

RATIONALITY BY ANY OTHER NAME: COMMON PRINCIPLES FOR AN EVOLVING EQUALITY

CODE

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Abstract

Jurisprudence on the right to equality in India suffers from a specific kind of inconsistency: a tendency to reinvent itself from time to time without accounting for the existing principles articulated under the right or clarifying the nature of the relationship between new and old principles. Ultimately, this creates considerable uncertainty regarding the outcomes of specific cases in which the right is applied, even when the stakes are high and the questions uncomplicated. This article examines the background and developments related to two emerging doctrinal trends in the form of the manifest arbitrariness test and the application of the principle of substantive equality to discrimination law. It finds that the former fails to bring to order the legacy of incoherence underlying the doctrine of arbitrariness and the latter, while along the right lines, remains inadequate and partly under the thrall of textual limitations. The relation between the two is also entirely unclear and, crucially, non-arbitrariness as a rationality-based principle may be incompatible with core aspects of non-discrimination. To resolve these issues, the article attempts to integrate the doctrines into a common set of principles regarding how questions of “relevance” are to be answered in determining the constitutionality of particular classifications and distributions. In doing so, it proposes a broader conception of rationality under equality law than has traditionally been attributed to the term, arguing for the mandatory relevance of other constitutional values in applying the right to equality and suggesting interpretative strategies to avoid the textual limitations in the non-discrimination provisions.

1. Introduction: The Trouble with Reinvention

Criticism of and popular resistance against the Citizenship (Amendment) Act, 2019 (“CAA”) has generally had one feature in common: heavy reliance on the right to equality under the

* I would like to thank Alok Prasanna Kumar and an anonymous peer reviewer for their invaluable comments on an earlier draft, and I am also grateful to the Vidhi Centre for Legal Policy and the Azim Premji Philanthropic Initiatives for their kind support under the Samvidhaan Fellowship 2020-21. All errors are my own.

Indian Constitution. The CAA explicitly differentiates on the basis of religion in offering relaxed eligibility for citizenship by naturalisation. When critics have relied on the principle of secularism to argue against the law's constitutionality, they have relied not so much on the principle's connection to religious freedoms as they have on its equality component.¹ The objections to the law have been firmly rooted in a conception of non-discrimination. And yet Article 15, the specialised protection against discrimination, remains applicable explicitly (and inexplicably, one may add) only to citizens.² Whether or not it is considered applicable, proponents of the CAA are quick to point out that merely classifying on the basis of religion doesn't make a law unconstitutional.³

The schism underlying opposing views on the CAA is a direct result of the fact that a classification that should be tested under a specialised guarantee against religious discrimination under Article 15 somehow now seems to be subject only to a general equality guarantee under Article 14. This incongruous situation suggests that faith in the Constitution's Equality Code may be misplaced to the extent that India's equality jurisprudence is in disarray. Since some years now, scholarship has been emphasising that Article 14's current protections are weak,⁴ and such observations seem to be bolstered by the fact that those who challenge the CAA on Article 14's terms feel compelled to expand upon and extend its principles.⁵ Faith placed in the Constitution's promise mingles here with doubt regarding whether the promise will be kept by our courts.

It would be one thing if India's non-discrimination jurisprudence under Articles 15(1), 16(2) and 29(2) was robust enough to be readily extended to Article 14. But it isn't so either: these

¹ See, for example, Farrah Ahmed, 'Arbitrariness, subordination and unequal citizenship' (2020) 4(2) *Indian Law Review* 121, 122 ("The Act denies people their constitutionally-protected entitlement to *equal* freedom of conscience and religion."); Editorial, 'India's citizenship bill puts secularism at risk' *Financial Times* (London, 11 December, 2019), <<https://www.ft.com/content/8e5bf5a2-1c34-11ea-97df-cc63de1d73f4>> accessed 6 June 2021; Alok Prasanna Kumar, 'Citizenship (Amendment) Act: An unconstitutional Act' *Deccan Herald* (Bangalore, 2021) <<https://www.deccanherald.com/specials/sunday-spotlight/citizenship-amendment-act-an-unconstitutional-act-785638.html>> accessed 6 June 2021. That this is the understanding of secularism at stake is also clear from the analysis in Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' (2020) 4(2) *Indian Law Review* 138.

² *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465, at para.28; *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs*, AIR 1964 SC 1140, at para.35.

³ Harish Salve, 'CAA is necessary: Why the many arguments about its being unconstitutional don't hold water' *The Times of India* (2020) , <<https://timesofindia.indiatimes.com/blogs/toi-edit-page/caa-is-necessary-why-the-many-arguments-about-its-being-unconstitutional-dont-hold-water/>> accessed 6 June 2021.

⁴ Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in S. Choudhry et al (eds) *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019), Chapter 2.

⁵ Ahmed, (n 1).

provisions have long been interpreted in a way that minimises protection from discriminatory state action and maximises the scope for the justification of such action.⁶ The peculiar Indian understanding of secularism adds to these troubles: what legal conception of non-discrimination would explain relative hostility towards religious classification on questions of citizenship alongside relative acceptance of such classification in other areas of governance?⁷ And does our Constitution's specific commitments towards affirmative action suggest that such action can be extended to communities not specifically named?⁸ Can the principle be extended to persecuted minorities in other countries?⁹

The space available here is insufficient to arrive at complete answers to these questions, and while the controversy over the CAA is a bright signal that there is a deeper malaise at play, an appraisal of its constitutionality is also not the objective here. Instead, this article is aimed at a different problem. Indian equality jurisprudence suffers from a peculiar kind of inconsistency: a tendency to reinvent itself by breaking from the past instead of growing out of it. This desire to start from scratch was on display in the formulation of the arbitrariness doctrine in *E.P. Royappa*¹⁰ as well as subsequent iterations of the doctrine. Decades later, *Shayara Bano*¹¹ may have attempted a consolidation of precedents, but it ultimately fails to bring to order the incoherence that it grapples with and opens the door to further disorder. A promising but inchoate strand of jurisprudence on substantive equality does better on this front,¹² but

⁶ Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 *The Equal Rights Review* 160; Bhatia (n 4), Chapter 1; Shreya Atrey and Gauri Pillai, 'A feminist rewriting of *Air India v. Nergesh Meerza* AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)' (2021) *Indian Law Review* (forthcoming) (copy on file with the author)

⁷ Tarunabh Khaitan, 'Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement' (2008) 50(2) *Journal of the Indian Law Institute* 177, at 178-179, fn.5 and 193 ("[A] powerful article 15 cannot co-exist with religion-based and gender-unjust personal laws."); Donald Eugene Smith, *India as a Secular State* (Princeton University Press, 1963), 116-117 ("While the existence of different personal laws contradicts the principle of non-discrimination by the state contained in article 15(1), the Constitution itself contradicts this principle in dealing with the problems connected with the caste system."). See, generally, Ronjoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (Oxford University Press, 2019).

⁸ Bhatia (n 4) at 103-107.

⁹ V. Muraleedharan, Minister of State in the Ministry of External Affairs, Answer to Unstarred Question No. 2925 (March 19, 2020), <<https://mea.gov.in/rajya-sabha.htm?dtl/32576/QUESTION+NO2925+CONCERNS+OVER+CITIZENSHIP+AMENDMENT+ACT>> accessed 6 June 2021 ("Interlocutors also understand the Indian position that the Citizenship Amendment Act 2019 is an affirmative action meant to address the long standing predicament of the vulnerable sections living in India ...")

¹⁰ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3

¹¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1

¹² *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1; *Naz Foundation v. Government of N.C.T. of Delhi*, (2009) 160 DLT 277; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Secretary, Ministry of Defence v. Babita Puniya*, (2020) 7 SCC 469; *Union of India v. Lt. Cdr. Annie Nagaraja*, (2020) 13 SCC 1; *Lt. Col. Nitisha v. Union of India*, 2021 SCC OnLine SC 261

questions remain unanswered and interpretative strategies unexplored. This article focusses on the arbitrariness doctrine and substantive equality because each constitutes an ongoing attempt to reimagine the right to equality as a more “substantive” protection. These two principles stand at the forefront of the evolution of India’s right to equality. And yet, it isn’t clear how they relate to each other. Do they operate in different spheres or have common elements? Does one subsume the other? Could they be viewed as identical?

The central argument of this article is that Indian equality jurisprudence would significantly benefit today from a systematic attempt to bring consistency and stability to its doctrinal evolution. The lack of these features is the source of our anxieties regarding the right. Pursuing this doesn’t require a return to formalistic interpretations of equality and non-discrimination, but an acknowledgment of how formal and substantive visions of equality do not stand in isolation from each other. An approach that leverages prior precedent and existing doctrinal tools can reconceptualise seemingly static principles like rationality and relevance to build a stronger and more coherent substantive guarantee. At the same time, this may also serve to persuade any deferential and recalcitrant members of the judicial community who may be wedded to outmoded interpretative techniques.

To this end, Part 2 of this paper focusses on the development and current status of the two doctrines under the right to equality undergoing marked evolution today: manifest arbitrariness and substantive equality. It finds that the manifest arbitrariness test under Article 14 has been adopted despite stark inconsistencies in the *Shayara Bano* judgment. Even if it were consistent with previous case-law, the structure of the test itself is problematic because it is overbroad and ambiguous to the point of incoherence. When it comes to Article 15 and its siblings, recent attempts to develop robust non-discrimination jurisprudence by applying the principle of substantive equality have proved inadequate not just because of the lack of consensus between judges in key opinions but also because discrimination has only been addressed in a piecemeal fashion without accounting for the variety of listed and unlisted grounds in which it occurs. Courts have failed to develop adequately broad underlying principles or tests for different kinds of discrimination. They have also prominently failed to engage with the textual limitations in the texts of relevant provisions. Following this negative project, Part 3 offers a limited constructive account regarding the minimum conditions for the emergence of a coherent substantive protection under the right to equality. It rehabilitates the concepts of rationality and relevance to outline a relevance-based test that is broad enough to meet the demands of

constitutional democracy while constraining the overbroad terms of the arbitrariness doctrine. The conclusion raises certain issues with the proposals made while also suggesting potential avenues for their resolution.

2. A Tale of Two “Substantive” Rights

Arbitrariness and substantive equality stand at the forefront of the evolution of the Constitution’s equality guarantee, and while both have some vintage, they have also recently yielded new manifestations. However, it remains unclear what each doctrine has to do with the other because, despite instances of their simultaneous application in cases like *Navtej Singh Johar*¹³ and *Joseph Shine*,¹⁴ their relationship is not discussed. This has largely been because the arbitrariness doctrine was a loose cannon at birth¹⁵ and has become an even looser one with time.¹⁶ Substantive equality, on the other hand, has a much better argument going for it, but the recent headway it has made in relation with non-discrimination remains an inchoate development. Because it borrows from other jurisdictions, reconciliation with existing Indian jurisprudence requires some interpretative work.

2.1. Arbitrariness: Half a Century of Ambiguity

Over almost half a century now, the arbitrariness doctrine has travelled a long and bumpy road to get to where it is today. And yet it doesn’t seem to have gotten any nearer to providing a systematic account of what it has to do with equality. If anything, it seems to have gotten further away from its origins in Article 14. Its claim to being a value underlying the Equality Code as a whole is contradicted by its incoherence and consequent failure to account for or explain specific provisions on non-discrimination and affirmative action. While MacKinnon once remarked that non-arbitrariness had opened the doors to substantive equality in India,¹⁷ it has instead veered towards a different kind of substantiveness: the American concept of “substantive due process”. Coming to grips with the directions it might veer to next requires that we account for the places it has been.

¹³ *Navtej Singh Johar* (n 12).

¹⁴ *Joseph Shine* (n 12).

¹⁵ H.M. Seervai, *Constitutional Law of India*, Vol I (4th Edition, 2015) 436-441.

¹⁶ Alok Prasanna Kumar, ‘Arbitrary Arbitrariness: A Critique of the Supreme Court’s Judgment in *Shayara Bano v. Union of India*,’ (2019) 8 *Indian Journal of Constitutional Law* 87.

¹⁷ Catherine A. MacKinnon, ‘Sex Equality under the Constitution of India: Problems, prospects, and “personal laws”’, (2006) 4(2) *International Journal of Constitutional Law* 181, 188.

2.1.1. Prior Formulations

The story is an old one, but starts in 1973 with *E.P. Royappa*. Previous judgments had indicated that non-arbitrariness was related to equality, but the idea that it is the principle underlying equality as a whole was *Royappa*'s invention. In the case, a senior government officer complained that he had been reduced in rank discriminatorily. The traditional test under Article 14 (the reasonable classification test) merely required the differentiating criteria for any legal classification to have a rational connection with the objective of the relevant law or measure. In *Royappa*, a majority on the bench formulated and applied a new test, holding that the right to equality was meant to prevent arbitrariness in State action.¹⁸ The formulation for this test required State action to be based on "valid relevant principles applicable to all similarly situate" and to exclude "extraneous or irrelevant considerations".¹⁹ This employed a standard of *relevance*. In referring to the applicability of the standard "to all similarly situate", it also seemed to require the standard to be *comparative* in the formalistic sense of "treating like cases alike". How then did it deviate from the traditional reasonable classification test? The most prominent difference seems to be that relevance was no more required to be assessed against the *object* of the legislation. While earlier, courts were bound by the reasonable classification test's complete deference to the policy choices and prioritisations implicit in a government's selection of governance objectives, the arbitrariness test seemed to allow courts to consider the question on the basis of additional relevant considerations.

The decision in *Royappa* illustrated this liberal attitude towards the identification of relevant considerations. The Court was dealing with a case of alleged reduction in rank and it touched upon a variety of considerations that it deemed relevant.²⁰ The Court implied that the facts of the case had to be viewed in light of a wide range of relevant factors (not just the objective proposed by the government) and it chose not to emphasise the limited comparison it undertook with those "similarly situate[d]". As it happens, this same lack of emphasis on the comparative element of equality may be seen in a range of early arbitrariness cases (alongside variable

¹⁸ n 10, at para 85.

¹⁹ *ibid*.

²⁰ *ibid*, at para.82-84, 87-93 (considering the relative competence of the government in determining the nature and responsibilities of posts, fixity in the status of posts, the political neutrality of civil servants, the confidence of ministers in senior bureaucrats, administrative exigencies, and equivalence in pay, and further finding that extraneous reasons like hostility and *mala fides* were unproven).

concern for the government's selection of objectives). For example, *R.D. Shetty*,²¹ *Ajay Hasia*,²² and *Nergesh Meerza*²³ involved comparative elements that the Court did not concern itself with, while *K. Nagaraj*²⁴ and *Kumari Srilekha Vidyarthi*²⁵ did not involve comparisons because they were concerned with measures affecting all members of a seemingly incomparable class.²⁶

Courts then considered the applicability of the doctrine to forms of state action other than administrative action. The Court in *Indian Express* found that “a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution”, and it differentiated such failures from ordinary unreasonableness.²⁷ *Khoday Distilleries (II)* assessed subordinate legislation on the basis of whether it was “manifestly arbitrary or wholly unreasonable” i.e. where there was “self-evident disproportionality” between the object to be achieved and the rules under review.²⁸ These judgments constrained the ordinary free-flowing standard of “relevance” or reasonableness under the doctrine and required that subordinate legislation be invalidated only if it failed to account for especially sensitive or significant interests (“very vital facts”) or if its unreasonableness was obvious and incontrovertible (“manifest” and “self-evident”). *Om Kumar* similarly distinguished between the situations when different tests should be employed: it found that the reasonable classification test was applicable where fundamental rights were involved and the arbitrariness test in other instances.²⁹ It also equated the former with a test of “proportionality” while it equated the latter with *Wednesbury* unreasonableness.³⁰

²¹ *R.D. Shetty v. International Airport Authority of India*, (1979) 3 SCC 489.

²² *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

²³ *Air India v. Nergesh Meerza*, (1981) 4 SCC 335, at paras.82-83, 97-101; See also, Atrey and Pillai, *Supra* 6.

²⁴ *K. Nagaraj v. State of Andhra Pradesh*, (1985) 1 SCC 523. The judgment requires that a government's premise for adopting a measure should be one that “has been accepted as fair and reasonable in comparable situations” (at para.8). Given the facts of the case, this may be read to impliedly permit comparisons with hypothetical groups where no similarly situated groups exist at the time of adjudication.

²⁵ *Kumari Shrelekha Vidyarthi v. State of Uttar Pradesh*, (1991) 1 SCC 212. While remaining non-comparative, the case does assess the exercise of the power to appoint counsel on the standard of the objective for which the power has been conferred on the government (at para 44).

²⁶ *Khaitan* (n 4) (noting this non-comparative element to the arbitrariness doctrine in labelling it “non-comparative unreasonableness”). The permissibility of such non-comparative analysis has been stated in so many words in *A.L. Kalra v. Project and Equipment Corp.*, (1984) 3 SCC 316, at para.19 (“One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment.”) (Cited approvingly in *Shayara Bano* (n11) at para 69).

²⁷ *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641, at para78.

²⁸ *Khoday Distilleries v. State of Karnataka*, (1996) 10 SCC 304, at para19.

²⁹ *Om Kumar v. Union of India*, (2001) 2 SCC 386, at paras 42-43, 47, 62-64, 66-67.

³⁰ *ibid*, at paras 32, 66-67.

Eventually, the Supreme Court began to explicitly strike down plenary legislations on the ground of arbitrariness. There appear to be two kinds of cases in which this happened. The first category involves forms of inconsistency between prior and later legal regimes. For example, the acquisition of a horse-racing club in public interest was struck down in *K.R. Lakshmanan* given that the government had maintained a consistent policy prohibiting horse-racing as a form of gambling.³¹ The decisions in *K. Shyam Sunder*³² and *A.P. Dairy Development Corporation Federation*³³ did not turn on similar findings of inconsistency but instead on a kind of hostility towards amendments that withdraw benefits protected under the original unamended laws. In the second category of cases, provisions were struck down seemingly because they imposed unreasonable constraints on certain classes of persons in their relations with distinct, rivalrous classes. In *Malpe Vishwanath Acharya*, the Court struck down outdated rent control provisions that required landlords to impose a standard rent without regard to changes in the value of money and the costs of maintenance over time.³⁴ In *Mardia Chemicals*, the Court invalidated provisions requiring a borrower to deposit 75% of the sum claimed to be under default before any appeal against a decision made in favour of the creditor.³⁵ These cases didn't involve equality between persons similarly situated at all, but instead seemed to involve questions of distributive justice in relation with classes whose interests conflicted.³⁶

2.1.2. *The Many Contortions of Shayara Bano*

One can thus observe that judicial engagement with the arbitrariness test came to revolve around the question of its applicability to subordinate and plenary legislation. The *Shayara Bano* judgment in 2017 sought to confirm that a particular variation of the arbitrariness doctrine would be applicable in the review of plenary legislations. The concept of “manifest

³¹ *K.R. Lakshmanan v. State of Tamil Nadu* (1996) 2 SCC 226

³² *State of Tamil Nadu v. K Shyam Sunder*, (2011) 8 SCC 737

³³ *A.P. Dairy Development Corpn. Federation v. B. Narasimha Reddy*, (2011) 9 SCC 286

³⁴ *Malpe Vishwanath Acharya v. State of Maharashtra*, (1998) 2 SCC 1

³⁵ *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311

³⁶ *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1 and *In re: Natural Resources Allocation*, (2012) 10 SCC 1 involved what may be considered a combination of questions related to irrationality and distributive justice. The Court was directly concerned in these cases with the fair distribution of public resources amongst rival claimants and while a classificatory selection process was involved, the Court chose to review the processes against a standard of arbitrariness viewed as a protection against abuse and irrationality. The irrationality here, however, was different from the *K.R. Lakshmanan* variety. *Lakshmanan* raised questions of inconsistency between public reasons, but these cases touched upon a conception of irrationality as *absence* of public reasons (similar to the ruling in *Kumari Srilekha Vidyarthi* (n 25)).

arbitrariness” that had earlier been applied to subordinate legislations was extended to plenary legislations. A key passage of Nariman and Lalit, JJ.’s opinion defined manifest arbitrariness by the legislature as acts carried out “capriciously, irrationally and/or without adequate determining principle”, as well as acts that were “excessive and disproportionate”.³⁷ However, the judgment is neither persuasive regarding the test’s applicability to plenary legislations, nor regarding the logic of its structure and content. Arguably, a fixation with conclusively answering the question of applicability resulted in reduced concern for how the content of the test needed to meaningfully correspond to the nature of the State action and the branch of government taking the action.

The opinion confronted previous rulings that had held the doctrine to be inapplicable to plenary legislation and traced their provenance back to *McDowell*.³⁸ It then proceeded to outline how *McDowell* was *per incuriam* because it had failed to account for the judgments in *Ajay Hasia* and *K.R. Lakshmanan*, failed to recognise that substantive due process had been incorporated into Article 14, viewed fundamental rights through the outmoded theory of “watertight compartments”, was deferential to parliamentary wisdom even on questions of constitutionality, and considered proportionality-based tests to have doubtful application in India though it supposedly had always been used by Indian courts.³⁹

However, these claims suffer from notable infirmities that may each be considered in turn. *Shayara Bano* makes much of a particular passage in *Ajay Hasia* that seems to allow for invalidation under Article 14 “[w]herever ... there is arbitrariness in State action whether it be of the legislature or of the executive or of an “authority” under Article 12 ...”⁴⁰ While pouncing on this passing reference to arbitrariness in actions of the legislature, the opinion glosses over the context of the reference. Immediately before referring to the possibility of arbitrariness by legislatures, *Hasia* was quite plainly discussing how the reasonable classification test was actually only a “judicial formula for determining whether the legislative or executive action in question is arbitrary”⁴¹ and, in this context, the judgment’s reference to arbitrariness in

³⁷ n 11, at para.101

³⁸ *State of Andhra Pradesh v. McDowell & Co.*, (1996) 3 SCC 709

³⁹ n 11, at paras.73-87

⁴⁰ *Ajay Hasia* (n 22), at para.16; *Shayara Bano* (n 11), at paras.70, 73

⁴¹ n 22, at para.16. Similarly, *K.R. Lakshmanan* may have struck down a law on the basis of “arbitrariness”, but the same paragraph also speaks of the law serving “no public purpose”, suggesting that its idea of arbitrariness is linked with a form of review of legislative objects (a form of review not traditionally or explicitly linked to the arbitrariness doctrine) (*K.R. Lakshmanan* (n 31), at para.46; *Shayara Bano* (n 11), at paras. 71, 73). It is

legislative action should have been read as a reference to applications of the reasonable classification test.

McDowell had also rejected the application of the arbitrariness doctrine to actions of legislatures because it would amount to recognising “substantive due process” as a ground of challenge. *Shayara Bano* disputed this by relying on a series of judgments that had derived a conception of substantive due process by applying principles of Article 14 to Article 21 and had torn down the “watertight compartments” theory under which different fundamental rights were treated as mutually exclusive concepts.⁴² This understanding of fundamental rights jurisprudence is correct, but all it means is that a more robust conception of reasonableness stands extended from Article 14 to Articles 19 and 21. At best, these would only make substantive due process relevant where fundamental freedoms are at stake and not otherwise.⁴³ *Shayara Bano* attempted a similar manoeuvre in relation with *McDowell*’s rejection of “proportionality” by relying on *Om Kumar*, a judgment that claimed to show that proportionality had always been applied by Indian courts. However, *Om Kumar* explicitly characterised the reasonable classification test (and not a distinct arbitrariness test) as the proportionality-based test in Article 14.⁴⁴ *Shayara Bano* somehow managed to quote this passage while failing to recognise the obvious contradiction with its own ruling on arbitrariness.⁴⁵ Finally, *McDowell*’s concerns that an arbitrariness test would involve courts sitting in judgment over legislative wisdom were dismissed by saying that such concerns are immaterial when a question of constitutionality is involved.⁴⁶ But this is circular reasoning

disingenuous to rely on *Lakshmanan* as an authority on the applicability of the doctrine to legislation without accounting for how it was applied.

⁴² n 11, at paras.74-84

⁴³ The opinion also correctly refutes *McDowell*’s reading of *Mithu v. State of Punjab*, (1983) 2 SCC 277 by recognising that the latter accepted a challenge on arbitrariness based on Article 21 along with Article 14, and not 21 alone (paras.77, 79-83). However, *Mithu* doesn’t advance Nariman and Lalit JJ.’s distinct conception of arbitrariness given that it turned at best on the logic of reasonable classification, containing comparisons between relevant classes and references to a “valid basis for classifying persons”, absence of “rational distinction”, and absence of “nexus with the object of the statute” (paras.10 and 13).

⁴⁴ n 29, at para.32; *Om Kumar* was also strictly concerned with the review of administrative action and not legislations (paras.32, 58, 66-67).

⁴⁵ n 11, at para.86. *Om Kumar*’s equivalence of existing fundamental rights adjudication with a conception of “proportionality” is itself highly doubtful given our current technical understanding of proportionality tests. See, Khaitan, n 7, 181 (referring to the equivalence drawn by *Om Kumar* as “simply incorrect”); Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’, (2020) 3(2) University of Oxford Human Rights Hub Journal 55, at 63-64, fn.41.

⁴⁶ *McDowell*, n 38, at para.43; *Shayara Bano*, n 11, at para.85

given that the judgment in *McDowell* clearly had a different view regarding how constitutionality is to be assessed.⁴⁷

McDowell was concerned that certain ways of interpreting Article 14 would altogether subsume every aspect of legislative policymaking within judicial review. If *Shayara Bano* had at all deigned to account for this concern, it would have done far more to formulate a test that distinguished in some meaningful manner between the legislative and judicial functions. Instead, it identified four impossibly broad and vague vices: caprice, irrationality, inadequacy of determining principle, and disproportionality.⁴⁸ These words are loose enough that they may be read to cover the entire field of legislative choice, from comparative and non-comparative aspects of legislative provisions to the individual motivations of legislators, from the prioritisations implicit in policy choices to the different modes of principled and instrumental rationality that governments may employ, from the breadth of the governance problem sought to be addressed to the magnitude of the measure chosen to address it. In forwarding this formulation, *Shayara Bano* did not seem to incorporate, elaborate upon, or adapt alternative formulations of “manifest arbitrariness”,⁴⁹ nor did it note that the formulation chosen by it had been distinguished in another judgment that it had relied on itself.⁵⁰ Instead, it sought to bluntly extend a cherry-picked test for the review of subordinate legislation to the review of plenary legislation with the astonishing and entirely unsupported statement that “there is no rational distinction between the two types of legislation when it comes to this ground of challenge.”⁵¹ It made such a statement despite the assiduous distinctions drawn between the two kinds of State action in judgments that it relied on itself.⁵²

It is difficult to embrace *Shayara Bano* as the resolution to a decades-long controversy that it claims to be.⁵³ The judgment has by now been confirmed and deployed in a variety of cases

⁴⁷ n 38, at para.43 (“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.”)

⁴⁸ n 11, at para.101

⁴⁹ The formulation seems to owe its content to *Sharma Transport v. Government of Andhra Pradesh*, (2002) 2 SCC 188 (para.25) and seems to ignore the formulations in *Indian Express* (n 27) and *Khoday Distilleries (II)* (n 28).

⁵⁰ *A.P. Dairy*, (n 33) (indicating that manifest arbitrariness required a form of “substantive unreasonableness” in the statute that went beyond mere caprice, irrationality, inadequacy of determining principle etc. (para.29)).

⁵¹ n 11, at para.101

⁵² *Indian Express* (n 27), at para.75 (“A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature.”) (reiterated in *Khoday Distilleries (II)* (n 28), at para.13).

⁵³ The application of the manifest arbitrariness test in *Shayara Bano* itself is difficult to follow (paras.102-104). It struck down a law that recognised a husband’s right to divorce his wife in a capricious and irrevocable manner.

that may not be discussed here for a lack of space,⁵⁴ except to tentatively note that these cases either employ the reasonable classification test to arrive at findings of arbitrariness, trot out one or more of the four vices listed at paragraph 101 of *Shayara Bano* without elaborating on their meaning, or fail to rely on *Shayara Bano*'s formulation at all. It will soon be 50 years since *E.P. Royappa* was decided. It would not be an exaggeration to say that if we still cannot predict with any certainty when an action would be liable to be struck down as arbitrary, we should seriously ask ourselves what the reason for this uncertainty is and what costs we bear if it is to continue to weigh down our right to equality.

2.2. Substantive Equality and the Search for Special “Effects”

Alongside the manifest arbitrariness test, a second green shoot of equality jurisprudence is the newly invigorated conception of “substantive equality”, a vision of equality that emphasises the recognition and material accommodation of disadvantages. This vision operates asymmetrically to target instances of social dominance, subordination and discrimination. While a principle of substantive equality had earlier been emphasised in cases related to affirmative action, the current doctrinal renewal additionally highlights its role in relation with the non-discrimination provisions of the Constitution, that is to say the provisions prohibiting discrimination on the basis of certain listed grounds (Articles 15(1), 16(2) and 29(2)). The developments under this renewal are outlined and discussed below. This scrutiny is essential in the Indian context because the lack of attention given to non-discrimination has severely impeded the meaningful realisation of substantive equality. The discussion below may appear to be a sharp deviation from the one above, and this is natural given that the general right to equality is distinct in many ways from the right against discrimination. However, proposals subsequently made in Part 3 of this article are aimed at reconciling these differences.

But while the right under scrutiny seemed to permit arbitrary actions by private persons, it did not automatically flow that the right itself was arbitrary because the legislature may not have been capricious in granting the right. Unlike in *Ajay Hasia*, *R.D. Shetty*, or the 2012 *2G Spectrum Case*, the arbitrary action empowered is private action and not the action of a State body. Some further elaboration on the nature of the interests involved was needed, surely, to distinguish the matter from other instances where the law permits arbitrary private action (e.g., contract law)?

⁵⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800; *Navtej Singh Johar* (n 12); *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1; *Harsh Mander v. Union of India*, 2018 SCC OnLine Del 10427; *Joseph Shine* (n 12); *Hindustan Construction Co. Ltd. v. Union of India*, AIR 2020 SC 122; *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17; *Indian Hotel and Restaurant Association (AHAR) v. State of Maharashtra*, (2019) 3 SCC 429; *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2020) 8 SCC 531; *Manish Kumar v. Union of India*, WP(C) 26 of 2020 (Supreme Court)

2.2.1. Text as the Enemy of Reality

Since the adoption of the Indian Constitution, its text has forthrightly acknowledged the need to prevent the subordination of members of disadvantaged groups.⁵⁵ Initially, the Constitution's sensitivity to the existence of social disadvantages and the need to ameliorate these disadvantages was constrained by its own text, even in the context of reservations. While the law on reservations certainly yielded the earliest instances of recognition of more capacious ideas of substantive equality,⁵⁶ the Constitution's recognition of specific instances of these ideas ironically led courts towards a vision of equality in which substantive elements were restricted only to those instances. This is in evidence in the saga regarding whether Articles 15(4) and 16(4) are exceptions or facets of the more general clauses of those provisions.⁵⁷ But these dynamics only emphasise the need to clarify the relation between the broader meanings of non-discrimination and substantive equality. The root of the problem lies not in the interpretation of the affirmative action clauses, but in the interpretation of the general non-discrimination clauses: Articles 15(1), 16(2), and 29(2). And the root of the problem within these clauses lies in a single word, the word "only".

Each non-discrimination clause prohibits discrimination "on grounds only of" religion, race, caste, and other similar characteristics.⁵⁸ Much has already been written about the unfortunate role played by the word "only" in these clauses.⁵⁹ Generally speaking, courts have read the word to allow governments a very peculiar mode of justification for discriminatory actions. Without the word "only", the prohibition on discrimination would be applicable as soon as a characteristic like religion, race, caste etc. was involved in some meaningful way in a particular government measure. What courts have instead done is to read the word "only" to limit the prohibition to only those instances of discrimination where a listed characteristic was the direct and exclusive motivation of the government for taking the measure. This allows governments

⁵⁵ Ahmed (n 1), 134-135; Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) 13.

⁵⁶ See, for example, S.2, Constitution (First Amendment) Act, 1951, and *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310

⁵⁷ Bhatia (n 4) Chapter 3

⁵⁸ The lists of characteristics in Articles 15(1), 16(2), and 29(2) have differences, and a textualist reading of these differences may suggest that they were formulated with special care to consciously exclude certain characteristics in certain contexts. See, for example, *D.P. Doshi v. State of Madhya Bharat*, AIR 1955 SC 334, para.5; *Dr. Pradeep Jain v. Union of India*, (1984) 3 SCC 654, para.6 (in the context of residence not being a ground listed under Article 15(1))

⁵⁹ Kannabiran (n 55) Chapter 10; Khaitan (n 7) at 192-194; Atrey (n 6); Bhatia (n 4), at 7-13.

to justify even the most gross forms of discrimination by declaring that they were not driven by a motive to discriminate and considerations of religion, race, caste etc., as the case may be, were not the *sole* or *exclusive* considerations.

This has yielded a set of absurd results. In a range of instances where sex discrimination has been alleged and where sex has constituted an *explicit* ground of classification in the text of the impugned measure, discrimination has been excused because of the involvement of some or the other additional consideration such as property-ownership and financial capacity,⁶⁰ the development of separate educational facilities,⁶¹ the dynamics between women and other family members in an Indian household,⁶² the hazards of proximity with male criminals,⁶³ gendered roles in the initiation of sexual relationships,⁶⁴ and pre-existing employee categories along with hiring costs in the operation of an airline business.⁶⁵ A basic observation to start with is that at least some of these instances of “justification” proceed on the erroneous premise that a charge of sex discrimination can be avoided by instead relying on social conditions attached to gender.⁶⁶ Some early judgments were naturally unimpressed by this impoverished understanding of sex discrimination.⁶⁷

The approach employed in relation to sex discrimination has also been applied to other forms of discrimination. Article 16(2) prohibits discrimination on the ground only of descent, and this has been relied on to prohibit hereditary offices.⁶⁸ But the Supreme Court has upheld employment granted to dependents of deceased employees because such appointments were not simply on the basis of descent but instead on compassionate grounds to meet “well-recognised contingencies” such as the death or medical invalidation of the breadwinner in a

⁶⁰ Mahadeb Jiew v. Dr B.B. Sen, AIR 1951 Cal 563

⁶¹ Anjali Roy v. State of West Bengal, AIR 1952 Cal 825

⁶² M.I. Shahdad v. Mohd. Abdullah Mir, AIR 1967 J&K 120

⁶³ R.S. Singh v. State of Punjab, AIR 1972 P&H 117

⁶⁴ Yusuf Abdul Aziz v. State of Bombay, AIR 1954 SC 321; Sowmithri Vishnu v. Union of India, (1985) Supp SCC 137

⁶⁵ *Nergesh Meerza* (n 23). This interpretative approach has also been affirmed in cases that have salutary effects on the position of women, e.g., *Dattatraya Motiram More v. State of Bombay*, AIR 1953 Bom 311 and *Government of Andhra Pradesh v. P.B. Vijaykumar*, (1995) SCC 4 520.

⁶⁶ This seems to have been noticed in *Walter Alfred Baid v. Union of India*, AIR 1976 Del 302. See also, Indira Jaising, ‘Gender Justice and the Supreme Court’ in B.N. Kirpal et al (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford India Paperbacks, 2000) 294.

⁶⁷ *Punjab Province v. Daulat Singh* [1946] FCR 1; *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561; *Rani Raj Rajeshwari v. State of Uttar Pradesh*, AIR 1954 All 608; *Radha Charan Patnaik v. State of Orissa*, AIR 1969 Ori 237; *Walter Alfred Baid*, *ibid*

⁶⁸ *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh*, AIR 1961 SC 564

family.⁶⁹ The Court explicitly relied on the narrow reading of “only” and applied a standard of reasonableness to account for what it considered exceptional circumstances calling for a departure from the prohibition in Article 16(2).⁷⁰

The same interpretation of non-discrimination has also been applied in the context of discrimination on the ground of religion. Key early cases on statutes dealing with personal laws remarked that these did not discriminate “only” on the ground of religion because they were additionally based on differences between the communities in texts, backgrounds, practices and levels of preparedness for social reform.⁷¹ Later, in *R.C. Poudyal*, the Supreme Court was considering the validity of a provision in a constitutional amendment reserving a seat in a legislative body exclusively for a member of a religious institution to be nominated by the institution itself.⁷² In adjudicating on a constitutional amendment, the Court was actually determining what aspects of the Constitution’s non-discrimination guarantee (under Articles 15(1) and 325) formed part of its basic structure. The majority on the bench upheld the provision, ruling that the religious institution in question (the Buddhist “Sangha”) was “not merely a religious institution” and had historically also been a political and social institution in Sikkim.⁷³ This reasoning did not go unchallenged and the dissenting opinions warned against the threats raised by separate electorates.⁷⁴ Such a mode of interpretation had also previously been rejected in *Thakur Pratap Singh*, where the Court considered an exemption granted to the Muslim and Harijan inhabitants of certain villages from contributing to the costs of stationing additional police forces there.⁷⁵ The government argued that this was not exclusively motivated on religious or caste grounds but on the additional consideration that the exempted communities had not engaged in the conduct necessitating police reinforcements. The Court rejected this justification by emphasising that the innocence or guilt of an entire community could not be presumed without being discriminatory.⁷⁶

⁶⁹ *V. Sivamurthy v. State of Andhra Pradesh*, (2008) 13 SCC 730, at para.18

⁷⁰ *ibid*, at para.9. Similarly, *State of Haryana v. Ankur Gupta*, (2003) 7 SCC 704 refers to such compassionate appointments as “reasonable and permissible” (para.6)

⁷¹ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, paras. 10-12; *Srinivasa Iyer v. Saraswathi Ammal*, AIR 1952 Mad 193.

⁷² *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324

⁷³ *ibid*, at para.137

⁷⁴ The dissenting opinions in *Poudyal* were clear about the “true identification” of the religious character of the Sangha, and emphasised the potential for “mischief” and the “adverse impact” on secularism arising from the impugned provision (*ibid*, at paras.29-30, 206-207).

⁷⁵ *State of Rajasthan v. Thakur Pratap Singh*, AIR 1960 SC 1208

⁷⁶ *ibid*, at paras.7-9. The breadth of the prohibition on religious discrimination was also recognised (without application) in *Nain Sukh Das v. State of Uttar Pradesh*, AIR 1953 SC 384, at para.4.

The word “only” again plays an interesting role in the context of discrimination in admissions to minority educational institutions. In *St. Stephen’s College*, the Court rejected an argument that preference to minority candidates in admissions to minority institutions was not solely on the basis of religion but because of the candidate belonging to a minority community.⁷⁷ While it clarified that this amounted to discrimination on the ground of religion and was prohibited under Article 29(2), it sought to balance the prohibition in that provision with the right of minorities to administer their own educational institutions under Article 30(1).⁷⁸ In *T.M.A. Pai*, the Court not only departed from *St. Stephen’s* on the question of where the appropriate balance lay, but also insisted on the significance of the word “only” in striking the balance given that preferential admissions were primarily aimed at preserving the minority character of the institution.⁷⁹

Finally, this judicial fixation with what may be called a “pure” theory of discrimination has also made its way into the law on reservations. Despite the existence of specific clauses authorising reservations in favour of backward classes, the prohibition on discrimination on the ground only of caste in Articles 15(1), 16(2) and 29(2) has been understood to prevent the identification of backward classes solely on the basis of caste, though it is permitted as a relevant factor for such determination.⁸⁰ Courts have insisted that the identification method must involve additional considerations such as occupation and poverty, or else the remedial measure becomes one that is motivated solely by caste. They have also insisted that the prohibition on caste discrimination does not cover discrimination on the ground of “Scheduled Caste”.⁸¹ The prohibition has also been relied on to require that any caste-based identification of a backward class mandatorily exclude all affluent or economically advanced members of the caste (the “creamy layer” rule).⁸² Where governments treat affluence as irrelevant, courts characterise the consequent identification as discrimination solely based on caste. At the same time, it is crucial to keep in mind that not all constraints on the power to grant reservations

⁷⁷ *St. Stephen’s College v. University of Delhi*, (1992) 1 SCC 558, at para.79

⁷⁸ *ibid*, at paras.79-102

⁷⁹ *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481, at para.149

⁸⁰ *Indra Sawhney v. Union of India*, (1992) 3 Supp SCC 217, at paras.784 (Jeevan Reddy, J), 418 (Sawant, J.), 323(2) (Thommen, J.); *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, at paras.162-163 (Balakrishnan, C.J.), 351, 358(7) (Pasayat and Thakker, JJ.), 650, 664 (Raveendran, J.)

⁸¹ *N.M. Thomas* (n 56), at paras.43 (Ray, C.J.), 82 (Mathew, J.) (“The word ‘caste’ in Article 16(2) does not include “scheduled caste”), 135 (Krishna Iyer, J.), 169 (Fazal Ali, J.).

⁸² *Indra Sawhney v. Union of India*, (2000) 1 SCC 168 (*Indra Sawhney* (II)), paras.8, 65; *Ashoka Kumar Thakur* (n 80), at paras.170-171 (Balakrishnan, C.J.), 659, 664-65 (Raveendran, J.)

stem from judicial hostility towards “pure” caste discrimination. Even where caste ceases to be the sole motivating factor and is required to be considered alongside additional factors, courts have found that reservations as a whole can become discriminatory where the proportion of the resources reserved is more than a certain maximum limit (the “50% ceiling”).⁸³ This is important to note because it suggests that courts have been willing to prohibit “discrimination” which is not “pure” i.e., not *solely* motivated by a listed characteristic. It is unsurprising that this recognition has happened in relation with the rights of members of forward castes.

This theory of justification thus only prohibits “pure” forms of discrimination but allows for measures as long as the government can adulterate its motivations with “additional” considerations. From the discussion above, it should be clear that though each non-discrimination clause in the Constitution appears to treat all listed characteristics alike and offers a uniform mode of justification,⁸⁴ the results can be markedly different depending on the nature of the discriminatory act and the “additional” consideration supporting it. While benign outcomes have sometimes followed, these forms of justifications have generally served to narrow the range of discriminatory acts prohibited. In reality, a wide range of discriminatory acts may be motivated by more than one consideration, and even where a government is motivated by bare hostility towards a group, justifications of the type described above can easily be contrived to evade scrutiny. This means that for any non-discrimination guarantee in our Constitution to be meaningful, it must supply a theory of justification that better accounts for the social reality in which each kind of discrimination operates.

2.2.2. Stereotypes and Structures: Two Types of Reality

⁸³ See, particularly, *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, at paras.48 and 120 (“[A] numerical benchmark is the surest immunity against charges of discrimination.”) and *Dr. Jaishri Laxmanrao Patil v. The Chief Minister*, 2021 SCC OnLine SC 362, at para.515 (Ravindra Bhat, J.). See also, *Indra Sawhney* (n 80) at para.294, 299 (Thommen, J.) (appearing to treat the 50% ceiling as a method of narrow-tailoring protective discrimination). These references aside, courts have been less specific about the precise source of the 50% ceiling, referring broadly to a principle of reasonableness in accounting for the rights and interests of forward classes (e.g., *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649, at paras.31, 34), antipathy towards protective discrimination becoming something more than an exception or special provision (e.g., *Indra Sawhney* (n 80), at paras.618 (Sahai, J.), 808 (Jeevan Reddy, J.)), or antipathy towards proportional representation (e.g., *Indra Sawhney* (n 80), at paras.505 (Sawant, J.), 613 (Sahai, J.), 807 (Jeevan Reddy, J.)). Arguably, a charge of “reverse discrimination” underlies these justifications as well.

⁸⁴ As discussed, however, the interpretation of “only” in the non-discrimination clauses has not been consistent. What is more, the reasonable classification test has inexplicably featured at times as the appropriate test even in relation with non-discrimination e.g., *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125, at para.33; *Indra Sawhney* (n 80), at para.741 (Jeevan Reddy, J.), and *Jaishri Laxmanrao Patil* (n 83) at para.161 (Bhushan, J.)

A range of cases have departed from the paradigm described above by bringing in more progressive interpretations of the prohibition on discrimination. A prominent point of departure is the case of *Anuj Garg*, in which the Supreme Court was considering a law that prohibited women from working in establishments where liquor was served.⁸⁵ The judgment rejected the paternalistic suggestion that discrimination against women would be permissible where it was claimed to be in their own best interests. The Court considered practical difficulties in ensuring the safety of women as serious⁸⁶ and affirmed that there was no absolute bar to sex-based classification,⁸⁷ but it insisted that measures aimed at protecting women should be shown to be both necessary for such protection and respectful of women's rights to privacy and employment,⁸⁸ and not instead animated by an oppressive and stereotypical understanding of gender roles.⁸⁹ The Court thus placed the burden on the government⁹⁰ to show that its protective discrimination was pursuant to a "compelling State purpose" that was "justified in principle" and "proportionate in measure".⁹¹ It applied a strict standard of scrutiny to excuses on the supposed "best interests" of women, noting that practical difficulties in law enforcement did not "ontologically" rise to the level of justifications.⁹² The mode of justification proposed in *Garg* was, however, specifically aimed at instances of protective discrimination, for which the Constitution provides explicit support in the form of Article 15(3). It remains unclear whether this can, on its own, confirm the appropriate level of scrutiny in contexts other than protective sex discrimination.

Further advancement in the law on sex discrimination came in the form of the Supreme Court's recognition of a range of rights held by transgender persons. In recognising that trans people were also protected from discrimination under provisions like Articles 15 and 16, the Court clarified that the discrimination on the ground of "sex" in such provisions included discrimination on the ground of gender identity (and not just biological sex).⁹³ This extension of the prohibition on sex discrimination to gender discrimination should have the positive effect of casting doubt on those judgments mentioned previously in this Part where discrimination

⁸⁵ *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1. For a discussion on the significance of the case, see Bhatia (n 4), Chapter 1.

⁸⁶ n 85, at para.20

⁸⁷ *ibid*, at para.21

⁸⁸ *ibid*, at para.30-37

⁸⁹ *ibid*, at paras.41-45, 47

⁹⁰ *ibid*, at para.21

⁹¹ *ibid*, at paras.46-47, 49-51

⁹² *ibid*, at para.20

⁹³ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, at paras.66, 82

was condoned because it was not solely on the ground of sex but on the grounds of gendered social structures built around sex.⁹⁴

This was followed up with an explicit but qualified rejection of the narrow approach to non-discrimination in *Navtej Singh Johar*, where the Supreme Court considered the constitutionality of a provision criminalising “carnal intercourse against the order of nature”. *Johar* was at once an opportunity to clarify the relation between manifest arbitrariness and non-discrimination and an opportunity to improve upon the old theory of discrimination. Findings of arbitrariness in the impugned law relied on *Shayara Bano* and rested on the law’s failure to account for consensual behaviour,⁹⁵ its excessiveness or disproportionality,⁹⁶ and its irrational and unprincipled nature.⁹⁷ On the other hand, the reasoning on discrimination was not unanimous. One judge seemed to refer to the point passingly at best,⁹⁸ while two others employed entirely different interpretative methods. Chandrachud, J.’s explained how formalistic interpretations of Article 15 had rendered its guarantee meaningless and held that the prohibition was actually against discrimination that was grounded in and perpetuated stereotypes related to any prohibited ground.⁹⁹ He then supplemented this anti-stereotyping principle with additional accounts of how discrimination had to be identified not just on the basis of the government’s objectives in adopting a measure but also on the basis of the disproportionate impact it could have, even if it appeared neutral on the face of it.¹⁰⁰ Finally, he relied on an intersectional theory of discrimination to hold that discrimination based on sexual orientation was linked to sex discrimination because it perpetuated stereotypical notions of sex and gender roles.¹⁰¹ On the other hand, Malhotra, J. read Article 15(1) as embodying a broader principle whose prohibitions extended beyond discrimination on grounds explicitly listed there to discrimination on any *analogous* ground that could undermine an individual’s personal autonomy.¹⁰²

⁹⁴ This may depend on whether one views the prohibition’s extension to gender discrimination as an extension only to gender identities or additionally to discrimination resulting from the assignment of gendered social roles. Perhaps, this depends on the extent to which gender identities interact with and depend on gender roles.

⁹⁵ *Navtej Singh Johar* (n 12) at paras.252, 254-255 (Mishra, C.J.)

⁹⁶ *ibid*, at paras.353, 366 (Nariman, J.); 417, 521 (Chandrachud, J.) (implying a proportionality-based logic given his focus on liberty interests).

⁹⁷ *ibid*, at paras.417-419, 423 (Chandrachud, J.), 637.10-11 (Malhotra, J.).

⁹⁸ *ibid*, at para.367 (Nariman, J.)

⁹⁹ *ibid*, at paras.429-440 (Chandrachud, J.) (overruling contrary findings in *Mahadeb Jiew* and *Nergesh Meerza*)

¹⁰⁰ *ibid*, at paras.438-446 (Chandrachud, J.)

¹⁰¹ *ibid*, at paras.448-453 (Chandrachud, J.)

¹⁰² *ibid*. at paras.638-639 (Malhotra, J.)

Johar thus produced a fractured reading of Article 15 and no one opinion can be considered binding precedent regarding the provision's meaning. Chandrachud, J. sallied forth alone and unaccompanied to tackle the decades-old curse of "only" on India's anti-discrimination jurisprudence and, by all accounts, he continues alone. In *Joseph Shine*, the Court considered the validity of an explicitly sex-discriminatory provision criminalising adultery only by men, and once again it relied on the right to privacy coupled with ambiguous applications of the manifest arbitrariness test.¹⁰³ On discrimination, Nariman, J. in a single sentence found a violation of Article 15(1) because the impugned provision treated women as chattel.¹⁰⁴ Malhotra, J. struck down the provision on both Articles 14 and 15 by applying the reasonable classification test and making a brief finding that women were discriminated against on the basis of sex alone as a result of their being barred from prosecuting their husbands.¹⁰⁵ On the other hand, Chandrachud, J. entered into a wide-ranging discussion regarding the need to avoid a formal reading of the provision as merely involving under-inclusiveness,¹⁰⁶ and to turn instead to an enquiry based on substantive equality that is sensitive to social realities and the impact of legal rules, particularly in terms of whether they contributed to the subordination of disadvantaged groups in the context of stereotyping and structural inequality.¹⁰⁷ Even after *Joseph Shine*, Chandrachud, J. has, while sitting in division benches, continued to combat gender stereotyping in a series of judgments on permanent commissions for women in the armed forces,¹⁰⁸ culminating in a potent and explicit ruling recognising indirect discrimination (a form of discrimination usually characterised by neutral criteria that fail to account for underlying systemic inequality) and formulating a carefully-structured effects-based test to address it.¹⁰⁹

There is no doubt that the recognition of these facets of equality jurisprudence constitute vital advancements to which India has arrived all too late. It remains a matter of concern, however, whether these advancements are adequately supported by a broader judicial consensus and a firm jurisprudential foundation. Why wasn't Chandrachud, J. accompanied, in his rulings in *Johar* and *Shine*, regarding the need to abandon the narrow interpretation of discrimination? Was it simply because the other judges were not progressive enough to realise the significance

¹⁰³ *Joseph Shine*, at paras.29-30 (Misra, C.J.), 103-104 (Nariman, J.), 162, 168-169 (Chandrachud, J.)

¹⁰⁴ *ibid.*, at para.105 (Nariman, J.)

¹⁰⁵ *ibid.* at paras.272, 272.1, 272.4 (Malhotra, J.)

¹⁰⁶ *ibid.* at paras.122-125 (Chandrachud, J.)

¹⁰⁷ *ibid.*, at paras.171-172, 175-186 (Chandrachud, J.)

¹⁰⁸ *Babita Puniya* (n 12); *Annie Nagaraja* (n 12)

¹⁰⁹ *Lt. Col. Nitisha* (n 12) (borrowing from *Fraser v. Canada*, [2020] SCC 28 (Supreme Court of Canada)).

of the positions he proposed? Can the rationale for adopting substantive equality be strengthened? Answering these questions first requires that we identify a peculiar problem with the narrow interpretation of discrimination discussed previously: it suffers not just from a failure to respect substantive equality but also a failure to respect meaningful formal equality. This is evidenced by the fact that Malhotra, J.'s opinion in *Shine* eschews the substantive equality sledgehammer for the mallet of reasonable classification. The known problem with the formal approach to non-discrimination is that it views the prohibited "grounds" of discrimination as referring to the motivations or reasons for discriminatory treatment and not to factors whose involvement (correlation) causes discriminatory effects.¹¹⁰ Escaping this ordinarily requires just that courts examine allegedly discriminatory measures on the basis of the effects suffered by victims of the discrimination and not on the basis of the motivations of the government. However, many of the provisions excused in India under the narrow interpretation have been excused despite there being strong evidence of discriminatory motivations in the explicit texts of the relevant laws, and challenges to them have instead failed because these motivations weren't *exclusive*. What is important then, is that even if we were to switch from a motivation-based reading to an effects-based one, the plea would still stand that the word "only" had to mean something,¹¹¹ that the effects were not "only" on interests linked to the listed characteristics, and that the effects in relation with other interests justified the relevant measure. In other words, substantive equality does not escape the curse of "only" because it continues to be susceptible to the word's peculiar influence on the nature of justifications that governments can rely on. The Constitution's non-discrimination guarantees suffer not just from a formal conception of equality but also from a specific formal interpretation of the text of the guarantees.

A further question is whether the recent judgments on substantive equality offer any alternative mode of justification for violations of the right against discrimination. At the outset, it is worth noting that some previous judgments seemed to treat any classification on the basis of a listed characteristic as automatically discriminatory, thus suggesting that the non-discrimination

¹¹⁰ Atrey (n 6) at 164-166, 182-183 (differentiating motive-based models and causal models in describing some strategies by which the Indian non-discrimination guarantees can be made effective); Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 160-162, 165-171 (differentiating between causes of a discriminator's action and causes of a victim's suffering in describing a general theory of discrimination law).

¹¹¹ This plea would be based, of course, on the rule of interpretation that no word in a statute should be ignored or read in such a manner as to render it meaningless, redundant, surplus, or otiose. See, generally, on the relative strictness of this rule of construction, John M. Golden, 'Redundancy: When Law Repeats Itself' (2016) 94 Texas Law Review 629.

guarantees are absolute.¹¹² But how does this square with the apparent acceptability of certain forms of classification explicitly based on caste, descent and religion for which no exception clauses have been carved out?¹¹³ Would abandoning the theory of justification underlying the word “only” *make* the non-discrimination guarantees absolute? In Chandrachud, J.’s recent sex discrimination opinions, the prevention of “stereotyping” is prominently forwarded as a basis for developing discrimination law. While it may not be anyone’s case that anti-stereotyping is the sole principle behind discrimination law, even the recent identification of further complementary principles remains undeveloped, hastily smuggling in advanced concepts before the basics have been settled.

Anti-stereotyping has certainly served as a potent remedy against some discriminatory measures because it foregrounds the manner in which oversimplified assumptions regarding groups of persons have continuously disadvantaged them throughout history. In cases like *Johar and Shine*, well-understood stereotypes regarding gendered sexual roles were effectively identified and combated, and the government had no justification to turn to other than stereotyping. And where exclusion has been sought to be justified based on the safety and best interests of women, the Court has noted in *Anuj Garg* how such solutions may perpetuate social stereotypes instead of prioritising the more vital interest that women have in their own autonomy. The language of “stereotyping” can, however, appear less persuasive in other situations. For example, in *Babita Puniya*, an argument was raised that women would have to face greater challenges in the armed forces due to prolonged absence as a result of pregnancy, motherhood and domestic obligations, and the Court dismissed this claim as a “strong stereotype which assumes that domestic obligations rest solely on women”.¹¹⁴ Similarly, an argument that lengthy statutory periods of maternity leave can have negative effects on the economy, the participation of women in the formal sector, and the rule of law¹¹⁵ can also be denounced as perpetuating stereotypes. However, those making such arguments may claim that

¹¹² See, for example *Walter Alfred Baid* (n 66) at paras.7, 10 and *Rani Raj Rajeshwari Devi*, (n 67) at paras.73, 76, 94-96. See also, for what was at best a speculative statement in a separate opinion, *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123, at para.7 (Sastri, C.J.) (“If [unfavourable bias] is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition ...”)

¹¹³ See also, *Lt. Col. Nitisha* (n 12) at para.84 (choosing to distinguish direct and indirect discrimination on the basis of intention and effects instead of justifiability, and thus appearing to suggest that direct discrimination may also be justifiable).

¹¹⁴ *Babita Puniya* (n 12) at paras.68-69 (this claim is listed alongside other far more blatant stereotypical remarks)

¹¹⁵ Shruti Rajagopalan and Alexander Tabarrok, ‘Premature Imitation and India’s Flailing State’ (2019) 24(2) *The Independent Review* 165, 174-176.

there may be more significant strategic and economic interests involved than a single-minded effort to combat stereotypes, or that such interests at least need to be accounted for. Further, the logic of anti-stereotyping may face some challenges in the context of statistically-supported discrimination or rational proxies. The inadequacy of the anti-stereotyping principle may be precisely why, in both *Navtej Johar* and *Lt. Col. Nitisha*, Chandrachud, J. additionally relies on theories related to disparate impact, intersectionality, structural inequality, and indirect and systemic discrimination. Indian discrimination law would surely benefit from a broader foundation in compelling moral reasons to reject certain kinds of generalisations¹¹⁶ and restructure certain kinds of distributions.¹¹⁷

This problem is certainly not as stark in the context of gender discrimination as it is in relation with other prohibited grounds, where stereotypes may often not be pronounced. One abiding issue with Chandrachud, J.'s call to overrule the old theory of discrimination, is that it fails to account for the use of that theory in relation with these other grounds. Indeed, soon after the decision in *Navtej Johar*, Chandrachud, J. himself endorsed the narrow interpretation of non-discrimination in a case on compassionate appointments.¹¹⁸ Further, as discussed, not only does the narrow interpretation form a potential basis for India's personal laws¹¹⁹ and the preservation of the character of minority institutions, but a five-judge bench of the Supreme Court has also

¹¹⁶ Frederick Schauer, *Profiles, Probabilities and Stereotypes* (Harvard University Press, 2003), Chapter 5 (discussing how empirically sound gender-based generalisations may be wrong not only because they might be contingent on cultural biases or because they contribute to the subordination of women, but additionally because of a need to make *compensatory* generalisations regarding the irrelevance of gender-based generalisations). We may also refer to justifications linked to the moral irrelevance of membership in certain groups (Sophia Moreau, 'What is Discrimination?' (2010) 38 *Philosophy and Public Affairs* 143).

¹¹⁷ See, Anca Gheaus, "Gender" in S. Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Oxford University Press, 2018) (arguing that the concept of implicit bias needs more attention than it has received and distinguishing distributive justice from recognition-based or relational justice, but also noting that the latter has an important distributive aspect); Sujit Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 *George Mason Law Review* 145, 156-157 (including rational proxies and statistical discrimination within the concept of "stereotyping"); Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', (2011) 11(4) *Human Rights Law Review* 707, 708-709 (referring to stereotypes as "widely accepted beliefs" and "supposed group characteristics"); Frederick Schauer, 'Statistical (and Non-Statistical) Discrimination' in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017), fn.1 (noting that the term "stereotyping" is ambiguous and is often used to refer only to inaccurate statistical generalisations). My concern here is that excessive reliance on anti-stereotyping can lead doctrine back towards legal tests related to accuracy or instrumental rationality. In any case, anti-stereotyping is often understood only as one aspect of robust theories on substantive equality (see, for example, Sandra Fredman, 'Substantive equality revisited' (2016)14(3) *International Journal of Constitutional Law* 712).

¹¹⁸ *Union of India v. V.R. Tripathi*, (2019) 14 SCC 646, paras. 12-13, citing *V. Sivamurthy* (n 69), and stating that, "Compassionate appointment ... is not founded merely on parentage or descent ..."

¹¹⁹ See, generally on the question, Law Commission of India, Consultation Paper on Reform of Family Law (31 August 2018), <<https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>> accessed 17 June 2021.

effectively treated it as part of the basic structure of the Constitution in *R.C. Poudyal*. To add to this, we must consider the fate of aspects of reservations law that rely on the narrow reading.¹²⁰ Along with the above, we must take account of the fact that inconsistencies will only proliferate further in relation with additional categories and grounds of discrimination such as sexual orientation, gender identity, language, disability, age, place of birth versus place of residence, sub-castes within castes, and even economic class. And finally, exceptions from the non-discrimination guarantees are variously assessed on the basis of reasonable classification, strict scrutiny, and subjective satisfaction tests,¹²¹ and this variable intensity of review would benefit from systematisation.

A resolution to the interlocking problems described requires that the word “only” be imbued with a different meaning from the one it currently has and, to do this, an alternative mode of justification must be offered that can account for the differential standards of scrutiny that need to be applied to different forms of discrimination to regulate the width of the exceptions available in relation with each. In what follows, this is attempted by considering how non-discrimination fits into the general equal protection guarantee and how it relates, along with the manifest arbitrariness test, to a common set of principles underlying the right to equality.

3. Rational Foundations for the Right to Equality

The challenges facing the development of the right to equality in India are formidable because they are old and many-sided. In the discussion above, key problems with recent jurisprudence in both Articles 14 and 15 have been outlined. This Part makes a limited attempt at describing what a solution to these problems could look like. A comparative view of modern equality and discrimination law shows that courts in other jurisdictions have moved past some of the basic issues that Indian law still grapples with, and these perspectives naturally offer attractive avenues for development. While noting this, the discussion that follows offers a distinct vision for the right to equality in India drawing from its existing case-law.

This approach addresses the allegation made in Part 2 of this article: that Indian equality jurisprudence has a tendency to drop everything and start from scratch when faced with

¹²⁰ n 80-83

¹²¹ While the first two have been noted in discussions above, the third test forms part of certain aspects of reservations law (*Indra Sawhney* (n 80) at para.798 (Jeevan Reddy, J.))

difficulties. It also takes seriously the ritual incantation by Indian courts that the general right to equality and the right against discrimination have a common home within the Constitution's Equality Code. The discussion below thus outlines a common set of principles capable of governing both rights without diminishing the richness of the contexts in which each is operationalised. Such a solution would, however, remain inadequate when it comes to the Constitution's non-discrimination guarantees which are additionally constrained by a textual limitation. This final challenge is tackled by offering an alternative interpretative strategy.

3.1. A Comparative View of Comparisons

Most modern comparative accounts regarding the evolution of the right to equality focus on its departure from the confines of formal equality and its recognition of some conception of substantive equality. Formal equality is often associated with the precept "treat like cases alike",¹²² which equates with what is often referred to as the "similarly situated" test.¹²³ This logic has often been repeated in Indian judgments in statements to the effect that only discrimination "among equals" is prohibited¹²⁴ or that "Equality is for equals".¹²⁵ The precept demands that we first identify some form of descriptive equality (i.e., factual similarity between compared persons) which serves as the basis for some form of prescriptive equality (i.e., similar treatment towards the compared persons). However, the test then confronts the classic question faced in any analysis of the principle of equality: equality of what?¹²⁶ What kind of factual similarity of situation should matter? What is the metric, parameter or "currency" of equality? What benefit, good, or resource should everyone have the same of? The ubiquity of this question (and the smorgasbord of answers to it) characterises philosophical discourse on equality, and its centrality will also shape the proposal provided later below. Without a meaningful answer to this question, the "similarly situated" test remains inadequate and underdetermining.¹²⁷ Constitutional law has traditionally provided a highly simplified response

¹²² Susanne Baer, 'Equality' in Rosenfeld and Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 986

¹²³ Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37(3) *California Law Review* 341, at 344-345.

¹²⁴ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, at para.55 (Das, J.)

¹²⁵ *State of Jammu & Kashmir v. Triloki Nath Khosa*, (1974) 1 SCC 19, at para.29

¹²⁶ Amartya Sen, 'Equality of What?' The Tanner Lecture on Human Values (May 22, 1979); Elizabeth Anderson, 'Equality' in David Estlund (eds) *The Oxford Handbook of Political Philosophy* (Oxford University Press 2012).

¹²⁷ H.L.A. Hart, *The Concept of Law*, 3rd Edn. (Oxford University Press, 2012) 159; Peter Westen, 'The Empty Idea of Equality' 95(3) *Harvard Law Review* 537, 572-573 (1982).

to this problem: that equality should be assessed against legislative purpose.¹²⁸ This equates with the reasonable classification test under Article 14¹²⁹ and is described as a rationality or relevance-based test.

The formal precept has been roundly criticised because it collapses the universe of possible conceptions of fair distribution to a solitary, isolated consideration: the governance objective selected by the legislature. Rooting equality in legislative purpose produces a right that amounts to a form of instrumental rationality beholden to majoritarian priorities. This kind of rationality weakens claims to equal treatment because it emphasises differences instead of similarities, always offering some or the other conception of what is a relevant difference and encouraging judges to side with legislative choices.¹³⁰ Crucially, the test is also insensitive to prior social inequality and the significance of group-based claims to equality.¹³¹ In Canada, for example, the rationality standard was initially proposed in the form of a test of “internal relevance” (indicating that relevance was to be adjudged on the basis of functional values internal to the legislation), but it was rejected because of its manipulability and circularity.¹³² The proposal has instead been to ground the right in a principle of substantive equality that does not accede entirely to legislative purpose as the sole standard for assessing claims. The fundamental operational shift has been to move beyond questions of purpose, intent and treatment to questions regarding the *impact* of the law.¹³³ By making the effects of a law relevant, substantive equality automatically accounts for pre-existing social disadvantage because facially neutral laws may affect differently advantaged groups of persons differently.

This operational shift has also modified the core values employed to explain the right to equality. Instead of being a guarantee to deliberative reasoning and rational action, the right is instead characterised as a promise to ameliorate disadvantages resulting from dominance,

¹²⁸ n 123, at 346-347

¹²⁹ n 124

¹³⁰ n 122, at 986-987 (providing examples of the Nazi distinction between Aryans and Jews, the American ‘separate but equal’ doctrine underlying segregation laws, and modern legal practice emphasising the uniqueness of abortion and pregnancy); Denise Réaume, ‘Dignity, Equality, and Comparison’ in Hellman and Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013)

¹³¹ Kate O’Regan and Nick Friedman, ‘Equality’ in Ginsburg and Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 474

¹³² *ibid*, 477; *Miron v. Trudel*, [1995] 2 SCR 418, 489 (Supreme Court of Canada) (McLachlin, J.) (“Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination ...”)

¹³³ n 131

subordination and discrimination.¹³⁴ This emphasis has also given rise to a rich body of jurisprudence on what makes *discrimination* law unique and distinct from the general body of equality law. The emphasis on group disadvantage yields a uniquely asymmetric structure to the right against discrimination, distinguishing non-arbitrariness from anti-discrimination¹³⁵ and “colour-blindness” from anti-subordination.¹³⁶ Further, these evolutionary trends have also yielded pressures against the use of comparative exercises in assessing claims of discrimination, given that disadvantages can be incomparably unique, and exclusion can be prevented without necessarily engaging in comparison.¹³⁷ Instead, scholars have argued that the right against discrimination isn’t rooted in equality at all but instead in values like freedom and dignity which are affected as a result of actions connected with certain personal characteristics or “grounds” (religion, race, sex etc.).¹³⁸

This brief comparative account reveals how Indian equality law is yet to confront a range of fundamental questions in its evolutionary journey. The discussion to follow attempts to describe how these questions can best be confronted while maintaining the coherence of the broader body of existing precedent.

3.2. The Supposed Inadequacy of Rationality

A central challenge for Indian equality law is the need to explain the relationship between the jurisprudence under Article 14 of the Constitution and that under Articles 15, 16 and 29. The traditional view is that Article 14 is the genus and Article 15 and its siblings are the species.¹³⁹ But what general principle should Article 14 be read to contain such that the non-discrimination guarantees flow logically and necessarily from it? On this point, the traditional account is that Article 14’s conception of equality is to be understood merely as a guarantee of rationality or

¹³⁴ n 122, at 986-988; see also, Khaitan (n 7) at 197-201, and Bhatia (n 4) at 68 (for discussions of substantive equality’s link to values of personal autonomy and group disadvantage).

¹³⁵ Khaitan (n 110) at 31-38 and fn.11 (suggesting that the idiosyncrasy of the 14th Amendment of the US Constitution is the source of confusion equating guarantees against arbitrariness with those against discrimination, and arguing that this is discounted by practice in other liberal democracies and in statutory protections in the US itself).

¹³⁶ Reva B. Siegel, ‘Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*’, (2003-2004) 117 *Harvard Law Review* 1470

¹³⁷ n 131, at 479

¹³⁸ Elisa Holmes, ‘Anti-Discrimination Rights without Equality’ (2005) 68(2) *The Modern Law Review* 175; Moreau (n 116); Réaume (n 130)

¹³⁹ See, for example, *S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427, at para.9; n 10, at para.85; *Naz Foundation* (n 12) at para 99.

non-arbitrariness, and non-discrimination guarantees prohibit the irrational use of supposedly irrelevant personal characteristics. This account is troublesome not just because rationality-based tests have been considered circular, manipulable and deferential (as discussed above), but because they are considered simultaneously overbroad and inadequate as a protection against discrimination.

When we understand a guarantee against discrimination as being a guarantee against arbitrariness, we are faced with the question as to why only certain traits like religion, race etc. are listed as grounds in the non-discrimination provisions. All traits that are predominantly irrelevant in society such as eye- or hair-colour or left-handedness or curly hair should be listed as grounds as well. This suggests that non-arbitrariness is an overbroad conception of non-discrimination, and we are compelled to search for some further reason why only those traits that are socially salient should be listed as grounds.¹⁴⁰

At the same time, non-arbitrariness is argued to be a narrow and inadequate basis for explaining non-discrimination. When we prohibit discrimination on the grounds of certain traits only because they are irrelevant, we are then compelled to permit the use of those same prohibited traits if they happen to be at all empirically relevant to any objective we choose to pursue. Viewing non-discrimination this way seems to convert a prohibition on the use of certain grounds into a nullity: if the standard was rationality all along, there is no need to specially prohibit discrimination. As a matter of fact, there are a range of situations when we feel compelled to ignore seemingly relevant traits or to treat them *as if* they are irrelevant despite the existence of an accurate empirical connection between the trait and a chosen objective. In one set of situations, a personal characteristic may be relevant because of “reactive attitudes”, such as when the sex or religion of an employee is relevant to the effective performance of her job because of the explicit or implicit preferences of customers or business partners.¹⁴¹ The trait is relevant here because discrimination by members of society must be taken into account to ensure the effective performance of a job requiring social interaction. Similarly, it is a legitimate business objective to hire persons who would more regularly come to work, and sex is relevant to the pursuit of this objective because women are more likely to take leave when

¹⁴⁰ Lena Halldenius, ‘Discrimination and Irrelevance’ in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) (drawing on Kasper Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press, 2014) 30; and Janet Radcliffe Richards, ‘Discrimination’ (1985) 59 *Proceedings of the Aristotelian Society* 53, 66, 70 and 75).

¹⁴¹ Halldenius, *ibid.*, at 115-116

they have children than men are.¹⁴² A prohibited trait may also serve as a rational proxy to efficiently screen out unqualified applicants for a job, but the reason behind the statistical correlation between the trait and qualifications may be historical discrimination.¹⁴³ There are good reasons to find these relevance-based choices unfair, and the wrongness of the consequences of these choices compels scholars to reject “rationality” as a basis for non-discrimination.¹⁴⁴

One may respond to such situations by engaging in more individuated classification (stop using the prohibited trait as a proxy and instead adopt the underlying characteristic for decisions) or by adopting measures of reasonable accommodation and affirmative action (modify the status quo by correcting the structural reasons for the use of a trait). No matter how one responds to such situations, one does so because one is concerned not just with the objective at hand but also with the conditions of the lives of persons excluded as a result of structural and systemic social issues.¹⁴⁵ Concern for social disadvantage is thus argued to be a superior explanation for the adoption of a list with socially salient traits as well as the asymmetric protections afforded to vulnerable groups identified by those traits.¹⁴⁶ Significantly, antipathy for relevance-based approaches to equality has also yielded the suggestion that the relation between Articles 14 and 15 should be reversed such that the general right to equality is understood as abstracting or generalising the specific disadvantage and exclusion-centred protections of the right against discrimination.¹⁴⁷

3.3. Keeping Relevance Relevant

¹⁴² Deborah Hellman, ‘Discrimination and Social Meaning’ in K. Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) 99

¹⁴³ Schauer (n 116)

¹⁴⁴ For example, see Hellman (n 142) (“The wrongfulness of discrimination cannot be reduced to irrationality or overgeneralization.”); Choudhry (n 117) at 156 (“The difficulty rational proxies pose is that they exhaust the first justification for anti-discrimination laws by forcing apart relevance and discrimination. Proxies clearly meet the test of relevance, which is why employers often use them. Nevertheless, to exclude an otherwise qualified individual from consideration simply because of a group-linked trait that is not directly linked to individual job performance, such as sex, still strikes us as discriminatory.”)

¹⁴⁵ n 140

¹⁴⁶ Khaitan (n 110) at 31-38

¹⁴⁷ Bhatia (n 4) at 57-68, 107-109. To be fair, Bhatia does accept the need for a rationality and reasonable-classification model, but suggests that this only serves a supplementary role under the right to equality, adequately addressing those situations under the equal protection clause where no discrimination-related questions are raised (n 4 at 66).

Understanding the right to equality to be fundamentally about disadvantage and exclusion (and jettisoning the rationality conception) has a number of attractive results but yields some troubling conundrums. For one matter, this conception of equality seems to separate formal and substantive equality into two distinct and seemingly unrelated modules. It seems unclear what substantive equality and its emphasis on group disadvantage has to do with the continued and conspicuous significance of formal equality in such matters as the general application of criminal laws or the symmetrically equal procedural treatment of rival parties before a court. Nor does it seem to be involved in the legal foundations for democracy under which each person is afforded one vote and no more, regardless of the gravity of the socio-economic disadvantage they suffer.¹⁴⁸

For another matter, we may consider the nature of exceptions available to specific prohibitions against discrimination. Certainly, some of the explicit exceptions under Articles 15 and 16 are aimed at ameliorating disadvantages faced by women, Scheduled Castes and Tribes, and backward classes. However, as we have noted in discussions above, there are notable exceptions to the prohibition against discrimination on the basis of caste, religion and descent. What is more some jurisdictions even provide narrow grounds on which differential treatment on the basis of sex may be treated as non-discriminatory if there is a “genuine and determining occupational requirement” with a legitimate objective pursued proportionately.¹⁴⁹ Exemptions from prohibitions on discrimination on the grounds of age and disability also notably feature considerations of proportionality¹⁵⁰ or regard for genuine qualifications¹⁵¹ for a job, undue hardship for an employer, and the fundamental nature of relevant activities.¹⁵¹ The legitimacy of individual exceptions aside, these provisions emerge as a result of the continued operation of a principle of relevance animating discrimination law. This is not least because some of the above instances of “exceptions” are not designed as exceptions at all but definitions of what constitutes discrimination in the first place.

The discussion above should suggest that there is tension between the reasons for jettisoning equality-as-rationality and reasons for considering its retention. A further reason for its retention, in the Indian context, is that the judicial development of constitutional doctrine

¹⁴⁸ Schauer (n 116) at 222-223

¹⁴⁹ EU Directive 2006/54/EC, Title II, Chapter 3, Article 14.2

¹⁵⁰ S.13(2) and (3), UK Equality Act, 2010

¹⁵¹ Americans with Disabilities Act of 1990, §§12111(10), 12112(5)(A), 12113, 12143(c)(4), 12182(b)(2)(A)(ii) & (iii)

should avoid, if possible, the urge to entirely disregard existing jurisprudence in formulating new tests and principles for a fundamental right. Reading Article 14 as being fundamentally rooted in substantive equality would likely have this effect, wasting doctrinal resources that may have considerable potential if only they are viewed from a new perspective. As it happens, the arbitrariness doctrine offers precisely such a perspective and it need not take much judicial effort to bring it to light.

A starting point for this is the simple observation that rationality and relevance-based conceptions of equality have been roundly criticised not because of something inherent in terms like “rationality” and “relevance” but solely because tests like the reasonable classification test have been overly deferential and self-defeating in their obsessive focus on the government’s identification of the object of the law. If the fatal flaw of relevance-based tests is their isolated consideration of equality against legislative purpose, then a test which relies on “relevance”¹⁵² but is not restricted to such an isolated standard should not be discarded out of hand but built up to meet the requirements of constitutional democracy. Indian equality jurisprudence already provides pointers as to when the object of a law should itself be treated as discriminatory, such as when a law impacts values like legislative control over administrative action,¹⁵³ minority rights,¹⁵⁴ valuable constitutional freedoms,¹⁵⁵ and hostility towards preferential treatment under

¹⁵² Here, I refer to the original conception of the arbitrariness doctrine under *E.P. Royappa* (n 10) as discussed above in Part 2.1.1. For the purpose of the present discussion, this idea of “relevance” may be viewed as synonymous with the ideas of “rationality”, “adequacy of determining principle” etc. adopted in *Shayara Bano* (n 11) at para 101 as applicable to plenary legislations.

¹⁵³ *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479 (Bose, J.) at para.18. The opinion drew upon a previous judgment on a similar point in which one opinion insisted that “insidious discrimination” can be “incorporated” into the general terms of a law such that any actual discrimination in the exercise of discretion would be “ultimately traceable” to the law itself (*Anwar Ali Sarkar* (n 124) at paras.27-28 (Fazl Ali, J.)). Note that this is only one conception of a line of rulings elaborating on a link between equality and unguided discretion including *Anwar Ali Sarkar* (n 124); *Lachmandas Kewalram Ahuja v. State of Bombay*, AIR 1952 SC 235; *Kathi Raniing Rawat* (n 112); *Kedar Nath Bajoria v. State of West Bengal*, AIR 1953 SC 404; *Shri Ram Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, (1991) Supp (1) SCC 600; *Subramanian Swamy v. Director, CBI*, (2014) 8 SCC 682 (acknowledging the continued availability of the ground at para.49). See also, for a reference to the link between lack of classification and “scope for misuse”, *Navtej Singh Johar* (n 12) at paras.637.10-11. See, for a contemporary application, Douglas McDonald-Norman, ‘The Citizenship Amendment Act and ‘Persons Belonging to Minority Communities’’, *Law and Other Things* (28 December 2019), <<https://lawandotherthings.com/2019/12/the-citizenship-amendment-act-and-persons-belonging-to-minority-communities/>> accessed 23 June 2021

¹⁵⁴ Though in an *obiter*, this was explicitly indicated as a ground for finding the object of a law to be discriminatory in *Nagpur Improvement Trust v. Vithal Rao*, (1973) 1 SCC 500, at para.26. Opinions in *Navtej Singh Johar* (n 12) also suggested that criminal provisions singling out minority groups could have a discriminatory object (at para.353 (Nariman, J.)) or else lack any legitimate object at all (at para.238 (Misra, C.J.)). In *Joseph Shine* (n 12) Nariman, J. not only held the impugned provision to be manifestly arbitrary, but also held its object to be manifestly arbitrary (at para 103).

¹⁵⁵ The finding of a discriminatory object in *Nagpur Improvement Trust* (n 154) was arguably triggered by the disproportionate invasion into a general right to property in that case (at para.31).

the rule of law.¹⁵⁶ This implies that in designing a stronger relevance-based test, adopting a free-flowing and unconstrained conception of relevance is far too broad and would allow judges to simply replace the legislative selection of priorities with their own views regarding appropriate principles of distribution.¹⁵⁷ On the other hand, we may be tempted to equate the arbitrariness doctrine with substantive equality, making questions of group disadvantage relevant to the constitutional adjudication of differential treatment and effects. But this approach faces the objections on the limited scope of substantive equality raised above. It not only forecloses any departure from the reasonable classification test's object-related deference for significant purposes other than those that substantive equality values but also fails to account for the arbitrariness doctrine's present structure.

Instead, it would be far more appropriate, analytically and doctrinally, to understand non-arbitrariness as articulating a broad-based conception of rationality that accommodates both formal and substantive equality. This is achievable if we can identify a set of principles to explain why considerations *external* to a law (not necessarily implied by its stated objective) should nonetheless be *mandatorily relevant* in the construction of the law's classifications and distributive aims. This set of principles can best be located within the variety of fundamental values embedded in the Constitution itself. Under this proposed approach, the right to equality would be applied by ordinarily considering the relevance of a classification or distribution against the object of the law, *but departing from such a narrow analysis whenever a fundamental constitutional value is at stake*. By virtue of their inclusion in the Constitution, these fundamental values serve as considerations that are perennially relevant to any classificatory or distributive measure: any clear negative impact on such values affords judges adequate reason to depart from deferential review and employ stricter standards.

This conception of equality-as-rationality remains in consonance with India's constitutional ethos and respects the principle of separation of powers. Notably, it also aligns with precedents in *Indian Express* and *Khoday Distilleries (II)* that respectively conceived of manifest

¹⁵⁶ In *Subramanian Swamy* (n 153), the Court found the object of a special law protecting senior public servants to be discriminatory because it conflicted with the object of a general anti-corruption law (at paras 64, 68).

¹⁵⁷ Réaume (n 130) at 11-12 (“We elect representatives based on views about just what sorts of distributive principles we want them to put into action. If an equal rights provision enabled claimants to contest any and all of these distributions on the basis of any plausible competing argument about how benefits and burdens should be distributed, the courts would be *comprehensively* substituting their judgment for that of the legislature. This ratchets up the usual concerns about the propriety of judicial review.”)

arbitrariness as State action that fails to take into account “very vital facts”¹⁵⁸ or contains “self-evident disproportionality”.¹⁵⁹ The proposal only narrows the ambit of this conception to *constitutional* values for the purposes of assessing plenary legislation.¹⁶⁰ What it also seems to do, however, is to convert the right to equality into a conception of rationality unconnected to strict egalitarianism.¹⁶¹ For example, under this view, concern for group disadvantage would seem to emerge not out of respect for the moral equality of all individuals but would be the result of a combined reading of equality’s demand for the rationalisation of social differences and the protections afforded to personal autonomy, deliberative freedoms, and dignity under Articles 19 and 21.¹⁶² Given limitations of space here, it is difficult to elaborate on the significant connections that scholars have been drawing between non-discrimination and liberty or dignity, but readers need only imagine how discrimination targets traits that individuals have no meaningful control over, limiting their ability to make choices and expressing contempt towards them. The prohibition on the usage of listed traits under non-discrimination provisions is thus rationally justified not because the traits are always irrelevant but because of the higher relative relevance of autonomy and dignity in certain contexts. Similarly, heightened scrutiny may also be triggered when distinctions between persons affect constitutional values like the rule of law, free and fair elections, and rights like those to property or to the freedom of speech. Despite the proposal that courts should be guided by constitutional values in navigating such contextual relevance, there may be legitimate criticism that this requires balancing between and comparison of incommensurate values.¹⁶³ However, in circumstances where such issues seem gravest, the balancing of the relative relevance of

¹⁵⁸ n 27

¹⁵⁹ n 28

¹⁶⁰ This may be read as an appropriately constrained alternative to the formulation of non-arbitrariness proposed by Ahmed (n 1) at 126-131 (arguing that the manifest arbitrariness test should be viewed as a device by which to identify laws and measures that are indifferent to relevant considerations or that employ pretextual objectives to hide real motivations). This approach is necessary because of the urgent need to narrow the arbitrariness doctrine’s reliance on “substantive due process”, a concept whose application is restricted to specific constitutional interests in life, liberty and property even in the United States (Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 5th Edn. (Wolters Kluwer 2015) §§7.1, 8.2.3, 10.2.2, 10.2.4, 10.3.2).

¹⁶¹ For a prominent argument rejecting strict egalitarianism, see Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), Chapter 9.

¹⁶² See, for instances where such linkages have been drawn, n 134. See also, n 138, for scholarly works defining the goals of discrimination law in terms of freedom or dignity instead of equality per se. Indian constitutional law already recognises the result of exporting “reasonableness” from Article 14 to Article 21. It should not be a great stretch to conceive of an import of “dignity” from Article 21 to Article 14. For relevant insights, see Laurence H. Tribe, ‘Equal Dignity: Speaking Its Name’ (2015) 129 *Harvard Law Review Forum* 16. See also, Khaitan (n 110) at 113; n 122 at 994 (“The more equality is understood as a right against discrimination, the more a test moves away from a comparative exercise and resembles a liberty test, directed against a violation of a fundamental interest or need.”)

¹⁶³ Stavros Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468.

different considerations would be more appropriate at the stage of defining the rights themselves and not when adjudicating whether a violation of the right is justified.¹⁶⁴

¹⁶⁴ T.M. Scanlon, 'Rights, Balancing, and Proportionality' in Kiossopoulou et al (eds), *Human Rights in Times of Illiberal Democracies: Liber Amicorum in Memoriam of Stavros Tsakyrakis* (Nomiki Bibliothiki, 2020) (discussing how even categorical norms are subjected to balancing when they undergo redefinition). For an example where such balancing is undertaken in defining the right against discrimination, one may consider Schauer's argument that the right requires the mandatory underuse of certain traits so as to compensate for the historical overuse and abuse of such traits (Schauer (n 116)).

3.4. Text Meets Reality

Finally, this approach can guide us in formulating an appropriate interpretative response to the textual limitations of the Constitution's non-discrimination provisions. We may demand, for example, a harmonious construction of Article 14 with Articles 15(1), 16(2) and 29(2), so as to temper the explicit exclusion of non-citizens from the protections of the latter. Arguably, the distinction between citizens and non-citizens has no rational nexus with the constitutional objective of protecting against discrimination (it seems to serve some purpose only in relation with discrimination on the ground of "place of birth"). Even if strict non-discrimination safeguards are viewed as some kind of special privilege accompanying citizenship, rational treatment would still require at least an intermediate heightened safeguard for non-citizens.

Similarly, we may address the formalistic interpretation of the word "only" in the non-discrimination provisions. As discussed in Part 2, courts have read the word as allowing for a peculiar form of justification for discriminatory acts.¹⁶⁵ Avoiding this usage of the word requires that we first read the word "discriminate" differently. The word is often read in a value-neutral sense that makes it synonymous with "classify".¹⁶⁶ This makes each non-discrimination provision an absolute prohibition on the use of the listed traits and does not align with what we understand regarding the need to allow for the use of the traits in narrow circumstances defined by the theory of wrongful discrimination at play (whether this theory is based on equality-as-rationality or not). Instead, the word "discriminate" should be given a value-laden meaning that excludes from its scope all justified uses of the listed traits.¹⁶⁷ This takes the weight of regulating exceptions to the prohibition off of the word "only" and allocates that work to the definition of the right itself (justified acts are simply not to be termed "discrimination").

The second step would be to read the word "grounds" not as *motivating* factors or *causal* factors for wrongful discrimination,¹⁶⁸ but instead as *enabling* factors. This would mean that a

¹⁶⁵ In fact, this seems to have been the intention at the time that the provision was being drafted. See, B. Shiva Rao, *The Framing of India's Constitution* (Indian Institute of Public Administration, 1968) 186 (B.N. Rau seemingly considered the word necessary to allow for discrimination against foreign nationals). This is discussed further in Mohammad Ghose, 'Judicial Control of Protective Discrimination' (1969) 11(3) *Journal of the Indian Law Institute* 371, 374-375.

¹⁶⁶ See n 112 (for indications that it tends to be given this meaning by courts)

¹⁶⁷ For an insightful discussion on the distinction between the value-neutral and value-laden meanings of the word "discriminate" and its relation to the concept of "relevance", see Halldenius (n 140) at 111.

¹⁶⁸ n 110

classification or a set of effects would become unlawful where the discriminatory nature of the outcome would have been different if not for the involvement of a listed characteristic in some meaningful way.¹⁶⁹ Significantly, this interpretation of “grounds” as enabling factors is not limited by the word “only”, which now serves to clarify and advance the reading. This is because enablement, unlike causation, may be the cumulative result of a number of necessary factors, each of which can simultaneously be claimed to have been solely or exclusively responsible for making some outcome (here, discrimination) possible.¹⁷⁰ One may note the difference between the statements “I researched only because of a grant” and “I was able to research only because of a grant”. In the first sentence, the research is caused exclusively by the grant, but in the second sentence, the research is made possible by the involvement of the grant, though other factors like research skills and mentorship may also be necessary in making the research possible. Enablement is an inclusive conception of causation, and its usage allows us to respect the text of the Constitution as well as the nature of wrongful discrimination (which can be intersectional¹⁷¹ and incident in relation with traits outside of a closed list¹⁷²).

4. Conclusion

If equality jurisprudence under the Indian Constitution is in a state of uncertainty today, it is because it is disjointed, its separate doctrines estranged from each other due to a combination of confusion, mutual aversion and seeming incompatibility. It is easy to suggest that this is a result of one or some of the aspects being entirely incorrect and others having things entirely

¹⁶⁹ The proposed interpretation may seem to have significant parallels with a “but-for” theory of anti-discrimination law, which is considered one mode by which an effects-based understanding of “grounds” can be brought to bear on discrimination law while maintaining the form of the more traditional understanding of grounds as “reasons”. See, Khaitan (n 110) at 162 (discussing *James v. Eastleigh Borough Council*, [1990] 2 AC 751). The word “only” is merely adapted into this understanding here. A similar theory was also employed in *Bostock v. Clayton County*, 590 US ___ (2020) to allow for a kind of conflation between sex discrimination and sexual-orientation discrimination. However, the formulation in *Bostock*, and even extensions of the formulation, still differ from a true disparate impact standard (See, for example, Katie R. Eyer, ‘The But-For Theory of Anti-Discrimination Law’ *Virginia Law Review* (Forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801699> accessed 25 June 2021). To the extent that this limitation exists, one need only note that the reading here would not suffer from it because it treats “grounds” as factors that enable the discriminatory nature or status of relevant outcomes, and not the outcomes themselves.

¹⁷⁰ As the involvement of a ground only *enables* a finding of discrimination under this reading, such involvement is a necessary element of discrimination, but not a sufficient one. There may be additional criteria for determining whether an outcome in a case is unjustified (See, Khaitan (n 110) at 180-194).

¹⁷¹ See generally, Atrey (n 6) (on how the narrow interpretation had limited the applicability of intersectional analysis).

¹⁷² As scholars have already noted, the principles underlying the specific non-discrimination guarantees may be read backwards into the general right to equality so that some heightened (or even intermediate) intensity of review may be required for grounds analogous to the listed grounds (See, Khaitan (n 7) at 203; Bhatia (n 4) at 57-59).

right. Instead, as this article has attempted to show, each doctrine or test faces issues due to overt deference, incoherence, overbreadth, inadequacy of basis, or inadequacy of applicability.

Part 3 of this article outlined the basic premise for a conception of equality that puts relevance and rationality at its centre, but not sterile forms of descriptive relevance and instrumental rationality joined at the hip with majoritarian objectives viewed in isolation. Instead, it is proposed that rationality can serve as the basis for equality if it is rescued from its traditional reputation of weakness and deference. There are a variety of utilitarian, prioritarian, sufficientarian, contractarian, relational, virtue-ethical and other traditions in political philosophy that employ independent and overlapping models of “rationality”, and any of these could well offer a sound common foundation for non-arbitrariness and non-discrimination. Admittedly, the proposals made above may seem to have failed to rescue equality-as-rationality from the allegation of emptiness. The pursuit of rationality may appear to prize the ever-growing discovery of differences between persons and the necessary relevance of these differences to different aspects of life. And yet, the symmetrical generality of many branches of the law and substantive equality’s offer of the same amount of concern to all individuals seem to echo each other by speaking in the language of *similarity* or *sameness* (whether of treatment, opportunities or outcomes).

This is a problem faced by any conception of the right to equality that rejects strict egalitarianism and a complete solution cannot be provided at this point. Perhaps, equality only results as a by-product of concern for values like autonomy because of a rational attitude of forbearance in the face of uncertainty. Seemingly relevant differences between persons have to be treated as immaterial because of uncertainty regarding whether those differences should be allowed to constrain autonomy. Rational responses to uncertainty could well run to the extent of allowing doubt and humility to govern instead of always believing that the collective action of categorisation should conclusively impinge on the ability of individuals to plan their own lives and set their own objectives.

These quandaries apart, it is hoped that this article has alerted readers as to the minimum conditions for articulating a coherent vision for the future of the right to equality, especially in the context of the Indian Constitution. The increasing availability and manipulability of information regarding groups and individuals means that governments will necessarily have a heightened ability to discriminate as time goes forward. It will only become easier to present

some putative difference to claim that some or the other discriminatory measure is “rational”. But the purpose of the equal protection guarantee is not to improve the ability of governments to come up with excuses, thereby hampering both the rule of law and the informed nature of participation that democracy requires. If this outcome is to be prevented, the right to equality must co-evolve with the government’s capacity to gamble with public reasons. It must call the bluff and match the bet.