324 [In the interpretation of constitutional document, "words are but the framework of concept and concepts may change more than words themselves".]

[49] TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Oscar Vilhena et al. eds., 2013); *See also* Pius Langa P., *Transformative Constitutionalism*, 17(3) STELL LR 353 (2016). [It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.]

[50] Upendra Baxi, *The Rule of Law in India*, *in* HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW 313, 317 (José-Manuel Barreto ed., 2013).

[51] (2014) 8 SCC 682. [Lodha, J. speaking for a five-judge Bench held that rule of law is a facet of equality under Article 14 and breach of rule of law amounts to breach of equality under Article 14]; Cf. K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1 [Kapadia, J. in a rather

of indirect application of the arbitrariness standard in constitutional adjudication concerning parliamentary enactments. This becomes further clear from the categorical assertion of Verma J. (in a 7:2 decision) in the *Second Judges case*: "It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution".[52]

Another refreshing development in the constitutional jurisprudence of the country is the judicial approval of the application of 'basic structure' test to ordinary legislation. Although the precedential authority of such an approval remains suspect, it provides another ground for resurrection of the 'arbitrariness' scrutiny *vis-a-vis* primary legislation for it has been long established that rule of law is a part of the basic structure of the Constitution of India.[53] In *Madras Bar Assn.* v. *Union of India*,[54] Khehar J. explicitly stated thus:

> "This Court has repeatedly held, that an amendment to the provisions of the Constitution, would not be sustainable if it violated the —basic structure of the Constitution, even though the amendment had been carried out, by following the procedure contemplated under —Part XI of the Constitution. This leads to the determination, that the —basic structure is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the —basic structure would be unacceptable".

The exposition of law was further reaffirmed in a rather ingenious manner by Khehar J. in the *NJAC* case. The argument was that whenever a plea was advanced raising a challenge on the basis of violation of the basic structure with reference to a particular feature characterised as such, the same had its basis in certain enumerated provisions of the Constitution, hence the 'basic structure' was "truly a set of fundamental foundational principles, drawn from the provisions of the Constitution itself". Thus, while examining the constitutionality of an ordinary legislation, all the constitutional provisions, on the basis whereof the concerned 'basic feature' arises, would be available. It was further stated:

> "In such view of the matter, it would be proper to accept a challenge based on constitutional validity, to refer to the particular Article(s), singularly or collectively, which the legislative

tautological manner stated that while 'arbitrariness' may undermine the rule of law, it is only after the Court concludes that a statute undermines the rule of law that 'arbitrariness' would be available as a ground for invalidating a statute and not vice-versa.]

52 Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.

53 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

54 (2014) 10 SCC 1.

> enactment violates. And in cases where the cumulative effect of a number of Articles of the Constitution is stated to have been violated, reference should be made to all the concerned Articles, including the preamble, if necessary. The issue is purely technical. Yet, if a challenge is raised to an ordinary legislative enactment based on the doctrine of "basic structure", the same cannot be treated to suffer from a legal infirmity. That would only be a technical flaw".[55]

VII. CONCLUSION

The foregoing analysis reveals that 'arbitrariness' is in fact the *one and only* test applicable in an equality analysis under Article 14 for any form of State action. When it concerns the distributive aspect of State action, it implies comparative unreasonableness and hence the 'reasonable classification' standard gets triggered which is itself informed by the principle of 'arbitrariness'. In the case non-comparative unreasonableness concerning primary legislation, the appropriate form of analysis is not quite clear and that brings into question, the legitimacy of the whole exercise. Notwithstanding the cloud of legitimacy, such an exercise is undoubtedly constitutionally permissible. It is however, advisable for the judiciary to introduce some clarity on this aspect perhaps through the authoritative pronouncement of a larger Bench. The possibility of adoption of the 'reasonableness' standard as explained above may be mooted or even introduction of differential standards of review applicable to primary legislation short of foregrounding select list of fundamental rights (and hence instituting the concept of 'preferred freedoms') may be considered.

[55] Supreme Court Advocates-On-Record Assn. v. Union of India, (2016) 5 SCC 1.