

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

DATE OF DECISION : 12.1.2018

1. C.W.P. No.2625 of 2012 (O&M)
Ramphal Dangi and another v. State of Haryana and others.
2. C.W.P. No.13566 of 2011 (O&M)
Dr.Satbir S.Kadian and others v. State of Haryana and another.
3. C.W.P. No.2564 of 2016 (O&M)
Shyam Lal v. State of Haryana and others.
4. C.W.P. No.18941 of 2016 (O&M)
Balraj Chauhan v. State of Haryana and others.
5. C.W.P. No.19841 of 2013 (O&M)
R.S.Sehrawat and another v. State of Haryana and another.

**CORAM : HON'BLE MR.JUSTICE MAHESH GROVER
HON'BLE MR.JUSTICE RAJ SHEKHAR ATTRI**

Present:- Shri Anupam Gupta, Senior Advocate with Shri Ashok Kumar,
Advocate for the petitioners (in CWPNo.2625 of 2012
and for the petitioners No.3 and 6 (in CWP No.13506 of 2011).

Shri J.K.Goel, Adocate for the petitioner
(in CWP No.2564 of 2016).

Shri Y.P.Malik, Advocate for the petitioner
(in CWP No.19841 of 2013).

Shri Saurabh Bajaj, Advocate for the petitioners
(in C.W.P. No.19841 of 2013).

Shri Sunil Nehra, Advocate for the applicant
(in C.M. No.13811-CWP of 2015).

Shri Lokesh Sinhal, Additional A.G. Haryana.

Shri R.Kartikeya, Advocate for respondents No.3 to 5.

MAHESH GROVER, J.

By this order we will dispose of C.W.P. Nos.2625 of 2012, 13566 of 2011, 19841 of 2013, 2564 and 18941 of 2016.

For the sake of convenience, brief facts have been taken from C.W.P. No.2625 of 2012.

The writ petitions have been filed questioning some of the provisions of the Haryana Civil Service of Engineers, Group A, Public Health Engineering Department Act, 2009 (herein after referred to as the Act) in particular, 3rd proviso to Section 9 and the impact of the rules on inter-se seniority and prospects of promotion.

As far as the individual grievances are concerned, they flow from the action of the respondents by applying the rules to determine their seniority and adversely affect their chances of promotion with reversion as a consequence in some of the cases.

Since the principal challenge is to the provisions of the Act, it would be essential to determine this issue in the first instance before commenting on the Act of the State and its impact on the petitioners' claim for seniority and promotion. An identical challenge has been mounted to some provisions which are absolutely similar, but flowing from different enactments applicable to different departments such as Irrigation Department. The Act was promulgated in the year 2009 (Haryana Act No.9 of 1990), but made applicable with effect from 1.11.1966 as Rule 1 sub-clause (2) which reads here below :-

“(1) This Act may be called the Haryana Service Engineers,
Group A, Public Health Engineering Department Act, 2009.

(2) It shall be deemed to have come into force on 1st day of

November, 1966.”

The word “service” has been defined in rule 2 sub-clause (q) to mean Haryana Service of Engineers, Group A, Public Health Engineering Department comprising two separate cadres of Civil and Mechanical. Similarly the word 'Service' has been defined in sub-rule 15 of Rule 2 of Haryana Services of Engineers Class-II P.W.D. (Irrigation Branch).

Rule 3 provides for two cadres of service namely Civil and Mechanical comprising of various posts as may be determined separately for each cadre on the 1st day of January each year, the relevant portion of which is extracted here below :-

“3. (1) There shall be two cadres of Service, namely, Civil and Mechanical comprising various posts as may be determined separately for each cadre on the 1st day of January each year or as soon thereafter, as may be practicable according to the provisions of Appendix A. The strength of the respective cadres so determined shall remain in force till it is revised by the Government.”

Rule 9 which is perceived to be an irritant and violative of the provisions of the Constitution, is extracted here below :-

“9. (1) Subject to the provisions of sub-sections (2) and (3) members of the Service of the respective cadre shall be eligible for promotion to any of the posts within their respective cadres :

Provided that a member of the Service in Group B who does not possess one of the degrees of a University or other qualifications as specified in section 6, shall not be eligible for promotion to the post of Executive Engineer till he has

acquired the requisite qualifications :

Provided further that promotion to the post of Engineer-in-Chief shall be made from amongst the members of the Civil Cadre only :

Provided further that in case of Mechanical cadre, an Executive Engineer having an experience of seven years may be given the pay scale of the post of Superintending Engineer as a personal measure while continuing to discharge the duties of Executive Engineer if an Executive Engineer of Civil cadre having equivalent length of service as Executive Engineer has been promoted as Superintending Engineer :

Provided further that in the case of Mechanical cadre, a Superintending Engineer having an experience of three years, may be given the pay scale of the post of Chief Engineer as a personal measure while continuing to discharge the duties of Superintending Engineer if an Superintending Engineer of civil cadre having equivalent length of service as Superintending Engineer has been promoted as Chief Engineer.

Explanation.- Once an officer has been appointed as member of the Service, his promotion within the service from one rank to another shall be regarded as promotion within the same cadre.

(2) Promotion shall be made by selection on the basis of seniority-cum-merit and suitability in all respects and a member of the Service shall not have any claim to such

promotion as a matter of right or mere seniority.

(3) A member of the Service shall not be eligible for promotion to the rank of -

- (a) Executive Engineer, unless he has rendered five years service as an Assistant Executive Engineer and has passed departmental examination as provided in section 15 :

Provided that an officer who has rendered six years or more service as an Assistant Executive Engineer shall, unless he is considered unsuitable for promotion, be given preference for such promotion over an eligible Group B Officer;

- (b) Superintending Engineer, unless he has rendered seven years service as an Executive Engineer ;
- (c) Chief Engineer, unless he has rendered three years service as Superintending Engineer ;
- (d) Engineer-in-Chief, unless he has rendered two years service as Chief Engineer.

Provided that if, it appears to be necessary to promote an officer who has successfully completed his probation in public interest, the Government may, for reasons to be recorded in writing, either generally for a specified period or in any individual case, reduce the period specified in clauses (a), (b), (c) or (d) to such an extent, as it may deem proper.”

Rule 12 lays down the manner of determining the seniority and is extracted here below :-

“12. (1) The seniority of the members of Service shall be determined separately for the Civil and Mechanical cadres.

(2) In the case of Assistant Executive Engineers, the order of merit determined by the Commission shall not be disturbed in fixing the inter-se seniority amongst them.

(3) The inter-se seniority of the member of the Service appointed as Executive Engineers shall be determined by the length of continuous service on the cadre post of Executive Engineer :

Provided that in case of Executive Engineers directly appointed or promoted from Assistant Executive Engineers or promoted from Group B Service against cadre posts or appointed by transfer against cadre posts on the same date, their inter-se seniority shall be determined in the following order :-

- (a) Executive Engineer directly appointed shall be senior to all :
- (b) Executive Engineer promoted from Assistant Executive Engineer shall be senior to the Executive Engineer promoted from Group B Service or appointed by transfer ;
- (c) Executive Engineer promoted from Group B Service shall be senior to the Executive Engineer appointed by transfer.

(4) In the case of the Executive Engineers appointed by transfer from different cadres, their seniority shall be determined according to pay, preference being given to a

member, who was drawing a higher rate of pay in his previous appointment, and if the rates of pay drawn are also the same, then by the length of their service in the appointments ; and if the length of such service is also the same, the older member shall be senior to the younger member.

(5) Where a member of the Service, for a cause which the Government considers to be sufficient, is unable to join the Service or continues with the Government's approval on deputation outside the Service, it shall be open to the Government to allow him credit for such service as if it was a service rendered under this Act for the purposes of the fixation of his seniority.

Explanation.- All employment on deputation after a member has joined the Service and has had his seniority fixed under this Act, shall count as if it was employment in the Service and shall not in any way affect the seniority already fixed, except to the extent that such seniority would in any case have been affected, had the member of the Service continued to work in the Department.”

The argument in brief with reference to the aforesaid provisions is that the seniority of the members of Service is to be determined separately for Civil and Mechanical cadres, but the rule of promotion denies the post of Engineer-in-Chief which is restricted to the members of the Civil Service cadre only. Similarly, an Executive Engineer of the Mechanical cadre with an

experience of 7 years is only given the pay-scale of Superintending Engineer as a personal measure while continuing to discharge duties as an Executive Engineer if an Executive Engineer of a civil cadre having equivalent length of service has been promoted as a Superintending Engineer.

Likewise, a Superintending Engineer of the Mechanical cadre with experience of 3 years has to be given the pay-scale of the post of Chief Engineer as a personal measure while continuing to discharge duties as Superintending Engineer in the eventuality of a Superintending Engineer of a Civil cadre having equivalent length of service as such having been promoted as Chief Engineer.

Similar is the position in C.W.P. No.13566 of 2011 where the primacy has been given to one cadre only to deprive other cadres of promotion.

It is contended that this rule is violative of Article 14 of the Constitution of India besides being arbitrary and deserves to be struck down as it discriminates qua the Engineers of Mechanical cadre vis-a-vis those of Civil Engineering who stand to occupy the seniormost posts with the Engineers of Mechanical cadre achieving the level of an Executive Engineer only.

That apart, it has been contended that rules have been made applicable with effect from the year 1966 and such retrospective operation of law is impermissible.

The respondents, on the other hand, justify the enactment with reference to the cadre strength which is heavily loaded in favour of the Civil Engineers with the cadre strength of Mechanical Engineers being a distant second and it is therefore, contended that vice of discrimination does not manifest itself in view of the negligible strength of Engineers in the Service and the fact that they have been admitted to the pay structure of a higher post even if they do not stand promoted. A tabulation with regard to the cadre strength existing in 2010 has been appended to the written statement and is extracted here below :-

	1.1.2004	1.1.2005	1.1.2006	1.1.2007	1.1.2008	1.1.2009	1.1.2010
Group A senior posts cadre posts.	76(Civil) 3(Mech.)	76(Civil) 3(Mech.)	76(Civil) 2(Mech.)	75(Civil) 2(Mech)	76(Civil) 3(Mech)	76(Civil) 3(Mech)	81(Civil) 3(Mech)
Ex cadre posts.	14(Civil) Nil(Mech)	14(Civil) Nil(Mech)	14(Civil) Nil(Mech)	14(Civil) Nil(Mech)	14(Civil) Nil (Mech)	14(Civil) Nil (Mech)	14(Civil) Nil(Mech)
Group A junior	14(Civil) Nil(Mech)	14(Civil) Nil(Mech)	14(Civil) Nil(Mech)	14Civil Nil(Mech)	14(Civil) Nil (Mech)	14(Civil) Nil (Mech)	14(Civil) Nil(Mech)
Ex cadre posts	Nil	Nil	Nil	Nil	Nil	Nil	Nil

We have heard the learned counsel for the parties on the aforesaid primary issue.

It would be worthwhile to refer to the statement of objects and reasons from where the enactment has flowed :

“So far as Public Health Engineering Department is concerned, it has been observed that the Public Health Engineering Department is predominantly a civil engineering organization and therefore, common seniority of civil and mechanical cadres is not desirable. Moreover, the number of posts of Group A and B officers in mechanical cadre of the department is very small as compared to the number of officers in the civil cadre. The Government had notified separate posts of civil and mechanical cadres. The preparation of common seniority of the officers of the Civil and Mechanical cadres has given rise to certain administrative problems and has also caused tension between officers of the

department in their day to day working. Therefore, it is desirable that separate seniority of Civil and Mechanical cadres is maintained by repealing the Haryana Service of Engineers, Class-I PWD(B&R Branch), (Public Health Branch) and (Irrigation Branch) respectively Act, 1995 (Haryana Act No.20 of 1995) in so far as its applicability to the Public Health Engineering Department is concerned and by enacting a new legislation the Haryana Service of Engineers, Group A, Public Health Engineering Department Act, 2009 in its place.

The proposed bill now seeks to replace the Act No.20 of 1995 with Bill so far as its applicability to the Public Health Engineering Department, in ensuing session of the Haryana Vidhan Sabha.”

Evidently, the aforesaid suggests, what has persuaded the State to take this decision is the overwhelming pre- dominance of the Civil Engineering cadre in the organization with the Mechanical cadres reduced relatively to a minority, and playing second fiddle to the majority cadre rendering a common seniority list not only undesirable, but also creating administrative problems on account of the tension between officers in the day to day work.

The first issue that we propose to discuss is the effect of retrospective operation of the Act and its legality.

In a given situation, the Legislature would have the power to give retrospective effect to a legislation, but if the consequences of such an enactment result in violation of any right or if it tramples on or subverts or subjugates individual rights, then such an enactment giving retrospective effect would

certainly have to be nullified.

In the Service Law, one has to understand that a person who gains employment, is subject to rules and an incumbent develops a legitimate expectations of future prospects at the threshold itself and has every right to choose or refuse employment if he perceives bleak future prospects. Even otherwise, once an employee binds himself to the rigors of the rules in a service, the benefits that accrue to him or are assured to him, cannot ordinarily be denied by an executive action. In the instant case, the 1995 Rules which held the field prior to 2009 Rules envisaged a common cadre with the seniority based on the length of service and promotion flowing in terms of Rule 9 from the common cadre on the basis of merit and suitability. For the purpose of reference, Rule 9 of the 1995 Rules is reproduced here below :-

9. Promotion within Service.- (1) Subject to the provisions of sub-sections (2) and (3), members of the Service shall be eligible for promotion to any of the post in the Service namely, Executive Engineer, Superintending Engineer, Chief Engineer and Engineer-in-Chief within their respective branches.

Provided that a member of the Service who does not possess one of the University degrees or other qualifications as specified in Appendix B of this Act, shall not be eligible for promotion to the post of Superintending Engineer or above, till he has acquired the requisite qualifications.

Explanation.- Once an officer has been appointed as member of the Service, his promotion within it from one rank to another shall be regarded as promotion within the same cadre.

(2) Promotions shall be made by selection on the basis of

merit and suitability in all respects and a member of the Service shall not have any claim to such promotion as a matter of right or mere seniority.”

Evidently, as per the prevailing 1995 Rules, any member of the Service from Civil or Mechanical cadre was eligible for consideration to the higher post of Engineer-in-Chief, Chief Engineer and Superintending Engineer, subject to merit and suitability. With the introduction of the 2009 Rules, the entire seniority and the chances of promotion beyond the level of Executive Engineer in the case of Mechanical cadre, have been thwarted.

While commenting on a retrospective operation of law and its resultant consequences the Hon'ble Supreme Court in **State of Gujarat and another v. Raman Lal Keshav Lal Soni and others** (1983) 2 S.C.C. 33 observed as under :-

“48. From the summary of the provisions of the Amending Act that has been set out above it requires no perception to recognise the principal target of the amending legislation as the category of ex-municipal employees', who are, so to say, pushed out of the panchayat service and are to be denied the status of government servants and the consequential benefits. The ex-municipal employees are virtually the “poor relations”, the castle, the panchayat service, is not for them nor the attendant advantages, privileges and perquisites, which are all for the “pedigree descendants” only. For them, only the outhouses. As a result of the amendments they cease to be government servants with retrospective effect. Their earlier allocation to the panchayat service is cancelled with

retrospective effect They become servants of Gram and Nagar Panchayats with retrospective effect. They are treated differently from those working in Taluqa and District Panchayats as well as from the Talatis and Kotwals working in Gram and Nagar Panchayats. Their conditions of service are to be prescribed by panchayats, by resolution, whereas the conditions of service of others are to be prescribed by the Government. Their promotional prospects are completely wiped out and all advantages which they would derive as a result of the judgments of the courts are taken away.”

The applicability of these rules is likely to jettison the chances of promotion of those in mechanical cadre besides creating a situation where a person who might have gained an entry into service much after an incumbent from the Mechanical cadre, stealing a march over him ; a situation that we perceive to be not only eminently undesirable, but also contrary to the settled tenets of the service law. It is almost in identical situation that the Hon'ble Supreme Court in **State of Andhra Pradesh v. Dr.N.Ramachandra Rao** 1990(2) R.S.J. 238, observed as under :-

“17. Furthermore, Rule 2 does not expressly excluded the service in Class-II Cadre for preparing panel for consideration for promotion to posts with which we are concerned. We also consider that it would be unreasonable and unjust to exclude the service and overlook the vertical seniority in the substantive cadre to which everyone was selected by the Public Service Commission. In medical profession there are specialties and specialties, but it is generally accepted that

they are not of equal importance or utility. However, the promotions are allowed on the basis of the respective specialties and the availability of promotional vacancies in such specialties. A junior with relatively less important specialty may be fortunate enough to get quick promotion than his senior with a different specialty. We are of the opinion that the juniors who get accelerated promotion on account of fortuitous circumstances depending upon their specialty and availability of vacancies in such specialty should not be allowed to march over their seniors for appointment to administrative posts. Any advantage gained by juniors on such fortuitous circumstances of having some specialty and promotion should not impair the rights of their seniors for promotion to posts where specialty or teaching experience is not called for. The seniority determined in order of seniority should not therefore be the basis for promotion to administrative posts. Any rule providing for the contrary may be vulnerable to attack on the ground of arbitrariness.”

We have perceived an element of arbitrariness in the said provisions of the 2009 Rules particularly when we see the justification offered by the State to amend the Rules is merely because of one cadre strength being numerically stronger than the other of mechanical cadre.

Accepting such an argument that the interest of a majority can be used as a justification to subvert the interests of those in minority would conflict directly with the guaranteed individual rights enshrined in the Constitution of India. The acceptance of the justification offered by the State is fraught with dangers of majoritarianism with marginalisation of those in minority in an

institution or in the social fabric at large if expanded on a larger canvas for the rights of an individual flow from the Constitution and are neither platitudinal nor proportionately dependent to the numerical strength of the populace.

In the present case, simply because the cadres of Civil Engineers are numerically greater, would not give the State a right to ignore or subvert the legitimate expectation of a numerically weaker cadre existing alongside.

Article 14 does not permit any such classification. A bare reading of the provision shows that the State cannot deny to any person equality before the law or equal protection of law. Article 14, therefore, embodies the sacred rule of equality before the law and equal protection of law. The action of the State in the present case tends to create a classification amongst the two cadres marginalizing the one while monopolizing the other. In **Lachhman Dass v. State** 1963(2) S.C.R. 353, the Hon'ble Supreme Court had observed that such an action is against the doctrine of classification and its over emphasis may deprive the citizens of the protection of Article 14 and result in arbitrariness.

In the present case, the State has virtually created a favourable classification qua the Civil Engineers and in an attempt to mask arbitrariness, admitted the Engineers of Mechanical cadre to a higher pay structure as an olive branch while working in their assigned posts. Such an action is completely arbitrary for the reason that an employee has a legitimate expectation of being promoted to a post with higher designation. It is not merely pay that draws an incumbent to the promoted post, but also the status and designation of the higher post. It is evident from the rule itself that the chances of career progression of the Engineers of Mechanical cadre have been restricted to the post of an Executive Engineer with the remaining post of Superintending Engineer and Chief Engineer and Engineer-in-Chief going only to those from the Civil Engineering cadre.

The doctrine of arbitrariness has been elaborately brought out in the

judgment of the Hon'ble Supreme Court in **Shayara Bano v. Union of India and others**, Writ Petition (Civil) No.118 of 2016 decided on 22.8.2017 and it will be useful to extract the relevant portion of the judgment which traces out in extenso the evolution of the principle of arbitration and its impact on the statutes in executive actions as below :-

“ ... 33. In the pre-1974 era, the judgments of this Court did refer to the “rule of law” or “positive” aspect of [Article 14](#), the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in [Article 14](#) and would be struck down on this ground. [In S.G. Jaisinghani v. Union of India](#), (1967) 2 SCR 703, this Court held:

“In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey — “Law of the Constitution” — 10th Edn., Introduction cx).

“Law has reached its finest moments”, stated Douglas, J. in *United States v. Wunderlick* [342 US 98], “when it has freed man from the unlimited discretion of some ruler....

Where discretion, is absolute, man has always suffered”.

It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes [(1770) 4 Burr. 2528 at 2539], “means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful”.” (pages 718 – 719)

This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of [Article 14](#) of the Constitution of India.

34. Similarly, again in the context of an [Article 14](#) challenge to service rules, this Court held in [State of Mysore v. S.R. Jayaram](#), (1968) 1 SCR 349 as follows:

“The principle of recruitment by open competition aims at ensuring equality of opportunity in the matter of employment and obtaining the services of the most meritorious candidates. Rules 1 to 8, 9(1) and the first part of Rule 9(2) seek to achieve this aim. The last part of Rule 9(2) subverts and destroys the basic objectives of the preceding rules. It vests in the Government an arbitrary power of patronage. Though Rule 9(1) requires the appointment of successful candidates to Class I posts in the order of merit and thereafter to Class II posts in the order of merit, Rule 9(1) is subject to Rule 9(2), and under the cover of Rule 9(2) the Government can even arrogate to itself the power of assigning a Class I post to a less meritorious and a Class II post to a more meritorious candidate. We hold that the latter part of Rule 9(2) gives

the Government an arbitrary power of ignoring the just claims of successful candidates for recruitment to offices under the State. It is violative of Articles 14 and 16(1) of the Constitution and must be struck down.” (pages 353 – 354)

35. In the celebrated [Indira Gandhi v. Raj Narain](#) judgment, reported in 1975 Supp SCC 1, [Article 329-A](#) sub-clauses (4) and (5) were struck down by a Constitution Bench of this Court. Applying the newly evolved basic structure doctrine laid down in [Kesavananda Bharati v. State of Kerala](#), (1973) 4 SCC 225, Ray, C.J. struck down the said amendment thus:

“59. Clause (4) suffers from these infirmities. First, the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes the constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case, because the previous law did not apply and no other law was applied by clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends rule of law.” (at page 44)

36. This passage is of great significance in that the amendment was said to be bad because the constituent power did not have any law to apply to the case, and this being so, the rule of law

contained in the Constitution would be violated. This rule of law has an obvious reference to [Article 14](#) of the Constitution, in that it would be wholly arbitrary to decide the case without applying any law, and would thus violate the rule of law contained in the said Article. Chandrachud, J., was a little more explicit in that he expressly referred to [Article 14](#) and stated that [Article 329-A](#) is an outright negation of the right of equality conferred by [Article 14](#). This was the case because the law would be discriminatory in that certain high personages would be put above the law in the absence of a differentia reasonably related to the object of the law. He went on to add:

“681. It follows that clauses (4) and (5) of [Article 329-A](#) are arbitrary and are calculated to damage or destroy the rule of law. Imperfections of language hinder a precise definition of the rule of law as of the definition of ‘law’ itself. And the Constitutional law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English law at Oxford, which were published in 1885 under the title, “Introduction to the Study of the Law of the Constitution”. But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of Government shall be conditioned by law and that subject to the exceptions to the doctrine of equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals,

as defined and enforced by the courts. The second meaning grew out of Dicey's unsound dislike of the French Droit Administratif which he regarded "as a misfortune inflicted upon the benighted folk across the Channel" [See S.A. de Smith:

Judicial Review of Administrative Action, (1968) p. 5].

Indeed, so great was his influence on the thought of the day that as recently as in 1935 Lord Hewart, the Lord Chief Justice of England, dismissed the term "administrative law" as "continental jargon". The third meaning is hardly apposite in the context of our written Constitution for, in India, the Constitution is the source of all rights and obligations. We may not therefore rely wholly on Dicey's exposition of the rule of law but ever since the second world war, the rule has come to acquire a positive content in all democratic countries. [See Wade and Phillips: Constitutional Law (Sixth Edn., pp. 70-73)]

The International Commission of Jurists, which has a consultative status under the United Nations, held its Congress in Delhi in 1959 where lawyers, judges and law teachers representing fifty-three countries affirmed that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. One of the committees of that Congress emphasised that no law should subject any individual to discriminatory treatment. These principles must vary from country to country depending upon the provisions of its Constitution and indeed upon whether there exists a written Constitution. As it has been said in a lighter vein, to show the supremacy of the Parliament, the charm of

the English Constitution is that “it does not exist”. Our Constitution exists and must continue to exist. It guarantees equality before law and the equal protection of laws to everyone. The denial of such equality, as modified by the judicially evolved theory of classification, is the very negation of rule of law.” (at page 258)

37. This paragraph is an early application of the doctrine of arbitrariness which follows from the rule of law contained in [Article 14](#). It is of some significance that Dicey’s formulation of the rule of law was referred to, which contains both absence of arbitrary power and equality before the law, as being of the essence of the rule of law.

38. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which State action may be struck down as being violative of the rule of law contained in [Article 14](#). In a significant passage Bhagwati, J., in [E.P. Royappa v. State of T.N.](#), (1974) 4 SCC 3 stated (at page 38):

“85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. [Article 16](#) embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so

vital to the building up of the new classless egalitarian society envisaged in the Constitution, [Article 16](#) is only an instance of the application of the concept of equality enshrined in [Article 14](#). In other words, [Article 14](#) is the genus while [Article 16](#) is a species. [Article 16](#) gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., “a way of life”, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. 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 [Article 14](#), and if it effects any matter relating to public employment, it is also violative of [Article 16](#). Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that 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. Both are inhibited by Articles 14 and 16.” [Emphasis Supplied]

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40. This was further clarified in A.L. Kalra v. Project and Equipment Corpn., (1984) 3 SCC 316, following Royappa (supra) and holding that arbitrariness is a doctrine distinct from discrimination. It was held:

“19... It thus appears well-settled that [Article 14](#) strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. 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 (sic) protection by law. The Constitution Bench pertinently observed in Ajay Hasia case [(1981) 1 SCC 722: 1981 SCC (L&S) 258: AIR 1981 SC 487: (1981) 2 SCR 79: (1981) 1 LLJ 103] and put the matter beyond controversy when it said “wherever therefore, there is arbitrariness in State action whether it be of the Legislature or of the executive or of an ‘authority’

under [Article 12](#), [Article 14](#) immediately springs into action and strikes down such State action". This view was further elaborated and affirmed in [D.S. Nakara v. Union of India](#) [(1983) 1 SCC 305: 1983 SCC (L&S) 145: AIR 1983 SC 130: (1983) UPSC 263]. In [Maneka Gandhi v. Union of India](#)[(1978) 1 SCC 248: AIR 1978 SC 597: (1978) 2 SCR 621] it was observed that [Article 14](#) strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of [Article 14](#)." (at page 328) The same view was reiterated in *Babita Prasad v. State of Bihar*, (1993) Suppl. 3 SCC 268 at 285, at paragraph 31.

41. That the arbitrariness doctrine contained in [Article 14](#) would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 (at pages 740-741):

"16... The true scope and ambit of [Article 14](#) has been the subject-matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of [Article 14](#) must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, [Article 14](#) came to be identified with the doctrine of classification because the view taken was that that article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two

conditions, namely, (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 that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E.P. [Royappa v. State of Tamil Nadu](#) [(1974) 4 SCC 3, 38: 1974 SCC (L&S) 165, 200: (1974) 2 SCR 348] that this Court laid bare a new dimension of [Article 14](#) and pointed out that that article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said: [SCC p. 38: SCC (L&S) p. 200, para 85]

“The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., “a way of life”, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. 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 [Article 14](#), and if it affects any matter relating to public employment, it is also violative of [Article 16](#). Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.”

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of [Article 14](#) was explored and brought to light in Royappa case [(1975) 1 SCC 485; 1975 SCC (L&S) 99; (1975) 3 SCR 616] and it was reaffirmed and elaborated by this Court in [Maneka Gandhi v. Union of India](#) [(1978) 1 SCC 248] where this Court again speaking through one of us (Bhagwati, J.) observed: (SCC pp. 283-84, para 7)

“Now the question immediately arises as to what is the requirement of [Article 14](#): What is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... [Article 14](#) strikes at arbitrariness in State action and ensures fairness and equality of

treatment. 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.”

This was again reiterated by this Court in International Airport Authority case [(1979) 3 SCC 489] at p. 1042 (SCC p. 511) of the Report. It must therefore now be taken to be well settled that what [Article 14](#) strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of [Article 14](#) nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under [Article 14](#) would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an ‘authority’ under [Article 12](#), [Article 14](#) immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.” [Emphasis Supplied]

42. In this view of the law, a three Judge Bench of this Court in [K.R. Lakshmanan \(Dr.\) v. State of T.N.](#), (1996) 2 SCC 226, struck down a 1986 [Tamil Nadu Act](#) on the ground that it was arbitrary and, therefore, violative of [Article 14](#). Two separate arguments were addressed under [Article 14](#). One was that the Act in question was discriminatory and, therefore, violative

of [Article 14](#). The other was that in any case the Act was arbitrary and for that reason would also violate a separate facet of [Article 14](#). This is clear from paragraph 45 of the said judgment. The judgment went on to accept both these arguments. In so far as the discrimination aspect is concerned, this Court struck down the 1986 Act on the ground that it was discriminatory in paragraphs 46 and 47.

Paragraphs 48 to 50 are important, in that this Court struck down the 1986 Act for being arbitrary, separately, as follows (at pages 256-257):

“48. We see considerable force in the contention of Mr. Parasaran that the acquisition and transfer of the undertaking of the Club is arbitrary. The two Acts were amended by the 1949 Act and the definition of ‘gaming’ was amended. The object of the amendment was to include horse-racing in the definition of ‘gaming’. The provisions of the 1949 Act were, however, not enforced till the 1974 Act was enacted and enforced with effect from 31-3-1975. The 1974 Act was enacted with a view to provide for the abolition of wagering or betting on horse-races in the State of Tamil Nadu. It is thus obvious that the consistent policy of the State Government, as projected through various legislations from 1949 onwards, has been to declare horse-racing as gambling and as such prohibited under the two Acts. The operation of the 1974 Act was stayed by this Court and as a consequence the horse-races are continuing under the orders of this Court. The policy of the State Government as projected in all the enactments on the subject prior to 1986 shows that the State Government considered horse-racing as gambling and as such prohibited under the law.

The 1986 Act on the other hand declares horse-racing as a public purpose and in the interest of the general public. There is apparent contradiction in the two stands. We do not agree with the contention of Mr. Parasaran that the 1986 Act is a colourable piece of legislation, but at the same time we are of the view that no public purpose is being served by acquisition and transfer of the undertaking of the Club by the Government. We fail to understand how the State Government can acquire and take over the functioning of the race-club when it has already enacted the 1974 Act with the avowed object of declaring horse-racing as gambling? Having enacted a law to abolish betting on horse-racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse-racing again in the name of public good and public purpose. It is ex facie irrational to invoke “public good and public purpose” for declaring horse-racing as gambling and as such prohibited under law, and at the same time speak of “public purpose and public good” for acquiring the race-club and conducting the horse-racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1986 Act.

49. We, therefore, hold that the provisions of 1986 Act are discriminatory and arbitrary and as such violate and infract the right to equality enshrined under [Article 14](#) of the Constitution.

50. Since we have struck down the 1986 Act on the ground that it violates [Article 14](#) of the Constitution, it is not necessary for us to go into the question of its validity

on the ground of [Article 19](#) of the Constitution.”

[Emphasis Supplied]

43. Close upon the heels of this judgment, a discordant note was struck in *State of A.P. v. McDowell & Co.*, (1996) 3 SCC 709. Another three Judge Bench, in repelling an argument based on the arbitrariness facet of [Article 14](#), held:

“43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is ‘arbitrary’ and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in [State of T.N. v. Ananthi Ammal](#) [(1995) 1 SCC 519]. Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament. No court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature

can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of [Article 14](#), it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of [Article 19\(1\)](#), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of [Article 19](#) and so on. 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. An enactment cannot be struck

down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see *Council of Civil Service Unions v. Minister for Civil Service* [1985 AC 374: (1984) 3 All ER 935: (1984) 3 WLR 1174] which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in [R. v. Secy. of State for Home Deptt., ex p Brind](#) [1991 AC 696: (1991) 1 All ER 720] AC at 766-67 and 762.) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted.” (at pages 737-739)

44. This judgment failed to notice at least two binding precedents, first, the judgment of a Constitution Bench in *Ajay Hasia* (supra) and second, the judgment of a coordinate three

judge bench in Lakshmanan (supra). Apart from this, the reasoning contained as to why arbitrariness cannot be used to strike down legislation as opposed to both executive action and subordinate legislation was as follows:

(1) According to the Bench in McDowell (supra), substantive due process is not something accepted by either the American courts or our courts and, therefore, this being a reiteration of substantive due process being read into [Article 14](#) cannot be applied. A Constitution Bench in Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 737, has held, following the celebrated Maneka Gandhi (supra), as follows:

“27. The stage was now set for the judgment in [Maneka Gandhi \[Maneka Gandhi v. Union of India, \(1978\) 2 SCR 621: \(1978\) 1 SCC 248\]](#). Several judgments were delivered, and the upshot of all of them was that [Article 21](#) was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into [Article 21](#). [See at SCR pp. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus:

(SCR p. 723: SCC pp. 338-39, para 85)

“85. To sum up, ‘procedure’ in [Article 21](#) means fair, not formal procedure. ‘Law’ is reasonable law, not any enacted piece. As [Article 22](#) specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such

detentions should conform to [Article 22](#). It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in [Article 21](#) are available. Otherwise, as the procedural safeguards contained in [Article 22](#) will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

28. Close on the heels of Maneka Gandhi case [[Maneka Gandhi v. Union of India](#), (1978) 2 SCR 621: (1978) 1 SCC 248] came [Mithu v. State of Punjab](#) [(1983) 2 SCC 277: 1983 SCC (Cri) 405], in which case the Court noted as follows: (SCC pp.283-84, para 6)

"6. ... In [Sunil Batra v. Delhi Admn.](#) [(1978) 4 SCC 494: 1979 SCC (Cri) 155], while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in [Bank Nationalisation case](#) [[Rustom Cavasjee Cooper \(Banks Nationalisation\) v. Union of India](#), (1970) 1 SCC 248] and Maneka Gandhi case [[Maneka Gandhi v. Union of India](#), (1978) 2 SCR 621:

(1978) 1 SCC 248] [In Bachan Singh](#) [[Bachan Singh v. State of Punjab](#), (1980) 2 SCC 684: 1980 SCC (Cri) 580]

which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if [Article 21](#) is understood in accordance with the interpretation put upon it in [Maneka Gandhi \[Maneka Gandhi v. Union of India, \(1978\) 2 SCR 621 : \(1978\) 1 SCC 248\]](#), it will read to say that:

(SCC p. 730, para 136) ‘136. “No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.”

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.” (at pages 755-756)

Clearly, therefore, the three Judge Bench has not noticed [Maneka Gandhi \(supra\)](#) cited in [Mohd. Arif \(supra\)](#) to show that the wheel has turned full circle and substantive due process is part of [Article 21](#) as it is to be read with Articles 14 and 19.

Mathew, J., while delivering the first Tej Bahadur Sapru Memorial Lecture entitled “Democracy and Judicial Review”, has pointed out:

“Still another point and I am done. The constitutional makers have formally refused to incorporate the “due process clause” in our Constitution on the basis, it seems, of the advice tendered by Justice Frankfurter to Shri B.N. Rau thinking that it will make the Court a third Chamber and widen the area of Judicial review. But unwittingly, I should think, they have imported the most vital and active element of the concept by their theory of review of ‘reasonable restrictions’ which might be imposed by law on many of the fundamental rights. Taken in its modern expanded sense, the American “due process clause” stands as a

high level guarantee of 'reasonableness' in relation between man and state, an injunction against arbitrariness or oppressiveness. I have had occasion to consider this question in Kesavananda Bharati's case. I said:

“When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources...If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause.”

In fact, [Mithu v. State of Punjab](#), (1983) 2 SCC 277, followed a Constitution Bench judgment in [Sunil Batra v. Delhi Administration & Ors.](#), (1978) 4 SCC 494. In that case, [Section 30\(2\)](#) of the Prisons Act was challenged as being unconstitutional, because every prisoner under sentence of death shall be confined in a cell apart from all other prisoners, that is to say he will be placed under solitary confinement. The Constitution Bench read down [Section 30\(2\)](#) to refer only to a person who is sentenced to death finally, which would include petitions for mercy to the Governor and/or to the President which have not yet been disposed of. In so holding, Desai, J. speaking for four learned Judges, held (at pages 574-575):

“228. The challenge under [Article 21](#) must fail on our interpretation of sub-section (2) of [Section 30](#). Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move,

mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of [Article 21](#) unless the curtailment has the backing of law. Subsection (2) of [Section 30](#) establishes the procedure by which it can be curtailed but it must be read subject to our interpretation. The word “law” in the expression “procedure established by law” in [Article 21](#) has been interpreted to mean in Maneka Gandhi’s case (supra) that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of [Article 21](#) would not be satisfied. If it is arbitrary it would be violative of [Article 14](#). Once [Section 30\(2\)](#) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law.” [Emphasis Supplied]

In a long and illuminating concurring judgment, Krishna Iyer, J., added (at page 518):

“52. True, our Constitution has no ‘due process’ clause or the VIII Amendment; but, in this branch of law, after [R.C. Cooper v. Union of India](#), (1970) 1 SCC 248 and [Maneka Gandhi v. Union of India](#), (1978) 1 SCC 248, the consequence is the same.

For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of [Article 21](#).” [Emphasis Supplied]

Coming to Mithu (supra), a Constitution Bench of this Court struck down [Section 303](#) of the Indian Penal Code, by which a mandatory sentence of death was imposed on life convicts who commit murder in jail.

The argument made by the learned counsel on behalf of the petitioner was set out thus:

“5. But before we proceed to point out the infirmities from which [Section 303](#) suffers, we must indicate the nature of the argument which has been advanced on behalf of the petitioners in order to assail the validity of that section. The sum and substance of the argument is that the provision contained in [Section 303](#) is wholly unreasonable and arbitrary and thereby, it violates [Article 21](#) of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which [Section 303](#) authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and [Section 303](#) of the Penal Code struck down.” (at page 283)

After quoting from Sunil Batra (supra), the question before the Court was set out thus:

“6.....The question which then arises before us is whether the sentence of death, prescribed by [Section 303](#) of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by [Article 21](#).” (at page 285)

After setting out the question thus, the Court further stated:

“9.....Is a law which provides for the sentence of death for the offence of murder, without affording to the accused an opportunity to show cause why that sentence should not be imposed, just and fair? Secondly, is such a law just and fair if, in the very nature of things, it does not require the court to state the reasons why the supreme penalty of law is called for? Is it not arbitrary to provide that whatever may be the circumstances in which the offence of murder was committed, the sentence of death shall be imposed upon the accused?” (at page 287) The question was then answered in the following manner:

“18. It is because the death sentence has been made mandatory by [Section 303](#) in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under [Section 235\(2\)](#) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the court is relieved from its obligation under [Section 354\(3\)](#) of that Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust.” 19... To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that [Section 235 \(2\)](#) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the question of sentence, it would have to put some such question to the accused:

“You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be

sentenced to death?” The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances.

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that [Section 303](#) of the Penal Code violates the guarantee of equality contained in [Article 14](#) as also the right conferred by [Article 21](#) of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.” (at pages 293, 294 and 296) In a concurring judgment, Chinnappa Reddy, J., struck down the Section in the following terms:

“25. Judged in the light shed by Maneka Gandhi [(1978) 1 SCC 248] and Bachan Singh [(1980) 2 SCC 684], it is impossible to uphold [Section 303](#) as valid. [Section 303](#) excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive.

[Section 303](#) is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that [Section 303](#), [Indian Penal Code](#), must be struck down as unconstitutional.” (at page 298) It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that [Article 14](#) has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be “arbitrary”.

However, the three Judge Bench in McDowell (supra) dealt with

the binding Constitution Bench decision in *Mithu* (supra) as follows (at page 739):

“45. Reference was then made by Shri G. Ramaswamy to the decision in *Mithu v. State of Punjab* [(1983) 2 SCC 277: 1983 SCC (Cri) 405] wherein [Section 303](#) of the Indian Penal Code was struck down. But that decision turned mainly on [Article 21](#) though [Article 14](#) is also referred to along with [Article 21](#). Not only did the offending provision exclude any scope for application of judicial discretion, it also deprived the accused of the procedural safeguards contained in [Sections 235\(2\)](#) and [354 \(3\)](#) of the Criminal Procedure Code. The ratio of the said decision is thus of no assistance to the petitioners herein.” A binding judgment of five learned Judges of this Court cannot be said to be of “no assistance” by stating that the decision turned mainly on [Article 21](#), though [Article 14](#) was also referred to. It is clear that the ratio of the said Constitution Bench was based both on [Article 14](#) and [Article 21](#) as is clear from the judgment of the four learned Judges in paragraphs 19 and 23 set out supra. 78 A three Judge Bench in the teeth of this ratio cannot, therefore, be said to be good law. Also, the binding Constitution Bench decision in *Sunil Batra* (supra), which held arbitrariness as a ground for striking down a legislative provision, is not at all referred to in the three Judge Bench decision in *McDowell* (supra).

(2) The second reason given is that a challenge under [Article 14](#) has to be viewed separately from a challenge under [Article 19](#), which is a reiteration of the point of view of *A.K. Gopalan v. State of Madras*, 1950 SCR 88, that fundamental rights must be seen in watertight compartments. We have seen how this view was upset by an eleven Judge Bench of this Court in *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248, and

followed in *Maneka Gandhi* (supra).

Arbitrariness in legislation is very much a facet of unreasonableness in [Article 19\(2\)](#) to (6), as has been laid down in several Judgments of this Court, some of which are referred to in *Om Kumar* (infra) and, therefore, there is no reason why arbitrariness cannot be used in the aforesaid sense to strike down legislation under [Article 14](#) as well.

(3) The third reason given is that the Courts cannot sit in Judgment over Parliamentary wisdom. Our law reports are replete with instance after instance where Parliamentary wisdom has been successfully set at naught by this Court because such laws did not pass muster on account of their being “unreasonable”, which is referred to in *Om Kumar* (infra).

We must never forget the admonition given by Khanna, J. in [State of Punjab v. Khan Chand](#), (1974) 1 SCC 549. He said:

“12. It would be wrong to assume that there is an element of judicial arrogance in the act of the Courts in striking down an enactment. The Constitution has assigned to the Courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the Courts to declare the provisions of an enactment to be unconstitutional,

even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution.

Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity." This again cannot detain us.

(4) One more reason given is that the proportionality doctrine, doubtful of application even in administrative law, should not, therefore, apply to this facet of [Article 14](#) in constitutional law. Proportionality as a constitutional doctrine has been highlighted in [Om Kumar v. Union of India](#), (2001) 2 SCC 386 at 400-401 as follows:

"30. On account of a Chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian Courts did not suffer from the disability similar to the one experienced by English Courts for declaring as unconstitutional legislation on the principle of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in [Article 19\(1\)](#) of the Constitution of India — such as freedom of speech and expression, freedom to assemble peaceably, freedom to form

associations and unions, freedom to move freely throughout the territory of India, freedom to reside and settle in any part of India — this Court has occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restriction was reasonable lay on the State. “Reasonable restrictions” under Articles 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion throughout to consider the proportionality of the restrictions. In numerous judgments of this Court, the extent to which “reasonable restrictions” could be imposed was considered.

In *Chintamanrao v. State of M.P.* [AIR 1951 SC 118: 1950 SCR 759] Mahajan, J. (as he then was) observed that “reasonable restrictions” which the State could impose on the fundamental rights “should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public”. “Reasonable” implied intelligent care and deliberation, that is, the choice of a course which reason dictated. Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Articles 19(2) to (6). Otherwise, it must be held to be wanting in that quality. Patanjali Sastri, C.J. in [State of Madras v. V.G. Row](#) [AIR 1952 SC 196: 1952 SCR 597: 1952 Cri LJ 966], observed that the Court must keep in mind the “nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time”. This principle of proportionality vis-à-vis legislation was referred to by Jeevan

Reddy, J. in [State of A.P. v. McDowell & Co.](#) [(1996) 3 SCC 709] recently. This level of scrutiny has been a common feature in the High Court and the Supreme Court in the last fifty years. Decided cases run into thousands.

31. [Article 21](#) guarantees liberty and has also been subjected to principles of “proportionality”. Provisions of [the Criminal Procedure Code](#), 1974 and [the Indian Penal Code](#) came up for consideration in [Bachan Singh v. State of Punjab](#) [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] the majority upholding the legislation. The dissenting judgment of Bhagwati, J.

(see [Bachan Singh v. State of Punjab](#) [(1982) 3 SCC 24 : 1982 SCC (Cri) 535]) dealt elaborately with “proportionality” and held that the punishment provided by the statute was disproportionate.

32. 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 courts 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. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see [Air India v. Nergesh Meerza](#) [(1981) 4 SCC 335: 1981 SCC (L&S) 599] (SCC at pp.

372-373)]. But this latter aspect of striking down legislation only on the basis of “arbitrariness” has been doubted in [State of A.P. v. McDowell and Co.](#) [(1996) 3 SCC 709] .”

45. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is

obviously unreasonable and being contrary to the rule of law, would violate Article

14. Further, there is an apparent contradiction in the three Judges' Bench decision in McDowell (supra) when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate

between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

46. We only need to point out that even after McDowell (supra), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of [Article 14](#) of the Constitution of India. [In Malpe Vishwanath Acharya v. State of Maharashtra](#), (1998) 2 SCC 1, this Court held that after passage of time, a law can become arbitrary, and, therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of [Article 14](#) of the Constitution of India (see paragraphs 8 to 15 and 31)."

The Hon'ble Supreme Court in atleast three of the judgments, i.e. in **E.P.Royappa v. State of T.N.** (1974) 4 S.C.C.3(supra), **Maneka Gandhi v. Union of India** (1978) 1 S.C.C. 248 (supra) and **Ajay Hasia v. Khalid Mujib Sehravardi** (1981) 1 S.C.C. 722, has commented on the vice of arbitrariness on the statutory and executive power of the State.)

In **Cellular Operators Association of India and others v. Telecom Regulatory Authority of India and others** 2016(7) S.C.C. 732 the Hon'ble Supreme Court held that there is a presumption in favour of the constitutionality and validity of a supporting legislation and it can be challenged on the following grounds :-

“34. In *State of T.N. v. P.Krishnamurthy*, this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus :(SCC pp.528-28, para as)

“12. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds :

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) **Manifest arbitrariness/unreasonableness (to**

an extent where the court might well say that the legislature never intended to give authority to make such rules).”

For the afore-stated reasons, we are of the opinion that restricting the rights of the Engineers of Mechanical cadre in the Public Health Engineering Rules and the electrical cadres in Haryana Services of Engineers Class-II P.W.D. (Irrigation Branch) Rules as provided for in the offensive clause of Rule 9 of the 2009 Rules extracted here below, is clearly hit by the vice of arbitrariness and deserves to be struck down. Ordered accordingly.

“Provided further that promotion to the post of Engineer-in-Chief shall be made from amongst the members of the Civil Cadre only :

Provided further that in case of Mechanical cadre, an Executive Engineer having an experience of seven years may be given the pay scale of the post of Superintending Engineer as a personal measure while continuing to discharge the duties of Executive Engineer if an Executive Engineer of Civil cadre having equivalent length of service as Executive Engineer has been promoted as Superintending Engineer :

Provided further that in the case of Mechanical cadre, a Superintending Engineer having an experience of three years, may be given the pay scale of the post of Chief Engineer as a personal measure while continuing to discharge the duties of Superintending Engineer if an Superintending Engineer of civil cadre having equivalent length of service as Superintending Engineer has been

promoted as Chief Engineer.”

The retrospective operation assigned to the rules with effect from 1966, has the effect of depriving the in service incumbents of the legitimate expectations they were assured of at the time of entry into service, besides prejudicially affecting their rights of promotion. Hence bad.

The 2009 Rules in particular the offensive Rule 9 tends to create an unreasonable classification between two cadres, which once existed alongside but with a common seniority list, based on the first principle of service law, to assign seniority with effect from the date one is borne on the cadre and is restrictive in promotional avenues to one, while favourable to those of Civil Engineering cadre, which can at best be termed to be discriminatory and arbitrary.

Having said thus we direct the official respondents to undertake the determination of seniority etc., in the light of what has been observed above.

Since the Court has primarily decided the question of law, there is no necessity of impleading the applicants. Hence C.M. Applications No.10147 of 2012 and 13811 of 2015 in C.W.P. No.13566 of 2011 are dismissed. All other pending miscellaneous applications stand disposed of.

The writ petitions are therefore, disposed of accordingly.

(MAHESH GROVER)
JUDGE

(RAJ SHEKHAR ATTRI)
JUDGE

January 12, 2018
GD

Whether speaking/reasoned	Yes
Whether reportable	Yes/No