THE DOCTRINE OF STRICT SCRUTINY AND CROSS-CONSTITUTIONAL BORROWING: READING *SUBHASH CHANDRA V. DELHI SUBORDINATE SERVICES SELECTION BOARD* 2009 (11) SCALE 278

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Introduction

The Indian judiciary has only recently attempted developing a normative context to justify its resort to strict judicial scrutiny of laws. In essence, such practice not only reverses the traditional presumption of constitutionality in favour of State action but also necessitates that the impugned legislation advances a *compelling interest* of the State and is narrowly tailored to advance such an interest through the *least rights restrictive* means available.[1]

The advent of the doctrine in Indian constitutional jurisprudence was seen in *Anuj Garg v. Hotel Association of India*[2], where the Supreme Court examined and struck down a protective discrimination provision in Punjab Excise Act, 1914 that restricted women's right to employment and equal treatment. Subsequently, in *Ashoka Kumar Thakur v. Union of India*[3], the Supreme Court rejected this argument, without making reference to *Anuj Garg*[4], and instead placing a rather skewed reliance on *Saurabh Chaudhary*[5] holding that strict scrutiny could not be applied in the context of affirmative action programmes, seeing as the Constitution expressly provides for and thus permits affirmative action.[6] The doctrine was then employed in *Subhash Chandra v. Delhi -Subordinate Services Selection Board*[7] and in *Muralidhar Rao*

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1. *See* Craig R. Ducat, *Constitutional Interpretation - Rights of the Individual*, E13 (West Thomson Learning, 7th ed. 2000, vol. II).
2. AIR 2008 SC 663.
3. (2008) 6 SCC 1.
4. A reference to *Anuj Garg* (delivered in December 2007) was not possible as the arguments for parties in *Ashoka Thakur* had been concluded in November 2007, while the judgment was delivered in April 2008. *See,* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177, 179, note 10.
5. (2003) 11 SCC 146.
6. The argument that the very existence of provisions for affirmative action in areas that would otherwise constitute *suspect classification,* precludes the application of this doctrine has generally constituted the criticism levelled at the application of this doctrine in India. *See also, Bhikaji Narain Dhakras and Ors. v. The State of Madhya Pradesh and Anr.* (1955) 2 SCC 589; *A.S. Krishna v. State of Madras*, (1957) SCR 399.
7. 2009 (11) SCALE 278.

v. State of AP[8], thus widening the scope for applicability of this stringent standard of review.

In this paper, the researcher will examine the import and application of strict scrutiny into Indian constitutional jurisprudence in context particularly with the exposition on strict scrutiny in *Subhash Chandra.* The researcher will attempt to expose the haphazard application of this doctrine, keeping in mind the contexts that warrant the application of strict scrutiny.

The scope of this paper is limited to an examination of the cross-constitutional borrowing of this standard of review with little methodological rigour, and its unmerited acontextual and therefore haphazard application. This paper shall not address the specific question of whether strict scrutiny can be applied to affirmative action programmes in India, attempts to resolve the contradiction between *Anuj Garg* and *Ashoka Thakur* have been made both in academic writing[9] as well as judicial exposition.[10] Further, the paper shall not concern itself with the possible ramifications of applying strict scrutiny to affirmative action programmes, such as the prospective development of a symmetrical notion of equality, in derogation from the constitutional mandate of substantive equality.

Facts and Judgment

In *Subhash Chandra v. Delhi Subordinate Services Selection Board*[11], the Supreme Court addressed a challenge to the validity of two circulars issued by the Government, Union Territory of NCT Delhi. The first circular was a clarification on the caste status of migrant Scheduled Caste/Scheduled Tribe/ Other Backward Classes (SC/ST/OBC) persons in their State of migration, while the second contained instructions regarding the issue of OBC certificates to migrants, resident in Delhi, who belonged to the SC/ST/OBC in their State of origin. The appellants who were migrants in Delhi and who were notified as SC/ST/OBC category in their State of origin, claimed the benefit of reservation in State services receivable by these groups in NCT Delhi, and thus challenged the said circulars.

The question emanating from the appellants' claim to SC/ST/OBC status in NCT Delhi based on their caste status in their State of origin had been sufficiently countenanced and conclusively refuted previously by the

8. Delivered on 8.02.2010 *as accessed at* http://hc.ap.nic.in/orders/wp_15267_2007.html.
9. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177;
10. *Naz Foundation v. Government of NCT*, 160 (2009) DLT 277.
11. 2009 (11) SCALE 278 (hereinafter referred to as *Subhash Chandra).*

Court in *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College,*[12] *Action Committee v. Union of India*[13] and *M.C.D v. Veena.*[14] The recognition of castes, races or tribes as SC/ST/OBCs is in relation to particular States or Union Territories.[15] The rationale for State-wise recognition of SC/ST/OBC is that the nature and extent of disadvantages and hardships faced by various castes and tribes vary from State to State[16]. State-wise notification of SC/ST/OBC ensures that reservation and benefits of the State accrue only to castes and tribes that are assessed to be SC/ST/OBC in that particular State; migrant SC/ST/OBC persons cannot claim these benefits in the State to which they have migrated.[17] The Court reiterated this position of law.[18]

The Court also held that the presidential notifications of Scheduled Castes and Tribes cannot be extended to migrant SC/ST persons by way of circulars; such extension being permissible only through legislation by the Parliament, as under Articles 341(2) and 342(2).[19] Furthermore, the Court employed strict scrutiny in adjudging the constitutionality of deprivation of reservation benefits to those SC/ST members lawfully entitled to the same within NCT Delhi, caused by the inclusion of migrant SC/ST persons within the purview of the said benefits.[20]

Critique of the Judgment

Applicability of Strict Scrutiny

The Honourable Court viewed the issue from the lens of Article 16(4) and went on to conclude that such circular cannot result in a situation wherein those residents of Delhi belonging to the SC, and thus, lawfully entitled to be regarded for service quotas within the State, would be deprived thereof, "*by way of bringing in another class of persons within the purview of the said category of Scheduled Castes, who are not entitled to the said benefit*";[21] such deprivation of a "*constitutional right*"[22], in the opinion of the Court, would warrant judicial review by the standard of strict scrutiny.

12. (1990) 3 SCC 130.
13. (1994) 5 SCC 244.
14. (2001) 6 SCC 571.
15. *See* Articles 341 and 342 of the Constitution of India, on State-wise recognition of SC/STs and *M.C.D v. Veena,* (2001) 6 SCC 571, for the law on State-wise recognition of OBCs.
16. *Action Committee v. Union of India*, (1994) 5 SCC 244, ¶9.
17. *Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College and Ors.* (1990) 3 SCC 130, ¶13.
18. *Subhash Chandra, ¶¶*27-32.
19. Ibid, *¶¶*40,41.
20. Id., *¶¶*43-44.
21. Ibid, ¶43.
22. Id.

That administrative instructions via **circulars** cannot add "*another class of persons within the purview of the... category of Scheduled Castes",* such addition being permissible only by the procedure followed under Article 341(2)[23]*,* forms the sole and absolute ground for the unconstitutionality of such inclusion. In this light, the subsequent discussion on strict scrutiny is wholly misplaced and is thus rendered infructuous.

Assuming for the sake of argument that such inclusion of "*another class of persons within the purview of the... category of Scheduled Castes"* was possible by way of an executive circular, judicial scrutiny is triggered when classes that are not entitled to special benefits under Article 16 are wrongly included in the list of beneficiaries of the special provisions.[24] However, no special standard of scrutiny had been enunciated by this Court thus far, in matters arising under Article 16(4).[25]

Judicial review by strict scrutiny has traditionally been applied, and is seen to be merited, in only two distinct contexts: *first,* classifications that infringe, invade, restrain or burden the exercise of fundamental rights[26], *second,* **any** classification based on suspect criteria[27].

In *Subhash Chandra*, the Court plunges into a haphazard discussion on the applicability of strict scrutiny, frequently oscillating between these two contexts, and thus fails to make a contextual analysis of the need for strict scrutiny of the matter. The Court holds that the commission of a "*constitutional violation*"[28] of the nature of a deprivation of a "*constitutional right"*[29] would entitle Courts to apply strict scrutiny, indicating that the Court viewed the matter in the former context. The Court however frequently strays into discussions on the applicability of this doctrine in "*protective discrimination cases*"[30] indicative of scrutiny of classifications based on 'suspect

23. *E. V. Chinnaiah v. State of Andhra Pradesh* (2005) 1 SCC 394, ¶96.
24. *Indra Sawhney v. Union of India,* AIR 1993 SC 477, per Sawant, J., ¶615.
25. *Indra Sawhney*, per Jeevan Reddy, J., ¶113;
26. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972); *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966); *Zablocki v. Redhail,* 434 U.S. 374, 388.
27. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Brown v. Board of Education*., 347 U.S. 483, 495 (1954). *See also, Anuj Garg v. Hotel Association of India,* AIR 2008 SC 663, ¶39.
28. *Subhash Chandra,* ¶43.
29. Ibid*,* ¶43, While discussing the compelling interest requirement, "*This process is under the intense gaze of the court because the government is impinging upon somebody else's core constitutional rights...*"; In observing that "*The government must have a* [sic] *overwhelming compelling interest to justify limitations on the freedom of association, free exercise of religion, free speech, right to vote, right to travel et al.*" the Court recognizes the "fundamental" freedoms, as recognized by United States Supreme Court, infringements of which have been subject to strict scrutiny.
30. Id.*,* ¶43, "*At the heart of the applicability of this doctrine in protective discrimination cases...*".

criteria'.[31]

It is submitted that the wrongful inclusion of a class of people within the list of Article 16(4) beneficiaries does not give rise to either of the contexts that merit this exacting standard of judicial review.

In order for an infringement to merit strict scrutiny, the right in question must necessarily be 'fundamental', as opposed to otherwise important rights, and must thus be guaranteed by the Constitution implicitly or explicitly[32].

The question of Article 16(4) conferring a fundamental right has undergone sufficient debate.[33] Judicial decisions hold that this provision merely confers a discretionary power on the State to make any special provision for the advancement of these classes.[34] The provisions under Articles 15(4) and 16(4) may be understood as embodying policy imperatives, comparable with Directive Principles of State Policy, coupled with the conferral of discretionary power to enable the fulfilment of the policy of reservations for the disadvantaged.[35] In this light, the argument that Article 16(4) confers **no right**, much less a fundamental right, on any backward class of citizens or on SC/ST seems to prevail. Thus, a demand for reservations by a member of a backward class or SC/ST on the basis of the "right to reservation" emanating from Articles 15(4)/16(4) is unjustified and thus unsustainable.

However, a relevant consideration is the possible **right to be considered** as eligible for service or other quotas, once the State has **already provided for** reservations for backward classes/SC/ST. This right enjoys no constitutional protection as a "fundamental right"; at best, such a right would be a legal right conferred upon a backward class/SC/ST individual **by the law creating special provisions.**

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31. Id., ¶43, While discussing Johnson v. California, 543 U.S. 499, "strict scrutiny is designed to 'smoke out' illegitimate uses of race..."
32. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-35 (1973).
33. See M.P. Singh, *Are Articles 16(4) or 15(4) Fundamental Rights?*, (1994) 3 SCC (Jour) 31, arguing that Articles 15(4) and 16(4) do confer fundamental rights; Paramanand Singh, *Fundamental Right to Reservation: A Rejoinder*, (1995) 3 SCC (Jour) 6, H. M. Seervai, *Constitutional Law of India*, 556, 558, ¶9.172 (Universal Law Publishing Co. Ltd., Delhi, 4th ed. 1991, vol. 1) arguing that these provisions are merely enabling provisions.
34. *C. A. Rajendran v. Union of India,* (1968) 1 S. C. R. 721, 733, The Court also observed "*...there is no constitutional duty imposed on the Government to make a reservation...*"; *See also P & T SCs and STs Employees' Welfare Assn. v. Union of India*, (1988) 4 SCC 147; *Indira Sawhney v. Union of India,* 1992 Supp (3) SCC 217.
35. Paramanand Singh, *Fundamental Right to Reservation: A Rejoinder, (1995) 3 SCC (Jour) 6.*

Finally, regard must be had to the fact that the bill of rights in Part III of our Constitution specifically declares that **all rights** enlisted therein are "fundamental rights", thus rendering the possibility of some rights being "more fundamental" than others itself nugatory. While some of the **rights per se** could be considered as more fundamental than some others, the constitutional protection guaranteed to **all of the Part III rights is** the same, within our constitutional scheme. Thus all Part III rights necessarily must be subject to the same standard of review as Courts are precluded from according a preferred position to certain rights in India.

It is thus clear that the first context is not only absent in the instant case, there being no infringement of a fundamental right, but also absent generally in the Indian constitutional scheme, as all Part III rights are 'fundamental rights', none less fundamental than the other.

The second context that merits strict scrutiny arises when State action is directed against a minority group, thereby creating a classification based on criteria that is rooted in either 'immutable status'[36] or 'fundamental choice'[37].

A suspect class is one that is "*saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process.*"[38] Therefore, a suspect classification arises when a minority is discriminated against vis-à-vis a majority group, at the hands of a majoritarian political process.[39] In the present matter, the two groups with opposing interests are the SC/STs native to Delhi, and migrants who are recognised as SC/ST in their State of origin, both of which are minorities in their own respect. In the matter of inclusion of migrant SC/STs as beneficiaries of reservation, it is evident that neither group qualifies as a 'suspect class' vis-à-vis the other; thus negating the possibility of discrimination emanating from

36. *Frontiero v. Richardson*, 411 U.S. 677, 686 "...sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."
37. Religion and place of residence are fundamental choices protected by the Constitution. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177, 197-199.
38. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).
39. Classifications have also been regarded as "suspect" in cases of affirmative action such as *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), Powell, J., *Fullilove v. Klutznick,* 448 U.S. 448 (1980), Stewart, Stevens, Rehnquist, JJ., *Richmond v. J. A. Croson Co.,* 448 U.S. 469 (1989), *Adarand Constructors Inc. v. Pena,* 515 U.S. 200 (1995). However, the question of subjecting affirmative action measures to strict judicial review is outside the scope of this paper, as discussed in the Introduction.

a majoritarian political process.[40]

Conclusion

Bricolage is the process of creating something, not as a product of calculated choice, using materials most suitable for a particular purpose, but by mere assembly of whatever material is available.[41] Mark Tushnet, a prominent scholar, extends this concept to law:

> *Constitution-makers and interpreters find themselves in an intellectual and political world that provides them with a bag of concepts "at hand," not all of which are linked to each other in some coherent way. As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they reach into the bag and use the first thing that happens to fit the immediate problem they are facing.*[42]

The haphazard application of strict scrutiny in *Subhash Chandra* seems illustrative of bricolage in judicial decision-making. While bricolage in constitution-making may have its uses[43], similar practice in judicial decision-making as part of the judge's justificatory process must be questioned, as it raises concerns of the import of foreign law being too personal, random and unprincipled.[44]

The exercise of caution is necessary in the use of comparative constitutional law in domestic constitutional interpretation.[45] Various methods[46] of approaching comparative constitutional law have *"different implications for the analysis of whether and how constitutional ideas migrate from*

40. *Massachusetts Board. of Retirement v. Murgia,* 427 U.S. 307, 313-314, where strict scrutiny was not applied as the group did not constitute a "discrete and insular minority" that was historically subject to discrimination, there arising no question of requiring protection from the majoritarian political process.

41. Claude Lévi-Strauss, *The Savage Mind*, 17 (University of Chicago Press 1966) (1962) *as cited in* Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 Yale L.J. 1225, 1286.

42. Ibid.

43. Id.

44. Basil Markesinis & Jorg Fedtke, *Judicial Recourse to Foreign Law, A New Source of Inspiration*, 167 (UCL Press, London, 1st ed. 2006).

45. Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes with Reference to Affirmative Action,* 36 Conn. L. Rev. 649.

46. Mark Tushnet suggests that *normative universalism* and *functionalism* involve efforts to see how constitutional ideas developed in one system might be related to those in another, in capturing the same normative value or in organising a government to carry out the same tasks. *Expressivism* requires an understanding that constitutional ideas to be expressions of a particular nation's self-understanding.

one constitutional system to another".[47] One such method, *contextualism,* recognises that constitutional law is embedded within the institutional, doctrinal, social and cultural contexts of a country[48]; a full appreciation and understanding of constitutional ideas can only be achieved by according due deference to the context within which they exist.

Adopting a contextualist approach to the import of 'strict scrutiny' into Indian law demands that 'strict scrutiny' review in the context of infringement of fundamental rights be understood as distinct from that in the context of 'suspect classifications'. The Supreme Court of the United States engages itself in deciding if a right is constitutionally 'fundamental', even if not mentioned in the text of the Constitution.[49] Thus, heightened standards of scrutiny are employed only on the finding that a **fundamental** right is infringed.[50] In India, given that fundamental rights have been expressly enumerated under Part III of the Constitution, whether the Supreme Court can decide if a right is fundamental **enough**[51] to warrant the application of strict scrutiny in respect of its infringement is a moot question. Thus, as argued earlier, the context of infringement of a 'fundamental' as distinct from an otherwise important right does not even arise in India, thus precluding the application of strict scrutiny for such infringements.

As regards the constitutionality of 'suspect classification', any classification based on suspect criteria that is rooted in "*a characteristic that relates to personal autonomy*[52]", except in cases of affirmative action, may be subject to strict scrutiny.[53] Thus, due caution in the import and subsequent application of foreign constitutional ideas into Indian law must be exercised by the judiciary, the absence of which is conspicuous in this decision.

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47. Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law* in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, 67, 68 (Cambridge University Press, London, 1st ed. 2006).
48. Ibid, at para 76.
49. The Ninth Amendment is used as textual justification for the protection of rights that are not expressly guaranteed in the Constitution. *See* Erwin Chemerinsky (ed.), *Constitutional Law, Principles and Policies*, 762-765 (Aspen Law and Business, 2nd ed. 2002).
50. *Bowers v. Hardwick,* 478 U.S. 186: The Court found that there was no fundamental right to engage in consensual homosexual activity among adults; rational basis review was thus applied, as opposed to strict scrutiny.
51. In the Indian context, it has been argued that the assumption that some fundamental rights within Part III are more fundamental than others is a necessary one in order to justify different standards of review for different violations. *See* Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI (2008), 177 at 178-179.
52. Viz. 'immutable status' and 'fundamental choice'.
53. *See Naz Foundation v. Government of NCT*, 160 (2009) DLT 277, ¶¶107-111, in which the seemingly contradictory verdicts of *Anuj Garg* and *Ashoka Thakur v. Union of India,* (2008) 6 SCC 1 were reconciled.

Thus, in this paper, it is submitted that the standard of strict judicial review has been employed acontextually in *Subhash Chandra,* keeping in mind the absence of both contexts that traditionally have warranted the use of this exacting standard of review. Thus, *Subhash Chandra* fails on an analysis on 'contextualism' and indulges in 'bricolage', on a comparative constitutional law analysis, thus exhibiting a lack of methodological rigour in cross-constitutional borrowing.

The ramifications of such haphazard application of this stringent standard of review are grave, considering that it entails the reversal of the presumption of constitutionality, an exercise that ought to be undertaken with sufficient circumspection. Furthermore, the precedentiary value of such judgments on the lower courts cannot be understated, as an uncertain and haphazard importation of such a doctrine into Indian law can be further entrenched by the lower courts with even less methodological rigour.