Rewriting *State of West Bengal v. Anwar Ali Sarkar*: The Possibility of an Anti-Colonial Jurisprudence

By *Tarunabh Khaitan*[*]

State of West Bengal v. Anwar Ali Sarkar
Civil Appeal No. 297 of 1951

And

State of West Bengal v. Gajen Mali
Civil Appeal No. 298 of 1951

AIR 1952 SC 75

Delivered on: January 11, 1952

Tarunabh Khaitan, J. (*concurring*):

The Facts

1. The respondents, Anwar Ali Sarkar and Gajen Mali, were convicted of various offences—including murder and conspiracy to murder—and convicted for various terms of imprisonment. These acts were said to have been committed in two specific incidents related to violent Communist uprisings. Sarkar was convicted for his part in an attack on the Jessop's arms factory in Dum Dum. Mali's conviction was for his role in a violent incident in Kakdwip organised by the Tebhaga movement, a sharecropper's revolt against landlords. A five-judge bench of the Calcutta High Court unanimously set aside their convictions and sentences, agreeing with the respondents that the orders of the Special Court convicting and sentencing them were issued without jurisdiction because the impugned law which was the basis of their convictions breached Article 14 of the Constitution of India [reported at AIR 1951 Cal 150]. The State of West Bengal has appealed to us against the High Court's order.

2. By its decision today, a majority of this court has dismissed the appeal on the ground that section 5 of the impugned law—which was the basis of the conviction of

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the Respondents—failed to make a reasonable classification required by Article 14 of the Constitution. I concur in this conclusion. However, I choose to write separately to highlight our anti-colonial founding ethos that should guide our interpretation of Article 14, and indeed the rest of our Constitution.

The Impugned Law

3. The West Bengal Special Courts Ordinance 1949 (hereinafter, 'the Ordinance'), was promulgated on 17 August 1949 under section 88 of the Government of India Act 1935. The Ordinance was superseded by the West Bengal Special Courts Act 1950 (hereinafter, 'the Act'), enacted on 15 March 1950. Although the Ordinance predates the coming into force of our Constitution on 26 January 1950, and the Act was passed after this date, the relevant provisions under both legislation are materially the same.

4. The Act is entitled 'an act to provide for the speedy trial of certain offences.' Its Preamble declares that 'it is expedient to provide for the speedy trial of certain offences.' Section 3 empowers the state government to constitute special courts of criminal jurisdiction by notification in the official Gazette. Section 4 provides for the appointment of special judges to preside over such courts. Section 5, whose constitutionality is impugned, lays down that:

> *"1. A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct.*
> *2. No direction shall be made under subsection (1) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court but, save as aforesaid, such direction may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act."*

5. Section 6 specifies that the Special Court shall follow the procedure prescribed by the Code of Criminal Procedure (hereinafter, 'the Code') for the trial of warrant cases by Magistrates, even if the offence would ordinarily have been tried by a Sessions Court under the Code. Ordinarily, graver offences are tried only by a Sessions Court, which follows a more demanding trial procedure than a Magistrate. Section 7 empowers the State Government to transfer a case from one Special Court to another at any stage of the proceedings. Section 8 empowers the Special Court to refuse to summon witnesses, and section 9 permits it to refuse to adjourn a trial for certain purposes, including for the purpose of securing the attendance of a legal practitioner.

6. Section 10 empowers the Special Judge to exclude the public or any particular person from the court room. Section 11 permits trials in absence of the accused in certain cases. Section 12 empowers it to pass any sentence authorised by law. Section 13 empowers a Special Court to convict an accused for any offence other than the offence directed under section 5 of the Act, even if it is graver than the offence originally notified. Section 15 provides for appeals by a convict or the State to the High Court on matters of fact as well

as on matters of law. Ordinarily, under the Code of Criminal Procedure, a case decided by a Magistrate may first be appealed before a Sessions Court [section 408, Code of Criminal Procedure 1898], whose order—in turn—is subject to revision by the High Court [sections 435 & 439, Code of Criminal Procedure]. Section 15 of the Act therefore allows the accused only one chance to challenge a conviction, whereas ordinary criminal procedure permits two possibilities. Although the crime of murder ordinarily requires trial by a jury in the State of West Bengal [as per notifications issued by the State under section 269 of the Code of Criminal Procedure], section 6 of the impugned Act deprives the accused of a jury trial before a Special Court.

7. It is clear that the procedure laid down in the Act is more disadvantageous to the accused when compared to the procedure mandated under the Code. The Act vests far greater powers in the Special Courts than what ordinary criminal courts possess. Furthermore, the extant law in the State of West Bengal would require the trial of the offences of murder and conspiracy to murder by a Sessions Judge sitting with a jury. There is no provision for a jury trial under the Act.

8. Exercising its power under section 5 of the Ordinance, the State Government directed the trial of Sarkar, and his 49 co-accused, to the Special Court through a notification published in the official gazette on 26 January 1950. Mali and his co-accused were tried by the Special Court after the State Government directed their trial to this Court by a notification issued under section 5 of the Act, which was published in the official gazette on 23 November 1950. The respondents were tried and convicted by the Special Court, and sentenced to varying terms of imprisonment.

Legal Issues

9. The following legal issues arise in this case:

(i) Is section 5 of the Act *ultra vires* the Constitution?

(ii) Are the notifications issued under section 5 of the Act in relation to the respondents *ultra vires* the Constitution?

(iii) Are any of the special procedures laid down under the Act *ultra vires* the Constitution?

(iv) Is the conviction of the Respondents under the impugned Act lawful?

A positive finding on any of the first two issues would necessarily entail an affirmative answer to the fourth issue. If the first two questions are answered in the negative, but the third in the positive, a closer examination of the procedures relied upon to convict the Respondents may become necessary for answering the fourth question.

Is section 5 of the Act *ultra vires* the Constitution?

10. The first issue that concerns us is whether section 5 of the Act is constitutional. Section 5 is a key operative provision of the Act. If it is found to be unconstitutional, nothing of the Act will survive after it is declared *ultra vires*. The doctrine of severability

does not permit the saving of the rest of the Act because without section 5, there is no way for the State Government to operationalise other provisions of the Act. We will therefore need to consider the second or the third aforementioned legal issues only if section 5 of the Act survives the first challenge.

11. The main challenge to section 5 is under Article 14 of the Constitution, which guarantees that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

An Anti-Colonial Jurisprudence: Interpreting a Revolutionary Constitution

12. Before we examine the first issue substantively, we will outline the proper approach that we should adopt in relation to the interpretation of our new Constitution. The dawn of this constitutional Republic on the 26th of January 1950 was not merely a cosmetic change. By resolving to adopt a constitution on behalf of the people of India, the Constituent Assembly was ushering in a change that was revolutionary in character. Despite the preservation of some of the language of the Government of India Act 1935 in the constitutional text, our Constitution's spirit is a thorough rejection of every argument that was used to justify the colonial state.

13. First and foremost, the change was revolutionary in a technical sense. To disavow its origins in the Cabinet Mission Plan [Statement by the Cabinet Mission, House of Lords Debates, 16 May 1946, HANSARD vol 141 cc 271-87], the Constituent Assembly adopted a rule that it could not 'be dissolved except by a resolution assented to by at least two-thirds of the total number of members of the Assembly' [Constituent Assembly Rules of Procedure 1947, Rule 20]. Also, the Assembly self-consciously refused to follow the procedure laid down in the Indian Independence Act 1947 passed by the British Parliament. Under that Act, the Constitution had to be enacted as a bill by the Assembly and secure the formal assent of the Governor-General in order to come into force. Instead, the Assembly ushered in a technical revolution by resolving to adopt the Constitution without submitting it to the Governor-General for his assent. Furthermore, Article 395 of the Constitution repealed the Government of India Act, 1935 and the Indian Independence Act, 1947—statutes enacted by the Westminster Parliament which the Assembly did not have the legal authority to repeal under the colonial legal order. By consciously performing these illegalities, our founders formally severed the umbilical cord that tied the new Republic to its former colonial masters.

14. The revolutionary character of this text is not, however, only technical. Our Constitution is revolutionary in a substantive sense as well. It commits itself to the representative and republican form of government, thereby ushering in the rule of the people of India. Anything less would have rendered the opening words of the preamble of our Constitution — 'we the people' — meaningless. This was a fundamental repudiation of the logic of colonialism, which had been based on the myth that our people are incapable of governing themselves and require the (ostensibly) paternalistic protection of the colonial state.

Although this paternalistic logic was somewhat dented by the provision of self-governing provincial governments under the Government of India Act, 1935, this transfer of power to Indians was limited to the provinces, and was based on limited—rather than universal—adult franchise. Indeed, one of the first things our Constituent Assembly did was to adopt an Objectives Resolution which underscored this feature without qualification by recognising that 'all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people of India' [clause 4].

15. Our Constitution is also revolutionary in the substantive sense because it understands that the people are not identical to their government, even when that government is elected by the people. It is sensitive to the corrupting influence of power, even upon good men and women. It therefore endorses the primacy of the people over their own government by guaranteeing to the people a set of fundamental rights in Part III of the document, that are directly enforceable in independent constitutional courts under Articles 32 and 226. Furthermore, the Constitution commits the state, especially through the directives issued to the state under Part IV, to work to secure the well-being of the people of India. These two parts of the Constitution amount to a fundamental rejection of the colonial order which, in reality, was based on an extractive system of abuse and exploitation of the governed by their governors.

16. The third distinguishing feature of our revolutionary Constitution is that it makes political power accountable. In keeping with our adoption of representative democracy, this accountability is owed primarily to the people during elections, and to opposition parties representing sections of the people in between elections. But it is also owed to a variety of independent constitutional institutions, including the Supreme Court, the High Courts, the Election Commission, the Finance Commission, Public Service Commissions, the Comptroller & Auditor General, the National Commission for Scheduled Castes, whose duty it is to advise and check the government of the day. Finally, the right to the freedoms guaranteed under Article 19 and the right to life and personal liberty under Article 21 are designed to facilitate a thriving civil society, which would include free and flourishing media, universities and other educational institutions, trade unions, political parties, religious organisations, non-governmental organisations, charitable trusts, cooperative societies, consumer societies, and so on. A free and vibrant civil society is as important a check on political power as other state institutions. Under colonialism, these forms of checks on the government were either weak or entirely absent. Repressive laws were routinely enacted and used to censor, weaken, or imprison the freedom fighters who opposed the government or its colonial policies. This system of accountability, based on democracy, separation of powers, and protection of civil society is the bedrock upon which we will build the new Republic.

17. The Constitution is substantively revolutionary in a fourth sense, in as much as it is committed to rule of *all* the people rather than a sub-set thereof. This non-discriminatory commitment to all the people is reflected in its adoption of universal adult franchise without regard to class, caste, sex, religion, education, property ownership or tax paying ability.

This is in sharp contrast to many other 'democracies': the Constitution of the United States infamously refused to extend freedom, franchise, or citizenship to its people of African descent for almost a century after its enactment. Most aboriginal people in Australia are still not allowed to vote. Women continue to be excluded from franchise in Switzerland, Mexico, and many other 'democracies.' Racial exclusions from franchise under Canada's Dominion Elections Act have only recently been repealed, in 1948, although exceptions to universal franchise continue to exist in many Canadian provinces. India's extension of citizenship and franchise to all its people—whether rich or poor, literate or illiterate, male or female, Brahmin or Scheduled Caste, Hindu or Muslim—at a time when so many other countries that claim to be democracies fail to do so is truly revolutionary. India's embrace of the principle of inclusiveness is therefore a firm rejection of the late colonial rule where the franchise was extended only to some categories of Indian citizens.

18. Furthermore, the colonial state—under its policy of 'Divide and Rule'—routinely used discriminatory classifications in state policies to pit one group of Indians against another. The promise of 'fraternity' in our preamble, as well as the outlawing of discrimination under Article 15, is a fundamental repudiation of the colonial policy of dividing Indians into 'manageable' segments based on their religion, caste, sex, race and other identities. The new Republic, on the other hand, can take these categories into account only for the purpose of uplifting certain sections of the population if they face disadvantages relative to other sections, or for recognising and protecting the religious, cultural, linguistic, or educational rights of minority groups.

19. This commitment to *all* the people of India is reflected also in the manner in which our Constitution was framed by the Constituent Assembly. Although itself elected on a limited franchise, the assembly did all it could to be inclusive and to decide by consensus rather than by majority, to take everyone along. Various accommodations were made, even to those whose views its leaders found unpalatable. There is room for everyone in this Constitution, or at least everyone who is willing to accept its fundamental tenet that it is a Constitution for all the people of India. This political commitment to inclusiveness is further evidenced by the fact that all but one member of our diverse Constituent Assembly ultimately put their signatures to this remarkable document.

20. The Constitution is comfortable with the messiness needed to be truly inclusive. This is reflected in the fact that many of its general guarantees, principles, and structures are peppered with exceptions and accommodations. Instead of seeking a one-size-fits-all federalism, for example, Part XXI of the Constitution adopts a federal arrangement that is tailored to the socio-political realities of our states. Part XVI recognises the special claims of historically marginalised sections of the Indian population. Part IV obligates the state to seek to improve the social and economic conditions of its poverty-stricken population. Most prominently, perhaps, the Constitution seeks to create inclusive public spaces through Article 15(2) and by prohibiting the practice of untouchability in Article 17. Where the colonial state categorised people to divide them, the new Republic can classify only to accommodate or equalise. Both accommodation and equality are essential to inclusiveness. It

is this commitment to inclusiveness for everyone that is fundamental for our understanding of our Constitution and must therefore be fundamental to any interpretive approach that this Court might develop. The Constitution's anti-colonial essence lies in the deep awareness of the missed opportunities to make India more inclusive during the two centuries of colonialism. The evil of colonial regime lay not only in what it did, but also in what it chose not to do—it allowed (and, sometimes, caused) so many of our people to remain uneducated, poor, marginalised, and excluded. Colonialism not only inflicted its own share of injustices, it also tolerated injustices inflicted by others. By contrast, our Constitution seeks to construct a state that shall do justice as well as strive to protect its people from injustice. A proper understanding of the revolutionary character of our Constitution, read in light of its repudiation of our colonial past, alone can enable this Court to evolve an anti-colonial jurisprudence.

21. Finally, it is not just the constitutional text or its framing that should guide this Court's anti-colonial jurisprudence. The ethos of the movement for our struggle for freedom against colonial rule is also material. We will do great injustice to the legacy of this movement and to our inheritance if we adopt an acontextual and ahistorical approach to our constitutional jurisprudence. We need to approach this document as a product of our specific history, one that we no doubt must continuously develop and improve upon in order to adapt it to our changing needs, but without forgetting its founding ethos. The founders of our Republic would be the first to admit they did not get everything right—our political legacy does not demand that we worship their mere words, but it does require us to imbibe the spirit of freedom they strove towards even as we consider what meaning we ought to give to their words. Will our ancestors who fought for this long-sought freedom ever forgive us if we fail to place ourselves in their shoes and feel what deprivation of freedom felt like, especially when brought about by unjust laws or after unfair trials? How can we coherently believe that racial discrimination against us was wrong, but discrimination against our fellow citizens based on their sex, caste, language, or religion is acceptable? Under the logic of colonialism, subjects serve the state. In a Republic, the state serves its people. In our newly constructed moral order, every single person matters—for his or her own sake—and not for the sake of the State. This is precisely the promise of 'assuring the dignity of the individual' made in the Preamble to our Constitution. The adoption of a Republican Constitution is the first step towards this reversal of attitude—a full about-turn will need to be fostered by us and by the coming generations, in our roles both as officials and as citizens tasked with preserving our egalitarian, freedom-giving, and fraternity-enhancing Constitution. Our approach to constitutional interpretation should therefore be historically grounded in our experience of colonialism and the ideals that inspired our compatriots to sacrifice their comfort, security, liberty, and occasionally even their life. In adopting such an approach, we need to recognise that no doctrinal test can fully capture the essential evil of colonialism. Rough and ready legal rules, although essential for legal certainty and stability, will forever strive towards better embodying the spirit of justice, but never with full success. Our doctrines and interpretive approaches therefore

need to be constantly updated and improved upon by future generations in light of their own needs, but without forgetting how and why we got here.

Presumptions of Constitutionality, Burden of Proof, and Standard of Review

22. In the case of *Chiranjit Lal Chowdhuri v. Union of India* [1950 SCR 869], a majority of a five-judge bench of this Court has recently held—drawing upon precedents from the United States—that when a primary legislation is challenged on the basis that it has breached a fundamental right, constitutional courts must presume the enactment to be valid. This presumption, they held, meant that the burden of proving that a law breaches any fundamental right rests solely on the person who challenges its constitutionality. We are still in the very early days of creating an indigenous constitutional jurisprudence, and it is inevitable that we will look to other established democracies to inspire our own jurisprudence. However, it is also important to borrow from other contexts while bearing in mind our particular constitutional ethos and aspirations. In particular, we have to be mindful of our anti-colonial founding ethos, which requires not merely a transfer of power from the colonial government to a representative government, but also ensuring that the exploitative, extractive, and overbearing logic of colonial governance is rooted out of our polity. It demands a full transition of our people from subjecthood to citizenship, not just as a matter of legal form, but also of social, economic, and political reality.

23. Key to this anti-colonial ethos is the assumption that the *raison d'etre* of the state is to serve all its people. It demands, therefore, for us to seek to enshrine a constitutional culture that expects the state to justify itself. A presumption of constitutionality is fundamentally at odds with the new responsive system of governance that the Constitution seeks to inaugurate. If the burden of proof remains on the claimant throughout the proceedings, courts would be obliged to resolve all factual uncertainties in favour of sustaining the impugned law. This is too deferential an approach to be legitimate under the new constitutional order we have inaugurated. We therefore hold that Indian courts shall not make any presumption regarding the constitutionality of any law in relation to an alleged breach of a fundamental right, to the extent that the doctrine concerns the burden of proof. The burden of proving that an impugned law has *prima facie* breached a fundamental right will rest on the person who challenges the constitutionality of such law. Once this burden is discharged, the burden of proof shall shift to the state or whoever is arguing in favour of the constitutionality of the impugned law to show that the *prima facie* breach of the right in question is nonetheless justified under the doctrinal standards that apply to the relevant fundamental right. To the extent that the judgment by a smaller bench of this Court in *Chiranjit Lal Chowdhuri* is contrary to our holding in this paragraph, that judgment stands overruled.

24. Rejecting the doctrine of presumption of constitutionality poses a challenge for an Article 14 inquiry. In an inquiry into (say) an alleged Article 19 breach, the claimant's initial burden would merely be to show that the state has restricted her freedom of speech

under Article 19(1)(a). The burden would then shift to the state to justify the law under Article 19(2). Similarly, in an Article 21 inquiry, the claimant simply needs to show that her life or personal liberty is threatened or limited, before the state needs to justify that limitation. Likewise, if an article 15(1) challenge is made, the claimant simply needs to show that the law classifies—either on its face or in its impact—on the basis of a protected ground. The initial burden of making a *prima facie* case on the claimant under Article 14, however, cannot merely be to show that the state has made a classification (or, indeed, failed to make one where it is merited). That would make almost all, if not all, laws stand in *prima facie* breach of Article 14. For this reason, the initial burden on the claimant for an Article 14 inquiry must prefigure the justification analysis set out in paragraph 42 below to some extent. Hence, we hold that under an Article 14 challenge, the claimant's burden is to prove that the state has made a classification or has failed to make a classification which *plausibly* denies to them equality before the law or the equal protection of the laws. Given the myriad ways this might be shown, we cannot lay down an exhaustive test for the same. The claimant only needs to make a *plausible* case that the state is unlikely to succeed in justifying the law in question, before the burden would shift to the state to in fact try to justify it.

25. Our rejection of the doctrine of presumption of constitutionality does not imply that we would never adopt a deferential attitude towards laws enacted by democratic legislatures. The *standard of review* required to show the unconstitutionality of a law is a distinct issue from the question of *burden of proof*. The appropriate standard of review concerns the level of deference that is due from courts to the impugned law. The deference due to any law depends on a variety of factors, including the nature of right that is engaged, the egregiousness and the impact of the rights breach, the manner in which the law was enacted, the relative judicial expertise in the matter, and so on. While a full exposition of the factors to be considered in determining the appropriate standard of review is not necessary in this case, we are likely, for example, to extend a greater degree of deference to (say) a classification made on the basis of complex economic factors between sellers of tea and sellers of toy that is challenged under Article 14 of the Constitution, but far less deference to a law that makes a classification prohibited by Article 15(1). Laws that are enacted in a consultative and deliberative manner by an elected legislature are likely to receive a higher level of deference than those that are not. Laws that might affect the independence or impartiality of the judiciary or other constitutional institutions (such as the Election Commission), or the autonomy of the press or universities, or the free and fair conduct of elections, are also likely to receive a lower degree of judicial deference. Substantive or procedural criminal provisions that are detrimental to the accused would, in general, receive a lower degree of deference from us because of their grave implications for personal liberty.

26. Turning to the case at hand, the Respondents have the burden to prove that the impugned Act, and/or the Ordinance it is based on, constitutes a *prima facie* breach of Article 14. If they succeed in doing so, the Appellant state shall have the burden of showing that

the breach is nonetheless justified. Furthermore, as the impugned Act concerns criminal procedure which has grave implications for the personal liberty of individuals, and because it is an almost verbatim reproduction of an undemocratic law that is pre-constitutional in origin and colonial in spirit, we will extend to the impugned Act a low level of deference. Therefore, our scrutiny of its constitutionality will be rigorous.

The scope of Article 14

27. The constitutional challenge to section 5 is based on the claim that it violates the constitutional guarantee of 'equality before law' under Article 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

28. Unlike its American counterpart found in the Fourteenth Amendment to the US Constitution, the equality guarantee in our Constitution is not limited to 'the equal protection of the laws.' To this phrase is added 'equality before the law,' perhaps inspired by Article 40 of the Irish Constitution. It is difficult to escape the conclusion that our framers, who had the American and the Irish examples before them, wanted a more capacious equality doctrine that combined the force of the two formulas. It is incumbent upon us to therefore give a robust interpretation to Article 14, drawing inspiration from our anti-colonial founding ethos.

29. A simple textual reading of the two clauses suggests that 'equality before the law' is a guarantee of formal equality—that, unless there are good reasons to do otherwise, the law shall not make classifications between the people it is designed to serve. 'Equal protection of the laws' adds a substantive caveat to this formal guarantee—the Constitution is not simply concerned with *prima facie* equal treatment. It also demands that the actual impact of its operation on the people, i.e. its protection, is broadly equal. Sometimes, because people are placed differently in the real world, providing them with equal protection of the laws may require classifying them formally for differential treatment. Again, a departure from 'equal protection of the laws' will only be constitutional if sufficiently justified. The bottom-line is this: equality forbids some classifications and requires others.

30. When a classification is legitimate and when it is not will depend on the context of a particular case, and should be ascertained by this Court in the manner we will describe below. It is also to be noted that, because equality may sometimes come into conflict with other values, the Constitution permits justifiable departures from the guarantee of equality. The nature and level of justification required will also vary from case to case, depending on the standard of review, as explained below.

31. For any classificatory rule, we can usually identify at least five distinct elements:

(a) Right: Is the right to equality *prima facie* breached?
(b) Differentia: What classes does the rule create?
(c) Objective: What end does it seek to achieve?
(d) Nexus: How is the objective connected with the differentia?

(e) Impact: What consequences does it subject each of these classes to, balanced against the importance of the objective and the degree to which it is likely to be realised?

32. The Right: With respect to the first element, it is clear that if the rule makes a classification, the right to equality is *prima facie* breached. But, as already noted, sometimes it is also breached when, even if the rule does not make any classification on the face of it, it has a disproportionate impact on different classes of persons (i.e. the classification is made not by the rule's formal requirements but because of its operation in the real world). The impact of a law could be injurious to fundamental rights in a material or a symbolic sense. An inquiry into the breach of fundamental rights should not merely be a formal one: courts have to consider the real-world impact of apparently harmless laws. As explained above, the claimant's initial burden under an Article 14 challenge is to prove not only that the state has made a classification or has failed to make a classification that it ought to have made, but also that doing so *plausibly* denies to them equality before the law or the equal protection of the laws.

33. The burden of proving this first element is on the person alleging that Article 14 has been breached. Once this is shown, the burden of proof shifts to the state (or another party seeking to defend the constitutionality of the impugned law) to show the breach is justified, based on the rest of the inquiry that follows. The state need not be required to answer all of the following questions: which justificatory questions are posed to the state, and with what intensity, will depend on the relevant standard of review.

34. The Differentia: For the second element—differentia—at least two further inquiries may be made: its intelligibility and its normative permissibility. Even the most deferential judicial inquiry would expect the state to show that the differentia is intelligible. Cases concerning the delegation of excessive and unguided power by the legislature to the executive are cases where the intelligibility of the differentia has not been established.

35. Again, even a deferential court should also evaluate the differentia normatively, to determine whether it is constitutionally legitimate. Our experience of racial discrimination under colonialism, and the suffering of so many of our compatriots because of their caste or sex, has made us realise that there are certain types of differentia that should not, barring exceptional circumstances, be used as a basis of legal classification. This is in fact what seems to have been the founders' intention behind the non-discrimination clauses in Articles 15(1), 16(2) and 29(2)—to render the specified differentia (based on sex, race, caste, religion and other similar personal statuses) presumptively impermissible.

36. The general equality guarantee contained in Article 14 is concerned with the normative legitimacy of differentia other than those prohibited by the specific anti-discrimination provisions contained in Articles 15, 16, and 29. These specific clauses do not, therefore, exhaust the list of impermissible distinctions. In general, what is normatively acceptable must be judged after evaluating our constitutional history, the constitutional text, and our founding ethos. The more illegitimate a differentiation in light of our constitutional ethos, the more anxious this Court will be in reviewing it.

37. The Objective: A judicial scrutiny would then test the third element of the classification test—the objective of the rule. One set of questions concerning the objective relate to its genuineness. Is the stated or apparent objective masking another, more sinister, one?

38. Apart from this evidential inquiry into its genuineness, one could also inquire into the normative legitimacy and the importance of the objective. The state must establish the constitutional legitimacy of the objective in every case: an objective to establish a theocratic state, for example, will not be constitutionally legitimate. If the justification inquiry is being conducted under a provision which specifies objectives permitted to the state (such as Article 19(2)), obviously the state will have to show that the impugned law pursues one of those specified objectives. A less deferential court may also inquire into the importance of the objective. The objective of administrative efficiency is legitimate, but likely to be less weighty than (say) the pursuit of universal healthcare.

39. The Nexus: Next, all courts must ask whether there is a *rational connection* between the impugned measure and the objective in question. As part of this inquiry, we can inquire into the over-inclusiveness and under-inclusiveness of the measure in seeking the stated objective. The more demanding our standard of review, the less tolerant we would be of over- and under-inclusive laws. We could further inquire into the extent to which the measure is likely to achieve this objective in reality.

40. Lastly, under the nexus analysis under an anxious review, we could ask if the same objective could be pursued (to a comparable degree) using means that do not restrict fundamental rights. If it can be, it is not *necessary* to infringe rights to achieve the objective, and hence the rights infringing measure is not justified.

41. The Impact: In the first step of this test, the claimant is already expected to establish the impact of the breach. In this final step, the impact consideration is a relative one: a grave impact on the right is less likely to be justifiable when the objective being realised is less important, or an important objective would nonetheless be realised only to a small extent. On the other hand, a minor breach of a right is more likely to be justified if a weighty objective is likely to be significantly realised. As this Court has previously held, 'Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and *unless it strikes a proper balance* between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by cl. (6) of Art. 19, it must be held to be wanting in that quality' [*Chintaman Rao v. State of Madhya Pradesh* 1950 SCR 759, emphasis added].

42. These questions concerning the impact of the classifying rule concern its operation in the real world and its effect on real lives. We can now summarize the questions we should ask when conducting an inquiry into an alleged breach of Article 14:

(i) Right: Is the right to equality engaged by the rule?
   a. Does the rule classify between persons or have a disproportionate impact on different classes of persons?
   b. Does the classification or failure to make a classification *plausibly* deny equality before the law or the equal protection of the laws?

(ii) Differentia: What classes does the rule create?
   a. Is the differentia intelligible?
   b. Is the differentia presumptively impermissible?
(iii) Objective: What end does the rule seek to achieve?
   a. Is the apparent objective genuine?
   b. Is the objective legitimate?
   c. Is the objective sufficiently weighty?
(iv) Nexus: How is the objective connected with the differentia?
   a. Is there a rational connection between the impugned measure and the objective?
   b. Is the measure necessary to achieve the objective?
(v) Impact: What consequences does the rule subject each of these classes to?
   a. How serious is the material or symbolic impact of the breach on the fundamental right, balanced against the importance of the state objective and the extent to which it is likely to be realised?

43. In the case at hand, given the egregious and discriminatory impact of section 5 on the personal liberty of the Respondents based on a law that has a strong resonance with a colonial mode of governance, we will examine it under a very anxious standard of scrutiny. The state, therefore, will need to answer all the steps in the justificatory analysis laid down above if the Respondents are able to cross the first hurdle of showing that the law is *prima facie* unconstitutional.

Does section 5 violate the right to equality?

44. The key provision for our consideration under issue (i) is sub-section (1) of section (5) of the impugned Act: "A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct."

45. Applying the first limb of the test we have outlined, this provision clearly engages the right to equality. It makes a classification between offences or classes of offences or cases or classes of cases (hereinafter, 'cases') that will be tried by the Special Court and those that will be tried by ordinary courts. While the fact of classification is obvious, does the classification *plausibly* deny the claimants equality before the law or the equal protection of the laws? The claimant only needs to make a plausible case, which is a lower standard than a reasonability or likelihood standard. In this case, the rule has a disproportionate impact on those persons who are tried before the Special Court, inasmuch as the procedure followed before this Court is less advantageous to the accused when compared to the procedure followed by ordinary courts. The impact of the law on personal liberty is egregious, its delegation of discretion to the government appears excessive, and it has a colonial stink about it. Given that we have held in paragraph 43 above that the state's burden of justification in this case is a very high one, it is very plausible that the claimant's

right to equality has been *prima facie* breached. Hence, the burden shifts to the state to satisfy us—on a very high standard of review—that the law is in fact constitutional.

46. In relation to the second set of questions under (ii), we now turn to ask the state to show us that the differentia it has created is 'intelligible.' The differentia created by the section is between cases placed by the State Government before the Special Court and those that are not so placed. The statute itself does not indicate any basis on which the Government may make this classification. As such, it is hard to find any intelligibility in the differentia. On this ground alone, the section fails to satisfy the constitutional demands without need for further inquiry. Such extraordinarily indeterminate laws are an especial evil because they allow the state to enforce them at its whim. They cast their net extremely wide, putting everyone potentially falling within it on notice: political dissenters or partisan opponents of the government are left at its mercy. The mere fear that they may become targets of the government's vast but undefined powers under such laws can prevent individuals from exercising their constitutionally guaranteed rights.

47. We also note the important parallels between the Act and the Anarchical and Revolutionary Crimes Act 1919 (also known as the Rowlatt Act 1919) passed by the Governor-General of India in Council. Like the impugned Act, section 3 of the Rowlatt Act sought to provide for 'the speedy trial of [certain] offences.' In section 8(2), it prescribed a similar procedure for these special trials, that is the procedure followed by Magistrates. The accused person's procedural rights were also restricted in a comparable manner. Admittedly, the much-criticised Rowlatt Act was worse than the impugned Act in many respects, although in one respect at least, it was better than the impugned Act: it actually specified the offences that could be tried using the special procedure it prescribed, rather than leaving it to the whims of the colonial government of the day.

48. The Rowlatt Act became a rallying cry for our anti-colonial struggle, for it came to symbolise all that was wrong with the anti-democratic government of British India. This colonial legislation became a catalyst for translating a largely elitist Congress Party seeking modest accommodation for Indians under the colonial regime into a mass movement that would eventually ask for, and secure, full political independence. It would not only be a betrayal of our moral inheritance to uphold a law that derives its inspiration from the epitome of colonialism; it would also be foolish to ignore the lessons from our recent history concerning the fate of an overbearing government.

49. We conclude that section 5 of the Act violates Article 14 of the Constitution and is therefore struck down as *ultra vires* under Article 13, read with Article 32, of the Constitution. Given that the section is not severable from the rest of the Act, we hold the entire Act to be unconstitutional. In light of this finding, it is unnecessary for us to

consider issues (ii) and (iii). With respect to issue (iv), we hold that the conviction of the Respondents under the unconstitutional Act was unlawful.

Conclusion

50. The appeals are, accordingly, dismissed.

Bibliographical Note from the Author:

I have not mentioned any facts in the judgment that the judges deciding the case in 1952 could not have known. The format does not permit references to material that were helpful in writing this judgment but were published after the original judgment was written. I therefore acknowledge the use of insights from the following works:

- *Arudra Burra*, What is "Colonial" about Colonial Laws?, American University International Law Review 31 (2016), pp. 137-169.
- *Aparna Chandra*, Proportionality in India: A Bridge to Nowhere?, University of Oxford Human Rights Hub Journal 3 (2020), pp. 55-86.
- *Farrah Ahmed / Tarunabh Khaitan*, Selective Under-Enforcement of the Law, Admin Law Blog, 23 June 2022, https://adminlawblogorg.wordpress.com/2022/06/23/farrah-ahmed-and-tarunabh-khaitan-selective-under-enforcement-of-the-law/
- *K. G. Kannabiran*, Wages of Impunity: Power, Justice, and Human Rights, New Delhi 2004.
- *Kim Lane Scheppele*, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models, International Journal of Constitutional Law 1 (2003), pp. 296-324, especially at pp. 299-300.
- *Rohit De*, Rebellion, Dacoity, and Equality: The Emergence of the Constitutional Field in Postcolonial India, Comparative Studies of South Asia, Africa and the Middle East 34 (2014), pp. 260-278.
- *Shivprasad Swaminathan*, India's Benign Constitutional Revolution, The Hindu, 26 January 2013, https://www.thehindu.com/opinion/lead/India%E2%80%99s-benign-constitutional-revolution/article12318419.ece (last accessed on 28 February 2023).
- *Tarunabh Khaitan*, Aversive Constitutionalism, in: Catherine O'Regan / Sujit Choudhry / Carlos Bernal (eds.), Research Handbook on Constitutional Interpretation, Cheltenham 2023 (forthcoming).
- *Tarunabh Khaitan*, Beyond Reasonableness—A Rigorous Standard of Review for Article 15 Infringement, Journal of the Indian Law Institute 50 (2008), pp. 177-208.

- *Tarunabh Khaitan*, Equality: Legislative Review under Article 14, in: Sujit Choudhry et al (eds.), The Oxford Handbook of Indian Constitutional Law, Oxford 2016, .pp. 699-719.