

DECRIMINALISATION OF HOMOSEXUALITY AND THE CONSTITUTION

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*Without making any value judgment or taking sides on the propriety or otherwise of consensual homosexuality between adults, this paper examines the constitutionality of Section 377 of the Indian Penal Code. It concludes that Section 377 does not violate the Constitution. Therefore, the Delhi High Court decision in **Naz Foundation** cannot be sustained unless the Supreme Court overrules the existing interpretation of the Constitution or reinterprets Section 377.*

I. PRELIMINARY

Naz Foundation, a Non Governmental Organization (NGO), has picked up and placed in the central stage an issue that I doubt deserves so much prominence in the present stage of our society as it has received. The homo or same sex sexuality may be adversely impacting and demeaning the life of many, but many more survival issues of large masses that demean and dehumanize them are staring at us everywhere without searching into the privacy of anybody's home or bedroom. The latest assessment tells that more than fifty percent households in India are living below poverty line and need to be attended immediately.¹ In the UNDP development index the country has further receded from 128th place last year to 134th place this year². Governments, NGOs, social organizations, lawyers, judges and many others are engaged and are expected to engage in finding solutions to the primary issues of life such as food, shelter, health care, education, livelihood, relocation and dignity. In comparison to them homosexuality could very well have a low priority, especially in the light of admitted facts that hardly anybody is prosecuted for homosexuality and nobody prevents the health organizations from

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¹ See Special Correspondent, *New Norms Put More Households Below Poverty Line*, THE HINDU (Kolkata), September 30, 2009 (reporting about the recommendations of the Expert Group led by N.C. Saxena set up by the Union Rural Development Ministry).

² United Nations Development Programme, Human Development Report, *Overcoming Barriers: Human Mobility and Development* (2009), available at http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf (Last visited on November 2, 2009).

administering prevention or cure of HIV/AIDS. As a matter of fact some of the organizations allegedly working for HIV/AIDS victims are doing flourishing business of running beauty parlours for gay and transgender.³ Even if the criminalizing provision of our law has a chilling effect on homosexuality or on the activities of the health organizers for HIV/AIDS it is doubtful if in our present day society these activities need to be made so sacrosanct as, for example, freedom of speech and expression, to be free from every chilling and inhibiting effects.

Our experience of 1975-77 Emergency is no doubt taken to have taught us our preference to freedom over bread if we have to choose between the two. May be *Naz Foundation* intended to demonstrate a reassertion of our continuing faith in our freedom.⁴ But I doubt if in a country where more than three crores (thirty million) cases, many of which involve issues of life and death, are waiting in our courts for years and decades for decisions the Supreme Court had to direct the Delhi High Court to decide this matter against the latter's initial rejection and whether the High Court's decision deserved so much favourable attention and publicity that in view of differences within the Central Government the matter had to be ultimately resolved in a Cabinet meeting only to the extent that the Attorney-General will simply assist the Supreme Court in the appeals.⁵ Though a freedom loving society must care for all its freedoms, priorities need to be fixed to gain and retain them. Freedoms like the ones included in Article 19(1) of our Constitution are the precondition for the organization and survival of any society while many others included in 'personal liberty' in Article 21 may follow in due course. Sex and sexual activity is also a necessary condition for the survival of the society and, therefore, no society has ever banned it. But like all other freedoms every society has regulated it in its own way, some of them having gone to the extent of denying sexual freedom except for procreation. These regulations could have different justifications, but they have been and are still there on some aspects of sexual activity. With the evolution and progress of the society some of these regulations have been found unjustified and have been removed in many societies while in some others they still exist. The Western societies, which perhaps suffered most from such regulations, took lead in this area also as they have done in many others in the expansion of freedoms and the rights of man. A careful examination of the development of rights and freedoms in the West, however, shows a process of succession. They have followed a logical sequence. Freedoms like freedom from unlawful arrest and detention, of speech and expression, of assembly and association came first and then the freedom from want such as hunger, disease, illiteracy, homelessness, etc. followed. By the end of the nineteenth or early twentieth century these societies had ensured basic necessities of life to all their citizens. After having achieved all this, since the middle of the twentieth century they have been attending to other restraints on freedom including

³ See Ambika Pandit, *Transgenders Get Their Own Beauty Parlour*, TIMES OF INDIA (Delhi), October 1, 2009.

⁴ Cf. S. Khilnani, *Freedoms Now*, 601 SEMINAR 14 (September 2009).

⁵ See TIMES OF INDIA, 4, September 19, 2009; INDIAN EXPRESS, 1-2, September 18, 2009. See also ECONOMIC TIMES, 3, September 16, 2009.

the ones on sexuality, child bearing, etc. As we are the late starters in this process we may not and need not logically follow that sequence in its entirety, yet we cannot completely ignore our priorities.

I do not, however, intend to pursue this matter any further. As a student of constitutional law I will like to confine my analysis only to constitutional issues. Even the foregoing remarks should not be taken as my support or opposition to homosexuality. I consider it a personal matter intimately related to oneself. I also believe in maximum individual autonomy and freedom consistent with similar autonomy and freedom of every other individual. But whether our Constitution incapacitates us to regulate it through our elected representatives in Parliament and state legislatures is an issue different from my personal opinion about it. In reading the Constitution I am likely to be influenced by my personal opinion but as student of law I learnt long back from Chief Justice Patanjali Sastri that my personal likes and dislikes should not play any role in interpreting the Constitution because it is made not only for me but for each and every citizen of this country.⁶ Similarly what is happening around us in the rest of the world should be relevant for the purpose of keeping our Constitution in tune with changing times, but again we should remember the sober advice given to us by our courts that no two constitutions are replicas of each other. Every constitution has its own peculiarities. Therefore, the fact that something is done in a particular manner in a constitution is no sure guide that it could be done the same way in every other constitution.⁷ For that reason the fact that consensual homosexuality between two adults has been decriminalized in all the Western and many other jurisdictions in the rest of the world may be taken into account in interpreting our Constitution, but that cannot be a conclusive answer to the question whether our Parliament and state legislatures have power to prohibit or punish it. I have tried to read as much material as I could from other jurisdictions on this subject, which my editorial team made available to me for which I am grateful to them. The more I read them more the difference between those jurisdictions and ours got magnified. The following discussion, therefore, is confined to the analysis of the issue in the context of our Constitution having, however, in the background all the developments that have taken place in the rest of the world and to which I could have access.

II. THE DECISION

On a public interest petition initiated by Naz Foundation against the National Capital Territory of Delhi and others, the Delhi High Court in a well written judgment through Chief Justice Shah and Dr. Justice Muralidhar on July 2,

⁶ State of Madras v. V.G. Row, AIR 1952 SC 196 at 200.

⁷ See, e.g., The Central Provinces Case (1939) FCR 18 at 38 and A.K. Gopalan v. State of Madras, AIR 1950 SC 27, 102. See also P.K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUMBIA L. REV. 319 (1957) and Arun K. Thiruvengadam, "The Common Illumination of our House?": *Foreign Judicial Decisions and Competing Approaches to Constitutional Adjudication* (unpublished J.S.D. dissertation, New York University School of Law, November 2006).

2009 decided that “Section 377 [Indian Penal Code], insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.”⁸ The Court added: “By adult we mean everyone who is 18 years of age and above.”⁹

Section 377 of Indian Penal Code (*hereinafter* “IPC”) reads:

Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

A. SECTION 377 AND ARTICLE 21

Dealing with Article 21 the Court held:

“In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.”¹⁰

It further held:

“Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalizes consensual sexual acts between adults in private.”¹¹

The Court also examined the validity of Section 377 with reference to Article 21 on the ground that it violates the right to health protected by that Article by impeding the efforts of the HIV/AIDS agencies and that it places unjustified restriction on sexual freedom in the name of public morality.

At the very first opportunity to interpret Article 21 soon after the commencement of the Constitution in *A.K. Gopalan v. State of Madras*,¹² the Supreme

⁸ Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277; W.P. (C) No. 7455/2001.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, ¶ 52.

¹² AIR 1950 SC 27.

Court recognized and admitted that the right to personal liberty included innumerable rights, which could not be exhaustively enumerated.¹³ Later, removing any lurking doubts that may have arisen in the light of subsequent developments,¹⁴ in *Maneka Gandhi v. Union of India*¹⁵ the Court reiterated that “the expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man”.¹⁶ Right to privacy as an aspect of liberty was also recognised at quite an early date,¹⁷ which is by now a well accepted right.¹⁸ Nor need it be disputed that sexual orientation and sexual activity is a matter of one’s privacy. We need not question the High Court’s conclusion that a person’s sexuality constitutes his or her ‘core identity’ and criminalization of gay sexuality “denies a gay person a right to full personhood” as quoted above. But the crucial issue is whether these rights are absolute in the sense that the state is incapable of regulating them.

Until *Maneka* somehow an impression was generally carried, which was fortified by *ADM Jabalpur v. Shivakanta Shukla*,¹⁹ that the state had absolute power to deprive a person of his rights under Article 21 by legislation. *Maneka* clarified that it was not the case. The state could deprive a person of his personal liberty only in accordance with a procedure established by law. Such “procedure must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.”²⁰ The Court did not say that the law which provides a ‘right, just and reasonable’ procedure must also pass the test of being ‘right, just and reasonable’. Some of the judges in *Maneka* and a few subsequent cases have made observations to the effect that give the impression as if not only the procedure but also the law must be “right, just and reasonable.”²¹ But as a matter of fact the Court has never

¹³ See, e.g., Kania CJ, “personal liberty” includes, inter alia “the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression ‘personal liberty’ in article 21”; Das J, referred to the right of free man. See also P.K. TRIPATHI, SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION 166 (1972) (where he says that personal liberty includes all those innumerable aspects of personal liberty which it is impossible to enumerate. The right to go to bed when one likes, to eat, dress or walk the way one likes, to speak the language one likes, in short, to do or not to do anything the way one likes).

¹⁴ Particularly the developments during the Emergency and the decision in *ADM Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521.

¹⁵ AIR 1978 SC 597.

¹⁶ *Id.*, 622, ¶ 54.

¹⁷ See, e.g., *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 and *Govind v. State of M.P.*, (1975) 2 SCC 148.

¹⁸ See, e.g., *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 1295; *R. Rajgopal v. State of T.N.*, (1994) 6 SCC 632; *PUCL v. Union of India*, AIR 1997 SC 568; *Mr. ‘X’ v. Hospital ‘Z’*, (1998) 8 SCC 296; *Sharda v. Dharampal*, (2003) 4 SCC 493; *Distt. Registrar & Collector v. Canara Bank*, (2005) 1 SCC 496.

¹⁹ (1976) 2 SCC 521.

²⁰ *Id.*, 624, ¶ 56.

²¹ See *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494, *Jolly George Verghese v. Bank of Cochin*, (1980) 2 SCC 360, *Mithu v. State of Punjab* (1983) 2 SCC 277.

examined the validity of the substantive aspect of law, especially of criminal law, that deprives a person of his life or personal liberty falling under Article 21. Even if it was ever done, the Court was quick enough to undo it. In *A.K. Roy v. Union of India*,²² a five judge bench of the Court clarified:

“The power to judge the fairness and justness of procedure established by a law for the purpose of Art. 21 is one thing: that power can be spelt out from the language of that article. ... The power to decide upon the justness of the law itself is quite another thing: that power springs from a ‘due process’ provision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty of property ‘without due process of law’.”²³ (Emphasis supplied)

This statement also clarifies that the decisions of the U.S. Supreme Court are not helpful and certainly not conclusive in determining the scope of Article 21.

In line with other jurisdictions, I have no difficulty in accepting that the right to life and liberty in Article 21 includes the right to have consensual sex with another adult of the same sex. But if that right has been denied by a competent legislation as permitted by Article 21, how do we challenge the validity of that law? We may argue, drawing support from *Maneka* and its progeny that the law must be valid as regards other fundamental rights. But Article 21 requires only procedure to be valid and not the substance of the law. The fundamental right in Article 21 restricts the power of the legislature only to the extent that it must provide a just, fair and reasonable procedure for taking away life or personal liberty. The fairness of the procedure may be judged with reference to other fundamental rights including primarily Articles 14 and 19. In *Naz Foundation* fairness of the procedure was not questioned but rather the substance of the law was questioned. The challenge was not to the procedure but to the substance of the law. Therefore, we must examine if under our Constitution a substantive law can be invalidated on the ground of being violative of Article 21 as decided in *Naz Foundation*.

B. ARTICLE 21 AND CRIMINAL LAW

Maneka was not a case connected with criminal law providing either for punitive or preventive arrest and detention. Ever since the Constitution came into operation on 26 January 1950 several provisions of the Indian Penal Code have been questioned from time to time for being inconsistent with one or the other fundamental right. Until *Maneka* such provisions were questioned with reference to provisions other than Article 21²⁴. After *Maneka* a few of them were

²² AIR 1982 SC 710.

²³ *Id.*, 726, ¶ 36.

²⁴ See *A.K. Gopalan v. State*, (1950) S.C.R 88, *K. V. Ramaniah v. Special Public Prosecutor* (1961) 1 Cr LJ 601 (AP), *M.B. Kanwar v. State* AIR 1963 Punj 201.

questioned under Article 21. Notable among them are provisions relating to death penalty under Section 302,²⁵ mandatory death penalty under Section 303²⁶ and attempt to commit suicide under Section 309.²⁷ In the context of death penalty under Section 302 of IPC, Krishna Iyer J. speaking for himself and Desai J. in *Rajendra Prasad v. State of U.P.*²⁸ expressing similar sentiments in global context for human rights as are expressed by the High Court in *Naz Foundation*, tried to interpret that section in a way that it had the effect of outlawing death penalty from that section. Chinnappa Reddy J. also tried to do the same in *Bishnu Deo v. State of W.B.*²⁹ In the light of pre-*Maneka* decision in *Jagmohan Singh v. State of U.P.*³⁰ a constitution bench of the Court, however, disagreed with that interpretation four to one in *Bachan Singh v. State of Punjab*.³¹ Examining the interpretation of Article 21 in *Maneka* the Court held that the Article so interpreted should read as follows: “No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.”³² It added: “In the converse positive form, the expanded article will read as below: A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.”³³ It went on to explain: “Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the Founding Fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.”³⁴

Examining the relevant constitutional provisions the Court concluded that, “[i]t cannot be said that the framers of the Constitution considered death sentence for murder or the prescribed traditional mode of its execution as a degrading punishment which would defile ‘the dignity of the individual’ within the contemplation of the Preamble to the Constitution.”³⁵

After detailed examination of the procedure in Section 354 (3) of the Criminal Procedure Code, 1973 for awarding the death penalty, the Court came to the conclusion that it did not violate either Article 21 or 14 or 19.

²⁵ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

²⁶ *Mithu v. State of Punjab*, AIR 1983 SC 473.

²⁷ *P. Rathinam v. Union of India*, AIR 1994 SC 1844.

²⁸ AIR 1979 SC 916.

²⁹ AIR 1979 SC 964.

³⁰ (1973) 1 SCC 20.

³¹ *Supra* note 25.

³² *Id.*, 930, ¶ 136.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

The next important case in this context is *Mithu v. State of Punjab*³⁶ in which Section 303 of IPC was invalidated by a constitution bench of five judges. Section 303 of IPC provided:

“Punishment for murder – Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.”

At places one gets the impression from the Court’s opinion as if Article 21 requires that the law must be right, just and fair and not arbitrary, fanciful or oppressive. But, as the Court approvingly cited and relied upon *Bachan Singh*, that would not be the correct reading of the case. On a close and careful reading of the case one finds that the law was invalidated under Article 21 because the procedure by which Section 303 authorised deprivation of life was unfair and unjust. It was unfair and unjust because it fixed the death sentence in advance in every case of such murder without any discretion with the judge to examine the facts, circumstances, motive etc for the crime. Secondly, it did not draw any distinction between life convicts for different offences. The Court noted as many as 51 sections of IPC including the offence of forgery for which a person could be awarded life imprisonment. Putting all these persons in the same category and excluding those who had already served their life sentence even for committing murder was found against the right to equality enshrined in Article 14. The Court concluded:

“On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law.”³⁷

Concurring with the rest of his colleagues, Chinnappa Reddy J. concluded:

“So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatized as arbitrary and oppressive.”³⁸

The foregoing statements may give an impression that the Court was invalidating the reasonableness of law rather than the procedure under Article 21. But reading them in the background of *Bachan Singh* makes it clear that that was not and could not be the case. In *Bachan Singh* the Court did not find anything

³⁶ *Supra* note 26.

³⁷ *Id.*, 483.

³⁸ *Id.*, 484.

wrong with the procedure while it found it unreasonable in *Mithu*. Moreover, classification of convicts serving life imprisonment and the rest for the offence of murder and mandatory death sentence violated Article 14.

The two other provisions of IPC which were challenged on the ground of Articles 14 and 21 are Sections 306 – abetment of suicide³⁹ – and 309 – attempt to commit suicide.⁴⁰ Inspired by global developments a two judge bench of the Supreme Court through Justice Hansaria invalidated Section 309 on the ground that Article 21 which gives the right to life to an individual also implies the right of the individual to bring his or her life to an end.⁴¹ Quoting extensively from literature on criminal liability and also from John Stuart Mill’s famous essay *On Liberty*, “*That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,*”⁴² [Emphasis in the original] the Court inter alia concluded that, “[s]uicide or attempt to commit it causes no harm to others, because of which State’s interference with the personal liberty of the concerned persons is not called for.”⁴³ Accordingly, it invalidated Section 309 on the ground of violation of Article 21 and observed, “May it be said that the view taken by us would advance not only the cause of humanisation, which is a need of the day, but of globalisation also, as by effacing Section 309, we would be attuning this part of our criminal law to the global wave length.”⁴⁴

The issues involved in *Naz Foundation* may be different but similar arguments and sentiments have been expressed in that case also to decriminalise an aspect of Section 377. A constitutional bench of five judges of the Court, however, overruled *Rathinam* in *Gian Kaur v. State of Punjab*⁴⁵ specifically citing some of the portions quoted above.⁴⁶ *Gian Kaur* was primarily concerned about the validity of Section 306 but as the decision in *Rathinam* was relevant for deciding the validity of Section 306 the Court had to reconsider that decision. Rejecting the argument of universal acknowledgement that “a provision to punish attempted suicide is monstrous and barbaric”⁴⁷ and emphasising the difference between the desirability and constitutional validity of Section 309 the Court observed that the latter had to be

³⁹ § 306 reads: “**Abetment of suicide.**- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

⁴⁰ § 309 reads: “**Attempt to commit suicide.**- Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both.”

⁴¹ *Supra* note 27.

⁴² *Id.*, 1857, ¶ 54.

⁴³ *Id.*, 1868, ¶ 111.

⁴⁴ *Id.*, 1868, ¶ 112.

⁴⁵ (1996) 2 SCC 648.

⁴⁶ I had also expressed my disagreement with that decision even before the *Gian Kaur* case. See *Can there be a Fundamental Right to Die?*, 17 DELHI LAW REVIEW 134 (1995).

⁴⁷ *Supra* note 45, 654, ¶ 9.

decided with reference to Articles 14 and 21 and any “reference to the global debate on the desirability of retaining a penal provision to punish attempted suicide is unnecessary for the purpose of this decision.”⁴⁸ On re-examination of all the decisions on Sections 306 and 309 the Court came to the conclusion that neither of these Sections violated either Article 14 or Article 21. Even in *Rathinam* the Court did not find Section 309 in conflict with Article 14. The Court in *Gian Kaur* adopted the same reasons for upholding the two sections under Article 14.⁴⁹

Comparison between homosexuality and attempt to commit suicide may not be apt, but several arguments such as it is a personal decision intimate to oneself, that it is done in privacy, that it does not harm others, that it is genetic or natural tendency and that both of them have been decriminalized in most of the countries, especially in the West, are common to both. Even then our lawmakers have not yet decriminalized either and our Supreme Court has not found the one that has come before it in violation of any fundamental rights guaranteed to us or of any other provision of the Constitution. The Supreme Court has also not found death sentence against any of our fundamental rights or any other provision of the Constitution though it has been abolished in many of the Western countries and has been found against the fundamental rights of the individual in some others. This has happened even though forceful arguments, including by the official bodies such as the Law Commission of India, have been made to change the law.

C. SECTION 377 AND ARTICLE 14

Examining the validity of Section 377 with reference to Article 14 the Court, after mentioning the reasonable classification test, held:

“In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective of such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held unreasonable.”⁵⁰

Holding that “Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people”⁵¹ with the sole objective of criminalization of “conduct which fails to conform with the moral or religious views of a section of society”⁵² the Court concludes: “The inevitable conclusion is that the discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.”⁵³

⁴⁸ *Id.*, 658, ¶ 17.

⁴⁹ *Id.*, 661-62, ¶ 30.

⁵⁰ *Supra* note 8, ¶ 88.

⁵¹ *Id.*, ¶ 91.

⁵² *Id.*, ¶ 92.

⁵³ *Id.*, ¶ 98.

It is true that a constitutional principle of reasonableness in state action has been evolved from Article 14 and I support it,⁵⁴ though contested by others.⁵⁵ But this is also true that this principle has not yet been applied clearly to a supreme legislation, though several subordinate legislation and administrative actions have been invalidated under it.⁵⁶ The issue seems to be pending before the Supreme Court for consideration by a larger bench.⁵⁷ Similarly even though the Court has made incidental remarks that the object of the law itself should be lawful, which again I support,⁵⁸ but what is lawful or unlawful has to be decided with reference to either the legislation or the Constitution or both, if the dispute is about administrative action,⁵⁹ or the Constitution, if the dispute is about the legislation.⁶⁰ We cannot introduce any abstract conceptions of justice or fairness in the determination of the object laid down by the legislature. Nor can we invalidate the objects on the basis of international or global developments. The legislature is expected to take into account all these factors while enacting a law. The courts may and should weave into the law those factors but it cannot substitute them for the law laid down by the legislature. The Court has reiterated time and again and stood by the two principles of reasonable classification, that is, (i) the intelligible differentia and (ii) nexus between the differentia and the object to be achieved. The Court, therefore, must examine if the above two tests are satisfied by Section 377.

Applying those tests one may say that there is an intelligible difference between those who have vaginal sex and those who have some other kind of sex. The object of such differentia may be either procreation or morality or health. The Court, however, does not discuss closely either in the above quoted statements or anywhere else the application of these tests to Section 377. Instead of saying that there is no intelligible differentia between anal and vaginal sex and even if there is such a differentia, it has no nexus with the object of the law, the Court says: “the criminalization of private sexual relations between consenting adults absent any serious harm deems the provision’s objective both arbitrary and unreasonable.”⁶¹ As we have noted above even if the objective is “unreasonable and arbitrary”, it has not yet been established that the courts can invalidate on that ground an otherwise valid law. Further, the Court is making a value judgment on the basis of global trends in this regard. But as I have already mentioned global trends cannot determine the constitutionality of legislation, though of course they can and do influence the legislators in making or unmaking the laws. If our legislators are not

⁵⁴ See, e.g., V.N. SHUKLA, CONSTITUTION OF INDIA 74 ff (M.P. Singh ed., 2008) and M.P. Singh, *The Constitutional Principle of Reasonableness*, (1987) 3 SCC (J) 31 ff.

⁵⁵ See, e.g., H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 436 ff (4th ed., 1991) and P.K. Tripathi, *The Fiasco of Overruling A.K. Gopalan*, AIR 1990 (J) 1.

⁵⁶ See however, *Karnataka STDC Ltd. v. Karnataka STAT*, (1986) 4 SCC 421.

⁵⁷ See *Subramanian Swamy v. Director, CBI*, (2005) 2 SCC 317.

⁵⁸ V.N. SHUKLA’S CONSTITUTION OF INDIA, *supra* note 54.

⁵⁹ See *Deepak Sibal v. Punjab University*, AIR 1989 SC 904.

⁶⁰ See *Nagpur Improvement Trust v. Vithal Rao*, AIR 1973 SC 689.

⁶¹ *Id.*, ¶ 92.

influenced by these trends, courts cannot do much as is evident from death penalty debate and *Bachan Singh* and the overruling of *P. Rathinam* in *Gian Kaur* on the question of attempt to commit suicide.

D. SECTION 377 AND ARTICLE 15

Considering the validity of Section 377 with reference to Article 15 the Court held:

“We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights....In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.”⁶²

Admitting that sex in Article 15(1) includes sexual orientation, the burden lies upon the petitioners to prove that Section 377 discriminates against them and that their sex alone is the ground for such discrimination. If there are other valid reasons in addition to their sex for such discrimination, the law cannot be declared unconstitutional. In the interpretation of “only” in Article 15 (1) and (2) there are two possibilities: one, the prohibited ground is prima facie the only ground and second, even though it is not prima facie the only ground the end result is discrimination only on that ground. The Supreme Court has primarily followed the second line. If we apply that rule, sexual orientation alone cannot be cited as the ground for the application of Section 377. It applies to every male person who indulges in that sexual behaviour irrespective of his orientation. People indulge in sodomy when for long time they are incarcerated and have no opportunity to come in contact with women⁶³. Incidents or prevalence of sodomy in jails for men only is one such example. There could be other reasons and instances of such indulgence. If we go strictly by the interpretation of the Supreme Court it has gone to the extent that Article 15(1) protects individual citizens and not a class of citizens.⁶⁴ In that case the Court’s argument that homosexuals as a class are targeted by Section 377 and, therefore, they are entitled to protection, fails. I need not, however, pursue this argument.

Let us, however, move to similar issues raised in relation to Section 497 of IPC which defines adultery and prescribes punishment for committing it but expressly exempts the women participant from punishment as an abettor.⁶⁵ Soon after the

⁶² *Id.*, ¶ 104.

⁶³ See Rukmini Sen, *Breaking Silences, Celebrating New Spaces: Mapping Elite Responses To The ‘Inclusive’ Judgment*, Part II, in this issue.

⁶⁴ See *John Vallamattam v. Union of India*, (2003) 6 SCC 611, 626.

⁶⁵ § 497 reads: “**Adultery.**- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is

commencement of the Constitution the Supreme Court briefly disposed of the challenge to this section on the basis of Article 15(3) which authorises making of special provision for women.⁶⁶ When the issue was again raised in the Court after a gap of over thirty years in *Swomitra Vishnu v. Union of India*,⁶⁷ the Court judged the validity of that provision with reference to some of the arguments similar to those raised in *Naz Foundation*. Examining “the position afresh, particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex”⁶⁸ and the claim that some women seduce man and deserve punishment, the Court held:

“This position may have undergone some change over the years but it is for the legislature to consider whether S. 497 should be amended appropriately so as to take note of the ‘transformation’ which the society has undergone. ... But, we cannot strike down that section on the ground that it is desirable to delete it.”⁶⁹

To the question that married man who has sex with unmarried woman goes unpunished while married women having sex with unmarried man is subjected to the allegation of indulging in adultery, the Court answered:

“The legislature is entitled to deal with the evil where it is felt and seen most: A man seducing the wife of another. ... We hope this is not too right but, an under inclusive definition is not necessarily discriminatory. The alleged transformation in feminine attitudes, for good or for bad, may justly engage the attention of law-makers when the reform of penal law is undertaken. They may enlarge the definition of ‘adultery’ to keep pace with the moving times. But, until then, the law must remain as it is. The law, as it is does not offend either Art. 14 or Art. 15 of the Constitution.”⁷⁰

The Court further observed: “the fact that a provision for hearing the wife is not contained in S. 497 cannot render that section unconstitutional as violating Art. 21.”⁷¹

If we transpose the same argument against Section 377 little survives in *Naz Foundation* in respect of either Article 21 or Articles 14 and 15.

guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

⁶⁶ *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321.

⁶⁷ AIR 1985 SC 1618.

⁶⁸ *Id.*, 1622, ¶ 10.

⁶⁹ *Id.*, 1620-21, ¶ 6.

⁷⁰ *Id.*, 1621, ¶ 8.

⁷¹ *Id.*, 1622, ¶ 9.

In the context of specific issue before the Court in *Naz Foundation*, I could not understand the relevance of the last two sentences in the quote from that case at the beginning of this section. To my understanding they are merely educative that Article 15(2) has horizontal application and public places are as much open to homosexuals as to others. But I doubt if they have anything to do with the validity of Section 377.

E. SECTION 377, SUSPECT CLASSIFICATION AND STRICT SCRUTINY

For arriving at the unconstitutionality of Section 377 the Court turns the presumption of constitutionality of legislation upside down. Relying upon an earlier two judge bench decision of the Supreme Court in *Anuj Garg v. Hotel Association of India*⁷² and distinguishing it from a later five judge bench decision of the same Court in *Ashoka Kumar Thakur v. Union of India*,⁷³ the High Court held:

“On a harmonious construction of the two judgments, the Supreme Court must be interpreted to have laid down that the principle of ‘strict scrutiny’ would not apply to affirmative action under Article 15 (5) but a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.”⁷⁴

It added that “[t]hus personal autonomy is inherent in the grounds mentioned in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual.”⁷⁵

It concluded:

“As held in *Anuj Garg*, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against “reasonableness” under Article 14 but be subject to “strict scrutiny”. ... A provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.”⁷⁶

As a rule of general application laws made by competent legislature are presumed to be constitutional. Anyone who disputes the constitutionality of a law

⁷² (2008) 3 SCC 1.

⁷³ (2008) 6 SCC 1.

⁷⁴ *Id.*, ¶ 111.

⁷⁵ *Id.*, ¶ 112.

⁷⁶ *Id.*, ¶ 113.

must prove to the satisfaction of the court that the law violates any provision of the Constitution. This is as much the case when a law is challenged on ground of violation of a fundamental right as on any other ground. With respect to some of the fundamental rights the presumption has been further strengthened by special emphasis on the rule. For example, in relation to Article 14 the Court has repeatedly reminded of the presumption in favour of the constitutionality of an enactment and of the burden upon the person who attacks it to establish that there has been a clear transgression of the constitution. The person, who pleads that Article 14 has been violated, must establish that not only he has been treated differently from others but that he has also been treated differently from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made.⁷⁷ The position is not different in this regard either with respect to Article 15 or Article 21.⁷⁸

In view of this long standing position how much reliance can be placed on *Anuj* which cites no previous decision of the Court in support of the proposition it lays down. Sinha J., who wrote the judgment for himself and Bedi J. cites cases from other jurisdictions not directly relevant to the issue in dispute. The very first sentence of the extract cited from the only relevant judgment from the United States on sex-based classification goes against his conclusion: "The heightened review standard our precedent establishes does not make sex a proscribed classification."⁷⁹ It means that even in USA from where the Court is drawing inspiration for suspect classification does not recognize sex-based classification suspect requiring strict scrutiny transferring the burden of proof to the state. Such classification is to be treated like any other normal classification where the presumption is of the constitutionality of the classification and burden of proof lies upon the person who challenges its validity. As regards Article 15 (1) read with 15 (3), it is apparent that classification based on sex is not discriminatory so long as it makes special provision for women. If classification on the basis of sex were suspect and required strict scrutiny how could Article 15(3) expressly authorize it? It is, therefore, clear beyond doubt that classification based on sex is not suspect.

In *Anuj*, Sinha J. also admits that the law in question was a 'protective discrimination' measure which potentially served as double-edged sword. "Strict scrutiny test should be employed while assessing the implications of this variety of legislations."⁸⁰ He repeats: "The test to review such a protective discrimination

⁷⁷ See, e.g., *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538; *Ramchand Jagdish Chand v. Union of India*, AIR 1963 SC 563; *Probhudas v. Union of India*, AIR 1966 SC 1044; *Special Courts Bill, In Re*, AIR 1979 SC 478; *State of Maharashtra v. Basantibai*, (1986) 2 SCC 516; *Municipal Corpn. Of the City of Ahmedabad v. Jan Mohd. Usmanbhai*, (1986) 3 SCC 32. For a different view see *D.S. Nakara v. Union of India*, AIR 1983 SC 130 and *B. Prabhakar Rao v. State of A.P.*, 1985 Supp SCC 432, 462.

⁷⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, *Mithu v. State of Punjab*, (1983) 2 SCC 277, *State of Rajasthan v. Pratap Singh*, AIR 1960 SC 1208, *Nain Sukh Das v. State of U.P.*, AIR 1953 SC 384.

⁷⁹ *United States v. Virginia*, 518 US 515, 532-33.

⁸⁰ (2008) 3 SCC 1 at 18, ¶ 46.

statute would entail a two-pronged scrutiny: (a) the legislative interference (induced by sex discriminatory legislation in the instant case) should be justified in principle, (b) the same should be proportionate in measure.”⁸¹

In view of these statements in *Anuj* the reconciliation that the Court does in *Naz Foundation* between *Anuj* and *Thakur* becomes impossible. If *Thakur* was affirmative action case *Anuj* was also affirmative action – ‘protective discrimination’ – case. Secondly, the two propositions in the foregoing statement do not seem complementary of each other. Proportionality and strict scrutiny is not one and the same thing. Further, the Court has also extended the strict scrutiny test to non-equality issue in *Anuj* in the following words: “Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases.”⁸² [*Emphasis supplied*]

Here the Court moves from equality to freedom. In *Naz Foundation*, the Court is discussing it under equality and not under freedom. If freedom were the issue the *Naz Foundation* Court could have relied on strict scrutiny test. In view of these uncertainties reliance on *Anuj* is not of much help firstly, because *Anuj* is not clear about what it holds, secondly, there is no precedent to what it says and thirdly, it stands overruled by *Thakur* which specifically deals with the same point and hold as follows.

In *Thakur* the Court formulated a specific question:

“Whether the principles laid down by the United States Supreme Court for affirmative action such as “suspect legislation”, “strict scrutiny” and “compelling State necessity” are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution of India?”⁸³

As the case was about Article 15(5) the Court had to formulate and decide the issue specifically with reference to it. But it did so after due discussion of all the previous decisions of the Supreme Court about the non-applicability of US decisions, particularly on the 14th Amendment of the U.S. Constitution. After drawing the distinction between the two constitutions the Court came to the conclusion:

“The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as ... we have not applied the principles of “suspect legislation” and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved.”⁸⁴

⁸¹ *Id.*, at 19, ¶ 50 (Emphasis supplied).

⁸² *Id.*, 18-19, ¶ 47.

⁸³ (2008) 6 SCC 1, 513.

⁸⁴ *Id.*, 520, ¶ 209.

The other judges, who wrote separate opinions, also concurred in this conclusion.⁸⁵

The Supreme Court had laid down the same propositions earlier in *Saurabh Chaudri v. Union of India*⁸⁶ in a five judge bench decision. Sinha J while concurring in *Saurabh* referred to one his earlier opinions where also he spoke for the application of strict scrutiny and held that even if the strict scrutiny were applied the result would be the same. He also referred to an earlier decision of his in which he incidentally speaks of strict scrutiny in the context of Article 19 (1) (g).⁸⁷ He also spoke of the same principle in another two judge bench case.⁸⁸ This constant follow up on strict scrutiny time and again reflects Justice Sinha's fascination for strict scrutiny which he could finally realize in *Anuj* as senior member of the bench. But in view of the past and subsequent Constitution bench decisions of the Court expressly rejecting the application of strict scrutiny test *Anuj* cannot be relied upon to introduce that test in respect of any of the fundamental rights.⁸⁹

As regards the suspect classification in the U.S. it is a product of post-*Brown v. Board of Education*⁹⁰ era. Until *Brown* reasonable classification test which could justify even separate but equal doctrine laid down in *Plessy v. Ferguson*⁹¹ was the law. *Brown*, however, changed that position by holding that equal but separate could not provide equal protection of the laws in matters of education. This led to the realization that, "[t]he cases involving segregation and other forms of racial or ethnic discrimination had created a category of 'suspect classifications' or 'invidious distinctions,' requiring 'the strictest judicial scrutiny' and constitutional condemnation unless 'narrowly tailored to achieve some compelling public interest'."⁹² Accordingly the law persons started looking for other areas of invidious or suspect classification

⁸⁵ *Id.*, 626 Pasayat J. summarized: "While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide material for deciding the question regarding constitutionality. In that sense, the strict scrutiny test is not applicable and in-depth scrutiny has to be made to decide the constitutionality or otherwise, of a statute." *Id.*, 709. Bhandari J. summarized: "The principles enunciated by the American Supreme Court, such as, 'suspect legislation', 'narrow tailoring', 'strict scrutiny' and 'compelling State necessity' are not strictly applicable for challenging the impugned legislation."

⁸⁶ (2003) 11 SCC 146, 164, ¶ 36, the Court held: "The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in the Indian courts."

⁸⁷ *Id.*, 182, ¶ 92. The case referred to is: Balram Kumawat v. Union of India, (2003) 7 SCC 628, 642, ¶ 42.

⁸⁸ *Nair Service Society v. State of Kerala*, (2007) 4 SCC 1 at 25, ¶ 47 he observed: "A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India may be considered to be a suspect legislation. A suspect legislation must pass the test of strict scrutiny."

⁸⁹ For a very incisive and detailed discussion on *Anuj* and on issues discussed in this section, see T. Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review of Article 15 Infringement*, 50 JOURNAL OF INDIAN LAW INSTITUTE 177 (2008).

⁹⁰ 347 U.S. 483 (1954).

⁹¹ 163 U.S. 537 (1986).

⁹² ARCHIBALD COX, THE COURT AND THE CONSTITUTION, 306 (1987, Indian reprint, 1989).

which could easily gain public support such as wealth or poverty or issues relating to aliens, illegitimate children, women, indigents and the like. The invidious or suspect classification doctrine has led to the expansion of equality in the United States but is not free from controversies and criticism.⁹³ Our Constitution makers could anticipate these developments and, therefore, specifically prohibited classification on the basis of what they considered to be invidious or suspect classification in the Indian society. Articles 15, 16 and 29(2) are examples of such classification. Therefore, our courts do not have the kind of justification for developing or applying such a doctrine. If they are looking for innovation, they will have to look for such an opportunity as the Court grabbed in the post-Emergency era which slowly slipped from its grips by the close of the century. The kind of issues which the Court picked up in the post-*Maneka* era, which invoked instant public support, must be found out for giving any new dimension to our fundamental rights. I doubt if the gay rights issue is such an opportunity for the courts in India.

It may also be relevant to note that in the U.S. Constitution equal protection and due process clauses are part of the same amendment – 14th Amendment – and almost all the rights guaranteed against the federal government in the first nine amendments have also been incorporated in the due process clause of the 14th Amendment.

Let us also note that replacing the presumption of constitutionality of legislation by suspect classification and strict scrutiny amounts to replacing the people's representatives by the judges. The Court in *Bachan Singh* has expressed it in so many words:

“Behind the view that there is a presumption of constitutionality of a statute and the onus to rebut the same lies on those who challenge the legislation, is the rationale of judicial restraint, a recognition of the limits of judicial review, a respect for the boundaries of legislative and judicial functions, and the judicial responsibility to guard the trespass from one side or the other.”⁹⁴

Reversal of such a fundamental principle of constitutional law will disturb the constitutional balance of power between the legislature and the judiciary. Such a major step cannot and should not be conceived of on the basis of *Anuj*.

F. SEVERABILITY AND READING DOWN

We have noted above that the High Court did not invalidate either whole or any part of Section 377. It merely declared that “Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution” and added that “Section 377 IPC will continue to govern non-

⁹³ *Id.*, 320-21.

⁹⁴ *Supra* note 25, 916, ¶ 67.

consensual penile non-vaginal sex and penile non-vaginal sex involving minors.”⁹⁵ I know of no other instance in which any court has given such a decision of unconstitutionality. The courts either invalidate the whole or part of a statute or any of its provision. This is done on the basis of two interrelated principles. Firstly, the legislation be given effect as far as possible and secondly, if the invalid part of the legislation can be severed from the valid part then it must be done and only the former should be invalidated while the later should be allowed to remain operative.⁹⁶

There is another important rule of constitutional interpretation about the validity of legislation. According to this rule if a statute is capable of two constructions one of which makes it *ultra vires* the powers of the legislature and the other keeps it within its powers, the latter must be adopted on the presumption that the legislature knows the limits of its powers and is presumed to be acting within them.⁹⁷ Though the Court in *Naz Foundation* finds so much of Section 377 “violative of Articles 21, 14 and 15” as much “criminalises consensual sexual acts between adults in private” it does not tell exactly what words or phrases in Section 377 do so. It also does not tell as exactly what words or phrases of that section will continue “to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.” Therefore, even if the Court’s decision is given full effect Section 377 remains as it is subject to the restrictive interpretation given to it by the Court. In that case the Court is not invalidating the section; it is merely reading it down so as to bring it in harmony or consistency with the Constitution. Such a reading of the decision of the Court will remove its incongruity with the existing law laid down by the Supreme Court and will also decriminalize the “consensual sexual acts between adults in private.” To the question that may be raised as to how could the makers of IPC know in 1860 about the limits of legislative powers created by the Constitution in 1950, the answer is available in *Kedarnath v. State of Bihar*⁹⁸ in respect of the validity of Section 124 of IPC vis-à-vis Article 19 of the Constitution. This is one of the ways in which the snake may be killed without smashing the stick i.e. Section 377 remains constitutional but it does not apply to “consensual sexual acts between adults in private.” Of course it will be a treacherous process because for arriving at that result we will have to presume that Section 377 offends Articles 14, 15 and 21. We could perhaps avoid that presumption by simply holding that out of two possible interpretations one of which would require examination of validity of Section 377 vis-à-vis Articles 14, 15 and 21 and the other that avoids such examination and at the same time does not restrict the legislative intent in Section 377, we should follow the latter. In the light of scientific findings since 1860 it could be said that “consensual sexual acts between adults in private” are not against “the order of nature” and, therefore, not covered by that section.

⁹⁵ *Id.*, ¶ 132.

⁹⁶ For the details of the rule of severability see *R.M.D. Chamarbaugwala v. Union of India*, AIR 1957 SC 628, 636-37.

⁹⁷ For a detailed discussion of this rule along with the cases in which it has been applied see, G.P. SINGH, *PRINCIPLES OF STATUTORY INTERPRETATION*, 560 ff. (11th ed., 2008).

⁹⁸ AIR 1962 SC 955.

III. CONCLUSION

As stated in the beginning I have tried to examine the existing constitutional position *vis-à-vis* Section 377 of IPC without making any value judgments or taking sides. As I find it, the constitutional interpretation in *Naz Foundation* is not in line with the interpretation of the Constitution as established by the Supreme Court. As some of the issues decided in *Naz Foundation* conflict with large bench decisions of the Supreme Court up to seven judges, the *Naz Foundation* interpretation could be upheld as per practice and precedent of the Court only by a bench of not less than nine judges.

Towards the end I have also tried to suggest with some difficulty the possibility of reading down Section 377 by making it non-applicable to “consensual sexual acts between adults in private”.

As the matter is pending before the Supreme Court and the Supreme Court has enormous powers to devise appropriate procedures and remedies according to the requirement of each case instead of availing of the option of strong review of either upholding or invalidating Section 377 it could also exercise a weak form of review by asking the Parliament to re-examine Section 377 in the light of new developments in law as already suggested by the Law Commission. Though, of course, such a review assumes unconstitutionality of Section 377, the Supreme Court could do it without arriving at such a conclusion.⁹⁹

⁹⁹ For discussion and analysis in comparative perspective on weak and strong forms of judicial review, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008) and its review by M.P. Singh in 3 *THE INDIAN JOURNAL OF CONSTITUTIONAL LAW* 198 (2009).