BEYOND REASONABLENESS – A RIGOROUS STANDARD OF REVIEW FOR ARTICLE 15 INFRINGEMENT

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I Introduction

RIGHTS, EVEN when fundamental, are rarely absolute.[1] Most constitutions allow the possibility of justification of the violation of most fundamental rights in certain circumstances.[2] Sometimes, the justification stage is distinct from (and subsequent to) the analysis of the infringement of the right. An example is article 19(1) of the Indian Constitution – all the rights mentioned therein can be justified in the manner provided in the other sub-articles. In other cases, where there is no distinct justification clause in the Constitution, a justification stage is usually built into the inquiry of the infringement of the right itself. For example, article 14 guarantees 'equality before law' and 'equal protection of the law'. There is no express justification clause, and seemingly the obligation on the state to respect equality before law is absolute. However, in analysing whether the right to equality has been violated, judges examine whether a given classification is 'reasonable' – if it is reasonable, they hold that the law was not unequal. Similarly, a violation of personal liberty under article 21 is permissible if the law doing so is just, fair and reasonable – even though there is no

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1. Under international law, for example, the right against torture is often cited as a right whose violation cannot be justified under any circumstance. Such rights may be said to have 'a simple categorical rule-like structure' — Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the place and limits of the proportionality requirement' in George Pavlakos, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* 131, 133 (Oxford: Hart, 2007).

2. For Alexy, rights that admit limitations are 'principles' or 'optimization requirements' which require the realisation of something to the greatest extent possible, given countervailing concerns – see, Robert Alexy, *A Theory of Constitutional Rights* 58 (Julian Rivers trans, OUP: Oxford 2002).

apparent exception clause to article 21. For the purposes of this article, the author treats the difference between these two types of justificatory models (separate and in-built) as merely semantic, and all references to 'justification' will refer to both of them. This article shares with most liberal conceptions of rights 'the idea that something protected as a matter of right may not be overridden by ordinary considerations of policy…Reasons justifying an infringement of rights have to be of a special strength.'[3]

The article deals with the appropriate standard of review for examining the justification of a violation of fundamental rights. In most constitutional democracies, courts have been the gatekeepers of fundamental rights. The task of determining whether a violation is in fact justified, therefore, is judicial. As will be explained later, justification is only a part, but a crucial one, of constitutional rights adjudication. Most talk of 'standard of judicial review' relates to this justification stage of constitutional rights adjudication. This aspect will be examined in great detail shortly, but as a preliminary (and rough) analogy, one may imagine trying to spot a blemish in an item of jewellery. One's success in spotting the blemish depends on how closely and with what intensity one examines it. Also, the more expensive the item of jewellery is and the less trust one has in the expertise of the jeweller, the closer and more intense will be his inspection. If the item of jewellery is a metaphor for fundamental rights, the blemish in question is an unjustifiable violation of the right, and the intensity of inspection is the standard of review. Thus, one can have a 'low' standard of review when the inspection is distant,[4] while a 'higher' standard of review will entail a close examination. These are, admittedly, rough and vague terms and the difference between them is a matter of degree. Yet, these are distinct categories whose difference should become clear in the course of this article.

It also follows from the analogy that the more important a right, the more anxious one will be to make sure that it is not unjustifiably violated. It is admitted that the claim that some rights are more fundamental than others is controversial. This is an important assumption because there is no point in discussing different standards of review if one cares about everything one is reviewing exactly to the same degree. However, this does not seem plausible. Two examples may be taken — in the first, the state imposes different rates of taxes on sellers of tea and sellers of coffee. In another case, the state imposes different rates of taxes on Hindus and

3. Kumm, *supra* note 1at 131.

4. In the context of judicial review where a decision already made by another body (typically the executive or the legislature) is under 'review, a low standard of review is often described as a 'deferential' standard of review, implying that this is done in deference to the judgment exercised by this other body in the first place.

Muslims.[5] Both cases arguably involve a claim that the right to equality has been violated. However, intuition tells us that these are not similar cases – that a differential tax rate on what you sell is a qualitatively different thing than a differential tax rate based on your religion. It is the author's opinion that a violation of the fundamental rights guaranteed by article 15(1), article 19(1)(a) and the negative rights under article 21,[6] in the very least, deserve an intense review because these are very special rights. In this paper, claim only with respect to article 15(1) is defended.

Traditionally the Indian Supreme Court has applied a single (and low or deferential) standard of review – *reasonableness* – to examine violations of articles 14 & 15.[7] This is a bold claim, and there may be enough material to be found in case-law to make a case that in fact the standards applied have been different, even if called by the same name. It is sufficient for the present purposes if one agrees that at least a self-conscious application of varying (and higher) standards of review in India is of recent origin.

While referring to a higher standard of review in some recent cases, the Supreme Court has used two distinct terms – 'strict scrutiny' borrowed from the US jurisprudence, and 'proportionality review' which has its origins in the jurisprudence of Canadian and European courts. In *Anuj Garg* v. *Hotel Association of India,*[8] for example, the Supreme Court tested a law that was discriminatory against women on a 'strict scrutiny' standard. In *Ashoka Kumar Thakur* v. *Union of India*,[9] delivered only a few months later and without any reference to *Anuj Garg*,[10] the Supreme Court refused to subject an affirmative action measure to 'strict scrutiny'. Typically, 'strict scrutiny' is understood to require the state to show that the impugned measure served a 'compelling state interest' and was the only means available to achieve it in order to justify the violation of the right. In *Teri Oat*, on

5. Incidentally (and arguably), the recognition of the legal personality of a 'Hindu Undivided Family' has precisely this effect.

6. Art. 21 imposes negative obligations on the state to refrain from violating life and liberty (for example, by refraining from torture), as well as positive obligations to enhance the value of life and liberty (for example, by securing the right to food). It is arguable that a deferential standard of review must be applied to positive rights under Art. 21 given the polycentric nature of decision-making in these cases – see, generally, Lon Fuller, 'The Forms and Limits of Adjudication' 92 (2) *Harvard Law Review* 353, 364(1978).

7. The 'doctrine of arbitrariness' propounded by the Supreme Court under Art. 14 will be discussed at an appropriate stage later in the article.

8. AIR 2008 SC 663.

9. 2008 (5) SCALE 1.

10. *Anuj Garg* could not have been cited in *Thakur* because the judgment in *Garg* was delivered on Dec 2007, while the arguments of the parties in *Thakur* were already concluded in Nov 2007 (even though the actual judgment in *Thakur* was delivered several months later in April 2008).

the other hand, the Supreme Court held: [11]

> Having regard to the extreme hardship which may be faced by the parties, [resumption] shall not ordinarily be resorted to…. The situation, thus, in our opinion, warrants application of the *doctrine of proportionality*…. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, *the appropriate or least restrictive choice of measures has been made by the legislature* or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "*maintain a proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.

The precise content of 'strict scrutiny' and 'proportionality review' is deeply controversial in their respective jurisdictions. Related to this is the confusion over the difference between the two terms, if any.[12] Further still, there is a strong body of opinion that believes that the 'strict scrutiny' standard has been unfaithfully applied in the United States to keep out certain groups from appropriate judicial protection by freezing the protection to very few groups.[13] Another strand of the criticism is that applying strict scrutiny to affirmative action cases 'has made it more, rather than less, difficult for government to remedy the effects of hostility toward racial minorities.'[14]

If the analogy between fundamental rights and an item of jewellery made sense in the beginning, these controversies surrounding higher standards of review caution us that exploring the subject is difficult

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11. *Teri Oat Estates* v. *U.T., Chandigarh*, (2004) 2 SCC 130 paras 43 to 46.(Emphasis added). See also, *Sudhakar* v. *Post Master General, Hyderabad,* 2006 (3) SCALE 524; *Om Kumar* v. *Union of India*, (2001) 2 SCC 386; Ashish Chugh, 'Is the Supreme Court disproportionately applying the proportionality principle?' (2004) 8 *SCC (J)* 33.

12. For an argument that strict scrutiny is best conceptualised as proportionality review, see Richard Fallon, 'Strict Judicial Review' 54 *UCLA Law Review* 1267 (2007).

13. See, generally, Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the failure of class-based Equal Protection* (Chicago: University of Chicago Press, 1999). But see, *contra, In re Marriage Cases* , S147999 (2008) 08 C.D.O.S. 5820, where the Supreme Court of California applied strict scrutiny to discrimination against gays and lesbians.

14. Suzzane Goldberg, 'Equality without borders' 77 *Southern California Law Review* 481, 487.

territory. If there is a case for a higher standard of review in the case of certain fundamental rights, it must be made on its own terms, and with the knowledge of relevant comparative jurisprudence as well as its criticism. While it is useful to learn from the experiences in other countries, it is equally important to not repeat their mistakes. Another reason to exercise caution is that comparative law can sometimes be misapplied by the 'borrowing' jurisdiction. Somek, for example, argues that the German constitutional court's jurisprudence evolved in the 1980s to incorporate a heightened standard of review, expressly borrowed from United States jurisprudence – and yet, 'nothing (or only very little) has changed'.[15] A similar attempt towards mere semantic change can be seen in *Om Kumar* v. *Union of India*:[16]

> So far as Article 14 is concerned, the Courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the Court considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality

This is a curious claim, and with respect, simply incorrect.[17] It is important that domestic courts do not merely engage in an exercise of semantic change without any substantial difference in the jurisprudence. This can become possible if the difference between the existing doctrine and the proposed standards are properly understood.

With these reasons in mind, it is proposed to examine the proper application of 'a rigorous standard of review' (RSR), as distinct from a reasonableness review that the Supreme Court has traditionally applied. The content of RSR and 'strict scrutiny' is very similar, but the latter term is avoided because of the controversial baggage it carries due to problems with its (mis)application in the United States. Several of the conclusions are quite different from the strict scrutiny jurisprudence in the United States. 'Proportionality review' is also avoided because proportionality better describes a particular step in RSR, but fails to capture its totality.

The second section of the article presents an evaluative framework of constitutional rights adjudication. Here, the different stages of constitutional rights adjudication will be identified, and the various possibilities of

15. Alexander Somek, 'The deadweight of formulae: What might have been the second Germanization of American Equal Protection Review' 1 *University of Pennsylvania Journal of Constitutional Law* 284, 287 (1998).

16. *Om Kumar*, *supra* note 11, para 32.

17. See section III, *infra*.

different standards of review will be located. This is not a normative section and the attempt is only to describe the possibilities in constitutional rights adjudication. The third section will then apply this framework to locate the standard of review under the traditional 'reasonableness' and 'arbitrariness' review in the context of article 14 to properly explain the traditional jurisprudence. The fourth section will do the same for article 15. The fifth section will make a principled case for applying RSR to justify an infringement of article 15. Section six will examine the application of RSR in *Anuj Garg*. Section seven will then look at some of implications of applying RSR in the Indian context and also provide a reconstructive (and reconciliatory) account of two recent judgments in *Anuj Garg* and *Thakur*.

II An evaluative framework for the stages in constitutional rights adjudication[18]

One can identify at least six aspects of constitutional rights adjudication in liberal democratic traditions. The final outcome of a constitutional rights challenge to a legislative or administrative measure depends on each of these aspects.

Standing

The first issue relates to who has standing before the court. The possibilities range from the victim herself who claims that her rights have been violated, to groups representing the victims of alleged rights violation, to bodies who have no direct (or personal) interest in the case. The Indian Supreme Court's public interest litigation jurisprudence has been the most activist in this regard, interpreting the standing rights very liberally.[19]

Burden of proof

The second, evidentiary, issue applies to all other aspects of rights adjudication – who has the burden of proving various elements that go into

18. A good part of this section is drawn from Alexy's framework of adjudicating constitutional rights and Kumm's reactions to Alexy's work. However, the author mainly relies upon their description of the stages in adjudication to understand the possibilities with judicial review – their normative framework has not been relied upon in this section. See, generally, Alexy, *supra* note 2; Mattias Kumm, "Constitutional Rights As Principles: On The Structure and Domain of Constitutional Justice" 2 *International Journal of Constitutional Law* 574; Kumm, *supra* note 1.

19. This aspect of constitutional rights adjudication will not be considered in this paper. For more details, see generally, Sangeeta Ahuja, *People, Law and Justice: Casebook on Public Interest Litigation* (London: Sangam Books 1997).

the adjudication? Many jurisdictions require the petitioner to only make a *prima facie* case that her case falls within the scope of the right, and that the right has been infringed. The burden of justifying the infringement, usually, falls on the state. The greater the burden of proof demanded of the state, the more intense is the judicial review of the impugned state action.

Scope and infringement of the right

The third question that a constitutional court may ask is the scope and infringement of a constitutionally guaranteed right. The first requirement of making a constitutional claim is to show that a right has been violated – the wider the scope of a right the brighter is the possibility of mounting a constitutional challenge. It is at this stage that courts consider whether, for example, the right to life and liberty imposes positive obligations on the state; or whether measures which have a disproportionate but unintentional impact on a particular group are discriminatory. This is an important stage in adjudication, but insufficient for the determination of the result, for it is very rare for constitutional rights to be absolute. There are almost always applicable justifications upon which a state may rely. The next two aspects of rights adjudication deal with the justification of a restriction on the right and are the core focus of this article.

Interest analysis

The fourth aspect of constitutional rights adjudication is the identification and evaluation of state interests, the pursuit of which may justify the infringement of the right. Not all rights admit justification. Most strongly, at least under international law, the right against torture is said to be so absolute that no state interest, howsoever important, will ever override it. But most rights do admit justification of a restriction by a sufficiently important state interest. Sometimes, these state interests are mentioned in the constitutional clause itself. Article 19 of the Indian Constitution, for example, expressly and exhaustively specifies the justificatory state interests in its various sub-clauses. These are fairly important state interests such as 'security of the State', 'friendly relations with foreign States', 'public order', 'decency or morality' etc. Any restriction on the freedoms guaranteed under article 19 must be intended to serve one of these specified interests.

However, such express articulation of permissible state interests is not always found in constitutional clauses, and is certainly not found in article 14 (article 15 specifies affirmative action for certain groups as one of the permissible state interests). The task must fall on the judiciary to supply a theory for distinguishing eligible state interests from ineligible ones. Two possible elements that the court may take into account are whether the

state interest is constitutionally legitimate and whether the state interest is important enough (so, mere administrative convenience may not be important enough to qualify as a permissible state interest, for example). Whatever the standard of review, a state interest must be legitimate to justify an infringement of a fundamental right. But whether a court should also insist on weighing the state interest *vis-a-vis* the right in question depends on the standard of review. It is possible to argue that certain rights are so important that they should be infringed very rarely, and only for compelling state interests. Additionally, a court may also choose to determine for itself the real state interest that the impugned law is seeking to achieve, instead of taking the law-maker's word for it.

Nexus analysis

The fifth aspect of constitutional adjudication is the question of *nexus* between the state interest claimed and the measure that seeks to achieve it. The most expansive rights with the most limited justifications may be useless if a very thin nexus is demanded. Various considerations enter at this stage of rights adjudication. The first of them is to examine the *suitability* of the means employed to actually (or even, conceivably) further the state interest claimed. This is an empirical question — if the facts of the case show that the measure adopted by the state cannot further the permissible state interest, there is not much point in allowing the impugned measure to violate the right in question. This first question regarding 'suitability' of the measure is also called the 'rational nexus' test under the 'reasonableness review' traditionally employed by the Supreme Court. The next question is whether the measure adopted is *necessary* to achieve the permissible state interest. This does not call into question the necessity of the state interest itself – that has already been established in the fourth aspect discussed in the preceding paragraph. Here, only the necessity of the measure in furthering the state interest is questioned. So, for example, if there is an alternative measure available which can also further this state interest to a comparable degree, and without violating the right in question (or violating it to a lesser degree), then this alternative measure should be preferred. In other words, the impugned measure is not necessary. Even if the measure is suitable and necessary to achieve the state interest, the final step in judicial scrutiny is to *balance* the competing interests. According to Alexy, the 'law of balancing' requires that 'the greater the degree of non-satisfaction of, or detriment to, on principle, the greater must be the importance of satisfying the other.'[20] On the one hand, the court should ask itself how important is the right in question and how seriously will the impugned

20. Alexy, *supra* note 2 at 102.

measure restrict it. On the other hand, the importance of the state interest in question needs to be examined, along with asking how effectively and to what degree this interest will be achieved by the impugned measure. So, if an important right is only slightly restricted towards achieving an important state interest that is substantially furthered, on balance, the impugned measure should be permissible. These three questions – suitability, necessity and balancing – together constitute what has been termed the 'proportionality review'. Although legitimacy of the state interest is also usually considered under a proportionality review, it does not necessarily embrace all aspects of the interest analysis described in the preceding paragraph. Therefore, it is more useful to see proportionality review as a form of nexus analysis (reasonableness review being another), while keeping the interest analysis as a distinct aspect of the standard of review applied to evaluate a justification of an infringement of a right.

Remedy

Finally, the court needs to pay attention to the type of *remedy* that it may grant in case of finding of a violation of the right. Traditionally, the remedy is declarative. But sometimes courts have found it important to go beyond the declarative remedy and even experiment with novel remedies for effective implementation. This aspect of rights adjudication is beyond the scope of this article.[21]

The main concerns of this article are the fourth and fifth aspect of constitutional rights adjudication – interest and nexus analysis - which may together be described as constituting standard of review.[22] A low, or deferential, standard of review means that the court is satisfied only with a legitimate (or permissible) state interest and does not insist that it may be important or compelling. Similarly, upon nexus analysis, a low standard of review may be satisfied only by showing the suitability of the measure to achieve the interest, without demanding that it be necessary and balanced.

RSR, is the most intense standard – *i.e.*, under the interest analysis, the court demands that the state interest should be legitimate and compelling. Under nexus analysis, it demands that the nexus between the means and interest should be proportionate. This is not to deny that other permutations are not possible. As already mentioned, it is possible to apply proportionality review without demanding a compelling state

21. On remedies generally, see Kent Roach, 'Principled Remedial Discretion' 25 *Supreme Court Law Review* (2d) 101(2004).

22. Some comments will be made later with respect to the second and third aspects as well, but only tangentially.

interest.[23] Again, in the case of an article 19(1)(a) analysis, RSR will only amount to proportionality review in practice because all possible state interests are exhaustively specified in article 19(2). However, the author will only defend the application of RSR to cases involving the infringement of article 15(1) which do not involve affirmative action measures.

This section has only described the possibilities in adjudicating constitutional rights. Not all cases require RSR. There may be good reasons not to conduct certain aspects of the interest or nexus analyses in a given case – the only claim for the moment is that their non-application should not be due to lack of imagination. Thus, the mere possibility of varying standards of review invites one (including judges) to the task of devising an appropriate theory which explains what should be the standard of review in a particular type of case. The factors which should inform such a theory will be discussed in section five. Before that, however, it will be useful to examine the traditional jurisprudence of the Supreme Court in light of the framework explained in this section. The next two sections will show that the traditional standard of review employed by the Supreme Court under articles 14 and 15 is extremely deferential.

III Article 14

Overview of equality provisions in the Indian Constitution

The constitutional guarantee of the right to non-discrimination is embodied in articles 14, 15, 16 and 29 of the Constitution. These articles form part of the chapter on fundamental rights, and their breach gives a right to approach the Supreme Court and high courts directly.

Article 14 is the general equality provision.[24] Article 15(1) prohibits the state from discriminating 'on grounds only of religion, race, caste, sex, place of birth or any of them'.[25] Article 16(2), which specifically bars

23. In cases like *Teri Oat*, *supra* note 11, the Supreme Court is already applying proportionality review without requiring compelling interest. Separating the interest and nexus analyses allows this possibility instead of presenting them as a package deal. Kumm says that all fundamental rights must be subject to a proportionality review – a claim neither supported nor contradicted in this article – see, Kumm, *supra* note 1.

24. Art. 14 - 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

25. Art. 15 - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to — (a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

discrimination in public employment, adds 'descent' and 'place of residence' to the grounds in article 15(1).[26] Both articles 15 and 16 have specific affirmative action provisions for women, children, 'scheduled castes and tribes' and 'other backward classes'. Further, article 29(2) prohibits discrimination in admission into any educational institution maintained by the state or receiving aid out of the state funds on grounds 'only of religion, race, caste, language or any of them'. While sex and place of birth are surprising exclusions, *language* is a unique inclusion in this provision. This provision is also subject to affirmative action provisions.

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(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

26. Art. 16 - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

This section will focus on the jurisprudence under article 14, while the next one will focus on article 15. Although articles 16 and 29 are important, their relevance is limited to discrimination in public employment and public education. In any case, most of what will be said regarding article 15 is applicable to these two articles as well.

There are two ways in which a law or an administrative action can be challenged under article 14:

1. the impugned measure makes an *unreasonable* classification (the classification test); or
2. the impugned measure is unjust, unfair or *arbitrary* (the arbitrariness test).

Given the semantic emphasis that the Supreme Court puts on the concept of 'reasonableness' while conducting these enquiries under article 14, they may appropriately be referred to as 'reasonableness review'. One might claim that the constitutional jurisprudence on 'reasonableness' is broader and applies to all fundamental rights generally, in this article references to the same are confined to its application under articles 14 and 15.

The classification test

The classification test has been the traditional inquiry conducted by courts to determine a violation of article 14. The test puts the burden on the person challenging the constitutional validity of the law to show that the classification was based on an 'intelligible differentia', and that it has 'a rational nexus with the object sought to be achieved'.[27] The ingredients of this standard of review were explained by the Supreme Court thus: [28]

> It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution.

M.P. Jain reviews the cases under article 14 to conclude that the courts 'show a good deal of deference to legislative judgment and do not lightly hold a classification unreasonable. A study of the cases will show that many different classifications have been upheld as constitutional.'[29] However, an analysis of the contents of the classification test in accordance

27. *Deena* v. *Union of India*, AIR 1983 SC 1154, 1167. If, however, discrimination is writ large on the face of the legislation, the burden of proof may shift to the state – *Dalmiya* v. *Tendolkar*, AIR 1958 SC 538.

28. *Union of India* v. *MV Valliappan*, (1999) 6 SCC 259, 269.

29. MP Jain, *Indian Constitutional Law* 858 (5th Edn., 2004).

with the framework described in the previous section will show that such deference is in-built in the test and it is structurally designed to uphold most constitutional challenges under article 14. Beginning can be made by considering the scope of the right under article 14.

Scope of the right

The scope of article 14 is all-encompassing. Any classification made by the state must pass the test of article 14. The Supreme Court has held that 'if equals and unequals are differently treated, no discrimination at all occurs so as to amount to an infraction of Article 14 of the Constitution. A fortiori if equals or persons similarly circumstanced are differently treated, discrimination results so as to attract the provisions of Article 14.'[30] Therefore, if the state imposes a tax on sellers of tea but not on sellers of coffee, for example, such discrimination must be justified under article 14 by showing that they are not similarly circumstanced (*i.e.* by satisfying the classification test). There is no need to satisfy any preliminary requirement of importance of the interest affected – if there is a classification, article 14 is attracted.

Interest analysis

It was noted previously that unlike article 19, which expressly articulates fairly important state interests as the only permissible grounds of restriction of the freedoms mentioned therein, article 14 has no express list of permissible state interests. In such cases, it is the task of the judiciary to supply such a list after developing a reasonable theory of identifying permissible state interests.

It appears that many (though not all) judgments do conduct a legitimacy analysis. Thus, while discussing the validity of a rule requiring termination of services of an air-hostess if she becomes pregnant, the alleged interest that it will be difficult for the pregnant woman to continue in the service was held to be 'neither logical nor convincing' because whether she does find it difficult 'is her personal matter'.[31] This is, essentially, a legitimacy analysis.[32]

Importance of the state interest receives less rigorous, if any, treatment — at least one case has held even administrative convenience as a good

30. *Air India* v. *Nergesh Meerza*, 1981 SCC (4) 335 para 26.

31. *Id.*, para 94.

32. It must be pointed out that even the legitimacy analysis is not done consistently. The case of *Githa Hariharan* v. *Reserve Bank of India*, (1999) 2 SCC 228 discussed in the next section, did not consider the question of whether the impugned law served a legitimate purpose.

enough state interest to justify a classification.[33] One can conclude that the reasonableness review requires a demonstration of a legitimate state interest, even though same cases fail to perform this task. However, there is no further requirement of showing that the state interest crosses any given importance threshold.

Nexus analysis

Under its 'reasonableness' standard of judicial review, the apex court demands any 'rational nexus' between the restrictive measure and the state interest sought to be furthered by it. *In re: Special Courts Bill, 1978*, a special criminal procedure was established to speedily try offences committed during the period of national emergency by those holding high political office. The Supreme Court held that there was a rational nexus between the object of the bill (to bring to speedy justice those who committed crimes during the emergency) and the special procedure set up, in that the special procedure would in fact lead to a speedier disposal of cases and that 'ordinary criminal courts, due to congestion of work, cannot reasonably be expected to bring the prosecutions contemplated by the Bill to a speedy termination.'[34] This only addresses the 'suitability' aspect of the nexus analysis. It is not that a proportionate nexus could not have been found in this case – just that the court did not find it worthwhile to even consider the necessity and balancing aspects of the nexus.

In several cases, the courts have bent over backwards to find some rational basis in the classification. This standard of review has been so deferential that the Supreme Court once warned itself that 'anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Article 14 of the Constitution.'[35] The 'necessity' and 'balancing' aspects of the nexus test have been completely ignored in most cases. There have been occasional exceptions when judges have demanded that a restriction be 'necessary'. For example, the dissenting opinion in *Bearer Bonds* case held that 'the impugned Act puts a premium on dishonesty without even a justification of necessity ... that the situation in the country left no option.'[36] The case involved preferential treatment of tax evaders through a voluntary disclosure of undisclosed income scheme. However, such application of the necessity test is exceptional and has certainly not been made in most cases (the fact that only the dissenting

33. *Supt. & Remembrancer of Legal Affairs* v. *State of West Bengal*, AIR 1975 SC 1030.

34. *In re: Special Courts Bill, 1978*, (1979) 1 SCC 380, para 82.

35. *L.I.C. of India* v. *Consumer Education and Research Centre*, AIR 1995 SC 1811, 1822.

36. *R.K. Garg* v. *Union of India*, 1981 AIR SC 2138, para 36.

opinion in the *Bearer Bonds case* required demonstration of necessity is in itself telling).

The arbitrariness test

A measure can be shown as unreasonable or arbitrary without the necessity of showing a suitable comparator with respect to whom the complainant is treated unequally. Although it has its roots in earlier dissenting opinions, the arbitrariness test was first expounded by a majority court in *Royappa*:[37]

> 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.… State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not *legitimate and relevant* but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former.

In admitting the possibility of a violation of article 14 even when there is no discernible classification, the arbitrariness doctrine is a distinct analysis under which was previously confined to the classification test. The full scope of the anti-arbitrariness principle remains unclear. Procedural arbitrariness, like *mala fides*, would mostly apply to administrative actions. However, legislative as well as administrative measures may be substantively arbitrary – e.g. a retroactive criminal law. This new dimension has, however, come under severe criticism from commentators for logical incoherence and doctrinal weaknesses.[38]

For the present purpose, arbitrariness implies an absence of any reason whatsoever. Evidently, to prove that something is arbitrary is very difficult.

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37. *E P Royappa* v. *State of Tamil Nadu*, AIR 1974 SC 555. para 85 (per Bhagwati J) (Emphasis added).

38. T.R. Andhyarujina, *Judicial Activism and Constitutional Democracy in India* 30-1 (Bombay: Tripathi, 1992); H.M. Seervai, *Constitutional Law of India* 436-42 (4th Edn., Bombay: Tripathi, 1991).

Even in *Royappa*, where the doctrine was first established, the court found that the administrative act in question was not arbitrary because the petitioner failed to prove allegations of *mala fide* exercise of power. If the presence of any (legitimate) reason makes an act non-arbitrary, it continues to be an extremely deferential standard of review. The above quote itself identifies that the state interest must only be 'legitimate and relevant' for the act to be non-arbitrary – there is no need for the interest to be important or compelling, and there is no requirement that the impugned means is proportionate towards achieving this state interest. From the perspective of the standard of judicial review, it is as deferential a standard as the classification test.

IV Article 15

Traditionally, the test employed for deciding whether there is any discrimination on a specified ground under article 15 has been exactly the same for an unspecified ground under article 14, *viz* to see whether the classification made on the said ground satisfies the reasonableness review.[39] There is no special status given to discrimination on article 15 grounds like sex or caste.

The main reason for this position seems to be the unhappy use of the word *only* in articles 15, 16 and 29.[40] To show that a classification on one of the enumerated grounds was reasonable, all that the state needs to show is that it was not made *only* on such ground, but also on some 'other ground', which has been liberally interpreted.

The position on the import of the word 'only' was far from clear in one of the earliest cases, *Champakam Dorairajan*.[41] In this case, Viswanatha Sastri J of the Madras High Court refused to place any significance to the word and held that 'the meaning of Article 15(1) would be wholly unaffected if the word 'only' were deleted from it'. However, Somasundaram J disagreed, holding that in certain circumstances it was possible for the state to classify amongst citizens on the ground of, say, caste, so long as caste was not the only ground for the classification.[42]

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39. Arguably, the only difference between Art. 14 and 15 is a slightly weaker presumption of constitutionality under Art. 15 because of the express mention of the suspect grounds of classification. Whether this has been systematically applied, or whether it has made any real difference in the outcome of the cases, is debatable.

40. Art. 15(1) – 'The State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth or any of them.' (Emphasis added)

41. *Champakam Dorairajan* v. *State of Madras*, AIR 1951 Mad 120, para 37.

42. *Id.*, para 57. On appeal, the Supreme Court refused to express an opinion on the question of Art. 15 discrimination, but did hold that in that case, there was discrimination 'only' on the ground of caste and religion – see, *State of Madras* v *Champakam Dorairajan*, AIR 1951 SC 226, para 14.

It was the latter view, however, which was affirmed in later cases. For example, it has been held that although *descent* is a prohibited ground under article 16(2), the state may provide employment to the son or daughter of a deceased employee on compassionate grounds since this does not amount to descent simpliciter.[43] It was confirmed in *Madhu Kishwar*[44] by Ramaswamy J that the test under article 15 is essentially the same as that under article 14 : 'when women are discriminated only on the ground of sex … the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair.'

It appears, therefore, that the word 'only' in article 15 had become a place-holder for any limiting state interest that was claimed as the real reason for the classification. Like article 14, there was no demand that this state interest be sufficiently important to warrant the limitation of article 15. And the standard of judicial review continues to check only for suitability of the impugned measure towards furthering that interest.

This semantic explanation is perhaps a generous view of the jurisprudence on article 15. A cynical explanation for the judicial non-development of article 15 is the complex existence of religion-based and gender-unjust personal laws in India. Given the emotive religious appeal of personal laws, the post-partition courts were understandably wary of applying constitutional touchstone to these laws.[45] The wariness, with a few exceptions, has persisted to date. This has ensured that article 15 has not been given any meaningful content of its own, for a powerful article 15 cannot co-exist with religion-based and gender-unjust personal laws.

The famous case of *Githa Hariharan*[46] illustrates the extremely deferential standard of review in personal law cases in particular. The case involved a constitutional challenge to section 6(a) of Hindu Minority and Guardianship Act, 1956, which granted the legal guardianship of minor children to 'the father, *and after him*, the mother'.[47] The provision clearly established a hierarchy between parents based only on sex. The court begins with the presumption of the constitutionality of the provision.[48] Neither of the two opinions delivered in the case identified the state interest that this

43. *Balbir Kaur* v. *Steel Authority of India*, (2000) 6 SCC 493.

44. *Madhu Kishwar* v. *State of Bihar*, (1996) 5 SCC 125, para 19.

45. Courts have sometimes gone to ridiculous lengths to achieve this — in *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84, the Bombay High Court held that personal laws did not need to satisfy the benchmark set by fundamental rights! See generally, AM Bhattacharjee, *Matrimonial Laws and the Constitution* (Calcutta:Eastern Law House 1996); Tarunabh Khaitan, 'Personal Laws and the Constitution – the Judicial Dilemma' 14(4) *Central India Law Quarterly* 521 (2001).

46. *Githa Hariharan, supra* note 32.

47. *Id*.,Emphasis added.

48. *Id*., paras 9, 43.

discrimination seeks to sought, let alone inquired into its legitimacy or weigh its importance. Anand CJI merely interprets 'after him' to mean in the 'father's absence from the care of the minor's property or person for any reason whatever'.[49] The mother has to show that the father is unable or unwilling to act as the guardian of the child. The court fails to notice that even this interpretation fails to resolve the initial claim of sex discrimination. As Catharine MacKinnon puts it, 'The mother was the child's guardian only in lieu of the father, not in her own right, her guardianship one step behind, the size of his absence.'[50] The court makes no attempts to justify why the mother's right to guardianship kicks in only in the absence of the father.

If the standard of review was more evolved and the court required sex discrimination to be justified under RSR, it would have conducted interest and nexus analyses. Arguably, a possible state interest in this case would have been to account for social reality where in most cases it was the father who in fact fulfilled the duties of a guardian. The court would have first considered whether this is a legitimate state interest. It would then be asked if this interest is compelling enough to restrict an important right like freedom from sex discrimination. Clearly, this alleged state interest tries to make the fact of existing sex discrimination in society a reason to perpetuate legal sex discrimination as well. Chances are that even if it was held to be legitimate, it would not have weighed heavily enough to apply as a compelling state interest. The next stage of inquiry that sees whether the restriction was proportionate would not even arise in this case because the interest was not compelling enough to qualify. The law would be struck down (or at least, applying the doctrine of severability, the words 'after him' would have been struck down). This example illustrates that the difference in the standard of scrutiny makes a real difference to the outcome of several cases.

Admittedly, this analysis of the traditional equality jurisprudence of the Supreme Court is patchy and incomplete. It probably ignores some progressive judgments which may have applied aspects of RSR and were worthy exceptions to the general trends noted above. However, as an overall picture, the analysis holds true. To summarize, 'reasonableness review' applied by the Supreme Court under articles 14 and 15 demands that an infringing measure must be justified by showing a legitimate state interest and a suitable (rational) nexus between the measure and this interest. The

49. *Id*., para 10. See also, para 46.

50. Catharine MacKinnon, 'Sex equality under the Constitution of India: Problems, Prospects and "Personal Laws"' 4(2) *International Journal of Constitutional Law* 181, 191 (2006). MacKinnon's article is otherwise problematic in its overgenerous treatment of the Supreme Court's equality jurisprudence and ignores most of the issues raised in this article.

next section will argue that this traditional standard of review is inadequate for discrimination on the grounds under article 15 and that recent judgments by the Supreme Court indicate growing recognition of this claim.

V Why apply RSR for article 15 infringement?

What particular standard of review should be applied while analysing the justification of the infringement of a given right requires a theory of constitutional rights adjudication. Such theory must incorporate at least two issues. First, it must begin with the assumption that constitutional (or fundamental) rights are important – this is the reason why they are constitutionalised in the first place. Their infringement, therefore, should not be very easy. Secondly, at least in constitutions which entrust the judiciary with the task of enforcing these rights, the theory must be sensitive to claims of institutional propriety. Given the institutional design of the judiciary, it is insulated from counter-majoritarian pressures and is, therefore, more amenable to protection of minority groups. On the other hand, and again because of its institutional design, the judiciary tends to lack expertise in complex polycentric policy matters which an executive or a legislature might command. Further, the judiciary is usually unelected, and is, therefore, vulnerable to accusations of democratic illegitimacy. These and other conflicting factors must inform the theory.[51]

Further, not all the 'fundamental' rights mentioned in part III of the Constitution have the same importance. Some rights are more fundamental (or, in other words, they affect more fundamental interests of the right-holders) than others. Accordingly, these even-more-fundamental rights deserve the most rigorous standard of review.

One such right is the right to be free from discrimination on grounds related to one's personal autonomy, which is largely (though not exhaustively) contained in article 15 of the Constitution. Part of the reason for making such a claim may appear to be textual. It is clear by the mere existence of a separate provision in the form of article 15 that the constitutional mandate required special protection for the grounds enumerated therein. To the extent that the original intention of the makers is relevant for interpreting a constitution, evidence is found in the debates of the Constituent Assembly which strenuously discussed which grounds should be enumerated and which should be left out. In particular, the assembly rejected calls for enumerating 'political creed' and 'dress', saying that the former was a legitimate basis for the state to discriminate and that the possibility of discrimination on the latter in the independent state was

51. Developing such a theory is beyond the scope of this article, but see Alexy, *supra* note 2; and Ely, *infra* note 71.

so remote that it did not need enumeration.[52]

However, mere text-based explanations do not go far enough, especially for those who believe that an organic constitution should be purposively interpreted to adapt it to the changing times. Indeed, the Supreme Court has often gone beyond the original intention of the framers to prefer interpretations which further core constitutional values.[53] A surer foundation for applying RSR is a principled one rather than a merely textual one. A principled foundation will also help to decide hard cases, such as whether an affirmative action provision which discriminates on a ground mentioned in article 15 should also be subject to RSR.

Intuitively, most instances of discrimination under article 14 appear to be different from those under article 15. One recognises that a legal distinction between sellers of tea and coffee, to return to a previous example, is qualitatively different from a distinction drawn between Hindus and Muslims, or between men and women. The value informing the intuition is that of personal autonomy something most of us hold dear.[54] Adopting a principled rather than a merely textual approach in *Anuj Garg*,[55] the Supreme Court held that a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to RSR (the court used the term 'strict scrutiny').

Anuj Garg is not terribly exciting in its facts, or indeed in its result. One may even say, ironically, that this was one case where discrimination was so obvious and the justification so weak that a creative judge could have relied on the old reasonableness review to strike down the law (of course, given the weakness of the reasonableness standard, a reluctant judge may have equally easily refused to strike down the impugned law. Applying RSR in this case left the judge with no choice but to strike it down). The impugned colonial law, among other things, prohibited the employment of women in any part of such premises where liquor or intoxicating drugs were consumed by the public. The Supreme Court declared it unconstitutional. What follows is a reconstructive account of the judgment which is true to the spirit of *Anuj Garg*, although principles evolved therein have been organised in analytically neater categories.

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52. Constituent Assembly Debates on 29 April 1947 *available at* <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm> accessed 30 May 2008.

53. Perhaps the most cited example is the decision in *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, where the Supreme Court overrode a clear intention of the constitution makers to incorporate substantive due process in Art. 21.

54. Raz argues the importance of personal autonomy and defends a particular conception of it in Joseph Raz, *The Morality of Freedom* Chapters 14 & 15 (Clarendon Press, Oxford 1986).

55. *Anuj Garg*, *supra* note 8.

Personal autonomy

The court held the value that underpins article 15's prohibition on sex discrimination to be the right to autonomy and self-determination, which places emphasis on individual choice.[56] Personal autonomy is the thread that runs through the grounds mentioned in article 15. Joseph Raz defines the concept thus: 'The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'[57] Autonomy is a matter of degree. Significantly autonomous persons 'are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete.'[58] Autonomous beings have an adequate number of valuable life options available to them. This explanation was mirrored by the court thus: [59]

> The bottom-line in this behalf would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.

Personal autonomy is inherent in the grounds mentioned in articles 15 and 16. Amongst the grounds mentioned therein, race, caste, sex, descent and place of birth are grounds over which most of us do not have any effective control. On the other hand, religion and place of residence are fundamental choices that are also protected by other constitutional rights [articles 25 and 19(1)(e) respectively]. These two strands of grounds in articles 15 and 16, derived from *immutable status* and *fundamental choice* respectively share a common foundation in personal liberty. It is perhaps best to quote John Gardner to explain this point: [60]

> Discrimination on the basis of our *immutable status* tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. …. And discrimination on the ground of *fundamental choices* can be

56. *Id.*, para 33, 41. Again, at para 45 – 'personal freedom is a fundamental tenet…'

57. Raz, *supra* note 54 at 369.

58. *Id.* at 154.

59. *Anuj Garg*, *supra* note 8, para 49.

60. J Gardner, 'On the Ground of Her Sex (Uality)' 18 *Oxford Journal of Legal Studies* 167, 170-1 (1998) (Emphasis added).

> wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life…. there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.

This analysis is well established in comparative jurisprudence, especially that of the Canadian and South African courts. In *McKitka*, [61] a Canadian court held that 'the enumerated categories of section 15[62] all tend to reflect characteristics that are personal and human. They reflect how, when and where we come into this world, matters over which we have no control'. This might explain all the specified grounds except religion because one has control over acquisition of a particular religion. McIntyre J in *Andrews* supplemented this with another explanation that includes religion as a fundamental choice to associate with a particular group — 'Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed'.[63]

Similarly, in *Corbiere*,[64] McLachlin and Bastarache JJ identify the thread running through these analogous grounds – 'what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is *immutable or changeable only at unacceptable cost to personal identity*'.[65]

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61. *R.* v. *Mckitka,* [1987] BCJ No 3210 (British Columbia Provincial Court) para 20.

62. S. 15, Canadian Charter of Rights and Freedoms: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

63. *Andrews* v. *Law Society of British Columbia*, [1989] 1 SCR 143 (Canada) para 19.

64. *Corbiere* v. *Canada* [1999] 2 SCR 203 (Canada).

65. *Id.*, 64, para 13. (Emphasis added)

The South African Constitutional Court recognized in *Prinsloo*[66] that discrimination on unspecified grounds is usually 'based on attributes and characteristics' attaching to people, thereby impairing their 'fundamental dignity as human beings'. *Harksen*[67] further developed the idea to say that 'there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'. Elaborating on what it means by potential impairment of dignity, the *Harksen* court resisted the temptation of laying down any such 'test' for discerning 'unspecified' grounds, but has this to say by way of guidelines: [68]

> In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.

Immutable status and fundamental choice must be regarded as shorthand tools to determine whether personal autonomy is involved. There may be cases where neither of these categories is satisfied, and yet personal autonomy may be in question. Dogmatic application of these tools may create essentialised boxes of personal identity which may exclude those who don't fit in, even though their personal autonomy is at stake. In particular, the phrase 'immutable status' has an unhappy history of being seen as opposed to, rather than complimentary to, fundamental choice. It has been used in some US decisions to deny protection by saying that a given characteristic is not immutable. Rehnquist J, for example, held that citizenship is different from 'condition such as illegitimacy, national origin, or race, which cannot be altered by an individual … There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts'.[69] What he did not ask was whether a choice of citizenship amounted to a fundamental choice an individual was entitled to make in keeping with her personal autonomy. It may be that it did not, but it is important that the judge thought mutability of the characteristic alone was sufficient to dispose off the case. These mistakes were made because of a dogmatic application of 'strict scrutiny'. This must be avoided. Attempt must be made in difficult cases to answer the question directly – does discrimination on this ground have the potential to impair the personal autonomy of an individual?

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66. *Prinsloo* v. *Van Der Linde*, 1997 (3) SA 1012 (CC) para 31.

67. *Harksen* v. *Lane* 1998 (1) SA 300 (CC) para 46.

68. *Id.,* para 49.

69. *Sugarman* v. *Dougall (Justice Rehnquist's Dissent)*, 413 US 634, 657, 93 S.Ct. 2861, 2865 (1973).

Group vulnerability

Sinha J in *Anuj Garg* went on to embellish the principle of personal autonomy with a special judicial role when dealing with laws reflecting oppressive cultural norms that especially target minorities and vulnerable groups:[70]

> [T]he issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over

This is the classic formulation of the role of courts as counter-majoritarian institutions which have a special role in protecting vulnerable groups.[71] The rationale was also famously expressed in *Carolene Products*,[72] where Stone J said that 'prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.' It is important to note, however, that although the term used is 'minority', protection need not be restricted to numerical minorities. There are several facets of vulnerability – political (often disclosed by the level of representation in political institutions), social (indicated by the degree of social prejudice and negative stereotypes prevalent against a group) and economic. In all these cases, there might be a special judicial role of protection.

Including group vulnerability in the analysis is but an extension of personal autonomy. Vulnerable groups (by definition) face systematic and widespread denial of opportunities because of existing societal discrimination. Isolated forms of discrimination against members of non-vulnerable groups are also wrong. But because they are isolated and not systemic or widespread, the victim's ability to fashion his life as he wishes is not harmed as severely. RSR as the highest form of judicial scrutiny must be reserved for those most deserving. Therefore, adding a vulnerability filter to personal autonomy only embellishes the latter.

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70. *Anuj Garg*, *supra* note 8, para 39.

71. See, generally JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, London 1980).

72. *United States* v. *Carolene Products*, 304 US 144, 153, 58 S.Ct. 778, 784 (1938) fn 4.

While the counter-majoritarian justification is difficult to argue with, there are two problems with using vulnerability of *groups* to decide upon the suspect status of *grounds* of non-discrimination. First, semantically, constitutional provisions usually speak of grounds, which define powerful as well as vulnerable groups. So, sex as a ground defines the usually powerful group of men as well as the vulnerable group of women. Conceptual difficulties arise as to why vulnerability of women should make 'sex' as a whole a subject to RSR.

Perhaps more importantly, vulnerability in itself can make very weak, if any, moral claims. Many groups have been vulnerable for ages and continue to be so. Murderers and rapists are two examples that spring to mind. Few of us would claim that the historical and contemporary vulnerability of these groups should entitle them to special protection.

It is, therefore, important to note that the criterion of vulnerability can apply only in conjunction with the previously discussed value of personal autonomy. The idea of personal autonomy gives moral content to the protection. Hence, there is no obligation to protect convicted murderers from discrimination even though they might be vulnerable – because discrimination against them does not proceed from an immutable status or fundamental choice. That a characteristic is related to personal autonomy establishes it as morally irrelevant in most circumstances. Members of vulnerable groups defined by these morally irrelevant characteristics are, therefore, undeservedly vulnerable. Discrimination against them is the worst form of discrimination and should invite the most intense form of judicial review (*i.e.* RSR).

VI Application of RSR in *Anuj Garg*

Burden of proof

Anuj Garg appears to do away with the presumption of constitutionality of the impugned law. To quote the court, 'it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden thereof would be on the State.'[73] This is a radical shift from the settled position that the court shall presume the constitutionality of the law and the burden is on the challenger to prove otherwise. The paragraph begins with an emphasis on the fact that the impugned law, a colonial legislation, was enacted at a time when 'the concept of equality between the two sexes was unknown'.[74] It is possible, to give it a narrow interpretation, that the case only establishes that the court shall not presume the constitutionality of pre-constitutional laws. A more radical

73. *Anuj Garg*, *supra* note 8, para 20.
74. *Ibid.*

reading will see the rule to be established in all cases where a law (whether pre- or post-constitutional) makes a classification on any article 15 ground.

Interest analysis

The court held that 'the interference prescribed by the state … should be proportionate to legitimate ends'.[75] Trying to discharge the burden of proving legitimacy, the state argued that the impugned measure was in exercise of its *parens patriae* power – where the state assumes a protective role by stepping into a parental role and putting in place restrictions to ensure the security of women. The court accepts that providing security is a legitimate aim for the state.[76] It goes on to say that the aim must not only be legitimate, but should serve a 'compelling state purpose'.[77] Legitimate aim and compelling state purpose together form the first wing of the test whose satisfaction the court required – *i.e.*, 'the legislative interference … should be justified in principle'.[78] It is, however, not clear from the judgment whether the court held the state's responsibility to provide security as a compelling interest – given that the measure was found to be unnecessary to provide such security in the nexus analysis stage, this question may be left open.

Nexus analysis

The court held that the 'standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society'.[79] This is a qualified reasonableness, reflecting the values of 'a modern democratic republic'. So now, it is not sufficient that a measure is reasonable – the state has to show that it is reasonable through the lens of modernity, democracy and republicanism. With equality at the heart of all of these values, a heavy burden needs to be discharged before the right to be free from discrimination can be restricted. The court must have found it strategically important to demonstrate continuity with the traditional reasonableness review - but there is no doubt that the standard being applied by this qualified reasonableness was the same as proportionality.

Under this proportionality review, the court held that in this case, the state has less restrictive alternative means available to pursue its legitimate aim of providing security, which can be pursued by empowerment and law enforcement strategies rather than by restricting autonomy.[80] Effectively,

75. *Id.,* para 35.
76. *Id.,* paras 27, 35.
77. *Id.,* para 45.
78. *Id.,* para 48.
79. *Id.,* para 35. See also para 48.
80. *Id.,* paras 36, 37.

the court said that if the state wants to protect female bartenders, it needs to empower them and provide better policing, instead of forcing them to stay at home and shirking its own obligations. Since the measure in question was not *necessary* to achieve the stated state interest, the measure was held to be unconstitutional.

VII Implications of RSR for non-discrimination jurisprudence – Divergence with 'strict scrutiny'

The principled foundations of the RSR explored earlier (personal autonomy and group vulnerability) have important implications for expanding the grounds protected by RSR and for affirmative action. These implications, it will be noted, are very different from the strict scrutiny jurisprudence in the United States, and respond to two important criticisms levelled against the latter. Each of these points is analysed in turn.

Possibility of an analogous-grounds jurisprudence

Articles 15(1), 16(2) and 29(2) list the grounds protected therein exhaustively. None of them mentions disability, HIV-status, pregnancy, sexual orientation, gender identity etc as protected grounds. These grounds and many others not specified in the Constitution have the potential to impair personal autonomy and are analogous to those that are specified in these articles.

However, the equality jurisprudence of the Indian Supreme Court has refused to cabin the principle into individual articles. It has been consistently held over a long period of time now that these articles are facets of the general guarantee of equality in article 14.[81] Article 14 is so broadly worded that it acts like a reservoir for any aspect of equality not found in the other articles. The law being so well-settled over the wide scope of article 14, it is an extremely plausible proposition that unspecified grounds that are analogous to those protected under articles 15(1), 16(2) and 29(2) are similarly protected under article 14. Further, in *Anuj Garg*, the court relied upon a purposive and principled interpretation to apply RSR rather than a semantic one. This semantic hurdle of close-ended non-discrimination clauses must not obstruct the logical extension of the personal-autonomy-informed prohibition of discrimination.

The analogous grounds jurisprudence is well-developed under section 15 of the Canadian Charter of Rights and Freedoms.[82] In the South African

81. *Indra Sawhney* v. *Union of India*, 1992 Supp 3 SCC 217, paras 40, 56, 405, 434.

82. Art. 15, Canadian Charter, *supra* note 62.

Constitution, section 9 guarantees equality and freedom from discrimination.[83] In *Andrews*, citizenship was held to be an analogous ground even though it was not specified in the Canadian non-discrimination clause.[84] This is but one example of several analogous grounds that have been treated at par with the specified grounds because they are informed by the same principle of personal autonomy. Indian courts must show similar regard to principle and be willing to extend RSR to other analogous if unspecified grounds.

It becomes clear that a principled application of RSR in fact nudges us towards the logical extension of its protection to all deserving grounds and groups. Just like the previous conclusion about affirmative action, this is the opposite of the application of strict scrutiny in the US where it has been used to freeze heightened judicial protection to a select few groups.[85]

Affirmative action implications

By combining personal autonomy with group vulnerability, it is clear that affirmative action measures that seek to empower vulnerable groups will not be subject to RSR. This was hinted at *Anuj Garg* itself, and further confirmed by *Thakur.* Before a discussion on this point, a clarification is in order. What counts as an 'affirmative action' measure is sometimes itself in dispute. The discussion on personal autonomy provides us with a useful framework in this regard. The state explained that the basis of the impugned law in *Anuj Garg* was 'protective discrimination'. The court had no doubt on its mind that while this may be the case, but it did not amount to affirmative action. One can surmise that only laws that enhance (rather than reduce) the personal autonomy of the members of a vulnerable group can be said to be an affirmative action measure. Laws that do not enhance

83. S. 9. Equality: Everyone is equal before the law and has the right to equal protection and benefit of the law.

1. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

2. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

4. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

84. *Andrews*, *supra* note 63, para 30.

85. Goldberg, *supra* note 14.

their personal autonomy are discriminatory, howsoever benign the motives behind it. Therefore, the impugned law in *Anuj Garg* was not an affirmative action measure. On the other hand, providing increased educational opportunities to members of a vulnerable group in *Thakur* enhanced their personal autonomy and was thus an affirmative action measure. The argument in this section is not that all paternalistic laws are unconstitutional – only that if a law is discriminatory (whether paternalistic or not) and does not enhance personal autonomy of the members of a vulnerable group, it must satisfy RSR.

In *Anuj Garg*, the court cites affirmative action as an example of a compelling state interest. Given that some US judges have applied strict scrutiny to strike down affirmative action measures, this clarification was essential in a judgment that introduces the idea to Indian jurisprudence and, therefore, marks another important departure from the US jurisprudence. This interpretation is strengthened by the telling emphasis that the court supplies to this quote (ironically citing a US judgment which does not reflect the current US jurisprudence on the issue): [86]

> The heightened review standard our precedent establishes does not make sex a proscribed classification…. *Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.*

This *obiter dicta* in *Anuj Garg* was confirmed in *Thakur* where the Supreme Court refused to apply strict scrutiny to an affirmative action measure. To quote Balakrishnan CJI:[87]

> Thus, the first limb of strict scrutiny test that elucidates the 'compelling institutional interest' is focussed on the objectives that affirmative action programmes are designed to achieve. The second limb, that of 'narrow tailoring' focuses on the details of specific affirmative action programmes and on the specific people it aims to benefit.

And further: [88]

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86. *Anuj Garg*, *supra* note 8, para 50, citing Ginsburg J in *United States* v. *Virginia*, 518 US 515, 532-33 (1996).

87. *Thakur*, *supra* note 9, para 179.

88. *Id.*, para 184. (emphasis added)It is important to note that Balakrishnan CJI only insists on a presumption of constitutionality for 'legislations passed by the Parliament', which does not include colonial legislations. This does not contradict the earlier point that that there is no presumption of constitutionality for colonial legislations.

> The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India *as the gamut of affirmative action in India is fully supported by constitutional provisions* and we have not applied the principles of 'suspect legislation' and we have been following the doctrine that every legislation passed by the Parliament is presumed to be constitutionally valid unless otherwise proved.

Admittedly, there are two ways of interpreting the CJI's remarks in these paragraphs. One can conclude that he rejects RSR as a doctrine in all types of cases. But it must be remembered that the Supreme Court was specifically dealing with an affirmative action case in *Thakur*, and the judgment in *Anuj Garg* was not before the court.[89] There is no mention of *Anuj Garg* in *Thakur*, let alone an attempt to overrule it. As such, one must attempt to construct the two cases harmoniously and prefer an interpretation which resolves the apparent conflict – especially because *Anuj Garg* itself predicts the result in *Thakur*. Thus, *Thakur's* rejection of RSR must be seen as restricted to affirmative action cases, as already conceded in *Anuj Garg*, and further clarified by the CJI's own summary of his judgment in *Thakur:* [90]

> The principles laid down by the United States Supreme Court such as 'suspect legislation', 'strict scrutiny' and 'compelling state necessity' are *not applicable for challenging the validity of Act 5 of 2007 or reservations or other affirmative action contemplated under Article 15(5) of the Constitution***.**

Another commentator on *Thakur* seconds the idea that fears of applying RSR to affirmative action measures in the Indian context are misplaced: [91]

> The concern of the Court [in *Thakur*] was that adopting the 'tiers of scrutiny' approach would require the Court to adopt the attitude of the United States Supreme Court and invalidate caste based affirmative action programmes in all cases. This concern was misplaced as the US Supreme Court's rejection of certain race-based affirmative action programmes rest only in part on the 'tiers of scrutiny' approach. The reasoning of the US Court to a larger extent depends on the adoption of a symmetric anti-discrimination principle where the court is likely to strike down any race based state action as it disables itself from an enquiry into whether this discrimination is benign or invidious — in other words whether it

89. For the peculiar circumstances that prevented the *Thakur* court from looking at *Anuj Garg*, see *supra* note 10.

90. *Thakur*, *supra* note 9, Summary point 9. (emphasis added)

91. Sudhir Krishnaswamy and Madhav Khosla, 'Reading *AK Thakur* v *Union of India*: Legal Effect and Significance' *Economic and Political Weekly* 2008.

> imposes benefits or burdens on the black community. The Indian constitution adopts in Article 15(3), 15(4), 15(5) and 16(4) an asymmetric discrimination principle and expressly allows the state to make special provisions for the benefit of specific categories of beneficiaries. To that extent there is no scope for a symmetric discrimination principle under the Indian constitution.

The proposition that emerges from this is that in the Indian context, RSR does not apply to an affirmative action measure. This is the logical conclusion if vulnerability of the victim's group, at least in part, informs the decision to apply RSR. It may be noted that this is diametrically opposed to the now well-established doctrine in the United States that strict scrutiny applies to affirmative action measures that seek to remedy past discrimination against racial groups.[92] This conclusion suggests that comparative law is a useful tool to probe one's own intuitions and ethics – merely because some aspects of an idea first developed in another country do not suit the context wholesale, one need not throw the baby out with the bath water.[93]

VIII Conclusion

It is clear that RSR for a violation of certain fundamental rights is an important and necessary development in Indian constitutional law. Although *Thakur* may be interpreted to have overruled *Anuj Garg*, such interpretation will stifle this development. In any case, the *ratio* of *Thakur* that RSR does not apply to affirmative action measures was anticipated in *Anuj Garg.* On a harmonious construction, the two cases must be interpreted to have laid down that a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to RSR. Future cases must crystallise this interpretation.

A principle-based application of RSR will avoid the problems that the doctrine of strict scrutiny has invited in the United States (*i.e.* freezing special protection to a select few groups and making it harder to remedy past discrimination by applying to affirmative action as well). The conclusions of this article on both these counts were diametrically opposed.

Much else needs to be done. The judiciary will have to evolve a coherent theory of all fundamental rights and justify whatever standard of review it applies to judge an infringement of a particular right. The constitutional

92. See *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003).

93. On use of comparative law in domestic jurisdiction, see generally, Arun K. Thiruvengadam, "*The Common Illumination of our House"?: Foreign Judicial Decisions and Competing Approaches to Constitutional Adjudication* (*Mimeo* JSD dissertation submitted to NYU School of Law, Nov 2006).

principles of liberty, equality, democracy and institutional propriety will surely have an important role to play in informing such a theory. In particular, articles 19(1)(a) and the negative rights under article 21 appear to be very strong claimants for RSR being applied on their infringement.

The court has taken the first tentative steps in the right direction. It must now follow it through and help establish a culture that is truly respectful of human rights.