

**ARBITRARINESS ANALYSIS UNDER ARTICLE 14 WITH SPECIAL REFERENCE TO
REVIEW OF PRIMARY LEGISLATION**

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I Introduction

THE RECENT decision of a division bench of the Supreme Court in *Rajbala v. State of Haryana*¹ (*hereinafter Rajbala*) has rejuvenated the debate on the content and scope of the doctrine of arbitrariness propounded by a constitution bench of the apex court in the famous *Royappa* case.² Ever since its inception, ‘arbitrariness’ has been a beleaguered doctrine. While some jurists have criticised the term for its imprecise import and its likely adverse impact on the ‘equality’ analysis under article 14, others have been indifferent in their response to this new development in that they believe that it is not a new test at all but simply a reassertion of the reasonable classification or nexus test. 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 on constitutional adjudication concerning article 14. It was often used in reference to the first limb of the reasonable classification test, namely, intelligible differentia and it was emphatically held that in order to satisfy the test of reasonable classification under article 14, the differentia must not be ‘arbitrary, evasive, or artificial’. Hence, it was unclear as to whether the doctrine of arbitrariness was simply a gloss on the reasonable classification test or *vice-versa* or was a standalone test having its own substantive content.

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¹ (2016) 2 SCC 445.

² *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3.

The later decisions of the Supreme Court sought to give some content to the doctrine by equating it with the concept of ‘unreasonableness’ but it was still unclear whether this unreasonableness pertained to the ‘distributive aspect’ of article 14 or could be a basis for constitutional scrutiny even in the absence of some comparative unreasonableness. Later decisions of the Supreme Court have addressed this issue and the doctrine has been successfully applied to cases in cases where there was no occasion for comparative evaluation.

The arbitrariness analysis which was sometimes used as a metaphor and sometimes as a standalone test was generally employed in reviewing the constitutionality of executive actions or subordinate legislations. In the absence of adequate volume of case laws pertaining to other forms of state actions, especially legislative actions including primary legislation, time and again doubts have been expressed as to the applicability of this doctrine to primary legislations. This was precisely one of the issues before the two-judge bench in the *Rajbala* case that answered the question in the negative. The legal impact and implications of the decision merit analysis. However, even independently of *Rajbala*, it remains to be seen what course of action should the courts adopt in an ‘arbitrariness’ analysis under article 14. This paper proposes to engage with these concerns.

II Enunciation of the doctrine

The period following immediately after the emergency and the infamous *Habeas Corpus* case³ (that had done considerable damage to the image of a conscientious and majestic Supreme Court) saw a number of remarkable judicial interventions aimed at reclaiming the lost legitimacy of the apex court. In its quest for populist legitimation, the Supreme Court of India sought to transform itself into the Supreme Court for India. In this context, it was nothing short of a founding moment in Indian constitutional jurisprudence when Bhagwati J speaking for the majority in a five-judge bench decision, discarded a ‘narrow, pedantic or lexicographical’ interpretation to the concept of ‘equality’ embedded in article 14 of the Constitution (that had hitherto been confined to the test of ‘reasonable classification’) and held thus:⁴

³ *A.D.M. Jabalpur v. Shiv Kant Shukla* (1976) 2 SCC 521.

⁴ *Supra* note 2.

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. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.

This ‘all-embracing scope’ and ‘activist magnitude’ of article 14 was reaffirmed in the celebrated *Maneka Gandhi case*⁵ where Bhagwati J concurring with the majority in a 6:1 decision observed: “Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment.”

Taking the discussion further on the test of ‘equality’ under article 14 Bhagwati J speaking for a five-judge bench acknowledged that *Royappa* did 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’. Thus article 14 essentially embodied a guarantee against ‘arbitrariness’ and therefore, the test of ‘reasonable classification’ was itself informed by the doctrine of ‘arbitrariness’. In this sense, ‘arbitrariness’ was not a new test at all but in fact the principle underlying the evolution of doctrinal tools and judicial standards for determination of the negation of the right to equality guaranteed under article 14 of the Constitution. This is what the court said:⁶

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 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. . . .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

⁵ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

⁶ *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

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.

In a similar vein Bhagwati J in *Bachan Singh v. State of Punjab*⁷ in his dissenting opinion stated thus:

It is now settled law as a result of the decision of this Court in Maneka Gandhi's case (supra) that Article 14 enacts primarily a guarantee against arbitrariness and inhibits State action whether legislative or executive, which suffers from the vice of arbitrariness. This interpretation placed on Article 14 by the Court in Maneka Gandhi's case has opened up a new dimension of that article which transcends the classificatory principle. For a long time in the evolution of the constitutional law of our country, the courts had construed Article 14 to mean only this, namely, that you can classify persons and things for the application of a law but such classification must be based on intelligible differentia having rational relationship to the object sought to be achieved by the law. But the court pointed out in Maneka Gandhi's 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.

III Giving content to the doctrine

The judicial innovation with regard to the 'arbitrariness' test was followed by attempts to provide content to the new doctrine. In *Maneka Gandhi*, Bhagwati J very clearly read the principle of reasonableness in article 14. He said: "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."⁸

Again, in *R.D. Shetty v. International Airport Authority*⁹ case, he held thus:

⁷ (1982) 3 SCC 24.

⁸ *Supra* note 5.

⁹ (1979) 3 SCC 489.

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.

More recently, Pasayat J in *Sharma Transport v. Government of A.P.*¹⁰ has observed as follows:

The expression ‘arbitrarily’ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.

Comparative unreasonableness

It is thus clear that the principle of ‘arbitrariness’ is the underlying concern in any form of ‘equality’ analysis under article 14. The doctrine therefore lies at the heart of both ‘reasonable classification’ test as well as the general test of unreasonableness. While the former constitutes comparative unreasonableness, the latter takes into account cases where no standard for comparative evaluation is available.

The former view is subscribed by P.K. Tripathi who argues that the arbitrariness prohibited by article 14 concerns the ‘distributive aspect’ of state action. He has stated thus:¹¹

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.

In this sense, the arbitrariness test seeks only to reinforce the ‘reasonable classification’ test and nothing more. This view finds support from Jagdish Swarup. While noting his disagreement with Bhagwati J that a new doctrine of ‘equality’ had been propounded in the *Royappa case*, he points out that:¹²

¹⁰ (2002) 2 SCC 188.

¹¹ P.K. Tripathi, “The Fiasco of Overruling A.K. Gopalan” *AIR Journal* 6 (1990).

¹² Jagdish Swarup, *Constitution of India* 401 (Modern Law, Allahabad, 2nd edn., 2006).

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.

The locus classicus on the point is *Ajay Hasia* where it has been observed:¹³

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.

Nevertheless, it has been pointed out that “arbitrariness doctrine’s unique contribution is to bring *non-comparative unreasonableness* within the ambit of Article 14.”¹⁴

Non-comparative unreasonableness

While the application of the doctrine of ‘reasonable classification’ is conditional upon some comparatively differential treatment between two persons or two classes of persons, the arbitrariness doctrine is not thus handicapped. It can and has been invoked for any sufficiently serious failure to base an action on good reasons. This new approach to constitutional adjudication involving article 14 has enormously widened the scope of the application of article 14 as one need not allege any discrimination *vis-a-vis* others.

This is evident from the observation made by the court in *A.L. Kalra v. Project and Equipment Corporation*.¹⁵ In this case, the appellant had lost his job because he had failed to utilise certain loans he had taken from the corporation and had also failed to return the same within the stipulated period. The court quashed the order partly for the reason that it was arbitrary and was violative of article 14 Desai J observed:¹⁶

¹³ *Supra* note 6.

¹⁴ Tarunabh Khaitan, “Legislative Review under Article 14” in *Oxford Handbook of Indian Constitutional Law* 4, *Forthcoming*; *Oxford Legal Studies Research Paper No. 29/2015* (2015), available at: <http://ssrn.com/abstract=2605395> (last visited on Feb. 2, 2015).

¹⁵ (1984) 3 SCC 316, 328.

¹⁶ *A.L. Kalra v. Project and Equipment Corporation* (1984) 3 SCC 316, 328.

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.

Similarly, in *Shrilekha Vidyarthi v. State of U.P.*,¹⁷ the court quashed the state government's order removing all the existing district government counsel (civil, criminal and revenue in the whole state) for appointing fresh ones in their place. The court held that even if the appointments of the counsel were contractual they had to be governed by the requirements of reasonableness and non-arbitrariness inherent in article 14 and the principle of the rule of law which apply to all state action whatsoever. It was further stated:¹⁸

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. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

As regards the employment of the 'arbitrariness' yardstick in deciding upon the constitutionality of administrative actions, *Om Kumar v. Union of India*¹⁹ is the leading case in point, wherein it was observed:

[W]here, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary

¹⁷ (1991) 1 SCC 212.

¹⁸ *Shrilekha Vidyarthi v. State of U.P.* (1991) 1 SCC 212.

¹⁹ (2001) 2 SCC 386.

cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.

IV Partial rejection of the doctrine

While the articulation of a seemingly new standard was celebrated by many scholars and constitutionalists, who had lamented the inadequacy and inappropriateness of the 'reasonable classification' test when applied to certain cases, the doctrine of arbitrariness was not without its critics. The most poignant criticism was arguably by the famous jurist and constitutional expert H.M. Seervai who stated thus: "The new doctrine hangs in the air, because it propounds a theory of equality without reference to the language of Art. 14."²⁰ He has further stated that the new doctrine suffers from "fallacy of undistributed middle" in that "whatever violates equality is not necessarily arbitrary, though arbitrary actions are ordinarily violative of equality".

Notwithstanding the soundness or otherwise of the arguments against the enunciation of the 'new doctrine', there is certain amount of vagueness associated with the theory of non-arbitrariness that has troubled lawyers and academicians alike. It was only a matter of time before the Supreme Court of India would express its unease with this apparently nebulous concept especially in its application in review of primary legislation.

In the case of *State of A.P. v. McDowell*,²¹ Reddy J on behalf of a three-judge bench of the Supreme Court, laid down 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."

²⁰ H.M. Seervai, *Constitutional Law of India* 438 (Universal, New Delhi, 4th edn., 1991).

²¹ (1996) 3 SCC 709.

In *Natural Resources Allocation, in re*,²² [hereinafter *2G Reference case*] the Court had the opportunity to further comment on the ‘doctrinal looseness’ of the arbitrariness test. Quoting extensively from McDowell, it was underlined that “A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity.”

The ultimate blow to the application of arbitrariness test *vis-a-vis* primary legislation was given by the decision of the division bench in *Rajbala* wherein it was held:²³

[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.

V Arbitrariness revisited: Reassessing *Rajbala*

The recent decision of the Supreme Court in *Rajbala* might have given great cause for rejoice to the constitutionalists, scholars and academicians who had long decried the application of the arbitrariness test to review the constitutionality of primary legislation.²⁴ However, it would be too simplistic to claim that the controversy is conclusively settled. It is submitted that the legal impact of the ruling is not very promising. The decision of the court cannot be said to be a correct statement of law for a number of reasons.

Firstly, the judgment may be criticised on the ground of ‘judicial discipline’. Judicial discipline dictates that 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.²⁵ Thus, it was improper on the part of a division bench having a strength of two to overrule the law laid down by earlier benches of larger strength (discussed earlier) that had not ruled out the

²² *Special Reference No. 1 of 2012*, (2012) 10 SCC 1.

²³ *Supra* note 1.

²⁴ See M.P. Singh, “Decriminalisation of Homosexuality and the Constitution” 2 *NUJS Law Review*. 361-380 (2009); Deepika Sharma and Radhika Gupta, “Doctrine of Arbitrariness and Legislative Action - A Misconceived Application” 5 *Nalsar Student Law Review* 22-34 (2010) and Khaitan, *supra* note 14.

²⁵ *Central Board of Dawoodi Bohra Community v. State of Maharashtra* (2005) 2 SCC 673.

application of the doctrine to legislative action and in certain cases, in no uncertain terms, had endorsed the view that the new doctrine had its application to both the forms of state action be it of the legislature or of the executive. In addition to the judgments cited earlier, two more observations of the Supreme Court are in point. The first is a two-judge bench decision in *State of U.P. v. Renusagar Power Co.*²⁶ where Mukharji J stated: “The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary.” The second case is a three-judge Bench decision in *State of Tamil Nadu v. Ananthi Ammal*,²⁷ where Bharucha J held thus: “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.” Moreover, *Malpe Vishwanath*²⁸ and *Mardia Chemicals*,²⁹ both decisions of three-judge benches, are authorities for the proposition that the arbitrariness test may be successfully employed to strike down statutes. *Rajbala* does not seek to constructively engage with the principles of law laid down in these decisions and confines the discussion relating to these cases to a mere footnote. It is thus submitted that the decision of the Supreme Court on this issue does not carry much weight and to that extent is *per incuriam*. As has been held, a decision can be said generally to be given *per incuriam* when this court has acted in ignorance of a previous decision of its own or when a high court has acted in ignorance of a decision of this court.³⁰

Secondly, the reliance on McDowell seems to be misplaced in that the decision in McDowell was to the effect that the mere assertion that an enactment was arbitrary would not be enough to assail its constitutionality. The assertion had to be duly substantiated in order to meet the judicial threshold of ‘arbitrariness’ and hence the application of article 14 of the Constitution. Thus, McDowell did not rule out the application of the doctrine to statutes. In any case, McDowell was the decision of a three-judge bench and hence cannot be an authority for overruling larger bench decisions on the point. It may, however, be argued that the *2G Reference* case had reached the same conclusion as *Rajabala*. In that sense, the *2G Reference* can be said to be a misreading of McDowell as well for similar reasons. It has been further pointed out that the trouble is that the *2G Reference* did not involve legislative review, and therefore its resurrection of *McDowell* remains *obiter*.³¹ It is now well settled that a

²⁶ (1988) 4 SCC 59.

²⁷ (1995) 1 SCC 519.

²⁸ *Malpe Vishwanath Acharya v. State of Maharashtra* (1998) 2 SCC 1.

²⁹ *Mardia Chemicals Ltd. v. Union of India* (2004) 4 SCC 311.

³⁰ *Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer* (1990) 3 SCC 682.

³¹ *Supra* note 14 at 20.

decision is an authority for what it decides and not what can logically be deduced therefrom.³²

Thirdly, the distinction between the standards of review applicable to supreme and subordinate legislation do not seem to be well-founded especially with the increase in volume of subordinate legislation that has effectively obliterated the distinction between legislation and administration. This view finds support from a two-judge bench decision of the Supreme Court (cited with approval in a subsequent Constitution Bench judgment³³):³⁴

It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'.

Of course, this doesn't mean that subordinate legislation enjoys the similar privilege as primary legislation. The position of law in this regard has been succinctly laid down by a three-judge bench in *Indian Express Newspapers v. Union of India*.³⁵ It was held:

A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.

³² *Union of India v. Chajju Ram*, (2003) 5 SCC 568.

³³ *Sitaram Sugar Company v. Union of India* (1990) 3 SCC 223.

³⁴ *Union of India v. Cynamide India Ltd.* (1987) 2 SCC 720.

³⁵ *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641.

Fourthly, the assertion of the court that substantive due process is not a part of constitutional jurisprudence of India can only be said to be partly correct. Substantive due process analysis has become a part and parcel of judicial scrutiny under article 21. The court's reliance on *A.S. Krishna v. State of Madras*³⁶ in support of the conclusion that the doctrine of due process has no application in Indian Constitution is grossly misplaced as no such proposition was laid down in the said case. Further, *Municipal Committee Amritsar v. State of Punjab*³⁷ was a decision rendered before the groundbreaking *Maneka Gandhi* case and was only a three-judge bench decision.

In any case, in *Selvi v. State of Karnataka*,³⁸ Balakrishnan J. speaking for a three-judge Bench has stated thus: "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'." Further, Nariman J. in *Mohd. Arif @ Ashfaq v. The Reg. Supreme Court of India*,³⁹ speaking for the majority in a five-judge bench decision held as follows: "Substantive due process is now to be applied to the fundamental right to life and liberty."

It is well-settled post *Maneka Gandhi* that any form of constitutional analysis under article 21 will necessarily attract article 14. As has been held:⁴⁰

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. . . . We have to remember that the fundamental rights protected by Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny.

The decision of the Supreme Court in *Rajbala* in so far as it departs from established precedents without any legitimate basis is counterproductive in that it threatens the doctrine of precedents. A Constitution Bench of the Supreme Court in *Union of India v. Raghubir*

³⁶ AIR 1957 SC 297.

³⁷ (1969) 1 SCC 475.

³⁸ (2010) 7 SCC 263.

³⁹ (2014) 9 SCC 737.

⁴⁰ *Supra* note 5.

*Singh*⁴¹ has explained the merit and purpose of the doctrine of precedents in the following words:

The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court.

It is therefore submitted that unless there is an authoritative judicial pronouncement by a larger bench on the issue, the decision in *Rajbala* should be seen as confined to the facts of the particular case and not laying down a new principle of law for general application.

VI Judicial threshold for evaluating ‘arbitrariness’: Rationality versus reasonableness

The evolution of the ‘arbitrariness’ test by the Supreme Court in *Royappa* has been described as the ‘constitutionalisation of administrative law’. Khaitan contends that “what the new doctrine has done is elevated an administrative law reasonableness standard into a self-standing constitutional ground for review, without the need for any crutches in the form of other rights or values.”⁴² If we examine the approach of the Supreme Court in any form of arbitrariness analysis under article 14, it would reveal that there is much truth in this proposition. While this fact may be of serious concern to academicians and scholars who insist on a strict separation of the two branches of the public law, it is too late in the day to contend that such a binary is feasible or even desirable in a modern state. As has been pointed out: “[T]he conceptual division between administrative and constitutional law is quite porous, and that along many dimensions, administrative law can be considered more constitutional in character than constitutions.”⁴³

Having established the administrative law foundation of the new doctrine, it would be worthwhile to seek guidance from the administrative law cases employing the reasonableness standard. It is interesting to note here that though the terms ‘rationality’ and ‘reasonableness’ are often interchangeably used, there is a conceptual distinction between the two and the

⁴¹ (1989) 2 SCC 754.

⁴² *Supra* note 14 at 16.

⁴³ Tom Ginsburg, “Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law” 117 (University of Chicago Public Law & Legal Theory Working Paper No. 331, 2010).

same may be analysed in order to arrive at a theory of proper application of the ‘arbitrariness’ doctrine.

A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable.⁴⁴ Virtually all administrative decisions are rational in the sense that they are made for intelligible reasons, but the question is whether they measure up to the legal standard of reasonableness.⁴⁵ ‘Irrational’ most naturally means ‘devoid of reasons’ whereas ‘unreasonable’ means ‘devoid of satisfactory reasons’.⁴⁶

The distinction has between the two terms has been succinctly summarised by Geoff Airo-Farulla in his seminal piece on “Rationality and Judicial Review of Administrative Action” as under:⁴⁷

In the administrative law context, ‘rationality’ should be seen as an umbrella term, encompassing many specific requirements of good decision-making. Many of these tend to be lumped under the ‘reasonableness’ rubric, but they should be seen for what they are — different aspects of rationality. ‘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). As long as this semantic clarity is maintained, no harm can come from including reasonableness under the rationality rubric.

It is submitted that the “reasonableness” standard as explained above should guide the judiciary in any form of ‘arbitrariness’ analysis under article 14. A major advantage of this approach would be that that the legitimacy of the decision will not be questioned on the ground that the court had sought to examine the wisdom of the legislature.

⁴⁴ Airo-Farulla, “Reasonableness, Rationality and Proportionality”, in Groves and Lee (eds.), *Australian Administrative Law: Fundamentals, Principles and Doctrines* 214-15 (2007).

⁴⁵ William Wade and Christopher Forsyth, *Administrative Law* 295 (Oxford, United Kingdom, 11th edn., 2009).

⁴⁶ See, *R v. Secretary of State for the Environment ex p Nottinghamshire CC*, [1986] AC 240 at 249, and in *R v. Home Secretary ex p Brind*, [1991] 1 AC 696. See also *Minister for Immigration and Citizenship v. Li* [2013] HCA 18, (2013) 87 ALJR 618 at para. 30 (recognising distinction between rational and reasonable).

⁴⁷ Geoff Airo-Farulla, “Rationality and Judicial Review of Administrative Action” 24 (3) *Melbourne University Law Review* 543 (2000).

VI Conclusion

The foregoing analysis reveals that there exists considerable amount of uncertainty on the question of legitimacy of application of the arbitrariness test to review the constitutionality of statutes. Notwithstanding the doubtful legitimacy of such an exercise, it is very clear in view of the judicial pronouncements made by the constitution benches of the Supreme Court that such an exercise is constitutionally permissible. The syllogism runs thus: All arbitrary state actions (legislative and executive) are antithesis to the principle of equality. Thus, all arbitrary state actions will fall foul of article 14. Furthermore, all state actions falling foul of article 14 will attract article 13. This is likely to be the true position of law till a constitution bench of larger strength declares otherwise. Piecemeal judicial interventions in breach of judicial discipline will not achieve the desired result.

However, the desirability of such a reference may be mooted and sincere efforts may be made to address the vagueness associated the arbitrariness doctrine. One may also explore the possibility of system of tiered review as in US or adopt differential standards (liberal or strict) for review of primary and secondary legislation in an arbitrariness scrutiny.