How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of *Mardia Chemicals v. Union of India*

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I. Introduction

Strange silences punctuate the Indian Constitution,[1] silences that distil powers of amendment[2] and temper the hastiness of legislative process.[3] Of these silences, one is a questionable presumption in favour of the benevolent aspect of the legislator, for it is well settled that a court will not look to the motives of Parliament,[4] or to the members of which it is composed, while testing the constitutionality of its statutes.[5] If a statute is to be invalidated, there must exist some lucid constitutional basis for the invalidation. No constitutional challenge can be sustained on the ground that the intention of Parliament was suspect – indeed there exists a converse presumption: that all statutes are enacted *bona fide* and the intention of Parliament in enacting the law is beyond question.[6] This is a silent fiction which pervades the Indian Constitution. The presumption is one so fundamental that it continues to be drawn even where the statute suffers from a constitutional infirmity, though it may be invalidated on that account.

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1. *See* F.S. Nariman, *The Silences in our Constitutional Law*, The First D.D. Basu Endowment Lecture, October 29, 2005 at (2006) 3 S.C.C. (Jour.) 15.
2. The Basic Structure Doctrine, a test used by Indian courts to restrain Parliament's power of amendment was developed by the Supreme Court of India in *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461, after which it has become the most powerful silence of the Indian Constitution.
3. Article 111 of the Constitution of India gives the President of India, who is required to give his assent to a Bill passed by both houses of Parliament, to return the Bill or withhold his assent therefrom. The silence lies in that this process is not time-bound, and may be used by the President to apply the pressures necessary to achieve a just result.
4. In this comment, the term 'Parliament' is used generically to describe both the Parliament of India and the Legislatures of each of the states. Consequently, all examples are examples of the central machinery, but may equally be used in the context of the states.
5. *See e.g. A.K. Roy* v. *Union of India*, (1982) 1 S.C.C. 271; *Nagaraj* v. *State of A.P.*, (1985) 1 S.C.C. 523; *Gurudevdatta* v. *State of Maharashtra*, (2001) 4 S.C.C. 534.
6. This presumption seems to be based on considerations of expediency, as attributing *mala fides* to an entire body of Parliament has been held to be difficult to establish. However, the presumption may more readily be attributed to the doctrine of Parliamentary sovereignty, to the notion of Parliament as an event rather than an institution [R.F.V. Heuston,

To lend this principle to illustration, a law which unconstitutionally seeks to subvert the fundamental freedoms of a citizen under Article 19 of the Indian Constitution will continue to be considered one which was enacted in good faith even though it may be struck down by the courts of India in exercise of the powers conferred by Articles 32 or 226 of the Indian Constitution.[7] This silent constitutional proposition may appear to be unreasonable at first. How can it be said that a law which seeks to contravene a fundamental right is one which was enacted with the best of intentions? In the Indian context alone, attempts have been made particularly during the national emergency of 1975 to hurriedly subvert unalterable, basic features of the Constitution – to preclude judicial review in matters of constitutional amendment or in the appointment of the Prime Minister – even these amendments were invalidated not on the grounds of bad faith, but unconstitutionality. Such are the silent, strange presumptions which are inherent in the Indian Constitution, one in which the separation of powers between co-ordinate, co-extensive bodies of government is regarded basic.[8] The presumption is always that the motive of Parliament is beyond scrutiny.[9]

It is in the light of this principle that this comment seeks to address one of the most significant trends in our Constitutional history: the use of the test of 'arbitrariness' in invalidating legislation. Several statutes have been condemned by the Supreme Court of India for the reason that they

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'Essays in Constitutional Law' (2nd ed. 1964) 1]. 'What the Parliament doth,' wrote Blackstone, 'no power on earth can undo', Bl. Comm., vol. I, 161. In his elegant but subsequently criticized 'The Law of the Constitution', A.V. Dicey would contend that the rule of law did not conflict with the principle of parliamentary sovereignty as it contained internal and external limits. According to Sir Ivor Jennings, sovereignty only means that 'courts will always recognize as law the rules which Parliament makes by legislation' [Ivor Jennings, 'The Law and the Constitution' (5th ed. 1959) 149].

7. *Cf.* H.M. Seervai, 'Constitutional Law of India' (4th ed. vol. 1 1994) 448 (hereinafter *Seervai*). The learned author argues that if the mandate prescribed by a fundamental right is violated, the law will be void, however laudable the motives of its makers; but if the mandate has not been so violated, the utmost malignity will not make it void. This argument is taken a step further in this comment, as it is suggested that even when the mandate prescribed by a fundamental right is violated, there will be a presumption that the motives of the law makers were laudable, since their motives are of no consequence in statutory invalidation.

8. *See Kesavananda Bharati* v. *State of Kerala*, (1973) 4 S.C.C. 225, 366 (para. 292) (per Sikri, C.J.); *Indira Nehru Gandhi* v. *Raj Narain*, (1975) (Supp.) S.C.C. 1, 197 (para. 521); *A.K. Roy* v. *Union of India*, (1982) 1 S.C.C. 271, 293 (para. 17); *Panipat Woollen and General Mills* v. *Union of India*, (1986) 4 S.C.C. 368, 374 (para. 9); *K. Veeraswami* v. *Union of India*, (1991) 3 S.C.C. 655, 754 (para. 129) (per Verma, J., dissenting, although not on this point); *All India Judges Assoication* v. *Union of India*, (1993) 4 S.C.C. 288, 303 (para. 25); *All India Statutory Corporation* v. *United Labour Union*, (1997) 9 S.C.C. 377, 415 (para. 38).

9. But this presumption may not be absolute, possibly admitting of some exceptions. Perhaps the most striking exception is *D.C. Wadhwa* v. *State of Bihar*, (1987) 1 S.C.C. 378, where a Governor's decision to repromulgate an ordinance was considered to be one in bad faith. Even then, this is an isolated exception which may be attributed more easily to the fiction of the legislative

suffer from the vice of manifest arbitrariness.[10] The legitimacy of the test will soon be questioned before a Constitution bench of the Supreme Court of India in *Subramanian Swamy* v. *Director, C.B.I.*[11] While the principle is not without its dissentients,[12] one of the decisions is particularly piquant: In *Mardia Chemicals* v. *Union*[13] the Supreme Court of India struck down Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, for being oppressive, unreasonable and arbitrary. Amidst the diverse arguments which were put forth before the Supreme Court, it was also contended that since a procedure for the recovery of dues was already in existence, the enactment of the impugned legislation was unnecessary. While the question of the necessity of the statute was left unanswered, certain critical observations made by the Supreme Court of India in the decision, may lead to the development of exacting objective standards for arbitrariness and substantive due process in Indian law, and deserve analysis.

The ground of arbitrariness as a limiting principle for legislation must be distinguished from its use as an instrument of substantive review against administrative determinations.[14] Administrative bodies, equipped with the discretion to make decisions, are often conferred powers that may enable unequal, under-reasoned decisions. Good examples may be found in *Satwant Singh Sawhney* v. *Passport Officer*[15] and *Maneka Gandhi* v. *Union of India*[16] where the Supreme Court of India deprecated the practice of the passport authority of India in considering requests for the issuance of passports without applying its mind to any systematic body of rules. The test of intentional or

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character with which an executive ordinance is clothed, rather than a derogation from the presumption of good faith, which may be drawn upon an authority as supreme as the Parliament. Another exception may be found in *Raja Ram Pal* v. *The Speaker*, (2007) 3 S.C.C. 184, where the Supreme Court reserved for itself the authority to question the expulsion of members of Parliament from the House. But then again, on a closer examination of the decision, it appears that the tests to be used in such cases will not include the ground of bad faith. However, it is important to note that the motives of government and its functionaries are not free from scrutiny. *See e.g. Express Newspapers* v. *Union of India*, (1986) 1 S.C.C. 133 (finding demolition notices issued by government authorities mala fide).

10. *S.G. Jaisinghani* v. *Union of India*, A.I.R. 1967 S.C. 1427; *Ajay Hasia* v. *Khalid Mujib*, (1981) 1 S.C.C. 722; *Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 S.C.C. 212; *Vineet Narain* v. *Union of India*, (1998) 1 S.C.C. 226; *Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 S.C.C. 1; *Mardia Chemicals* v. *Union of India*, (2004) 4 S.C.C. 311. In *Malpe Vishwanath Acharya* and *Mardia Chemicals*, statutes were invalidated on the ground of arbitrariness, as against the other cases noted herein, which condemned the arbitrary exercise of power.
11. (2005) 2 S.C.C. 317.
12. *State of A.P.* v. *McDowell*, (1996) 3 S.C.C. 709; *Khoday Distilleries* v. *State of Karnataka*, (1996) 10 S.C.C. 304.
13. (2004) 4 S.C.C. 311.
14. *See* M.P. Singh, *The Constitutional Principle of Reasonableness*, (1987) 3 S.C.C. (Jour.) 31.
15. A.I.R. 1967 S.C. 1836.
16. (1978) 1 S.C.C. 248.

purposeful discrimination is available against administrative authorities that discriminate with 'an evil eye and unequal hand.'[17] But can the same test be applied to legislative authorities, which, in their wisdom, are entrusted the task of enacting laws which they find necessary subject to constitutional limitations?

Is it possible to attribute to Parliament the finding that its laws are enacted without reason? Is the ground of arbitrariness legitimate when the Constitution contains specific fundamental rights upon the touchstone of which unconstitutional laws can and were intended to be invalidated? Is the ground justifiable under a Constitution which presumes that supreme legislative authorities act *bona fide* even though they may act unconstitutionally? This comment seeks to address as its principal question, the legitimacy of the use of arbitrariness as an instrument of statutory invalidation as a stepping stone in understanding the conflict between the Legislature and Judiciary. It is argued that the test of arbitrariness in its use against legislation in India suffers from the vice of vagueness and lacks coherent objective standards upon which it may be legitimised. It is submitted that these objective standards may be discerned from the silences surrounding the Supreme Court's decision in *Mardia Chemicals*, and must inform the decisions of Indian courts as they determine whether the statute before them suffers from the vice of arbitrariness.

II. Non-Arbitrariness - An Extra-Constitutional Test

Non-arbitrariness as a method of statutory invalidation was not intended to be a part of the Indian Constitution. The intention of the founding fathers of India was strongly against the use of the doctrine of substantive due process by new Constitutional courts of India which were to be equipped with hitherto unseen powers of judicial review.[18] But that is not what happened.[19] Articles 14 and 21 became repositories of fairness and due process as they were given a 'new dimension'.[20] The test of arbitrariness as

17. *Musaiam* v. *Venkatachalam*, A.I.R. 1956 S.C. 246.
18. Incidentally, the phrase 'the equal protection of the laws' under Article 14 was borrowed from the 14th amendment to the Constitution of the United States of America – an amendment which also contained the 'due process of law' clause. The draft Indian Constitution, at a time when its provisions were being exhaustively debated in the Constituent Assembly of India, had replicated the due process clause. There was considerable dissent on whether the Indian Constitution ought to have done so. Sir B.N. Rau, an eminent member of the Constituent Assembly of India, upon an extensive conference with Justice Felix Frankfurter of the United States Supreme Court, recommended that the due process clause be removed. The words 'procedure established by law', taken from the Japanese Constitution, found their place where the due process clause was once to be. *See* T.R. Andhyarujina, *The Evolution of Due Process of Law*, in 'Supreme But Not Infallible: Essays in Honour of the Supreme Court of India' edited by B.N. Kirpal et al. (Oxford University Press, 2000) 197-198.
19. Andhyarujina, *id*. *See also* Justice B.N. Srikrishna, *Skinning a Cat*, (2005) 8 S.C.C. (Jour.) 3.
20. *Maneka Gandhi* v. *Union of India*, (1978) 1 S.C.C. 248.

a limiting principle in constitutional law began with the equality provisions of Article 14 of the Indian Constitution.[21]

In the locus classicus, *Royappa* v. *State of T.N.*,[22] equality and arbitrariness were declared 'sworn enemies' and 'antithetic' principles. Bhagwati J., in his celebrated opinion in *Royappa*, found that equality and arbitrariness were conflicting principles – one belonged to the rule of law, the other to the whim and caprice of an absolute monarch.[23] In this case, the transfer of a public officer to an inferior post was unsuccessfully challenged as being 'arbitrary, hostile and mala fide.' This was not a case where the constitutionality of legislation was in question. The decision was soon followed by *Maneka Gandhi* v. *Union of India*,[24] where it was reiterated that equality could not be 'cribbed, cabined and confined' within traditional and doctrinaire limits.[25] In this decision, once again, no legislation was under challenge. An administrative decision whereby the passport of a journalist was impounded in 'public interest' was seriously questioned. The trend was set for a new method of constitutional challenge, notwithstanding strong doctrinal criticisms from certain corners. It was submitted by H.M. Seervai, a noted Constitutional jurist, that the equation of non-arbitrariness with equality under Article 14 suffered from the logical fallacy of the undistributed middle, as everything which was arbitrary could not, in the opinion of the learned jurist, have been unequal.[26] Arun Shourie, a distinguished commentator of the judicial process of India, found that these decisions treated rhetoric as precedent.[27] In *State of A.P.* v. *McDowell*,[28] the Supreme Court of India laid down that no enactment could be struck down on the sole ground that it was arbitrary or unreasonable – but a challenge would be sustained, only if there were some constitutional infirmity found within the four corners of the Constitution itself. In *Khoday Distilleries* v. *State of*

21. Article 14 of the Constitution of India reads: "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".
22. (1974) 4 S.C.C. 3, 38.
23. *Id*.
24. (1978) 1 S.C.C. 248.
25. *E.P. Royappa* v. *State of T.N.*, (1974) 4 S.C.C. 3, 38 (para. 85).
26. *Seervai*, supra note 7, 439.
27. *See* Arun Shourie, 'Courts and their Judgments', (Rupa & Co., 2001) 402. It must however be noted that even an obiter dictum of the Supreme Court of India is considered binding, *Sarwan Singh* v. *Union of India*, (1995) 4 S.C.C. 546. The learned author was perhaps referring to the following paragraph from *E.P. Royappa's Case*, (1974) 4 S.C.C. 3, 38: "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."
28. (1996) 3 S.C.C. 709.

Karnataka,[29] it was repeated that arbitrariness is not a separate ground of challenge to the constitutionality of a statute in India.

Following this trend, Indian courts have consistently and categorically declared that the absence of arbitrary power is an essential tenet of the rule of law.[30] The test of non-arbitrariness was therefore justified as being a safeguard to the rule of law. For example, in *Shrilekha Vidyarthi* v. *State of U.P.*,[31] a government order which sought to terminate the services of all district government counsel in the state was considered arbitrary and a violation of the rule of law. It is submitted that this equation of non-arbitrariness with the rule of law cannot strictly sustain itself. In particular, the 'rule of law' is a phrase which is often misunderstood. It is settled law that all power has its legal limits,[32] and that the motive force of the law lies in ensuring that discretionary power does not become arbitrary power. Simply stated, the 'rule of law' means that nothing can be done without the sanction of law.[33]

At all times, the question that ought to be asked while challenging the discretion of an authority is: where is the law?[34] Without a law which legitimates the discretion of the authority, the action impugned is void. By the scheme of things as they stood at the time, Article 21 of the Indian Constitution appeared to contain the rule of law guarantee: that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. Sir Ivor Jennings had once opined that this provision was a 'mere application of the common law rule', that an act is lawful unless declared unlawful.[35] The preservation of the rule of law was therefore safeguarded by the Constituent Assembly of India under Article 21 of the Indian Constitution, whereby an action would be considered valid so long as it had the sanction of law. But while Article 21 prescribed 'law' as the essential forerunner to the rule of law, what was to ensue when the law existed, but it appeared to be unreasonable? In other words, if the arbitrariness perceived in the statute withstood the express tests of the Indian Constitution, could a court invalidate the statute none the less, on grounds which did not appear within the Constitution? Once the mandated standards prescribed by the Constitution are satisfied, is the court justified in applying

29. (1996) 10 S.C.C. 304.
30. *See e.g. Subramanian Swamy* v. *Director*, (2005) 2 S.C.C. 317.
31. (1991) 1 S.C.C. 212.
32. H.W.R. Wade & C.F. Forsythe, 'Administrative Law' (Clarendon Press, 7th ed. 1994) 379.
33. Soli J. Sorabjee, 13th M.C. Chagla Memorial Lecture Series – Government Law College, Mumbai, January 2007.
34. *Id*.
35. Ivor Jennings, 'Some Characteristics of the Indian Constitution' (Oxford University Press, 1953) 40.

substantive standards as vague as 'arbitrariness' in questioning the constitutionality of statutes?[36]

The decisions which followed, it is submitted, understood *Royappa* and *Maneka Gandhi* in the context of the factual matrices in which they were decided. Both cases involved the exercise of discretionary powers by administrative authorities. Both sought to prevent discretionary powers from assuming the countenance of arbitrary powers. For example, in *Ajay Hasia* v. *Khalid Mujib*,[37] a rule framed by a society regulating admission of students to various courses in a college was struck down as arbitrary and unconstitutional – but no statute was invalidated for being arbitrary in itself. Statutes may have been deprecated because they permitted administrative authorities to exercise arbitrary powers, but the requirement at all times was that there ought to have existed a law, and that the procedure established by law for the deprivation of the right to life and personal liberty ought to have been 'fair, just and reasonable'. The standard required the application of vague, almost tautologous standards. But it was none the less legitimate, because legislative wisdom was not supplanted.

In *S.G. Jaisinghani* v. *Union of India*,[38] the constitutional validity of the 'seniority rule' of the Income Tax Service was challenged as being arbitrary. The rules within which the impugned rule was ensconced, were framed by the Government of India and were therefore a form of delegated, not primary legislation. The standards which apply to delegated legislation differ from those which ought to apply to primary legislation, for it is submitted that the test of arbitrariness is illegitimate in the absence of objective standards, because it is *Parliament* which enacts the law in its legislative wisdom, and not because of the *legislative* character of the function. Therefore, where a statutory delegate carries out a legislative function, it is submitted that it cannot be treated with the same deference as is meted out to Parliamentary legislation. However, it must be noted that delegated legislation cannot be invalidated on terms distinctly available against administrative authorities. For example, where rules are passed by the Central Government without giving aggrieved persons the opportunity of being heard, they cannot be invalidated on the ground that natural justice was not given its due. The guarantee of natural justice subject to exceptions[39] is available against administrative and quasi-judicial authorities in India.

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36. Significantly, the standard of 'reasonableness' was meant to by applied under the Indian Constitution, as the freedoms enjoyed under Article 19 of the Indian Constitution are subject to 'reasonable' restrictions.
37. (1981) 1 S.C.C. 722.
38. (1967) 2 S.C.R. 703.
39. *See e.g. Aligarh Muslim University* v. *Khan*, (2000) 7 S.C.C. 529.

But the tests applied against administrative and quasi-judicial bodies cannot be applied to delegates of legislative power. Further, the tests of arbitrariness as applied against delegated legislation in India are more legitimate than those applied against Parliament. Delegated legislation must be exercised by the principles upon which Parliament presumably intended the delegated power to be exercised. Indian courts have adopted the test that the legislative policy of the statute which makes the delegation must be certain. Arbitrariness on the part of the statutory delegate would therefore imply a non-observance of the legislative policy. Importantly, in these cases it is not open to courts to question the policy itself.

III. Questioning *Malpe Vishwanath v. Maharashtra*

The principal argument which may be made against the use of arbitrariness as a method of statutory invalidation is rooted in its subjective character. First, an investigation into the arbitrariness or otherwise of a statute entails the application of vague standards and personal predilections – notions of justice that differ with the size of the proverbial Chancellor's boot.[40] Second, the absence of objective standards may lead to the application of 'progressive' variables where the danger of populism threatens to influence the psyche.[41] Third, given that the objective of the law lies in ensuring certainty, the stark absence of objective standards in the use of the instrument of arbitrariness, may lead to unpredictable outcomes – cases which may be harder to predict than most. Fourth, the delicate balance upon which the Indian political system exists, one which harmonises the functioning of co-ordinate institutions, is liable to be further upset in the application of vague standards.

As was seen in the previous section, while the test of arbitrariness has been applied against arbitrary administrative decisions, against statutes that give leave to administrative authorities to exercise their powers in an arbitrary fashion, and against subordinate legislation framed by the government, there appear to be only two cases so far wherein the test of arbitrariness has been used to invalidate legislation. The first was the decision in *Malpe Vishwanath* v. *State of Maharashtra*[42], where the Supreme Court of India deprecated

40. True it is that courts of equity have wide discretionary powers, and that no court can do justice without discretion, but even the discretion of equity has its reasonable limits. There exist objective rules of equity which may be applied in ascertaining whether relief ought to be granted even in those cases where relief is wholly discretionary. Rules such as 'he who comes to equity must come with clean hands', 'he who seeks equity must do equity' and 'equity treats that as done which ought to be done' etc. are good examples. The discretionary law of specific relief in India has its own statute. Further, it is submitted that grave questions of constitutional significance should never be decided on the application of wholly vague standards. After all, there is a strong prime facie presumption in favour of the constitutionality of a statute.

41. A.S. Anand, *Judicial Review-Judicial Activism-Need for Caution*, (2000) 42 J.I.L.I. 149, 159.

42. (1998) 2 S.C.C. 1.

pro-tenant mandatory brackets of rent under the Bombay Rent Act on the ground that its provisions, once a reaction to the social necessities of the time and in particular to the needs of tenants, had ceased to be socially relevant. The decision is an authority for the proposition that legislation which is initially justified may become arbitrary, and consequently unconstitutional with the passage of time. While it was categorically affirmed by the Supreme Court of India that the provisions of the impugned statute had lost their social utility and were consequently arbitrary, the principal statute was not struck down for the reason that it was temporary legislation and its extended period was to come to an end very soon, upon which the government would have the opportunity to reconsider the social value of the statute. The questions which arise are: had the statute not been time-bound, would the court have condemned it for the reason that its provisions had become socially irrelevant, thereby arbitrary and unconstitutional? If the answer to this question were to be in the affirmative, should the court not have invalidated the statute on the strength of the finding that its provisions were unconstitutional? In other words, should an unconstitutional statute have survived challenge merely because its provisions were time-bound? But more significantly, is it legitimate for a court to examine the necessity of a statute and to invalidate it for its obsolescence, a function which is ordinarily the province of legislative repeal?

IV. Objective Standards in *Mardia Chemicals v. Union of India*

The Supreme Court's decision in *Mardia Chemicals* v. *Union of India* is the only other decision in the conceived spectrum of the constitutional cases of India, in which the provision of a statute was invalidated for being arbitrary.[43] Sections 13, 15, 17 and 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, were under challenge. The impugned statute created a mechanism by which secured creditors could recover their dues from non-performing assets. It permitted the secured creditor to take recourse to various measures e.g. securing possession of the secured assets on the borrower's default. Section 17 permitted the borrower to institute an appeal against the said measures – but before filing the appeal, he would have to deposit a sum equivalent to 75% of the amount claimed by the secured creditor with the Debt Recovery Tribunal. The question was: did this requirement, viz. the deposit of 75% by the borrower, due to its excessively onerous character render the right of appeal conferred by the statute illusory? Section 17[44] was thereby assailed

43. (2004) 4 S.C.C. 311.

44. The section reads: "17. Right to appeal.- Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his

on the ground that the right created thereunder was illusory and suffered from the vice of arbitrariness. It must be noted that the right to appeal of which the Section speaks was not really a right of appeal, but a right to institute a proceeding in the first instance. In favour of the statute, it was contended by the Union of India that such provisions were not unknown to the law, and that the right of appeal was one which inhered in no person. Rejecting the submission, the provision was struck down by the Supreme Court of India as arbitrary and unconstitutional.

In the light of this finding, an important question arises for analysis: can it be contended that a right which had never existed before the statute, i.e. a right which had no common law foundations, can be invalidated for being illusory – notwithstanding that no person has an inherent right to a right created by statute? However, the finding is perhaps better understood in the light of an important exception: *fundamental rights*. No statute can take away or abridge a right which inheres in a citizen or person under Part III of the Constitution. *Judicial review* is a fundamental right under Article 32 and a part of the basic structure of the Constitution. However, while the right to approach the Supreme Court to enforce rights conferred by Part III is a fundamental right, judicial review in the abstract is not a fundamental right, although it is a part of the basic structure of the Indian Constitution. Article 32 of the Indian Constitution confers upon all persons the right to move the Supreme Court of India for the enforcement of fundamental rights, but it does not confer a blanket right to judicial review by all courts. Therefore, the Supreme Court in *Mardia Chemicals* did not have the option of invalidating Section 17 of the impugned statute on the touchstone of Article 32 or any of the express fundamental rights embedded in Part III of the Constitution since Section 17 dealt with the right of judicial review before a quasi-judicial tribunal – a right which was not expressly granted by any provision of the Constitution – and not the Supreme Court. An extra-constitutional test would therefore have been required for the invalidation of Section 17. The test was that of arbitrariness.

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authorised officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

It is submitted that in this manner, an objective standard may be ascertained in defining the test of arbitrariness. The standard, it is submitted, is the test of the basic structure of the Indian Constitution. While the plenary right to judicial review in its entirety is embodied in no specific provision of the Constitution, the right to judicial review is none the less a part of the basic structure of the Indian Constitution. The proposition therefore is: if a statute does not confer the right of judicial review, the right must be read into the statute, but if the statute confers the right of judicial review and the right is considered illusory, it must be struck down for violating the basic structure of the constitution – a test which is traditionally applied only to amending acts and not statutes.[45] The arbitrariness in Section 17 of the impugned statute may therefore be attributed to its rendering illusory a right which was a part of the basic structure of the Indian Constitution.

> "The contention of the petitioners is that in the first place such an oppressive provision should not have been made at all. It works as a *deterrent or as a disabling provision impeding access to a forum which is meant for redressal of the grievance of a borrower*...The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive..."[46] (italics supplied)

While the basic structure test is applied only against amendments of the Constitution and not in the testing of ordinary legislation, following the silences surrounding the decision in *Mardia Chemicals* it is submitted that the basic structure test may be used as an objective standard in ascertaining the arbitrariness or otherwise of legislation.[47] The question which at all times must be asked is: does the statute violate the basic structure of the Constitution, or render illusory a right inherent in the basic structure? If the question is answered in the affirmative, it is submitted that the statute may

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45. *See e.g. Indira Nehru Gandhi* v. *Raj Narain*, (1975) Supp. S.C.C. 1; *Kuldip Nayar* v. *Union of India*, (2006) 7 S.C.C. 1. The 'basic structure' test was developed by the Supreme Court of India at the helm of a serious of property cases which inundated the Indian courts in the post-independence period. In *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461, a bench of 13 judges of the Supreme Court, in the longest set of judgments to have been printed in the law reports, laid down substantively by a majority of 7-6 that Parliament's power of amendment was limited in that while fundamental rights could be amended, the 'basic features' of the Indian Constitution could not be destroyed.
46. *Id*., 352.
47. While the court in *Mardia Chemicals* did not refer specifically to the basic structure theory in applying the test of arbitrariness, it is submitted that the silences of the decision speak for themselves, in that the right which was being questioned was a part of the basic structure of the Constitution.

then be struck down as being arbitrary and consequently unconstitutional.[48] This principle is subject to one important qualification, i.e. that the test of 'non-arbitrariness' is an extra-constitutional test, and is not, by itself, a part of the basic structure of the constitution.

V. Conclusion

The Indian Constitution is the principal document of the nation, upon which an enacted statute must either stand or fall. Part III of the Constitution limits, both negatively and positively, the exercise of state authority and in particular the power of Parliament to make law. The test of arbitrariness would ordinarily be one which would not be applied by Indian courts since there exist specific tests prescribed expressly in the Constitution, which may be used to question legislation. It is only when the impugned legislation successfully sustains the traditional constitutional proscriptions that courts will have to look beyond the text of the Constitution for tests that fulfill the sentiment of justice, brewed daily in the cauldron of courts.[49] If Section 9 of the Civil Procedure Code, 1908, were for example, repealed, thereby destroying the right to move a civil court; or if Section 62 of the Representation of People Act, 1951 were repealed thereby endangering democratic process in India (the right to vote in India being a statutory and not a fundamental right); the court may find it necessary to step in and preserve basic features of the Indian Constitution which are not enshrined in fundamental rights. Whether extra-constitutional tests are legitimate is in itself a fundamental question. The words of the Supreme Court of India in *Indira Nehru Gandhi* v. *Raj Narain*,[50] while rejecting the use of the basic structure doctrine against ordinary legislation, bear meaning:

> "To accept the basic features or basic structures theory with regard to ordinary legislation would mean that there would be two kinds of limitations for legislative measures ... This will mean *rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution*."[51] (emphasis supplied)

The extra-constitutional test of arbitrariness may necessarily involve a rewriting of the Constitution, consequently robbing Parliament, in the exercise of its legislative function, of acting within the framework of the Constitution. The legitimacy of a function which involves 'rewriting' and

48. Even if the test of arbitrariness is, in itself, considered to be a part of the basic structure of the constitution, it is submitted that it must be informed by the other features of the basic structure for the development of objective standards.
49. A phrase which may be attributed to Benjamin N. Cardozo, 'The Nature of the Judicial Process', (Yale University Press, 2004 rep.) 10, 44.
50. (1975) Supp. S.C.C. 1.
51. *Id.*, para. 134.

'robbing' may seriously be questioned. However, it must be understood that in the Indian context, legitimacy is more a question of perception than formality,[52] and decisions will be legitimate, as they have in the past been perceived legitimate, if and only if institutions survive. Struggles for the custody of the Indian Constitution, as they have been in the past, are imminent. The Indian courts' decisions over the next decade will hold the key in ascertaining whether an element of objectivity will legitimise the functioning of judicial process in India.

52. *See* S.P. Sathe, 'Judicial Activism in India: Transgressing Borders and Enforcing Limits', (Oxford University Press, 2002) 249-311.