Taking Rights Seriously - The Supreme Court on Strict Scrutiny

Raag Yadava*

Whilst fundamental rights may not be inalienable, it must be ensured that they remain fundamental. In the constitutional scheme of matters, this duty falls upon the judiciary. Thus, legislative actions seeking to restrict these rights must satisfy certain judicial standards. With respect to equality analysis, the existing standard is one of reasonableness. However, in the interest of according enhanced protection to these rights, the Supreme Court has been called upon to subject legislations to a more rigorous evaluation or a heightened level of scrutiny, namely strict judicial scrutiny. In a seemingly simple issue, confusion and ambiguity reign prevalent as a result of differing opinions expressed by the Supreme Court. Whilst one school of thought views it as a foreign principle of law incapable of harmonious integration within the existing jurisprudence, the other observes no such disharmony. To add to the confusion, the Delhi High Court recently provided its own opinion on the matter, leaving the question of applicability of strict scrutiny in India open to academic discussion. In this context, this article attempts to trace the rather uncertain development of this doctrine. It seeks to operate on two levels: first, it conducts a positive analysis to determine status quo and related problems. Subsequently, it conducts a normative study arguing in favour of importing the strict scrutiny standard.

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* The author is a IIIrd year B.A. LL.B. (Hons.) student at the National Law School of India University, Bangalore.

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I. Introduction

Fundamental rights must remain fundamental. Seemingly simple to state, this task is more complex than one might assume. This complexity arises by virtue of the fact that rights, even those considered to be fundamental, are rarely absolute.[1] Being far from inalienable, each of them exists subject to violation or reasonable restrictions by the State.

Such violation, however, must meet prescribed standards and constitutional benchmarks. In the constitutional scheme of matters, the duty of determining these standards, and ultimately the constitutionality of legislative actions, falls upon the judiciary.

Formulating such standards, in essence, is an exercise of carefully balancing public and private interests. The courts must draw the line as to when an individual's fundamental right can or cannot be violated in the interest of a greater public good- essentially, though not exclusively, a utilitarian analysis. With regard to equality analysis, the standard traditionally utilized by the Indian courts is one of reasonableness – requiring reasonable classification with an intelligible differentia possessing a rational nexus to the object of the Act.[2] This standard, however, has recently come under question. With the intention of according greater protection to individual rights, the courts have been called upon to adopt standards involving a more rigorous evaluation of legislations. One such standard – strict scrutiny – is the focus of this article.

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1 Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Art.15 Infringement*, 50(2) J. Ind. L. Inst. 177 (2008).

2 John Vallamattom v. Union of India, AIR 2003 SC 2902 (Supreme Court of India); *see also* State of Kerala v. N.M. Thomas, AIR 1976 SC 490 (Supreme Court of India).

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If one turns to recent developments, the adoption of strict scrutiny has been the subject of significant controversy with the apex Court of the country articulating several differing views on the matter. The question also recently came up before the Delhi High Court in the much talked about *Naz Foundation* case.[3] The High Court, though bound by precedent, seemingly offered its own interpretation, introducing further ambiguity and opening the door for discussion.

Accordingly, the aftermath of the *Naz Foundation* case witnessed a plethora of literature ranging from the social consequences of the verdict to the moral concerns raised by it.[4] Peculiarly, however, a striking dearth of legal literature can be observed, with the focus tending to the social-moral-ethical debates. Keeping this in mind, this paper focuses its attention towards a *legal* analysis of the strict scrutiny doctrine, employed by the Delhi High Court. This paper argues that howsoever erroneous the reasoning adopted by the apex Court may have appeared, the matter was not open for determination before the Delhi High Court, which remained bound by the opinion expressed therein.

The primary problem, however, arises in this domain: the Supreme Court's opinion on the matter is itself uncertain, at best. The manner in which the apex Court has approached the issue raises several problems with inconsistency remaining the only continuing feature. The thesis statement of this paper, thus, is simply this: the doctrine of strict scrutiny, though currently withering in doubt over its applicability in India, *should* be adopted by judiciary in order to facilitate more effective protection of fundamental rights.

With these reasons in mind, the article is divided into two sections. While the first attempts to study the present state of the law, the second provides a normative study of the direction in which it should be headed.

Part I analyses, individually and subsequently in relation to each other, opinions expressed by the Supreme Court over the application of strict scrutiny. Here, the apparent contradictions within judgments and between different

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3 Naz Foundation v. Govt. of NCT of Delhi, 160 (2009) DLT 277 (High Court of Delhi).

4 *See, e. g.*, Siddharth Narrain, *Crystallising Queer Politics - The Naz Foundation Case and its Implications for India's Transgender Communities*, 2(3) NUJS L. R. 455 (2009); Rukmini Sen, *Breaking Silences, Celebrating New Spaces: Mapping Elite Responses to the "Inclusive" Judgment*, 2(3) NUJS L. R. 481 (2009).

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judgments are sought to be understood and reconciled, if possible. In this context, the myth of an apparent conflict between strict scrutiny and existing Indian constitutional jurisprudence is dispelled. Finally, conclusions are drawn as regards the law as it stands in *status quo*.

Part II provides a normative study determining whether strict scrutiny should or should not be adopted in India. This paper argues for the former, i.e., in favour of adopting a rigorous standard of review. It seeks to justify these claims by conducting a cost-benefit analysis of such a move. Finally, it demonstrates how strict scrutiny is not a foreign principle of law unknown to Indian jurisprudence but is in fact the next *logical* addition to the existing standards devised by the Supreme Court for adjudging constitutionality of legislations.

II. The Indian Perspective on Strict Scrutiny

The application of strict scrutiny in the Indian context and its adoption in the Indian legal framework has recently been considered by the Supreme Court in a string of cases. However, no consistent reasoning has been employed and consequently, the question of its application remains in doubt and largely unanswered. At this juncture, it is important to note that the jurisprudence on this subject is still at a nascent stage despite several judgments having dealt with it in depth. This follows from the fact that the question of applying the strict scrutiny standard was argued substantially before the Supreme Court for the first time as recently as 2003 in *Saurabh Chaudri v. Union of India*.[5] Although a definitive stand was taken on the matter, i.e., against application of the doctrine, subsequent decisions of the Supreme Court have attempted to distinguish and interpret the judgment to allow for application of this heightened level of judicial scrutiny.

A. Tracing the Roots

The term 'strict scrutiny' can be found in several judgments of the Supreme Court.[6] However, these are nothing more than passing references often used in a

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5 Saurabh Chaudri v. Union of India, (2003) 11 SCC 146 (Supreme Court of India)[hereinafter "*Chaudri*"]. It is interesting to note that strict scrutiny was argued in an earlier case of R.S. Garg v. State of Uttar Pradesh, (2006) 6 SCC 430 (Supreme Court of India). However, it was not dealt with in any significant terms and the matter was decided on other grounds.

6 *See, e.g.*, Narendra Kumar v. Union of India, AIR 1960 SC 430 (Supreme Court of India); Secretary to Government of Madras v. P. R. Sriramulu, (1996) 1 SCC 345 (Supreme Court of India).

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loose context. The doctrine of strict scrutiny, as it is presently known in terms of its two-pronged test,[7] was not what the Supreme Court necessarily meant in the usage of the phrase. It merely implied the grammatical meaning of the words, i.e., a closer and more detailed scrutiny of the matter rather than application of the principles of the doctrine.

The first substantial analysis of strict scrutiny by an Indian court was made in *Saurabh Chaudri v. Union of India* [hereinafter "*Chaudri*"].[8] The question for consideration, in the words of the Court, was "whether reservation by way of institutional preference comes within suspected classification warranting strict scrutiny test?"[9] The answer came in the negative but raised more questions than it answered. The judgment of the Court, delivered by V.N Khare, C.J., stated, "the strict scrutiny test or the intermediate scrutiny test applicable in the United States of America cannot be applied in this case. Such a test is not applied in Indian Courts."[10] The reasoning employed for non-application of the doctrine was the presumption of constitutionality that existed in the Indian courts. The burden, it was said, would be on the individual approaching the Court rather than the State, as "the courts always lean against a construction which reduces the statute to a futility."[11] In substance, the absence of a presumption of constitutionality, i.e., the absence of the presumption that the legislature acted *bona fide*, in the strict scrutiny test was singled out by the Court as the determining factor in rejecting the argument for employing the heightened level of scrutiny.

However, in apparent contradiction, the Court further stated,

> In any event, such a test may be applied in a case where legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove the contrary is on him who asserts the same.[12]

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7 *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny* 54 UCLA L. Rev. 1267 (2007).

8 *Supra* note 5.

9 *Supra* note 9, at ¶ 33.

10 *Supra* note 9, at ¶ 36.

11 *Supra* note 9, at ¶ 36; *see also* Commissioner of Income Tax, Delhi v. Teja Singh, AIR 1959 SC 352 (Supreme Court of India); Tinsukhia Electric Supply Co. Ltd. v. State of Assam, AIR 1990 SC 123 (Supreme Court of India).

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The Court, therefore, laid down two exceptional circumstances wherein strict scrutiny could be applied. One, if the legislation is ex facie unreasonable; and two, if the impugned legislation violates Article 21. The implication seems to be that in such circumstances the presumption of constitutionality would not apply and the burden would be transferred onto the State.

This presents a dilemma, as the Court in the same breath posits two contradicting principles. The strict scrutiny doctrine, by transferring burden, *necessarily* negates the presumption of constitutionality, a well-entrenched principle in Indian constitutional law. In *Chaudri*, the Court seemingly allows for strict scrutiny in Article 21 challenges, thereby impliedly *reversing* the burden of proof in such cases. However, the jurisprudence of the Court reflects that Article 21 challenges are *not* an exception to the general principle of presumption.[13] Whether the Court actually did intend to reverse the burden in such cases is debatable. If it did, whether such a reversal is objectively correct, in light of the existing jurisprudence, leads to further dispute. While a host of decisions seemingly militate against such a proposition, it could, perhaps be justified, if the impugned legislation is "suspect".[14]

B. An Alternate Interpretation

In any case, if the reasoning in *Chaudri* is accepted and construed in line with the existing jurisprudence, the observations of the Court operate to exclude strict scrutiny only in cases where a presumption exists. The Court seems to proceed on the premise that the concept of presumption of constitutionality applies across the board – an assumption which is, with respect, incorrect. Presuming the constitutionality of impugned legislations is not a principle to be followed in all circumstances blindly by the Courts, as established in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors*.[15] Presumption may be the general rule, but several exceptions exist. Hence, whilst one must accept that in those circumstances where

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12 *Supra* note 9, at ¶ 36.

13 *See* D.K. Basu v. State of West Bengal, AIR 1997 SC 610 (Supreme Court of India); *Olga Tellis* v. Bombay Municipal Corporation, AIR 1986 SC 180 (Supreme Court of India); Maneka Gandhi v. Union of India, AIR 1978 SC 597 (Supreme Court of India).

14 Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors., AIR 1958 SC 538 (Supreme Court of India) (highlighting exceptions to the presumption of constitutionality); *see also* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting J. Stevens' dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980), discussing instances of suspect legislations).

15 Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors., AIR 1958 SC 538 (Supreme Court of India).

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the constitutionality is to be presumed, applying strict scrutiny would remain problematic as it negates this constitutional precept; this does not preclude the Court from utilizing the strict scrutiny standard in those matters wherein this presumption does not operate. The duty of the Court, therefore, is to determine the categories of legislations where the State is not to be given the benefit of presuming *bona fide* intentions and constitutionality, i.e., those legislations which are to be viewed as 'suspect' or classifications which are "simply too pernicious to permit any but the most exact connection between the justification and the classification."[16]

Contrary to popular belief, this exercise does not contravene the existing authority which advocates the presumption, but merely carves out certain exceptions from this general rule – an activity recognized by the existing authority itself. The Court must ask themselves how much deference they will give to the legislature,[17] and consequently draw a line so as to determine in *which* cases constitutionality is to be presumed.

As opposed to answering whether strict scrutiny *should* be adopted, the above exercise determines the scope of its application. This scope-subject matter distinction is critical, as determining the latter is necessarily unique to the Indian context. The categories of legislations which would be subject to strict scrutiny would quite obviously be different in India and the United States keeping in mind the differing societal contexts of the two countries. For example, the concept of race, which is subject to strict scrutiny in the US, is not prevalent in India but is analogous to caste.[18] In another instance, the right to vote is sacredly protected by the judiciary in the US, and hence it has opined that any legislation dealing with it must pass the test of strict scrutiny.[19] Similarly, right to life and liberty is accorded a high degree of protection by the Indian courts, and in fact, by virtue of this fact the Court in *Chaudri* sought to apply strict scrutiny to statutes which restricted this right.

Strict scrutiny has been adopted in the United States for several classes of legislations, ranging from race-based legislations considered 'constitutionally

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16 Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting J. Stevens' dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)).

17 Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1 (Supreme Court of India). [hereinafter "*Thakur*"].

18 *Thakur* (*per* Bhandari, J.).

19 Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969).

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suspect'[20] to free speech[21] and freedom of association[22] cases. One may ask as to why these classes of legislations, and not others, deserve a strict standard of judicial scrutiny. The answer to that question lies in the values considered to be fundamental by *that* legal system. In light of the American history, race-based legislations, discriminating against African-Americans were viewed with great disdain. Consequently, a rigorous standard of review was adopted. Similar sentiments have guided courts in extending this application to other spheres. While the substance of the strict scrutiny test may be imported from the American legal system, the scope of its application, or in the other words, the classes of legislation to which it may apply, must be determined keeping in mind the Indian framework and the values it seeks to guard jealously.

C. Extending the Scope of **Chaudri**

As indicated earlier, the necessary implication of allowing strict scrutiny in Article 21 analysis and ex facie unreasonable legislations seems to be that in such circumstances the presumption of constitutionality would not apply, thereby removing the obstacle to application of strict scrutiny. Extending this logic, one can infer that *other* scenarios wherein the presumption of constitutionality is not operative would also be open to the application of strict scrutiny. In this case, the exceptions highlighted by *Chaudri* would be illustrative rather than exhaustive,[23] thereby leaving the door open for future benches to determine whether the case at hand merits a presumption or not and consequently decide on the question of application of strict scrutiny. *Chaudri* does not, therefore, reject strict scrutiny conclusively. It only identifies the determining factor in deciding whether or not strict scrutiny is applicable, i.e., the absence or presence of a presumption of constitutionality, thereby leaving the matter open for consideration in subsequent cases. In sum, it provides nothing more than the analytical framework within which the Court must decide whether strict scrutiny can be applied in a particular case or not.

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20 Bolling v. Sharpe, 347 U.S. 497 (1954).

21 *See* NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307-08 (1964); McGowan v. Maryland, 366 U.S. 420, 466-67 (1961); Saia v. New York, 334 U.S. 558, 562 (1948); Martin v. City of Struthers, 319 U.S. 141, 147 (1943); Thornhill v. State of Alabama, 310 U.S. 88, 96 (1940).

22 *See*, Barenblatt v. United States, 360 U.S. 109, 127 (1959); Uphaus v. Wyman, 360 U.S. 72, 81 (1959).

23 One must also note that the language of the judgment supports such an interpretation. The Court, for example, states, "In any event, such a test may be applied in a case where legislation ex facie is found to be unreasonable. Such a test may also be applied in a case …" Therefore, the observations of the Court seem to illustrate areas in which strict scrutiny may be applied ('may also') rather than suggest that these are the only areas in which it may be applied.

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Therefore, whilst the judgment generates an initial impression that the doctrine would not be applicable, through subsequent reasoning it seemingly contradicts itself and in conclusion, allows for application of strict scrutiny to certain categories of legislations identified by it; a practise mirroring the American system. Thus, while there may have existed a prima facie opposition to the application of the doctrine, a closer reading of the judgment indicates otherwise.

III. Reconciling the Irreconcilable

A. From Anuj Garg *To* Ashok Kumar Thakur

The matter, however, did not end with *Chaudri*. The controversial question came up before the Supreme Court for a second time in two cases, *Anuj Garg v. Hotel Association of India*[24] and *Ashok Kumar Thakur v. Union of India*,[25] which delivered diametrically opposing judgments. Interestingly, both matters were heard by different benches of the Supreme Court simultaneously and neither finds mention in the other. While the former was a two judge bench, the latter constituted five judges.

This paper seeks to analyse both decisions in order to reach a final conclusion as to whether they can be reconciled and interpreted harmoniously, as was attempted by the Delhi High Court.

B. Ashok Kumar Thakur: *Providing A Broad Interpretation*

In *Ashok Kumar Thakur*, the Supreme Court, as is reiterated and accepted by the Delhi High Court, declined the application of strict scrutiny. However, the High Court sought to limit the ratio laid down in *Thakur* to the facts of the case (i.e., affirmative action) thereby leaving the field outside reservation open to application of strict scrutiny.

The question that arises for consideration in this matter is whether the Supreme Court, in *Thakur*, did in fact restrict its opinion to affirmative action? The subsequent section argues that there is nothing in the judgment which indicates that the Court's refusal to adopt strict scrutiny was confined to only affirmative action and any interpretation to this end would be erroneous.

At this juncture it would be helpful to discuss relevant portions of the judgment at length. The judgments of Balakrishnan, C.J., Pasayat, J. (Thakker,

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24 Anuj Garg v. Hotel Association of India, AIR 2008 SC 663 (Supreme Court of India) [hereinafter "*Anuj Garg*"].

25 *Supra* note 17.

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J. concurring) and Bhandari, J. discussed the issue at length with Raveendran, J. considering it unnecessary to decide on the matter.

Balakrishnan, C.J. rejects strict scrutiny quite plainly.[26] In reaching this conclusion, he places heavy reliance on the "differing structural provisions" between the two Constitutions which meant that decisions of US Courts were "not applied in the Indian context." In addition, he states that the presumption of constitutionality present in Indian constitutional analysis cannot be reconciled with the absence of the same in strict scrutiny. For this, he cites *Chaudri* at length, and consequently seems to indicate his approval for application of strict scrutiny in cases where the "life and liberty is put in jeopardy." At this juncture, the Delhi High Court's interpretation limiting *Thakur* to affirmative action runs into problems. The observations of Balakrishnan, C.J., in emphasising that strict scrutiny may be applied to Article 21 analysis, clearly take on a much wider scope than affirmative action. For that matter, the judgment goes beyond the realm of equality analysis to highlight whether the refusal to apply the doctrine extends to all cases. An inference that the Court restricted its opinion to affirmative action would be problematic for the reason that the observations of the Chief Justice were not limited to affirmative action but in fact also discussed adopting strict scrutiny in matters which clearly lie outside the scope of affirmative action.

Hence, the fact that the Court accepts strict scrutiny only in Article 21 analysis indicates its refusal to accept it in other domains. Unless this is the implication, one would find the reference to the presumption of constitutionality unnecessary as there exists no special presumption in cases of affirmative action. Thus, Balakrishnan, C.J. seems to reject strict scrutiny in all domains including all equality analysis, except Article 21 analysis.

Bhandari, J., by means of discussing the persuasiveness of American decisions and drawing analogies between the American and Indian social contexts, appears to recognize the possible advantages of importing such a doctrine.[27] However, he does not go beyond such borderline assertions seemingly sympathetic towards strict scrutiny. On the contrary, he states, "of course, Indian courts have not accepted the principles of narrow tailoring and strict scrutiny." Therefore, he accepts clearly that strict scrutiny is not applied in India, without limiting this statement to affirmative action in any manner. Whilst he does provide a discussion tending to his approval of the application of strict scrutiny, at several

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26 *Supra* note 17, at 20.

27 *Supra* note 17, at 229.

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instances he reiterates the current stance that strict scrutiny is not strictly applicable.

In fact, his seemingly sympathetic attitude towards strict scrutiny goes contrary to the Delhi High Court's interpretation as he seems to be leaning *towards* application of strict scrutiny to matters of affirmative action.[28] The implication of his statement seems to be that in ordinary circumstances strict scrutiny is not to be applied; however in cases of affirmative action it may be prudent to adopt such a doctrine. If such is his intention, it stands wholly contrary to the High Court's interpretation of *Thakur*.

Finally, Pasayat, J. rejects strict scrutiny without any caveats or exceptions on grounds of structural differences between the American and Indian Constitutions.[29]

C. Critiquing Ashok Kumar Thakur

In sum, two reasons for rejecting strict scrutiny appear from *Thakur*. First, the presumption of constitutionality that exists in Indian jurisprudence which is conspicuous by its absence in strict scrutiny; and secondly, the structural differences in the respective equality provisions of the Indian and American constitutions. With due respect, both levels of reasoning employed by the Court are merely superficial and cannot be sustained in view of strong arguments to the contrary.

D. To Presume or not to Presume

As regards the presumption of constitutionality, the Court places enormous reliance on the fact that such a presumption exists in all circumstances and for all impugned legislations, thereby rendering it impossible to adopt strict scrutiny. If, however, one traces the root of this concept, it becomes patently clear that such is not the situation. The presumption of constitutionality finds its beginning in Indian constitutional jurisprudence, as is oft cited, in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.*[30] In that case, the Court noted that "there is always a

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28 Bhandari, J. cites American authority on the point extensively. He deals with Justice O'Connor's opinion in *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (dealing extensively with application of strict scrutiny in affirmative action cases in the United States) as well as Chief Justice Robert's opinion in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1* et al., 551 U.S. 701 (2007) (dealing with the same issue).

29 *Supra* note 17, at 81.

30 Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors., AIR 1958 SC 538 (Supreme Court of India).

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presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles." It also, however, carved out certain exceptions to this rule. Hence, while such a presumption may be the general rule, several exceptions have been carved out. Quoting the relevant portions of the judgment, the Court added a caveat to its earlier statement,

> that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.[31]

Hence, the presumption of constitutionality does not extend to all circumstances.[32] Certain statutes by virtue of being unsubstantiated and ex facie irrational do not come within the domain of this presumption.[33] Consequently, notwithstanding the presumption of constitutionality, adopting the strict scrutiny standard does not contradict the existing constitutional jurisprudence but merely operates in the exceptions already carved out. Furthermore, such a stance has already accepted by the Court previously in the matter of *Chaudri* wherein it was accepted that:

> In any event, such a test may be applied in a case where legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove the contrary is on him who asserts the same.[34]

The implication of this statement seems to be that there are certain cases where the Indian judiciary has refused to accept a presumption as to constitutionality. Therefore, the reasoning employed in *Thakur* stands vitiated as

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31 *Id*. at ¶ 14.

32 A limited exception to the presumption, similar to section 106 of the Indian Evidence Act, 1872 may be said to be created.

33 *See, e.g.*, Ram Prasad v. State of Bihar, 1963 SCR 1129 (Supreme Court of India); Minerva Mills v. Union of India, (1980) 2 SCR 478 (Supreme Court of India); B. B. Rajwanshi v. State of Uttar Pradesh, (1988) 2 SCC 415 (Supreme Court of India).

34 *Supra* note 9, at ¶ 36.

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strict scrutiny *can* be applied to these categories of cases where there is no presumption and the statute appears to be prima facie unconstitutional.

Viewed from a different direction, this argument necessary implies the absence of a presumption of constitutionality in the American system - for it is premised on the fact that the Indian and American standards of adjudication on constitutional challenges differ on the point of the presence of such a presumption. However, as any study in American constitutional theory would reflect, presumption of constitutionality is a concept extremely well recognized and deep seated in the American legal system.[35] Notwithstanding this presumption, strict scrutiny is applied in America to certain classes of legislations which are carved out as exceptions to this general rule of a presumption in favour of constitutionality. In an analogous situation, even in India certain classes of legislations are not accorded this benefit – as has been noted in *Ram Krishna Dalmia* and *Chaudri*. In such a scenario, what exactly stops application of strict scrutiny remains unclear.

E. Rebutting the Argument on Structural Differences

As regards the conclusion drawn by *Thakur* regarding the structural dissimilarity in the equality provisions, it is interesting to note that the fundamental rights in the Indian Constitution follow largely from the 'Bill of Rights' embodied in the American Constitution.[36] In fact, Article 14 of the Indian Constitution is adopted from the last clause of section 1 of the 14th Amendment of the Constitution of the United States of America.[37] While structural differences between the two constitutions do arise, they do in other domains of administration, legislative powers etc.

Furthermore, if one is to accept the argument advanced in *Thakur*, reconciling the same with the Court's opinion in *State of Uttar Pradesh v. Deoman Upadhyaya*[38] would involve several difficulties. To quote *Deoman Upadhyaya* at length, the Court stated,

> ... it may reasonably be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the

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35 The principle of presumption of constitutionality can be observed in literature as early as Alexander Hamilton, *Federalist No. 78*, *in* Federalist Papers (1788) to Justice Stone's opinion in *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) and other cases such as *Williamson v. Lee Optical of Oklahoma, Inc*., 348 U.S. 483 (1955); *see also* Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 Sup. Ct. Rev. 397 (1987).

36 H.M. Seervai, Constitutional Law of India 424 (2002).

37 *Supra* note 7, at 424.

38 State of Uttar Pradesh v. Deoman Upadhyaya, AIR 1960 SC 1125 (Supreme Court of India) [hereinafter "*Deoman Upadhyaya*"].

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> authorities of the superior courts in the United States, we would not therefore be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differs from ours.[39]

In apparent contradiction, *Thakur* provides that strict scrutiny is not applicable in India as it operates under wholly different facts and circumstances. If viewed in the context of its usage in America, one can infer that strict scrutiny does not follow an approach dissimilar to our own. On the contrary, it is an off-shoot of the rational basis standard in the US, which closely mirrors the Indian reasonableness test. Further, though this paper does not pursue the argument to its fullest, strict scrutiny operates upon the compelling state interest standard already existing in Article 21 analysis.[40]

Thus, it remains problematic to accept the contention of the Court in *Thakur* that 'structural differences' between the two Constitutions render adoption of strict scrutiny unfeasible.

F. Reconsidering Anuj Garg

Whilst the reasoning in *Thakur* was suspect, the Court nevertheless provided a clear answer to the question of applying strict scrutiny. The judgment, however, cannot be viewed in vacuum as the Court, in a seemingly contrary stand, in the matter of *Anuj Garg* allowed for application of strict scrutiny and saw no reason to uphold the contrary. It unambiguously conveyed its acceptance of 'strict scrutiny' as it quite frankly stated that the "strict scrutiny test should be employed while assessing the implications of this variety of legislations."[41]

Therefore, a plain reading of the judgment makes it rather straightforward to reach the conclusion that *Anuj Garg* accepted application of the doctrine of strict scrutiny. Here, such conventional wisdom is sought to be questioned. Is *Anuj Garg*, as it is generally accepted to be, in favour of the application of 'strict scrutiny'? While a plain reading of the judgment would reflect the above opinion,

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39 *Id*. at ¶ 14.

40 *See, e.g.*, People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399 (Supreme Court of India); Sharda v. Dharmpal, (2003) 4 SCC 493 (Supreme Court of India).

41 *Supra* note 24, at ¶ 44.

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the question to be asked is: what did the Court mean by the term 'strict scrutiny'? Several Supreme Court decisions have used the phrase, though none have intended to deal with the doctrine in question.[42] Whilst it cannot be contested that the Court provided its approval to 'strict scrutiny', it can be argued, as will be done here, that the Court was not referring to the doctrine of strict scrutiny in its usage of the term 'strict scrutiny'.

In this context, it is of significance to note that the Court in *Anuj Garg* rather conspicuously limits its understanding of strict scrutiny only to a 'compelling state interest' while wholly excluding the other primary component of the doctrine – 'narrow tailoring'.[43] The judgment, in its relevant portion, reads under the heading "The Standard of Judicial Scrutiny":

> 44. It is to be borne in mind that legislations with pronounced 'protective discrimination' aims, such as this one, potentially serve as double edged swords. **Strict scrutiny** test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects …
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> 45. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency *until and unless there is a compelling state purpose.*" (Emphasis Supplied)

Whether such exclusion is intentional and hence limits the approval of strict scrutiny of the Court in *Anuj Garg* to that extent is a question for keen consideration.

Although *Anuj Garg* does allow for application of strict scrutiny in no uncertain terms, this statement must be viewed in context of what the Court understood by the term strict scrutiny. The Court accepts strict scrutiny on the grounds that "no law in its ultimate effect should end up perpetuating the oppression … until unless there is a *compelling state purpose*." (Emphasis Supplied) Therefore, the Court's approval of strict scrutiny is based solely on its positive view of the 'compelling state purpose' standard. The implication of its statement seems to be that a statute which meets the 'compelling state purpose' standard would pass the test of strict scrutiny, with no further requirement of using the

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42 *Supra* note 7.

43 Whilst the 'compelling state interest' is referred to in abundance (*see, e.g.,* ¶ 45), and applied to the facts of the case, 'narrow tailoring' appears neither in form or substance in the judgment, despite forming an integral part of the strict scrutiny standard.

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least restrictive means. The Court, by expressly excluding *any* reference to one component of strict scrutiny while discussing the other at great length and citing it at the *sole* reason for approval of the doctrine, must be understood to grant approval only to the latter.

The heightened level of scrutiny (or strict scrutiny) referred to in *Anuj Garg*, therefore, is no more than the requirement of a compelling state interest. The approval given to strict scrutiny is limited by the manner in which strict scrutiny has been understood in the present judgment; and consequently the approval given is restricted to the 'compelling state interest' standard as opposed to the strict scrutiny doctrine as a whole.

G. Thakur* v. *Anuj Garg

In any case, the judgment in *Anuj Garg* reflects a diametrically opposing view to the subsequent opinion of a larger bench in *Thakur* wherein application of strict scrutiny is rejected in its entirety.

In light of the discussion of the two judgments in the previous section, it can be concluded that they represent two opposing schools of thought which cannot be reconciled. While *Thakur* is in firm opposition for adoption of strict scrutiny, *Anuj Garg* finds no reason to reject adoption at least insofar as certain components were concerned. The Delhi High Court attempts to harmoniously reconcile the two by concluding that the Supreme Court, in *Thakur*, intended to reject application of strict scrutiny only in the domain of affirmative action. Contrary to this interpretation, the apex Court stated in no uncertain terms that strict scrutiny would not be applicable in the Indian Courts whatsoever the circumstances.

It was not open for the Delhi High Court to avoid the application of *Thakur* or adopt a patently unconvincing reasoning in an attempt to 'harmoniously construct' the two judgments when there was no scope for such a conclusion. The judgment in *Thakur* indicates that it bars strict scrutiny across the board and not just in affirmative action cases and despite the irregular reasoning adopted, it remains the lex loci until further revision by a larger bench. The Delhi High Court, with due respect, in an attempt to 'harmoniously construct' the two decisions left its conclusion unsubstantiated to the extent that it amounts to a misinterpretation of a binding precedent. While one must attempt to construct seemingly opposing precedent harmoniously and favour an interpretation which resolves the apparent conflict, such an exercise cannot go to the extent of misinterpreting and ignoring the textual implication of either.[44] Limiting the ratio

[44] *But see supra* note 1.

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of *Thakur* to affirmative action does not resolve the conflict that arises in this situation, providing a distorted reflection of the Court's opinion. Further, the judgment in *Thakur* was delivered by a larger bench and is a later decision. Hence, even on these grounds precedence must also be given to it over *Anuj Garg.*

Finally, advocates of a harmonious construction of these judgments commonly provide the following argument in support of their opinion: The Court in *Thakur* had the option to overrule *Anuj Garg* if it so decided. The fact that it did not do so represents an implicit approval of *Anuj Garg*. This seemingly conclusive occurrence can be explained otherwise if one turns to the chronology of events. As highlighted earlier, the judgment in *Anuj Garg* was delivered after the conclusion of oral pleadings in *Thakur*. *Anuj Garg* was therefore obviously not argued before the Court in *Thakur*. The bench, following from this, did not include *Anuj Garg* in its judgment having not heard the matter argued before it in the course of its proceedings. This precludes the conclusion that *Thakur* approved of the conclusions drawn in *Anuj Garg*.

Therefore, notwithstanding whether these decisions have been decided rightly or wrongly, it seems apparent that they *cannot* be reconciled. However, the discussion at hand cannot be viewed in vacuum. One must take notice of a *third* opinion expressed recently by the Court which transforms the scenario completely.

IV. *Chandra*: Back to the Beginning

Chaudri, to *Anuj Garg* and finally to *Thakur*, the Court has gone a complete circle – from rejecting conditionally, to accepting without hesitation and finally, rejecting without doubt. With this opposition of verdicts by simultaneous benches, and contradictions within judgments, the applicability of strict scrutiny remains undecided. However, the present debate was transformed entirely in 2009, with the introduction of another equally controversial decision. Indeed, it kept alive the standard of inconsistency and confusion that has characterized this discourse. The judgment in question is a two judge bench decision written by Sinha, J., in the matter of *Subhash Chandra v. Delhi Subordinate Services Selection Board & Ors*.[45] Keeping in mind the fact that the Court decided on this case as recently as August 2009, its implications are largely unexplored. Thus, this paper attempts to analyse the repercussions of this judgment post *Naz Foundation*.

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[45] Subhash Chandra v. Delhi Subordinate Services Selection Board & Ors., (2009) 15 SCC 458 (Supreme Court of India) [hereinafter "*Chandra*"].

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In that case, the Court analysed *Chaudri*, which it referred to as the sole basis of the decision in *Thakur*, and expanded its scope to include a broad and expansive application of strict scrutiny. As it stands, the judgment allows for an extensive and liberal application of the doctrine.

As discussed earlier, *Chaudri* impliedly accepts application of strict scrutiny in certain quarters. *Chandra* places heavy reliance on this submission of the Court to reach the conclusion that strict scrutiny *is* applicable in India. It states, "*Saurabh Chaudri* itself, therefore, points out some category of cases where strict scrutiny test would be applicable. *Thakur* solely relies upon *Saurabh Chaudri* to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard."[46] Considering this fact, the Court was of the opinion that in respect of the certain categories of cases, the adoption of strict scrutiny is justified. However, the judgment not only approves strict scrutiny but goes one step beyond by expanding the scope of its application tremendously. It does so by enumerating categories of legislations wherein strict scrutiny may be applied. Incidentally, it reverses the presumption of constitutionality in respect of those legislations. Further, these categories within themselves cover an extremely wide domain of legislations and legislative actions.[47] Additionally, as the Court admits, the categories enumerated therein are merely illustrative and not exhaustive, thereby leaving scope for extending the application of strict scrutiny to other areas. Thus, *Chandra* marks a manifest departure from the existing jurisprudence by allowing for application of strict scrutiny in, and consequently removing the presumption of constitutionality from, a significantly large domain of legislations.

In this regard, two questions require further consideration: first, *Chaudri* accepts application of strict scrutiny only in specific circumstances such as Article 21 analysis wherein the presumption cannot be upheld. *Chandra*, whilst accepting

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46 *Id*. at ¶ 43.

47 The categories enumerated, which amongst them cover a significant number of legislations, are: Where a statute or an action is patently unreasonable or arbitrary, where a statute is contrary to the constitutional scheme, where the general presumption as regards the constitutionality of the statute cannot be invoked, where a statute or execution action causes reverse discrimination, where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right, where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19, for example, clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof, where a statute is 'expropriatory' or 'confiscatory' in nature, where a statute prima facie seeks to interfere with sovereignty and integrity of India.

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this fact, somehow allows for application of strict scrutiny in areas *beyond* such a scope wherein the presumption still holds. It highlights eight illustrative instances wherein strict scrutiny may be invoked. Point three reads, "Where the general presumption as regards the constitutionality of the statute or action cannot be invoked." If the Court, as it appears to, places sole reliance on *Chaudri* for reaching the present conclusion, application of strict scrutiny to the aforementioned cases would have been the limit of its pronouncement. However, the judgment further lists out several instances such as "where a statute is 'expropriatory' or 'confiscatory' in nature" wherein the presumption would normally be upheld. Point five notes that strict scrutiny may be applied in cases where a statute has been enacted restricting rights under Article 19 – if such is the case, the burden would now be on the State to justify the reasonableness. Such an extreme viewpoint, requiring the State to take upon itself the burden to prove constitutionality in case of *any* alleged violation of fundamental rights, prima facie seems to neglect constitutional jurisprudence as regards the presumption of the constitutionality. While this article argues in support of strict scrutiny, it does not support the sweeping observations in the present case whereby the principle of presuming constitutionality of statutes is implicitly overturned.

Strict scrutiny, *even in* American constitutional jurisprudence, is meant to be applicable only to *those* legislations which are 'inherently suspect' or ex facie unreasonable and hence a presumption of constitutionality is not merited. By allowing for application of strict scrutiny to categories of legislations wherein no such suspicion exists, the Court has decided, without any significant reason, against decades of jurisprudence in support of a presumption of constitutionality. Furthermore, the observations of the Court extend to a significantly large domain of legislations as explained above. For example, *Chandra* transfers the burden onto the State to justify the reasonableness of restrictions of rights under Article 14 and 19 without limiting its statement in any manner to only those cases wherein a prima facie unreasonableness or suspicion of unconstitutionality appears. The implications of the present case, therefore, are far reaching and pose a significant threat to the concept of presuming constitutionality of legislations.

Secondly, the conclusion in *Chandra* is premised on the fact that *Thakur* did not make any independent observations. With respect, the validity of this assertion must be questioned. Out of the three judgments dealing with strict scrutiny in *Thakur*, *Chaudri* does not find mention in one. Further, Pasayat, J. merely makes a passing reference to the matter. Finally, while Balakrishnan, C.J. does cite *Chaudri* at length, he provides independent reasons for not adopting strict scrutiny in terms of the structural differences between the two constitutions. These

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observations of the Chief Justice fail to find any mention in *Chandra.* Therefore, the premise of the Court's argument in *Chandra* – that *Thakur* does not make any independent observations – remains highly questionable.

Therefore, while *Chandra* draws a conclusion which is seemingly prudent insofar as it accepts application of strict scrutiny to legislations where the presumption of constitutionality does not operate, its attempt to bypass *Thakur* reflects a misunderstanding of the observations made therein.

V. A Normative Study

In adopting a principle from a foreign jurisdiction, two factors must be taken into consideration: first, whether the principle can be harmoniously construed with the existing Indian constitutional jurisprudence; and second, whether adopting such a principle would result in a system with enhanced efficiency?

In relation to adoption of strict scrutiny, both answers come in the positive. As has been highlighted above, strict scrutiny can be harmoniously integrated with the current legal framework insofar as it is applied to cases wherein the presumption of constitutionality does not stand. In this regard, the apex Court, in *A.K. Roy v. Union of India* ably noted, "We cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution."[48] Such views of the Court are often cited in rejecting strict scrutiny. However, as far as strict scrutiny is concerned, the Supreme Court itself seems to have dispelled all such doubts regarding relevance. It observed, as previously quoted in this paper but reiterated here at the cost of repetition, that

> ...it may reasonably be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior courts in the United States, we would not therefore be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differs from ours.[49]

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48 A.K. Roy v. Union of India, (1982) 1 SCC 271 (Supreme Court of India).

49 *Supra* note 39.

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Read in conjunction with Bhandari, J.'s opinion in *Thakur* where he critically notes that "the problem of race (in America) is akin to our problem of caste,"[50] one can conclusively infer that adopting strict scrutiny would not be led to signify inclusion of a wholly foreign principle but in fact a valuable and sustainable addition to equality analysis in India . The approach of the United Sates in the realm of equality analysis has closely mirrored the Indian standards. The concepts of rational basis and reasonable classification find strong precedent in constitutional challenges of statutes in the American jurisdiction, much like in the Indian scenario.[51]

The level of heightened scrutiny provided by the doctrine in question is merely an additional tier of protection sought to be provided to certain classes of legislations, which in the view of the judiciary, resulted in unreasonable restrictions on fundamental rights. It does not represent a foreign principle incapable of integration within the existing jurisprudence in India.

Further, adopting such a standard carries certain inherent benefits. First, the narrow tailoring requirement naturally excludes the creamy layer from all classifications and hence, resolves this long standing issue. Secondly, the need for a compelling state interest represents a prudent standard that condones violation of individual rights only in cases of a larger public interest. Further, as the burden to prove constitutionality is placed on the Government, it ensures that the Government employs greater assessment standards before effecting legislations. Finally, as opposed to common belief, strict scrutiny will not rule out positive discrimination by striking down all legislations. It will serve to merely streamline the process of reservation to ensure greater efficiency in allocation of resources to those in need.

Normatively, in light of the unconvincing reasoning adopted by *Thakur*, this article is in agreement with the conclusion reached in the recent judgment of the Supreme Court only insofar as its observations do not contradict earlier authority on the principle of presuming constitutionality. It represents prudence to adopt a strict standard of judicial scrutiny to protect and preserve basic fundamental rights and ensure that the Government does not transgress the authority granted to it. In any case, if the legislation does not invade upon the fundamental rights or creates a reasonable classification, it will pass through the requisite standards of the strict security test. In this domain, a common myth reigns prevalent in the

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50 *Supra* note 17, at ¶ 270.

51 *See supra* note 34.

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current debate – that strict scrutiny is strict in theory but fatal in fact. The doctrine, however, as supported by several empirical studies merely ensures a higher threshold of protection of fundamental rights and does not hinder the implementation of legislations which do, in fact, adhere to the constitutional scheme and create a reasonable classification for a compelling state interest.[52]

VI. Strict Scrutiny: Common Sense Restated

Taking a step back, one recognizes the core concern fuelling this debate: developing an appropriate standard of review for examining the justification for a violation of fundamental rights. Numerous phrases used to describe these standards have been coined. Several standards have been developed, critiqued and finally established or done away with. The challenging task of determining at what the point violation of fundamental rights becomes justified falls upon the judiciary. In fulfilling this duty the Court has developed several standards, some stricter than others. From the well established 'rational basis' in equality analysis to the relatively newer 'public interest' standard in the right to privacy[53] – all tests seek to set certain standards which the legislations of that class must adhere to. What strict scrutiny, as this paper understands the doctrine to be, provides is merely this: a higher standard for reviewing certain legislations which prima facie appear to unreasonable and deal with matters considered to be of prime importance.[54] This heightened standard does not impose an unreasonable burden on the drafters. Simply put, all it asks is this: one, violation of individual rights only if society benefits on the whole; and two, narrow tailoring and employment of least restrictive means to ensure that individual rights are not abrogated unnecessarily when alternative means exist. Thus, strict scrutiny does not prescribe unreasonably elevated standards which acutely limit the freedom of the legislature. On the contrary, it only requires legislations violating the *fundamental* rights of citizens to pay heed to two commonsensical benchmarks.

Adoption of strict scrutiny seems a small price to pay, even if it is viewed in such terms, for ensuring greater accountability in the legislative process and enhancing protection of fundamental rights to ensure they *remain* fundamental. It is often argued that status quo is a self- sufficient system; a system which does

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52 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006).

53 *See* Sharda v. Dharmpal, (2003) 4 SCC 493 (Supreme Court of India).

54 *Supra* note 8.

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not require additions by way of importing foreign principles. The rather narrow sighted implication of this argument seems to be that one should not improve status quo even if the opportunity presents itself – an absurd line of thought seemingly asserting that the present system is faultless.

VII. Conclusion

As stated at the beginning of this article, fundamental rights must remain fundamental. Strict scrutiny ensures that they do. Its requirements of a compelling state interest and employment of least restrictive means are logical and commonsensical standards which are neither impractical nor place an unassumingly high burden on the State. The principal reasons put forth to reject the application of strict scrutiny, as discussed through the course of this paper, cannot be sustained in view of compelling arguments to the contrary. Strict scrutiny remains in harmony with Indian constitutional jurisprudence and the heightened level of judicial scrutiny provided by it is the next logical addition to prevailing standards.

Whilst the question of accepting strict scrutiny in the Indian legal system does the rounds, arguments in support are gaining momentum. In essence, the strict scrutiny standard ensures greater protection of fundamental right by keeping a check on unnecessary and excessive State power. These reasons in mind, the judiciary must take a favourable stance towards such standards which prescribe rigorous examination of legislations attempting to restrict the *fundamental* rights of an individual. If recent decisions of the Court are any indication of the final outcome, the future seems bright. However, these series of judgments are only the beginning of a heated debate. The Court must now follow through with its initiative in order to truly act as the guardian of rights.

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