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Revival of Doctrine of Manifest Arbitrariness

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ABSTRACT

"Rights like the right to equality were empty vessels into which each generation pours its content by judicial interpretation."[2]

This article provides an analytical overview on evolution of "Doctrine of Manifest Arbitrariness" as a ground for the Judicial review of legislative action (herein after legislative review). The applicability of 'arbitrariness' as the ground for legislative review has been Res integra for a very long period of time until recently settled in case of Shayara Bano v. Union of India .[3]

In Indian context the doctrine traces its evolution from the Art 14 of the Constitution. However, in Indian Constitution the concept of 'equality' with respect to legislative review under Art 14 has been seemingly, equated to just 'reasonableness of classification' and has been reduced to a mere formula (classification test) ignoring the true essence of concept of equality. Article 14 contains a powerful statement of values, 'Equality before the law' and 'Equal protection of laws'. By reducing it to a formal exercise of 'classification test' we are missing the true value of 'equality' as a safeguard against arbitrariness in state action. Wherein state action implies all the administrative, as well as legislative action.

'Non Arbitrariness' test for a very long time was not considered as a standalone test to determine the validity of a legislation. However, it was a relevant and recognized test in Judicial review of administrative action (herein after administrative review) since the famous British decision in 'Wednesbury case'.[4] *The question which then arises is why the courts in India have adopted different level of scrutiny in examining the pervasiveness of arbitrariness in different organs of government (legislative and executive).*

The introductory part of this paper deals with the scope of Art14 with respect to the legislative review or more precisely, only with one aspect of Art14 that is 'Doctrine of Manifest arbitrariness'. The second part of this article analyses adequate volume of cases in which time and again the doubt has been expressed as to the applicability of this doctrine. For convenience the cases have been classified in three categories as 'Pre Mc-Dowell Decisions', 'Mc- Dowell and Post Mc-Dowell Decisions' and 'Post Shayara Bano Decision'. In the third part through empirical study we will find out how frequently this

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[2] Ruma Pal, 'Judicial Oversight or Overreach' (2008) 7 SCC J 9, J16.
[3] MANU/SC/1031/2017 : (2017) 9 SCC 1.
[4] Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (CA).

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claim has been raised post Shayara Bano decision and the future prospects.

I. INTRODUCTION

The Judicial review is a tool which empowers judiciary to strike down any action which is in conflict with the Constitution. Judicial review under Indian Constitution can be classified as –

(1) Judicial review of Constitutional amendment – the Constitutional amendments are tested on the yardstick of basic structure as in case of Sajjan Singh[5], Minerva mills[6], Indira Gandhi[7] etc

(2) Judicial review of legislative action – the competency of legislature is assessed as well as the statute of parliament, state government and subordinate legislations are examined to be in conformity with the fundamental rights and other provisions of the constitution. Subordinate legislations are also examined to be in conformity with the parent legislation.

(3) Judicial review of administrative action - action of the Union of India as well as the State Governments and authorities falling within the meaning of State are reviewed primarily on the three grounds illegality, procedural impropriety and irrationality.

Here in this article we will be dealing with the Judicial review of legislative action on the touch stone of the principle of equality (Art14). With respect to legislative review Art 14 can be said to consist of two facets[8]. One that the legislation in question was 'discriminatory' and therefore violative of Art14 and other that the legislation in question is 'arbitrary' and for this reason violative of another facet of Art14. The 'discrimination' entails 'comparison' and can be deduced by applying 'classification test'. But where the legislation is not based on sufficiently rational reasons or over a period of time with the changing social circumstances the law has become redundant the test of 'manifest arbitrariness' is applied. The test was first recognised in case of E.P. Royappa v. State of Tamil Nadu[9] but since then it remained *Res Integra* for a period of four decades until finally refined and concretised in *Shayara Bano* case[10].

The concept of "*Equal protection of law"* envisaged in Art14 states that *"equals are to be treated alike and unequal are not to be treated alike*" which actually provides an affirmation to the concept of 'legislative classification'. Hence any legislation which is authorizing

[5] *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845
[6] *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625
[7] *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1
[8] K.R. Lakshmanan (Dr.) v. State of Tamil Nadu, MANU/SC/0309/1996 : (1996) 2 SCC 226
[9] MANU/SC/0380/1973: (1974) 4 SCC 3
[10] MANU/SC/1031/2017: (2017) 9 SCC 1

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classification or differentiation, if based upon the reasonable grounds of distinction are valid legislation. And 'the test of reasonable classification' was evolved as a subsidiary test to determine whether the classification or differentiation are based on reasonable ground or not. It involves two conditions, namely

1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

2. The differentia must have a rational relation to the object sought to be achieved by the statute in question.

For example, in case of Mithu v. State of Punjab[11] section 303 of Indian Penal code 1860 was held to be unconstitutional and violative of Art14. As it provided mandatory death penalty for murder committed by a life convict while sec 302 conferred direction to the court to impose life imprisonment or death penalty for a murder committed by free man. The court held that the classification between the person who committed murder while they were under the sentence of life imprisonment and those who committed murder while they were not under the sentence of life imprisonment was held to be unreasonable classification not based on rational principle. That is it is found infringing the second principle of 'classification test'.

In another case of Yusuf Abdul Aziz v. State of Bombay[12] the constitutional validity of section 497 of Indian penal code, 1860 was challenged on the grounds that the last part of the section which runs as, "*In such case the wife shall not be punishable as an abettor"* completely absolves the women of punishment which was claimed to be discriminatory and in complete contravention Art 14 and 15 of the Constitution. However the court held that, *"Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in section 497 of the Indian Penal Code*." Here the classification on the basis of sex was held to be a valid classification grounding the reason on Art 15(3) which enables the state to make special laws for women and children.

This case was brought before the supreme court in the early 50's when there was a societal presumption in favor of the wife, she was considered to be an innocent or more appropriately a victim in the crime of adultery. However, time and again this provision has been challenged

[11] AIR 1983 SC 473
[12] MANU/SC/0124/1954

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as infringement of equality.[13] But it cannot be proved till recently[14] since it withstood the classification test. Although, this classification still stands valid today but the impact of the law on the real world, on persons and groups cannot be formalistically derived. Law and society are intrinsically connected concepts. Law influences the society and societal values and societal stereotypes are sometimes reflected in the laws but with the changing social norms laws are also required to be changed. Thus, law cannot be tested in the formalistic manner since it negates the consideration of various other variables. The classification test was devised as the subsidiary test should not be equated to mean the practical aspect of principle of equality. And we cannot allow the continuance of such archaic law. Therefore, we needed a mechanism to nullify the effect of arbitrariness within the legislation as such the test of 'manifest arbitrariness' is concretized by *Justice RF Nariman* in *Shayara Bano case.* The test to determine "manifest arbitrariness" is to decide "whether the enactment is drastically unreasonable and / or capricious, irrational or without adequate determining principle."[15]

II. JUDICIAL APPROACH AND CONTROVERSY WITH REGARD TO DOCTRINE OF "MANIFEST ARBITRARINESS"

The doctrine of 'Manifest Arbitrariness' was first recognised in case of E.P. Royappa v. State of Tamil Nadu[16] but since then it remained *Res Integra* for a period of four decades until finally refined and concretised in *Shayara Bano* case. The reason for such a delayed output is contradictory and *per incuriam* judgements in various cases involving constitutionally significant matter. In this part we will trace the evolution of this doctrine through few important cases discussing them in chronological order.

Pre McDowell decisions

In **E.P. Royappa v. State of Tamil Nadu**[17], the transfer of a public officer to an inferior post was challenged as being 'arbitrary, hostile and mala fide.' This was not a case where the constitutionality of legislation was in question. But the validity of state action was made subject to the test of arbitrariness. The Court observed as

"*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*

[13] V. Revathi v. Union of India and Ors. MANU/SC/0562/1988 ; Sowmithri Vishnu v. Union of India and Anr. MANU/SC/0199/1985 ;
[14] Invalidated in case of Joseph Shine vs. Union of India (UOI) (27.09.2018 - SC) : MANU/SC/1074/2018
[15] MANU/SC/1031/2017 : (2017) 9 SCC 1.
[16] MANU/SC/0380/1973 : (1974) 4 SCC 3
[17] *Supra note 15*

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 observation was soon reiterated in **Maneka Gandhi v. Union of India**[18] where Bhagwati J concurring with the majority in a 6:1 decision observed Art 14 as the, "*guarantee against arbitrariness in State action and the doctrine of classification was evolved only as a subsidiary rule for testing or determining whether a particular state action was arbitrary or not*." Here also an administrative decision whereby the passport of a journalist was impounded in 'public interest' was challenged.

Indian Express Newspapers (Bombay) Private Ltd. and Ors. vs. Union of India and Ors.[19] The validity of amendment to provision of *Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions (Amendment) Act, 1989* was challenged as being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The test of manifest arbitrariness propounded in this case has been adopted in Shayara Bano case. Which states as,

"Manifest arbitrariness for invalidating the legislation must be something prescribed to be done by the legislature, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."

In **Ajay Hasia and Ors. v Khalid Mujib Sehravardi**[20] Bhagwati J, speaking for a constitutional bench, implicitly equated the level of Article 14 scrutiny in cases of executive and legislative actions. In the Court's words,

"*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."*

[18] 1978 AIR 597, 1978 SCR (2) 621
[19] MANU/SC/0406/1984
[20] MANU/SC/0498/1980

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Analysis

Thus Bhagwati J. contribution in elaborating the concept of Art 14 cannot be unpretentious. In *Royappa case* speaking for majority in 5 judge bench discarded the "*Narrow, Pedantic or lexicographical*" interpretation to the concept of 'equality'. Again in case of *Maneka Gandhi* concurring with 6:1 majority reaffirmed the 'activist magnitude' of Art14 and further acknowledged that, " Royappa did nothing more than explore and bring to light the 'vital and dynamic aspect' of equality that had till then been lying '*latent and submerged in the few simple but pregnant words of article 14*'. So in this period it was very clear that wherever there is arbitrariness in state action, Article 14 immediately springs into action and strikes down such state action. Without making any attempt to distinguish between authorities whether it be the legislature or the executive or an authority under Article 12. The word 'state action' is understood to accommodate all the above-mentioned authorities. However, in the later stage it was misinterpreted that Bhagwati J. pronounced the 'arbitrariness' only in context of executive action since both the cases *Royappa* and *Maneka Gandhi* cases were the one in which executive action was challenged and not the legislative action. Even though the position was made clear in *Ajay Hasia*. There were many other cases in which these above cases were referred and followed in that period to name some cases *International Airport Authority case*[21], *Nergesh meerza* [22], *Special courts bill,*[23] *A.L. Kalra v. Project and Equipment Corporation*[24].

III. POST MCDOWELL DECISIONS

This was the period of most inconsistent judicial output, contradictory and precedent blind decisions with regards to the application of doctrine of 'arbitrariness.'

Interestingly the doctrine of manifest arbitrariness saw its revival in judgement of Justice RF Nariman in Shayara Bano case who argued the famous case of ***Mcdowell & Co. and Ors. case***[25] (1996) which actually led deviance from earlier judgements. Advocate RF Nariman contented that "the total prohibition of manufacture and production on the liquors is 'arbitrary' and the amending Act is liable to be struck down on this ground alone". He had argued this case before the bench headed by Justice BP Jeevan Reddy who held that an enactment cannot be struck down by just saying it is arbitrary or unreasonable, some other constitutional infirmity has to be found. In the words of court

[21] Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. MANU/SC/0048/1979
[22] AIR India vs. Nergesh Meerza and Ors. MANU/SC/0688/1981
[23] The Special Courts Bill, 1978 Vs. [1978] INSC 247 (1 December 1978)
[24] (1984) 3 SCC 316, 328
[25] (1996)3 SCC 709

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"*The power of Parliament or for that matter, the State Legislature 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.... 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*"

Thus *McDowell case* did not rule out the application of the doctrine but the mere assertion was that 'an enactment was arbitrary would not be enough to assail its constitutionality. The assertion had to be duly substantiated with some other constitutional infirmity in order to meet the judicial threshold of 'arbitrariness'.

Malpe Vishwanath Acharya and Ors. v. State of Maharashtra and Anr.[26], In this case the writ petitions challenging the constitutional validity of provisions of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 was in question. It was contended that the provisions of this act impose restriction on the right of landlord that they cannot charge rent in excess of standard rent. The rents were frozen in 1940 and with the passage of time the provision of the act became arbitrary, discriminatory, unreasonable and consequently ultra vires to Art14 of the constitution. As it was a time bound act initially enacted for a period of two year and there after government kept on extending it time to time. It was held that,

"we have no doubt that the existing provisions of the Bombay Rent Act relating to the determination and fixation of the standard rent can no longer be considered to be reasonable. The said provisions would have been struck down as having now become unreasonable and arbitrary but we think it is not necessary to strike down the same in view of the fact that the present extended period of the Bombay Rent Act comes to an end on 31st March, 1998."

So, although the act was not struck down since it was a time bound act, yet the decision reflected the intention of judiciary to strike down the act on the ground of arbitrariness.

Mardia Chemicals Ltd. and Ors. v. Union of India and Ors.[27] The various provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act

[26] [MANU/SC/0905/1998 : (1998) 2 SCC 1]
[27] MANU/SC/0323/2004 : (2004) 4 SCC 31

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2002 were challenged. While striking down the statutory requirement of a pre-deposit as a condition of appeal under sec17(2) of the above act, the Supreme Court entered into an assessment of the reasonableness of the substantive provision, holding it to be 'unreasonable, arbitrary and violative of Article 14 of the Constitution'. In the words of court

"In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down."

Ashok Kumar Thakur v. Union of India and Ors.[28] (2008) while dealing with reservations in educational institutions, **Constitutional bench** of Supreme Court held that unreasonableness 'by itself' does not constitute a ground for invalidating legislation and that '[t]he validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law'.

K.T. Plantation (P) Ltd. and Anr. v. State of Karnataka[29] the validity of Section 110 of the Land Reforms Act,1961, the validity of the notification dated 8.3.1994, the constitutional validity of the Acquisition Act,1996 and the claim for enhanced compensation and the scope of Article 300A of the Constitution was under challenge.

After heavy reliance on the observation of the Constitutional bench in ***Ashoke kumar thakur, McDowell*** it was observed,

"*that plea of unreasonableness, arbitrariness, proportionality, etc., always raises an element of subjectivity on which Court cannot strike down a statute or a statutory provision. Unless a constitutional infirmity is pointed out, a legislation cannot be struck down by just using the word arbitrary."*

Natural Resources Allocation, IN re, Special Reference No. 1 of 2012 (2G reference case)[30]**,** this case did not read McDowell as being an authority. Indeed the Court, after referred to all the earlier judgments, and Ajay Hasia (in particular), went on to conclude that

"Arbitrariness when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is manifestly arbitrary i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious,

[28] MANU/SC/1397/2008 : (2008) 6 SCC 1
[29] MANU/SC/0914/2011 : (2011) 9 SCC 1
[30] MANU/SC/0793/2012 : (2012) 10 SCC 1

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biased, with favoritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc."

Subramanian Swamy v. Director, Central Bureau of Investigation & Another,[31] In this case, the Court was concerned with a challenge to the constitutional validity of Section 6A of the Delhi Special Police Establishment Act 1946, which required the Central Bureau of Investigation to obtain Union government sanction before conducting an inquiry or investigation into any alleged offence committed under the Prevention of Corruption Act 1988, if the officer concerned was of the rank of Joint Secretary or above.

The question was finally raised before the constitutional bench, "Whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Article 14 of the Constitution of India are available or not as grounds to invalidate a legislation?" it was held

"*Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution."*

Although the provision was declared to be unconstitutional but not on the ground of arbitrariness instead on the ground that it makes an unreasonable classification of an otherwise homogenous group of officers accused of committing an offence under the Prevention of Corruption Act without there being reasonable nexus between the classification and the object of the Act. It was further observed

"The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

Rajbala v. State of Haryana[32] The State of Haryana amended the Haryana Panchayati Raj

[31] (2014) 8 SCC 682
[32] (2016) 2 SCC 445.

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Act, 1994 by prescribing a minimum educational qualification for contesting elections. The Supreme Court considered the question whether the provision which disqualifies a large number of persons and denies their rights to contest for various offices under the Haryana Panchayati Raj Act was constitutionally invalid and offending Article 14 of the constitution. While dealing with this question, the Supreme Court answered it as follows:

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

Binoy Viswam vs. Union of India (UOI) and Ors[33] *the validity of* Section 139AA of the Income Tax Act, 1961 has been inserted by the amendment to the said Act vide Finance Act, 2017, to make the seeding of the Aadhaar number with the PAN card mandatory. The doctrine of arbitrariness was vehemently rejected and the classification test applied withstood provision as having are reasonable classification hence the provision was held to be valid. Court stated

"*Article 14 in its ambit and sweep involves two facets, viz., it permits reasonable classification which is founded on intelligible differentia and accommodates the practical needs of the society and the differential must have a rational relation to the objects sought to be achieved. Further, it does not allow any kind of arbitrariness and ensures fairness and equality of treatment. It is the fonjuris of our Constitution, the fountainhead of justice. Differential treatment does not per se amount to violation of Article 14 of the Constitution and it violates Article 14 only when there is no reasonable basis and there are several tests to decide whether a classification is reasonable or not and one of the tests will be as to whether it is conducive to the functioning of modern society."*

ANALYSIS

In this period the doctrine of precedent was completely overlooked. Each successive decision were counterproductive without any legitimate basis. Starting with the *McDowell case* Reddy J. delivering on behalf of 3 judge bench of supreme court, overlooked larger bench decisions on the point (*Ajay Hasia* in particular) as stated in *Shayara Bano case*, "*Mcdowell itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its*

[33] MANU/SC/0693/2017

reasoning even otherwise being flawed. The judgments, following McDowell are, therefore, no longer good law." Moreover the *McDowell case* seems to be misplaced as few successive cases[34] read it, as asserting complete bar to the use of 'arbitrariness' to strike down a legislation. However it simply asserted that it has to be duly substantiated with some other constitutional infirmity in order to meet the judicial threshold of 'arbitrariness'. Which cannot be interpreted to mean an absolute bar.

Mardia Chemicals and *Malpe Vishwanath* wherein the Doctrine of 'arbitrariness' was reaffirmed and being the post McDowell decisions each of three judge bench would have diluted the affect of *McDowell.* That is *McDowell* would have been a dead letter in context of the application of doctrine of 'arbitrariness' in legislative review. But the Constitutional bench in *Ashoke kumar Thakur* specifically mentioning the grounds of challenge in legislative review overruled the effect of decisions in *Mardia Chemicals, Ajay Hasia,* and *Malpe Vishwanath Acharya*.

Thereafter Constitutional bench in *2G Reference case* relied heavily on *McDowell case* and restructured it by citing that, "*a law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity." "It warned against the arbitrary use of arbitrariness doctrine*." However, this case did not involve legislative review and therefore, it remained obiter.

Finally, to settle the inconsistency the question was referred from three judge bench to five judge bench in *Subramanian Swamy* that arbitrariness is not available as a ground for legislative review. But answering this question the court proceeded on a consideration of only those authorities which mandated a limited scope of review of legislative acts, and has not referred to any of the inconsistent decisions in order to resolve the conflicting approaches. *Ajay Hasia* was completely overlooked. Therefore, it wasn't considered to be the conclusion. Similarly, *Rajabala* and *Binoy Viswam*[35] were decision of division bench not much importance was given as them as they were also decided *pre incuriam*. Other related cases of this period not discussed in this paper are *K.R. Lakshmanan (Dr.) v. State of Tamil Nadu*[36], *Shrilekha Vidyarthi v State of Uttar Pradesh*[37], *State of Tamil Nadu v. Ananthi Ammal*[38]

[34] State of Bihar v. Bihar Distillery Ltd., MANU/SC/0354/1997, State of M.P. v. Rakesh Kohli, MANU/SC/0443/2012, Rajbala v. State of Haryana & Ors., MANU/SC/1416/2015, Binoy Viswam v. Union of India, MANU/SC/0693/2017
[35] MANU/SC/0693/2017
[36] MANU/SC/0309/1996 : (1996) 2 SCC 226
[37] (1991) 1 SCC 212 [36].
[38] (1995) 1 SCC 519.

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IV. POST SHAYARA BANO DECISIONS

Shayara Bano vs. Union of India[39] was an authoritative pronouncement of the supreme court and it finally brought the controversy to an end. It described 'manifest arbitrariness' as

"Under Article 14 the test of manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14."

In clear and no uncertain terms it was held that talaq-e-biddat drives its legal force from sec 2 of Shariat Act,1937 which is the 'law in force'. And such law being manifestly arbitrary was struck down as violating Art 14 of the constitution. In the terms of court

"*Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in Rashid Ahmad, such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases."*

This doctrine has been again invoked in the Judgment striking down criminalisation of homosexuality in ***Navtej Singh Johar vs. Union of India***[40] again by Justice Nariman. It was held that "*modern psychiatric studies and legislation which recognizes that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized, the Section must be held to be a provision which is capricious and irrational. And*

[39] MANU/SC/1031/2017 : (2017) 9 SCC 1.
[40] (2018) 1 SCC 791

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sentences going upto life imprisonment is clearly excessive and disproportionate"

"*In view of the law laid down in **Shayara Bano** and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent adults. Further, Section 377 Indian Penal Code fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 Indian Penal Code, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary."*

Similarly, in **Joseph Shine vs. Union of India[41],** the judge invoked this doctrine of manifest arbitrariness to strike down Section 497 IPC in the view of "social progression, perceptual shift, gender equality and gender sensitivity."

"*What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's constitutional morality, in that the very object with 36 which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt."*

Justice K.S.Puttaswamy(Retd) vs Union Of India[42] in conformity with the Shayara Bano the scope of judicial review discussed in this case as, *"the Court has accepted that apart from two grounds noticed in Binoy Viswam, on which legislative Act can be invalidated [(a) the Legislature does not have competence to make the law; and b) law made is in violation of fundamental rights or any other constitutional provision], another ground, namely, manifest arbitrariness, can also be the basis on which an Act can be invalidated. The issues are examined having regard to the aforesaid scope of judicial review."*

The validity of Section 139AA of the Income Tax Act, 1961 as was examined in Binoy

[41] AIR 2018 SC 4898
[42] (2017) 10 SCC 1

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viswam has been upheld in this case, as adhaar-PAN linking is in public interest and satisfies the test of proportionality and reasonableness.

However sec 57 of Aadhaar Act which was susceptible to be misused by private entities which could have lead to commercial exploitation of the personal data of individuals without consent and could also lead to individual profiling was struck down on the ground on 'manifest arbitrariness' under Art 14

Hindustan Construction Company Ltd. v. Union of India[43] the constitutional validity of Section 87 as introduced by the Arbitration and Conciliation (Amendment) Act, 2019 was challenged. Section 87 was introduced after deleting Section 26 of the 2015 Amendment Act .

It was held that, "*the deletion of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Arbitration Act, 1996 by the 2019 Amendment Act, results in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act. It was considered manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act."*

Lok Prahari vs. The State of Uttar Pradesh and Ors. [44] in this case sec 4(3) of Uttar Pradesh Ministers (Salaries, Allowances and Miscellaneous Provisions) Act, 1981 was struck down as it provides, the allocation of government bungalows to constitutional functionaries after such functionaries demit public offices was subjected to judicial review on touch stone of Art 14. It was held*, "such bungalows constitute public property which by itself is scarce and meant for use of current holders of public offices. The questions relating to allocation of such property, therefore, undoubtedly, are questions of public character and, therefore, the same would be amenable for being adjudicated on the touchstone of reasonable classification as well as arbitrariness."*

Analysis

Although, Post Shayara Bano judgement it will be too simplistic to claim that the controversy is conclusively settled.

But it has also raised another concern about the rampant use of this doctrine which can eventually lead to the mis-use of this doctrine. From the date of declaration of Shayara Bano judgement that is from August 22, 2017 till February 2020 within the period of 2.5 years the

[43] *Writ Petition (Civil) No. 1074 of 2019, Supreme Court, judgment rendered on November 27, 2019.*
[44] MANU/SC/0507/2018

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claim for manifest arbitrariness to nullify the legislation has been raised in more than 65 cases across various High Courts and in around 12 cases in Supreme court among which in almost 7 cases the law has been struck down and in 5 cases the law was found to be constitutional. As it is said that, "*a claim of arbitrariness is the simplest argument to build in any challenge that even remotely involves the State*[45]." The judges should be very careful in applying this doctrine in the matters of legislative review since judicial review of legislation is the counter majoritarian force, it cannot be exercised loosely. Invalidating an act passed by the legislature and affirmed by the president of the Nation is a grave step which should be exercised diligently. While undertaking the task of judicial review of legislation the court examines the competency of the legislature with respect to powers assigned in the list under VII schedule (procedural judicial review). The compatibility of the law is examined with the fundamental right and other provision of the Constitution (substantive judicial review). If the law appears to be violative of fundamental right or other provision of Constitution then the court is suppose to undertake the exercise of reading it down so as to bring it in conformity with the constitutional provision. If that is not possible then the offending portion of the statute should be severed and should be struck down declaring the same as unconstitutional.

V. CONCLUSION

Since, the inception 'arbitrariness' has been a beleaguered doctrine. Although Bhagwati J. very clearly read the principle of 'arbitrariness' under Art14 and applied it to all kind of state action without making any attempt to draw distinction between legislative and administrative function. Yet for a very long-time doctrine of arbitrariness was considered to be applicable only in administrative matters and scope of judicial review of legislation on the grounds of 'equality' under Art14 was equated to 'classification test'. However, there was lack of framework to test the judicial validity of a legislation where there was no occasion for comparative evaluation yet there is unreasonableness imbibed in the legislation or over a period of time due to change in circumstances its relevancy has ceased.

Post Shayara Bano judgement the controversy came to an end. But the significant question posed by this long struggle of four decades to re-establish a well-established doctrine is, Can we afford such prolonged anonymity in the constitutionally significant matters? Besides, such *per incuriam* decisions as in case of *McDowell, Rajbala* which deviates from established precedents without any legitimate basis leads to inconsistency, contradictions and lack of

[45] Upendra Baxi, 'The Myth and Reality of Indian Administrative Law' in Massey (ed), Administrative Law (8th edn, 2012), xxviii.

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precisions in defining standards and parameters such decision poses serious threat to 'doctrine of precedent'[46] and ultimately, to the judicial discipline.[47]

Moreover, still the test of manifest arbitrariness lacks objective standard due to which the doubts can be expressed as to the applicability of this doctrine which can even impede upon the balance of power between legislature and judiciary.

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[46] The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs

[47] law laid down by this court in a decision delivered by a bench of larger strength is binding on any subsequent bench of lesser or co-equal strength.

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