THE CONUNDRUM OF MANIFEST ARBITRARINESS AND LEGISLATURE'S INTENT: AN INQUIRY

ANUBHAV KUMAR [1] & NEHA TRIPATHI[2]

Article 14 of the Indian Constitution, which guarantees the right to equality, has evolved significantly, shifting from the old reasonable classification test to considerations of arbitrariness. Justice Bhagwati's opinion in E.P. Royappa introduced the doctrine of arbitrariness as intrinsic to equality, a view later revived and extended by Justice Rohinton Nariman in Shayara Bano, where "manifest arbitrariness" was proposed as a ground for striking down legislation. While this development has attracted academic interest and judicial application, it has also faced criticism regarding the scope of judicial review and a potential encroachment on legislative intent. This paper explores the historical development of Article 14, examines the contours of arbitrariness as a constitutional doctrine, critiques the basis and application of manifest arbitrariness, and argues that courts should exercise caution in extending the doctrine to legislative review under Article 14. In conclusion, the paper argues that the post-Shayara Bano expansion of the arbitrariness doctrine under Article 14 departs from the Constitution's core equality principles and risks unsettling the institutional balance between the judiciary and the legislature. Accordingly, judicial review under this doctrine should be exercised with measured restraint when assessing the validity of legislation.

TABLE OF CONTENTS

* Cite it as: Tripathi & Kumar, *The Conundrum of Manifest Arbitariness and Legislature's Intent: An Inquiry,* 9(2) COMP. CONST. L. & ADMIN. L. J. 23 (2025)

[1] Adv. Anubhav Kumar, Advocate, Supreme Court and High Court of Delhi. The author can be reached at advanubhavkumar@gmail.com.

[2] Ms. Neha Tripathi, Assistant Professor of Law, School of Law, Mahindra University. The author can be reached at nehatripathi.kls@gmail.com.

INTRODUCTION

The arbitrariness doctrine, devised by Justice Bhagwati in *E.P. Royappa v. State of Tamil Nadu*[3] has seen a peculiar development with Justice Rohinton Nariman's opinion in *Shayara Bano v. Union of India (Triple talaq)*[4] extending "*arbitrariness*" as a ground to successfully challenge plenary legislative enactments. This has evoked mixed reactions from jurists, litigators and academicians alike on its viability in jurisprudence. *Manifest Arbitrariness* is, as Justice Nariman holds, for himself and Justice U.U. Lalit, "*Must be something done by (the) legislature capriciously, irrationally and/or without adequate(ly) determining principle and it would be a ground to negate legislation*".[5]

This is a significant departure from the settled legal principles around arbitrariness, as it opens up avenues for not only unwarranted Judicial interventions but also tacitly hurts the principle of Separation of Powers. Interestingly, Article 14 of the Constitution, providing for the "*right to equality*",[6] has undergone various shifts in its understanding, which included moving away from the old test of "*reasonable classification*" to the test of "*arbitrariness*". While the test of arbitrariness was initially limited to executive actions only, now *Shayara Bano* has extended its applicability to legislative actions as well. This effectively means that the judiciary can now look into the motive of the legislature and hold a law arbitrary under Article 14, consequently, holding it unconstitutional. This interpretation has far-reaching consequences since it has birthed another "*undefined*" principle upon which laws can be invalidated as unconstitutional in India, in addition to the instances where a law could be struck down only if either it was

[3] E.P. Royappa v. State of T.N., (1974) 4 SCC 3.

[4] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[5] *Id.*

[6] INDIA CONST. art. 14.

inconsistent with Part III of the Constitution[7] and/or the legislature lacked competency in enacting it.[8]

The judicial creativity of "*manifest arbitrariness*" which provides for a judicial enquiry on "*intent of legislature*" while deciding constitutionality of a plenary legislation or statute, might lead the court to trench into the arena of the legislature while the task at hand is limited to an examination based on rights and competence.[9] Hence, today there is a growing concern regarding arbitrariness not only as a basis for review, but also for its increasing use by the judiciary to strike down laws extensively in cases like *Navtej Johar v. Union of India*[10], *Joseph Shine v. Union of India*[11] & *Hindustan Construction Company v. Union of India*[12]. More recently, while striking down the Electoral Bond scheme, the constitution bench of the Supreme Court in *Association of Democratic Reforms & Anr v. Union of India & Ors*[13] not only employed the doctrine of manifest arbitrariness but also went a step further and ventured into the domain of testing the "*purpose*" of enacting a provision. It is in this context that the conceptualisation and usage of the doctrine through an unruly horse-like interpretation have received an acerbic criticism.

Through this article, the authors endeavour to present the case that the doctrine of manifest arbitrariness, in its current form, is not in consonance with the established constitutional values and its usage to invalidate plenary legislation is tantamount to excessive and unwarranted judicial intervention. Regular employment of this doctrine by the judiciary would also increase the risk of "*Juristocracy*" and undermine the principles of the Separation of Powers.[14] In the course of this paper, the authors will argue that a) the expansive reading of arbitrariness in Article 14 after *Shayara* is not the correct understanding of the object of equality as carved in the

---

[7] INDIA CONST. art. 13, cl.2.

[8] State of A.P. v. McDowell, (1996) 3 SCC 709.

[9] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 82-84 (Harvard University Press, 1978).

[10] Navtej Johar v. Union of India, (2018) 10 SCC 1.

[11] Joseph Shine v. Union of India, (2019) 3 SCC 39.

[12] Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.

[13] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 206.

[14] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM, 222 (Harvard University Press, 2007).

Constitution, and hence, courts should exercise restraint in deploying manifest arbitrariness to strike down statues; b) the test of arbitrariness is out of purview of Article 14 for plenary legislation and "presumption of constitutionality" is not a barrier, but a tool in judicial interpretation; c) the doctrine of manifest arbitrariness is constitutionally unsustainable and is hit by settled precedents and; d) the doctrine is not defined normatively and its application is prejudicial to established constitutional principles.

However, at this stage, it is pertinent to trace the historical development of equality in the Indian Constitution in regard to its inception, the constituent assembly debates and the evolution of reasonable classification through different cases to give a context to the underlying debate and understand this constitutional tussle.

REASONABLE CLASSIFICATION AND EQUALITY: DEVELOPMENT OF ARTICLE 14

Article 14, as it stands today, is a strategic blend of twin concepts, namely "*equality before law"* and "*equal protection of law"*. However, it is interesting to note that this was not a standalone provision in the draft Constitution of 1948 and was initially included in draft Article 15 (Article 21 now).[15] It was only on 3rd November, 1949 in a letter to the President, the Drafting Committee of the Constituent Assembly mentioned that "*we have considered it more appropriate to split this article into two parts and to transfer the latter part of this article dealing with equality before law to a new Article 14 under the heading "Right to Equality*".[16]

Sir B.N. Rau, the advisor to the Constituent Assembly, explaining equality in the Indian Constitution, said "*that we cannot have a notion of formal equality because it treats equality and fact as necessary to drawing equality in law.*"[17] The evolving tale of Article 14 has been inspired by the U.S. jurisprudence

---

[15] Drafting Committee, Report on Draft Constitution of India (1948), https://www.constitutionofindia.net/committee-report/draft-constitution-of-india-1948/.

[16] INDIA CONST. art. 14.

[17] See generally, Sripati Vijaushri, *Towards Fifty years of Constitutionalism and Fundamental Rights in India: Looking Back to see ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413 (1998).

under the Fourteenth Amendment.[18] As said before, Article is a blend of two "*facets*" of equality, first of the two facets of Article 14, which is *Equality before law,* is said to be inspired by the British doctrine of the rule of law[19] however, traces are even found in Article 118 of the Weimar Constitution.[20] It is often referred to as a "*negative concept implying the absence of any special privilege by reason of birth, creed*" or the like in favour of any individual and the equal subjection of all classes to the ordinary law. The other facet, *equal protection of the laws,* is a more positive concept, implying the right of equality of treatment in equal circumstances.[21] Equality before law is the corollary of *Dicey's*[22] concept of the rule of law, which is that all people shall be subject to the same ordinary law. It is pertinent to note that both connotations i.e., equal protection of law, and equality before law were subject to challenges in the constituent assembly by notable members such as Sir Alladi Krishnaswamy Iyer[23] and K.M. Munshi[24] respectively as they were "*vague and open to any interpretation*", however, when the Constitution was finally adopted, both the terms were added as a compromise.[25]

The Judiciary, in order to devise a tool to interpret the right to equality, naturally turned to the United States, where the Court in the *Gulf, Colorado & Santa Fe Ry. Co*.[26] had already developed the "*Classification Doctrine*" in 1890 and said that the legislature had the right to classify for the purpose of equality but the classification must be based on some "*substantive*

---

[18] U.S. CONST. art. 14.

[19] Basheshar Nath v. The Commissioner of Income Tax Delhi, 1959 AIR 149.

[20] Grundgesetz [GG] [Basic Law], art. 118, (1919).

[21] DD BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 100 (LexisNexis, 27th ed., 2024).

[22] A.V. DICEY, J.W.F. ALLISON (ED.), THE LAW OF THE CONSTITUTION, 120 (Oxford University Press, 1st ed., 2013).

[23] The phrase "equal protection of the laws" has been considered vague and open to varied interpretation. *See* e.g., CONSTITUENT ASSEMBLY DEBATES, Book No. 7, November 30, 1948 *speech by* ALLADI KRISHNASWAMY IYER 494-95 (1948).

[24] The phrase "equality before the law" was found to suffer from similar concerns. See, eg., CONSTITUENT ASSEMBLY DEBATES, Book No. 7, November 30, 1948 *speech by* K.M. MUNSHI 497-98 (1948).

[25] Sarath Chandran, *The Doctrine of Manifest Arbitrariness*, YOUTUBE (MAY 21, 2020) https://www.youtube.com/watch?v=S3P6j5ld0Ek.

[26] Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150 (1897).

distinction" and the classification must also have a nexus to the object of the classification.[27] Indian courts have adopted this classification doctrine, which makes explicit what was already implicit in the very concept of the rule of law.[28] One may very well argue that the classification doctrine is therefore a product of the "*equality paradox*"[29] which is aimed at reconciling discrimination (which is bound to happen when the legislature classifies people) and simpliciter right of equality.

Traditionally, Courts in India held that Article 14 does not forbid all classification but only that which is discriminatory. In *State of West Bengal v. Anwar Ali Sarkar,*[30] while striking down a criminal law in early 1951, the Hon'ble Supreme Court affirmed the application of the test of reasonableness in relation to Article 14. The following two tests were laid down by Justice S. R Das: *First,* the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and *second*, the differentia must have a rational nexus/relation to the object sought to be achieved by such legislation.[31] In *Bidi Supply Co. v. Union of India*,[32] Justice Vivian Bose moved a step further and took the object of the classification into consideration. He said, "*It is not merely classification. If the object of the Act itself is condemnable the question of resorting to classification would never arise*". Justice Subba Rao in the case of *Khandige Sham Bhatt v. Agrl ITO*[33] added another facet of Article 14 when he held that "*in applying Reasonable test, you must take care of the impact (uneven) of the law*æ. However, in ensuing years the court continued to follow the "traditional

---

[27] *Id.*

[28] State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1.

[29] The author defines equality paradox by explaining that while there have been many broad declarations proclaiming equality" to be a right inherent in all human beings, in practice, the concept of equality has been given a far more limited effect. *See*, eg., Navroz Seervai, *Article 14 and the Paradox of Equality*, BAR & BENCH, (Aug. 2, 2020). https://www.barandbench.com/columns/article-14-and-the-paradox-of-equality#:~:text=The%20article%20argues%20that%20although%20%E2%80%9Cequality%E2%80%9D%20is%20proclaimed,analyze%20Article%2014%20and%20the%20paradox%20of%20equality.

[30] State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1.

[31] *Id.*

[32] Bidi Supply Co. v. Union of India, (1956) 1 SCC 427.

[33] Khandige Sham Bhat v. Agricultural Income-tax Officer, Kasaragod, AIR 1963 SC 591.

approach" as devised in *Anwar Ali Sarkar* to test the constitutionality of a legislation on the anvils of Article 14.

One may therefore outline the following features of the reasonableness doctrine which are that: (a) the classification can be done through state action only (b) it relates to "*State action*" governing vertical relationships between an individual and the State (c) the classification doctrine entails an equal treatment principle (d) 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.[34]At this stage, it is important to reiterate that until pre-Royappa, the classification doctrine's scope was limited to state action only and any executive action was out of the purview of the test. Further, the old doctrine did not take into account "*arbitrariness*" to test the constitutionality of a legislation simply because not all arbitrary actions may be violative of equality and some of them are created by the "*state*" to further both facets of equality; much like the "*Equality Paradox*".

This doctrine, therefore, asks only two sets of questions while taking the right to equality into account, which are (a) *whether the classification made is based on intelligible differentia or not* and (b) *whether this differentia has a rational nexus with the object that the rule seeks to achieve.* These two questions, as Prof. Khaitan argued, are formalistic and ignore the real-life impact. It was this apparent error or limitation which induced the court in 1974 to devise a new doctrine in *E.P. Royappa*, which introduced the facet of "*arbitrariness*" in Article 14.

DOCTRINE OF ARBITRARINESS AND ROYAPPA

In 1974, the Supreme Court in the case of *E.P. Royappa v. State of Tamil Nadu*[35] expanded the ambit of Article 14 by laying down "*non-arbitrariness*" as a limiting principle in the context of executive actions. It also declared that "*equality is (an) antithesis to arbitrariness*".[36] The Doctrine of arbitrariness as devised by Justice Bhagwati, has always been a beleaguered doctrine and

[34] Tarunabh Khaitan, *Equality: Legislative Review under Article 14*, in SUJITH CHAUDHARY ET AL. (EDS.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 699–719 (Oxford University Press, 2016).

[35] E. P. Royappa v. State of T.N., (1974) 4 SCC 3.

[36] *Id.*

has faced fierce criticism on two fronts, i.e., some attack it for its "*imprecise import*" which is most likely to affect equality while many believe that it is not a new test but simply a reassertion of the reasonable classification or the nexus test.[37] The view held by the latter group of jurists finds support from the fact that the term 'arbitrary' was not a new addition to the lexicon of constitutional adjudication concerning Article 14.[38] The doctrine reads "*arbitrary"* for "*discriminatory"* under equality and the most moving and convincing criticism of the same was by the renowned constitutional law jurist H.M. Seervai, who noted, "*The new doctrine hangs in air, because it propounds a theory of equality without reference to the language of Article 14*."[39] This also furthers another limb of a significant criticism which is, as Prof. Tarunabh Khaitan argues of "*Constitutionalization of Administrative law*" as arbitrariness was essentially the ground to check administrative actions or subordinate legislation in India and it has caused damage to both constitutional as well as administrative law in India.[40]

Prof. Khaitan argued that while the "*old doctrine*" of equality is excessively narrow in its scope, the solution to it cannot be a "*new doctrine*" of arbitrariness. Instead, there is scope to develop the old doctrine with contextualised and more sound legal understanding to counter the existing gap. It has faced this backlash because "*arbitrariness*" was believed to be inherent in the first part of equality, and in preceding judgements, the Court, while locating intelligible differentia or reasonable nexus, had already noted that the classification shall not be "*arbitrary, evasive or artificial*". This, therefore, created confusion on the usage of the arbitrariness test as to whether it was a standalone test or part of reasonable classification. Before we delve into a detailed critique of the arbitrariness doctrine, its

---

[37] See, Jahnavi Sindhu & Vikram Aditya Narayan, *Reasonable Classification Versus Equality Under the Indian Constitution*, 17 NAT'L L. SCH. J 187 (2023). Also *see*, Rethinking "Manifest Arbitrariness" in Article 14: Part I – Introducing the Argument, I. CON. LAW PHIL. (May 6, 2020), https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/.

[38] Shivam, *Arbitrariness Analysis under Article 14 with Special Reference to Review of Primary Legislation,* 84 ILI LAW REV. (2016).

[39] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 438 (Universal, 4th ed., 1991).

[40] Farrah Ahmed & Tarunabh Khaitan, *Constitutional Avoidance in Social Rights Litigation*, 35 OXFORD J. LEGAL STUD. 607 (2015).

Constitutionalization and application to legislative actions, it is important to understand the observations made by Justice Bhagwati.

While enunciating this doctrine, Justice Bhagwati discarded a narrow reading of Article 14 and held,

> "*Equality is a dynamic concept with many aspects and dimensions, and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.*"[41]

Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.[42]

This opinion was reaffirmed in subsequent cases of *Maneka Gandhi v. Union of India*[43] and *Ajay Hasia v. Khalid Mujib*[44]. It was also a redemption measure that the Court took the stance of an activist to shed the baggage of blot (*Judiciary's subdued constitutional adjudication in times of declared emergency*) which *ADM Jabalpur v. Shiv Kant Shukla*[45] brought with itself. It is however, interesting to note that at this stage, Justice Bhagwati himself in *Ajay Hasia* clarified that "arbitrariness" is a vital and dynamic concept which was underlying Article 14 latently, and *Royappa* did nothing but to bring it to light. It is, therefore, fair to conclude here that arbitrariness is hence not a standalone doctrine devised by the judiciary but something which was already homed in reasonable classification.

A staunch critic of "arbitrariness", jurist H.M. Seervai observed that the new doctrine suffers from the "fallacy of undistributed middle" in that "*whatever violates equality is not necessarily arbitrary, though arbitrary actions are*

---

[41] E.P. Royappa v. State of T.N., (1974) 4 SCC 3, ¶85.

[42] Khaitan, *supra* note 34.

[43] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

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

[45] ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

ordinarily violative of equality"[46]. It is important to note that inequality and arbitrariness are not the same. Courts have misunderstood the relation between "*arbitrariness"* and "*discrimination"*. Seervai adds that it appears, from the Court's own reasoning, that "*arbitrary"* involves a voluntary action of a person on whom the power has been conferred[47]. However, according to Seervai, one cannot attribute will or intention to a legislature. With the advent of the Manifest Arbitrariness doctrine, Seervai's fear of attributing intent to legislature has become true as Justice Nariman held that the courts can enquire into "*intent*" of legislature while striking down a law, thus in effect enunciating new grounds apart from violation of Fundamental right or exceeding legislative competence which was used to strike down a statue. Seervai also held his ground on "*whatever that violates equality is not necessarily arbitrary, though arbitrary actions are ordinarily violative of equality*".[48] The proposition that equality is antithetical to arbitrariness needs to be reconsidered in its proper context, as the antithesis of equality is discrimination and "*arbitrary*" needs to be understood specifically in this sense. The Doctrine of Arbitrariness in constitutional law therefore, brings nothing new to the table that the reasonable classification doctrine could not. The statutes could be struck down if they were unconstitutional, even with the old reasonable classification doctrine. In essence, it led to constitutional development apart from confusion amongst the court.

However, in the case of *State of A.P. v. McDowell*[49] Justice Reddy, speaking for a majority in a three-judge bench, held that "*no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act*", thus, rejecting the argument of extending the test for legislative actions. It is also interesting to note that Justice Nariman was the senior counsel in this matter and argued in favour of Manifest Arbitrariness.

[46] Seervai, *supra* note 39.

[47] *Id.*

[48] *Id.*

[49] State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709.

The final blow to the application of the arbitrariness test on primary legislation was struck by the decision of the division bench in *Rajbala,*[50] wherein it was held,

> "*[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.*"

Last, the incorporation of *"non-arbitrariness* or arbitrariness doctrine in constitutional law to review a statute is an extension of administrative law standards of arbitrariness. This is effectively available to subordinate or delegated legislation. This extension and interchangeable usage of arbitrariness is criticised by academicians across as the degree and standards of arbitrariness vary in administrative law and constitutional law, vary in degree and weight of application.[51] As we have maintained throughout the paper, Justice Bhagwati, while emancipating Article 14, used "*arbitrary"* and "*unreasonableness"* interchangeably, which is not correct. Prof. Khaitan[52] hence argued that non-arbitrariness was a particularly ill-advised choice of a test if the purpose of the new doctrine was "*to crystallize a vague generality like Article 14 into a concrete concept*"[53]. The doctrine was therefore never settled and was on shaky grounds on its viability, but with Shayara Bano, it seems to be developing into a monster which no one thought of when it was conceived.

While Prof. Khaitan argued in favour of non-application of arbitrariness doctrine to legislative actions, in 2008, renowned Advocate Abhinav Chandrachud in his essay, argued in favour of applying doctrine of arbitrariness to the legislations while criticising the "*Presumption of*

---

[50] Rajbala v. State of Haryana, (2016) 2 SCC 445.

[51] Seervai, *supra* note 39.

[52] Khaitan, *supra* note 34.

[53] Ruma Pal, *Judicial Oversight or Overreach* (2008) 7 SCC J 9, J16.

Constitutionality"[54]. The premise of the essay was that there is an extensive use of "Doctrine of Presumption of Constitutionality" which acts as a barrier, while deciding cases dealing with constitutional validity. He argued that *"the presumption of validity of statutes is acting as a barrier from applying this doctrine to legislations"*, since there is a "*presumption*" in favour of the constitutionality.[55] It is therefore pertinent to understand whether the presumption of constitutionality is an actual hurdle in constitutional interpretation. The general principle of construction of statute is that the reasonable doubt must be resolved in favour of the legislative action and the act sustained. Therefore, there is a presumption of constitutionality,[56] a law will not be declared unconstitutional unless the case is so clear as to be free from any doubt. The argument holds to the extent that there is a presumption of constitutionality of a legislation, but it falters since that presumption is not absolute. Over the years, adoption of the reasonable classification doctrine has actually led to the striking down of laws *via* amendments, if the classification is evasive or there is no nexus found between the classification and the object, i.e., on the touchstone of the traditional classification doctrine[57]. Hence, the courts do oblige the scope of presumption of constitutionality, however, to theorise it in favour that this presumption has acted as a hurdle for the judiciary is a misplaced understanding. It is not the "*doctrine of presumption of constitutionality*" which acts as a barrier in extending the arbitrariness doctrine for striking down laws, but it is because "*arbitrariness*" itself is out of the purview of Article 14.[58]

---

[54] *See generally*, Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*, 2 INDIAN J. CONST. L. 179 (2008).
[55] *Id.*
[56] V.M. Syed Mohammad & Co. v. State of Andhra, (1954) 1 SCC 360, ¶54).
[57] *See*, Deepika Sharma & Radhika Gupta, *Doctrine of Arbitrariness and Legislative Action: A Misconceived Application*, 5 NALSAR STUDENT L. REV. 22-34 (2010).
[58] *Id.*

MANIFEST ARBITRARINESS AS A TOOL TO STRIKE DOWN LEGISLATIVE ACTION: UNRULY POWER?

The fears of jurist H.M. Seervai were turned into reality when Justice Nariman in *Shayara Bano*[59], crafted the doctrine of manifest arbitrariness and later, when the Supreme Court in *Navtej Johar v. Union of India*[60] extended the scope of "*arbitrariness*" holding that it can be used to strike down legislative actions. The confusion regarding the arbitrariness doctrine was not resolved by the judiciary as regards to its application, and another limb to it was added, which is a dangerous precedent as it enables intervention of the judiciary in legislative domains and allows Judicial Powers greater than prescribed, which has the potential to hurt the balance in the separation of powers. Justice Nariman, while laying down the doctrine, said, "*The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14*."[61] To give a legal backing to his decision, he also traced the doctrine in cases like *Ajay Hasia*[62] where in the year 1982, the Court held:

> *"It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not Paraphrase 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... 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"*

Manifest Arbitrariness, therefore, is something, as held in *Shayara Bano, "done capriciously, irrationally and/or without determining principle. Also, when*

---

[59] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[60] Navtej Johar v. Union of India, (2018) 10 SCC 1.

[61] Shayara Bano v. Union of India, (2017) 9 SCC 1.

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

something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."[63] However, there is no suggestion made in the definition to give clarity on the need for the doctrine and how the old doctrine of reasonableness was unable to tackle the issue. As we saw throughout the article, the arguments are furthered with the understanding that every arbitrary action is detrimental to equality, an understanding which Seervai and other jurists have urbanely critiqued. It is therefore a case of a theory which involves "*fallacy of the undistributed middle*" since it rides on the premise that all arbitrary actions are violative of equality. In doing so, the courts have opened up avenues and ways of unbridled powers to intervene in the legislative domain of law-making.

Justice Nariman, in his opinion, concurred by Justice Kurian Joseph, went on to hold Justice Reddy's opinion in *McDowell* as bad in law, as it did not take into account the earlier judgment of *Ajay Hasia*, by holding:

> "*That a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive, or unreasonable", yet such [a] challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive, or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution*"[64]

In continuation, Justice Nariman highlighted the subsequent use of the doctrine post *McDowell* to strike down a legislation in *Maple Vishwanath v. State of Maharashtra*[65]. However, there has been an inconsistency in reading the precedents, which is highlighted in the subsequent section.

The Supreme Court in *Navtej Singh Johar* went on to use "*manifest arbitrariness"* as a tool to strike down laws. The constitution bench was

[63] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[64] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[65] Maple Vishwanath v. State of Maharashtra, (1998) 2 SCC 1.

coherent in this opinion and found that Section 377 was manifestly arbitrary. Again, the employment of doctrine in this case as well was not normative and no tests were devised to test the "*manifest arbitrariness*" of the legislation. This paved the way for the actual use of doctrine in striking down legislation on "*arbitrariness"* and inquiring into the intent of the legislature. These apprehensions were put forth in the use of "*manifest arbitrariness*", and it came to life in *Hindustan Construction*[66] lately when the Court held that a provision can be held unconstitutional only because it purportedly reversed the clock on an earlier amendment. More recently, in *Association of Democratic Reforms & Anr v. Union of India & Ors,*[67] while striking down the Electoral Bond scheme, the Supreme Court not only employed the doctrine of manifest arbitrariness but also went a step further and ventured into the domain of testing the "*purpose*" of enacting a provision. The Court held that,

> "… *The doctrine of manifest arbitrariness can be used to strike down a provison where: (a) the legislature fails to make a classification by recognising the degrees of harm; and (b) the purpose is not in consonance with constitutional values*."

While it did endeavour to lay down a twin test to determine if any legislative action is manifestly arbitrary, upon a close enquiry, these appear to be repackaged tests of old classification doctrine and proportionality doctrine. The criteria as to what would be manifestly arbitrary still remain unclear. The only progress we seem to have made is through this test, allowing this judicial creativity to take over the legislative domain. The consequences of the doctrine are such that Dhruva Gandhi and Sahil Raveen, in a blog post, said that it is a matter of time when "*the doctrines will become arbitrary*".[68]

---

[66] Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.

[67] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 206.

[68] Dhruva Gandhi and Sahil Raveen, *Hindustan Constructions – Another Instance of the Failings of Manifest Arbitrariness*, I. CON. LAW PHIL. (APR. 4, 2020). https://indconlawphil.wordpress.com/2020/04/04/hindustan-constructions-another-instance-of-the-failings-of-manifest-arbitrariness/.

TESTING MANIFEST ARBITRARINESS ON PRECEDENTS

With the enunciation of the doctrine of manifest arbitrariness, the Court also held *McDowell*[69] as *per incuriam* and subsequent judgement to be bad in law. While holding *McDowell*[70] bad in law, Justice Nariman held that it overlooked the precedents from constitutional benches decided way earlier as Justice Bhagwati had handed down a new doctrine in *Royappa* in 1974, which was affirmed by him in *Ajay Hasia* in 1980, which is applicable to legislative action thus laying new dimensions of Article 14. However, the reading that Justice Bhagwati's opinion is final insofar as "arbitrariness" is concerned, for it was affirmed in *Ajay Hasia,* is rather an inconsistent reading. Therefore, the premise of the doctrine of manifest Arbitrariness in *Shayara Bano* is on shaky grounds. To understand this, it becomes quintessential to refer to Justice Bhagwati's opinion in *R.K. Garg v. Union of India*[71] a 1982 decision, after *Ajay Hasia*. In this case, Justice Bhagwati holds in paragraph 8,

> "*…that takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the Judgment of one of us (Chandrachud, J. as he then was) in Re: Special Courts Bill It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us*." (*emphasis added*)

This is therefore, in stark contrast to the opinion of Justice Nariman, which relied on *Ajay Hasia* when Justice Bhagwati himself, in a later case of R.K. Garg, held that the true scope of Article 14 is laid down in a 7-judge bench

[69] State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709.

[70] State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709.

[71] R.K. Garg v. Union of India, (1981) 4 SCC 675.

of *In re Special Courts Bill.*[72] Therefore, creation of deduction of doctrine of manifest arbitrariness is unsustainable on precedents and further, that Justice Bhagwati, contrary to as held by J Nariman, did not develop a 'new doctrine' in *Ajay Hasia v. Khalid Mujib*[73] and instead in a seven Judge Bench in *R.K. Garg v. Union of India*[74] (decided on 13 November 1981, a year later to Ajay Hasia) clarified that there is no application of the *Royappa* Doctrine to the legislation.[75]

Justice Nariman, in his observation, seems to have blurred the difference between "*arbitrariness"* in administrative and constitutional law, when he refers to *Om Kumar*[76] in holding that arbitrariness in legislation is very much a facet of equality, whereas the case pertained to administrative action per se. It is apparent that there are the inconsistencies in reading of the precedent which the author has relied upon to argue that doctrine of manifest arbitrariness is flawed both on precedent and on settled constitutional principles too, as manifest arbitrariness is vague and unclear which is not defined and offers nothing new except for seeking to extend a doctrine which is already inherent to Article 14 dangerously to enquire intention of legislature. The "*arbitrary"* action is, as the reasonable classification doctrine stands, already covered in it.

CONCLUSION

Justice Rohinton Fali Nariman's contribution to liberal values and their interpretation is unmatched. Recently, on his retirement, many op-eds featured describing his legacy as "*when comes such another"*[77] and as "*leading prophet"* of the court[78]. While analysing his role, it is pertinent to point out

---

[72] Special Courts Bill, 1978, In re, (1979) 1 SCC 380.

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

[74] R. K. Garg v. Union of India, (1981) 4 SCC 675.

[75] Vijaushri, *supra* note 15.

[76] Om Kumar v. Union of India, (2001) 2 SCC 386.

[77] *See generally*, Sanjay Hegde, *Justice Rohinton Nariman's Legacy: 'Whence Comes Such Another?'*, BLOOMBERG QUINT (Aug. 11, 2021) https://www.bloombergquint.com/opinion/justice-rohinton-narimans-legacy-whence-comes-such-another.

[78] *See generally*, Arghya Sengupta, *Leading Prophet: The Legacy of Justice Rohinton Nariman*, THE TELEGRAPH (Aug. 18, 2021) https://www.telegraphindia.com/opinion/the-legacy-of-justice-rohinton-nariman/cid/1826918.

his contribution to the development of Insolvency laws and arbitration, it is also true that his upholding rights and liberal values image shatters, taking NRC into account. In all of the buzz, his contribution to the Judiciary by providing a tool to strike down legislation by enquiring into the intent of the legislature is perhaps most striking.

In the course of this article, the author has endeavoured to explore facets of the right of equality granted in the Indian Constitution in the context of an expansive reading of Manifest Arbitrariness. The author has *first,* traced the reasonable classification doctrine under Article 14. *Further,* we saw the development of the arbitrariness doctrine and its criticism, and it was observed that the new arbitrariness doctrine was nothing but reasonable, the old nexus doctrine wrapped in a new cover. In the last two parts, the author went through the creation of manifest arbitrariness, its historical usage as argued and its philosophical foundation. The doctrine of manifest arbitrariness, apart from being constitutionally flawed, is also found to be bad in precedents.

It is safe to say that the doctrine of manifest arbitrariness, since its inception, has not been free from criticism for emulating administrative law standards in constitutional law and wrongly placing "*arbitrariness"* and "*equality"* in Article 14 on the same pedestal. This has faced criticism from jurists like H.M. Seervai, an academician. The doctrine also complicated the already existing effective test of "*reasonable classification"* and rational nexus test, and arbitrariness was inherently read in the first part of Article 14.

Courts rightly also refrained from striking down legislations on the basis of "*legislative intent"* as it was against the constitutional principles of testing legislation on constitutional standards, which involved a violation of Part III or in case of exceeding legislative capacity. Any decision which did not have a rational nexus is covered in the existing old test. In this context, the author argued that the doctrine of manifest arbitrariness is a concept which encroaches on the judicial domain in the inquiry of statute. It was also argued that the understanding of the doctrine conceptualised in Shayara Bano is inconsistent with precedents, as it wrongly proceeds on a ratio which is not binding, as a newer case with a larger bench observes a different reading. It is perhaps time to make a constitutional enquiry into

the usage of the doctrine of manifest arbitrariness, as it has for some time complicated the usage of Article 14 in going beyond what is mandated, which has the potential to affect the constitutional structure of different institutions in the country.