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DOCTRINE OF STRICT SCRUTINY IN THE INDIAN CONTEXT

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ABSTRACT

The Doctrine of strict scrutiny is essentially a narrower method for interpreting the law passed as to whether a fundamental right of an individual may or cannot be infringed in the sake of a larger public good. This paper focuses on the applicability of the doctrine of Strict Scrutiny in the Indian context and whether it can replace the reasonable classification test, essentially pondering the question as to whether it can be legally applied and the practical consequences of the same, This paper will look into the precedents that have been set by several Courts in this matter and the attempt of the Delhi Court in interpreting the same. Finally this paper will briefly look into the Christian Dalit reservation matter and analyse whether if the strict scrutiny doctrine is applied there might be a different outcome. This paper is divided into 2 main chapters, each dealing with one research question respectively, but interlinked with each other.

INTRODUCTION

The strict scrutiny doctrine raises the bar for judicial review of legislation that violate our fundamental rights or are founded on questionable categories. To avoid the taint of unconstitutionality, it is necessary for the classification or infringement to be narrowly tailored to achieve a compelling governmental necessity, and the State bears the burden of proof for the narrow tailoring and compelling necessity rather than the individual proving the violation of fundamental rights. The courts must determine whether a fundamental right of an individual may or cannot be infringed in the sake of a larger public good—basically, but not solely, through utilitarian analysis. When it comes to equality analysis, Indian courts have typically used the criteria of reasonableness, which calls for a reasonable categorization with an understandable differentia and a rational connection to the Act's purpose. If one looks at recent events, the adoption of rigorous scrutiny has been the topic of intense debate, with the country's Supreme Court expressing a variety of opposing opinions on the subject. It has been asserted in some scholarly works that the doctrine of Strict Scrutiny cannot be applicable in

ISSN: 2582-6433

the Indian context as the constitutional test limits the same[1]. It is argued in this paper that it is not the case because of the interpretation of the phrase due process of law. This paper contends that if the doctrine of Strict Scrutiny is applicable in India and it allows for a better protection of fundamental rights, to explain this a hypothetical situation of christian Dalit reservation is taken where the strict scrutiny doctrine is applied.

RESEARCH QUESTIONS

1. Whether the 'Doctrine of Strict Scrutiny' can be applied instead of the test of Reasonable Classification by the Supreme Court?
2. Whether applying the doctrine of strict scrutiny to the case of Christian Dalit reservation will yield a different result?

RESEARCH OBJECTIVES

1. To look into the doctrine of Strict Scrutiny in depth and see whether the fundamental principles of the same can be applied to the Indian context replacing the test for reasonable classification that is currently being employed.
2. To analyse the situation of Christian Dalit reservation and attempt to see from the point of view of the government applying the test of strict scrutiny will yield the desirable outcome.

STATEMENT OF PROBLEM

The doctrine of Strict Scrutiny currently faces much problem in its application in India, the apex Court also holds contradicting views on the matter.

REVIEW OF LITERATURE

1. **Vijay K. Tyagi, "Invocation of Scrutiny Test in Delegated Legislation and Ordinance: A Relook at the Doctrine of Presumption of Constitutionality", *Delhi Law Review.*[2]**

This piece of literature deals with the principle of strict scrutiny and the reasons it shouldn't apply to challenges to the constitutional validity of ordinances issued by the president and governors, as the case may be; secondary legislation made by the executive; and pre-constitutional

[1] "Moiz Tundawala, Application of Strict Scrutiny test in India, Why the Opposition?", 3 NUJS L. REV.465 (2010).
[2] Vijay K. Tyagi, "Invocation of Scrutiny Test in Delegated Legislation and Ordinance: A Relook at the Doctrine of Presumption of Constitutionality", 7 *Delhi Law Review* 20(2020).

ISSN: 2582-6433

laws have been covered by the authors in this article. The three degrees of inspection tests used in the United States of America and their related means and goals are another major topic of the essay. Additionally, it has been examined how these tests may be used in India. The fundamental contention of this essay is that secondary legislations should be subjected to a stringent scrutiny test rather than receiving the defence of a presumption of constitutionality. Similar to this, pre-constitutional statutes and ordinances must likewise be subject to varied degrees of examination and not be afforded this defence. The authors further hold that severe scrutiny is just a logical addition to the pre-existing criteria established by the Supreme Court of India for deciding the legality of laws, not an alien norm of law to Indian jurisprudence.

2. **Yadava, Raag. "Taking Rights Seriously - The Supreme Court on Strict Scrutiny."** ***National Law School of India Review*****, (2010).**

In this article the writer traces the roots for the doctrine of strict scrutiny, he looks at how in India the test for reasonable classification is used by courts. He says that both the tests essentially exist to ensure that the fundamental rights remain inalienable. The test of strict scrutiny is more vigorous and has a more heightened level of scrutiny. The Supreme Court and the High Court of Delhi have both taken contrary views on the matter of strict scrutiny and therefore allowed there to academic discussion on the same matter. The Supreme Court opinions against this doctrine as it goes against the existing jurisprudence that has been employed by Indian Courts. This work makes an effort to chart the hazy evolution of this philosophy. It aims to function on two levels: first, it does a positive analysis to identify the current situation and any associated issues. It then undertakes a normative analysis to support bringing in the stringent scrutiny standard.

3. **Moiz Tundawala, "Invocation of Strict Scrutiny in India: Why the Opposition?", Manupatra (2010).**[3]

This essay examines the compatibility and application of India's constitutional jurisprudence to the American idea of rigorous scrutiny. In order to determine whether laws purportedly breaking the norm of equality are constitutional, courts in India have used the presumption of constitutionality concept and the reasonable connection test. The severe scrutiny approach, in contrast, requires more judicial assessment of policies that violate basic rights or are founded on dubious categories. This essay evaluates the details of the stringent scrutiny theory and the Indian judiciary's strategy for dealing with it.

[3] *Supra* note 1.

ISSN: 2582-6433

4. **Siegel, Stephen A. "The Origin of the Compelling State Interest Test and Strict Scrutiny."** ***The American Journal of Legal History*** **(2006).**[4]

This article traces the origin and the principles of the doctrine of strict scrutiny employed in America. As this doctrine has first emerged and is being practised in America and now is being contemplated by Indian Courts whether it should be employed or not we must trace the origin of the same in America. The article says that initially when the concept of strict scrutiny was employed by Courts it was not explicitly mentioned, other methods were employed. After analysing several cases it concluded that the doctrine of Strict scrutiny offers the maximum protection for Fundamental rights. This article talks about the compelling state interest as well, in detail. To conclude it is an enlightening piece providing us a detailed view of American Legal History.

RESEARCH METHODOLOGY

This study will follow a doctrinal method of research, primarily employing the bare text of the Constitution, relevant case laws, articles and books for the research.

LIMITATIONS OF THE STUDY

The resources and case laws available on this topic are a handful but limited. This is a limitation.

CHAPTER I: THE DOCTRINE OF STRICT SCRUTINY: AN ANALYSIS OF JUDGMENTS

ORIGIN OF THE DOCTRINE OF STRICT SCRUTINY IN THE USA

To understand the application of the Strict Scrutiny test in India, the origin of the test must be traced. *United States v. Carolene Products*[5] implicitly proposed the rigorous scrutiny test as a method of judicial review in constitutional law matters. More significantly, *Lochner v. New York*[6] was reversed in one of the three instances that included Carolene Products, ending the contentious judicial practice of severely restricting states' and Congress' capacity to adopt progressive economic policy. In *Skinner v. Oklahoma*, the Supreme Court used the specific phrase "strict scrutiny" for the first time. In that case, the Court struck down an early, excessively rigorous

[4] Siegel, Stephen A. "The Origin of the Compelling State Interest Test and Strict Scrutiny." 48 *The American Journal of Legal History* 355 (2006).
[5] 304 U.S. 144, (1938).
[6] 198 U.S. 45 (1905).

ISSN: 2582-6433

form of a "three strikes" legislation.[7] A previous concurring opinion at least possibly had a pioneering role in developing the canonical conditions for rigorous scrutiny before *Roe v. Wade*[8] became the first Supreme Court majority judgement to use strict scrutiny in a substantive due process issue. In *Griswold v. Connecticut*[9], which held that a Connecticut statute forbidding the use of contraceptives could not be enforced against married couples, a concurring opinion in 1965 provided the first articulation of the strict scrutiny test that is wholly consistent with formulations that have endured into the twenty-first century.[10]

STEPS TO APPLYING THE DOCTRINE OF S TRICT SCRUTINY

"There are three main steps that are applied in applying the doctrine of strict scrutiny the first step is to identify the preferred or fundamental rights that are affected by the law or action to which strict scrutiny test can be applied after which the second step would be to determine which governmental interests count as compelling; and the third one giving content to the requirement of narrow tailoring."[11] In the United States there have been raging debates in the Supreme Court as to which rights would be able to avail the protection under this strict scrutiny test, for example whether abortion rights are fundamental in character, this debate has taken place in *Roe v. Wade*, which was recently overturned.[12] These debates are not just centred around those subjects covered under the Due Process Clause.[13] So essentially what takes place in the United States is that when the Court rules that a particular infringement of a particular "triggering right" is unlawful because the government has not established that it is necessary to advance a compelling interest, it frequently leaves open the possibility that a similar infringement might be legal under a more restrictive statute or upon a recordial. This is an important way that the modern strict scrutiny formula frequently manages to avoid judgements of ultimacy.

There were at least three different interpretations of the test that were available from the start in the USA but the Justices never made a technically binding decision. According to one understanding, severe scrutiny was meant to be lethal in almost all circumstances: It assured the

[7] 316 U.S. 535, 541 (1942).
[8] 410 U.S. 113 (1973).
[9] 381 U.S. 479 (1965).
[10] Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", *59 Vanderbilt Law Review* 793 (2006).
[11] Richard H. Fallon, Jr, "Strict Judicial Scrutiny", 54 *UCLA LAW REVIEW* 1267 (2007).
[12] Planned Parenthood v Casey, 505 U.S. 833 (1991).
[13] U.S. Constitution, 1787, 5th Amendment and 14th Amendment.

ISSN: 2582-6433

protection of favoured rights aside from situations involving impending disaster. The approach, however, may also be seen as little more than a weighted balance test. The operational provisions of the test continue the incomplete theorization of the choice to use the stringent scrutiny formula as the fundamental test for safeguarding fundamental rights: They continue to be significantly ambiguous, making them susceptible to different interpretations from one Justice and case to another, taking *Roe v. Wade* again for example.[14] Thus when the applicability of the same is subject to interpretation in the United States, if applied to the Indian scenario the judges must choose a concrete and stable approach to application.

DUE PROCESS OF LAW

Unlike the Constitution of the United States of America, the Constitution of India, 1950, has no explicit reference of the phrase "due process of law" anywhere in the text. Despite its conscious exclusion by the Indian Constitution's makers, the Supreme Court of India attempts to read the due process into the Indian Constitution through the interpretation of two Constitutional Articles, primarily Articles 14 and 21. In *A.K. Gopalan v. State of Madras*[15] The Supreme Court of India concluded that "procedure established by law" simply meant that a method had to be created by legislation adopted by the Legislature, reflecting on the objectives of the Constitution's drafters. Three decades later, in *Maneka Gandhi v. Union of India*[16] The Supreme Court disagreed with its prior view and ruled that the process envisioned by Article 21 is equitable and fair and not arbitrary. The process must adhere to Article 14 of the Constitution and be reasonable and fair. 'Procedure established by law' has been, in effect, changed in interpretation to 'Due Process of law' as a result of this judgement, and therefore in application it is almost interpreted in the same sense as Due Process but not entirely.[17]

The reason we delve into this difference is because the interpretation of this phrase affects the applicability of the doctrine of strict scrutiny. The doctrine assumes the unconstitutionality of the legislation from the beginning, and checks whether the ‘due process’ is followed. However in India the opposite is assumed, that is constitutionality is assumed, because of such an assumption, the application of the doctrine is a foreign concept, but now that the interpretation is

[14] *Supra* note 11 at 1336.
[15] AIR 1950 SC 27.
[16] AIR 1978 SC 597.
[17] Raushan, “Comparative Analysis of Due Process of Law: USA & India”, 10 I*nternational Journal of Humanities and Social Science Invention* 2319.

ISSN: 2582-6433

moving towards the characteristics similar to the 'due process clause', we can see that the Courts are being more accepting towards this doctrine.

The Supreme Court of India has many times considered the application of the doctrine of strict scrutiny in the Indian context.[18] However in doing so, a logical or sound backing was not provided and as a result of which, there is an issue with regards to the applicability of the same and this issue is still in consideration in Courts. The jurisprudence on the issue is still in its infancy at this point, despite the fact that various judgements have extensively covered it, often in contradiction to one another.

SAURABH CHAUDRI V. UNION OF INDIA

The applicability of the doctrine of strict scrutiny was brought up in the case of *Saurabh Chaudri v. Union of India.*[19] The crux of the argument put forth in this case with relation to the doctrine was that in any scenario, where a law is judged to be irrational, such a test may be used. Such a criteria may also be used in situations when a legislation endangers a citizen's life or liberty. This Court has operated on the theory that the constitutionality of a statute is to be presumed, and that the burden of proving otherwise rests with the party making the claim, with the exception of a few cases where the legislation was held to be prima facie completely irrational. The courts are always inclined to reject an interpretation that renders the law meaningless.

The reason the courts have rejected the application of this doctrine is because of the presumption of unconstitutionality, although this presumption is correct in some cases it is not true in others.[20] therefore as determined in the Supreme Court in the U.S where this doctrine originally emerged from it is the responsibility of the Court to identify the categories of laws where the State is not to be given the benefit of the doubt regarding their constitutionality and good faith, i.e., those laws that are to be viewed as "suspect" or classifications that are "simply too pernicious to permit any but the most exact connection between the justification and the classification."[21] When we look at the judgement in the *Saurabh Chaudri* case, it is seen that the Court does not completely reject the test of strict scrutiny, what it does offer is the critical foundation for the Court to use in determining whether the doctrine of strict scrutiny can be used in a specific case.

[18] Om Kumar And Ors vs Union Of India, (2001 (2) SCC 386, Canara Bank vs V.K. Awasthy, (2005) 6 SCC 321,
[19] 11 SCC 146(2003).
[20] Ram Krishn Justice S.R. Tendolkar and Ors, AIR 1958 SC 538.
[21] Gratz v. Bollinger, 539 U.S. 244, (2003).

ISSN: 2582-6433

ANUJ GARG & ORS V. HOTEL ASSOCIATION OF INDIA & ORS

In *Anuj Garg & Ors vs Hotel Association Of India & Ors* with regards to the test of strict scrutiny the court held that "When evaluating the effects of this type of law, strict scrutiny should be used. Legislation should be judged on its consequences and impacts rather than just the goals it is intended to achieve. The contested law is plagued by ingrained moral stereotypes and conceptions of sexual roles. The resultant viewpoint is restrictive in approach and out of date in content." by this type of law what the court means are laws that have clear "protective discrimination" goals. This is due to the fact that they might have both positive and negative effects. When evaluating the effects of this type of law, strict scrutiny should be used.[22]

It is very important to note that throughout the entire judgement, although the Court's endorsement of "strict scrutiny" cannot be disputed, it is found that the Court did not have the doctrine of strict scrutiny as what is utilised in the United States in its traditional sense in mind when it used the term "strict scrutiny."[23] As a result, the Court's endorsement of rigorous scrutiny is exclusively reliant on how it interprets the "compelling state purpose standard." According to its approach, a law that satisfies the requirement of "compelling state purposes" would satisfy the stringent scrutiny test without additional need for the least restrictive parameters. Therefore when we look at the Court's interpretation of the strict scrutiny test in simple terms, the Government only needs to prove that there existed a compelling state interest on its side, in order to pass the law.

ASHOK KUMAR V. UNION OF INDIA

Subsequently, the question of strict scrutiny is again brought up in the case of *Ashok Kumar Thakur v. Union of India.*[24] The court held that foreign rulings are of little significance for interpreting constitutional requirements. They could offer information to help with the constitutionality debate. In that regard, the strict scrutiny standard is not relevant, and a more thorough examination is required to determine whether or not a legislation is constitutional. In Thakur, CJ Balakrishnan cites Chaudri in great detail, reaffirming the same argument that was put forth in Chaudri. The views made by Balakrishnan, C.J., in highlighting the possibility of applying

[22] AIR 2008 SC 663.
[23] Raag Yadava, "Taking Rights Seriously - The Supreme Court on Strict Scrutiny", 22 *National Law School of India Review* 161 (2010).
[24] 6 SCC 1 (2008).

ISSN: 2582-6433

severe scrutiny to Article 21 analysis, plainly cover a lot more ground than affirmative action. In addition, the judgement highlights whether the unwillingness to apply the concept in all circumstances by moving beyond the scope of equality analysis. It would be problematic to infer that the Court's opinion was limited to affirmative action because the Chief Justice's observations discussed adopting strict scrutiny in situations that are obviously outside the purview of affirmative action.[25]

The application of strict scrutiny is denied on grounds that there exists structural differences between the American and Indian Constitution with regards to Thakur's finding that the equality provisions differ structurally from one another, it must be noted that the basic rights outlined in the Indian Constitution are substantially derived from the "Bill of Rights" enshrined in the American Constitution. In actuality, the last clause of section 1 of the 14th Amendment to the Constitution of the United States of America served as the model for Article 14 of the Indian Constitution. While there are basic differences between the two constitutions, there are also disparities in legislative authority and other areas of administration.[26]

NAZ FOUNDATION V. GOVERNMENT OF NCT OF DELHI

Now we will attempt to analyse the judgement of *Naz Foundation vs Government Of Nct Of Delhi*[27] When we look into the judgement, we can see that the Court has attempted to draw a conclusion using both Thakur as well as *Anuj Garg*, fundamentally attempting to harmonise the two judgments. However just by using pure logic it is impractical to harmonise the two judgements, is it not? Let me explain this simply *Thakur* has rejected the use of strict scrutiny, whereas *Anuj Garg* has permitted the doctrine, but only certain elements of it. The Delhi High Court has drawn a conclusion that in *Thakur* the Court confines the inapplicability of the strict scrutiny doctrine to only to cases of affirmative action, as the facts of the case questioned the validity of reservations, however on reading the judgement the conclusion is not based upon concrete reasoning, as the *Thakur* the Court clearly held as follows. “While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide materials for deciding the question regarding constitutionality. In that sense, the strict

[25] Mahendra P. Singh, Ashoka Thakur v. Union of India: Divided Verdict on an Undivided Social Justice Measure, 1 NUJS L. REV. 193 (2008).
[26] Seervai H.M, Constitutional Law of India, 424 (Universal Law Publishing, New Delhi 2015).
[27] 160 DLT 277(2009).

ISSN: 2582-6433

scrutiny test is not applicable and in depth scrutiny has to be made to decide the constitutionality or otherwise of a statute."[28] It is evident from this extract that the court did not confine itself only to affirmative actions, and it has in fact gone past that and declared that this doctrine employed in foreign decisions do not have persuasive value in Indian Courts. Furthermore, the decision in *Thakur* was rendered later and by a larger bench. Therefore, even on these grounds, it must be given precedence.

Finally, it is a common argument that those in support of the *Naz Judgement* abide by, it is that if *Thakur* indeed did not want the Strict Scrutiny test to take root in India, it would have explicitly mentioned in the judgement speaking out against the *Anuj Garg* judgement, but it did not do so. Again we will see the logical fallacy with this argument. Taking a closer look at the timeline, the arguments that were put forth in *Thakur* were completed, when the judgement of *Anuj Garg* was delivered so practically there is no way for the Court in Thakur to overturn Anuj Garg on text. But it must be noted that *Thakur* has overturned the judgement; it has just not outright mentioned the same.

CHAPTER II: APPLICATION OF THE TEST TO THE CASE OF CHRISTIAN DALITS

A hypothetical question will be posed in this chapter, that is whether the doctrine of strict scrutiny can be applied to the Christian Dalit reservation case that is currently ongoing in the Supreme Court, and whether doing so will yield a stronger argument in support of the Government of India?

SOOSAI V. UNION OF INDIA

This issue has already come up before the Supreme Court in the case of *Soosai v. Union of India.*[29] In this case the petitioner was a Hindu who 'formerly' belonged to the Adi-Dravida caste, and once he had converted to Christianity he had lost his benefits owing to paragraph 3 of the Scheduled Caste Order, 1950.[30] The petitioner had contended in this case that the Scheduled Caste Order, 1950 was violative of his rights under Article 14, 15,16 and 17. The judgement deals with whether the exclusion of people who have converted from Hinduism to Christianity but belong to

[28] *Supra* note 24 at 139.
[29] Soosai Etc vs Union Of India [1985] AIR 733.
[30] Under the Constitution of India, reservation for Scheduled Caste is provided by the Scheduled Caste Order, 1950. Under paragraph 3 of this Act the reservation extends to only Hindus, Sikhs and Buddiststs because the concept of Caste is directly linked with religion in India.

ISSN: 2582-6433

the Scheduled Caste, hereafter referred to as 'Christian Dalits' is constitutional. To determine whether a law is unconstitutional, the Court applies the reasonable classification test. This test checks whether the law classifies in an arbitrary manner, and to do so there are 2 criterias, It must first be proved that the there was intelligible differentia on classifying between the two groups and the second criteria is that there must be rational nexus between the law and the classification made. This petition was dismissed on grounds that there existed no authoritative text to prove that the president had acted in an arbitrary manner. The Court stated that it must be proved that the christian members who had belonged to the scheduled caste earlier still continue to face severe discrimination at par with those who are Hindus, in order to deem the Scheduled Caste Order unconstitutional. After which the Court merely dismissed the petition holding this order constitutional.

APPLYING THE DOCTRINE OF STRICT SCRUTINY: ARGUMENT FROM THE PETITIONERS SIDE

Firstly it is contended that there is a violation of fundamental rights, on denying Hindus who have converted to Christianity the right to reservation. Although the Court has held that reservation is not a fundamental right[31] The argument to be put forth is that denying Christian Dalits reservation is violative of Article 14[32] of the constitution as well as Article 15.[33]

There is a violation of Article 14 as those who have converted from Hinduism to Christianity, and who belong to the Scheduled Caste still continue to face discrimination on the basis of their caste. In India caste is no longer a practice that is associated with religion but it is a social phenomenon that accompanies an individual no matter what his religion is.[34] The Article 15 violation is brought in because the Constitution doesn't mention religion while stating that the State must make provisions for the advancement of the backward classes.

Oftentimes in the US the doctrine of strict scrutiny is only applied to those rights that are

[31] Dravida Munnetra Kazhagam v. Union of India and Ors.
[32] The Constitution of India. article 14. Which states 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."
[33] The Constitution of India, article. 15. Clause (4), Which states that "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."
[34] Padmanabh Samarendra, Religion, Caste and Conversion: Membership of a Scheduled Caste and Judicial Deliberations 51 *Economical and Political Weekly* 41 (2016).

ISSN: 2582-6433

"prefered" and not "ordinary rights" for the ordinary rights the rational nexus test is applied.[35] The same could be done in India as the strict scrutiny test ensures that the fundamental rights of priority, that is those rights guaranteed by the golden triangle rule involving Article 14, 19 and 21 are protected.

QUESTION OF UNDER INCLUSIVITY AND OVER-INCLUSIVITY

George Schedler talks under inclusivity and over-inclusivity; he states that a statute cannot be both overinclusive and underinclusive in order to pass severe scrutiny. If it benefits more people than necessary in order to accomplish its compelling goal, it is overinclusive. In that instance, there are more impacted individuals than necessary in the class. On the other hand, a legislation is underinclusive if it only applies to a small group of people and thus fails to effectively accomplish its goal. To put it another way, under-inclusion denotes the Court's conclusion that the statute's compelling interest could only be fully served by applying to a group greater than the one it currently affects.[36] In the case of reservation there is under inclusion in the sense, the reservation only applied to one religion while excluding the others, even though such exclusion should not be possible. It is arguably justified that the Scheduled Caste order, 1950 violated the fundamental right to equality.

APPLYING THE DOCTRINE OF STRICT SCRUTINY: ARGUMENT OF THE STATE

It is the States duty to prove that there exists substantial State interest in not providing reservation for Christain Dalits. The argument that can be advanced is that under Article 15 (4) and (5), it is the States duty to provide provisions for the advancement of backward classes. The argument rests on the fact that a commission be formed by the State and they are able to prove that Christian Dalits do not face the same sort of discrimination as Hindu Dalits and that religion is in fact the determination for discrimination in terms of the Scheduled Caste Order.

However if this cannot be proved, the application of the Strict scrutiny test would deem the Scheduled Caste Order as unconstitutional, as the constitution does not specify differentiation

[35] *Supra* note 5 at footnote 4.
[36] George Schedler, "Does Strict Judicial Scrutiny Involve the Tu Quoque Fallacy?" 9 *Law and philosophy* 273 (1990).

ISSN: 2582-6433

based on religion[37] Therefore doing the same would be unconstitutional when applying the Strict Scrutiny test.

CONCLUSION

To Conclude, completely embracing the Strict Scrutiny doctrine is not provided textually in the Constitution or by Courts, however there is basis for the application of the same and this test of constitutionalism can be applicable in India to prevent violation of rights especially the golden triangle. The reason for stating that the doctrine of strict scrutiny may protect the fundamental rights better than the rational nexus test is due to the fact that when we do apply the rational nexus test, the state can argue stating that Hindus who have converted to Christianity do not face the same amount of discrimination as those who continue to stay Hindus. It can also be argued that discrimination is historical and the purpose of the reservation is to put an end to this historical discrimination and not let it continue on, and historically it has been associated with religion and upon conversion the two groups are sufficiently distinguished. Therefore the rational nexus test will also be applicable in favour of the State. However practically speaking the fundamental rights of individuals would be affected on applying this test. The main benefits with respect to the Strict Scrutiny test is that unconstitutionality is presumed.

BIBLIOGRAPHY

1. Moiz Tundawala, "Application of Strict Scrutiny test in India, Why the Opposition?", 3 NUJS L. REV.465 (2010).
2. Vijay K. Tyagi, "Invocation of Scrutiny Test in Delegated Legislation and Ordinance: A Relook at the Doctrine of Presumption of Constitutionality", 7 Delhi Law Review 20(2020).
3. Siegel, Stephen A. "The Origin of the Compelling State Interest Test and Strict Scrutiny." 48 The American Journal of Legal History 355 (2006).
4. Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", *59 Vanderbilt Law Review 793 (2006)*
5. Richard H. Fallon, Jr, "Strict Judicial Scrutiny", 54 UCLA LAW REVIEW 1267 (2007).
6. Raushan, "Comparative Analysis of Due Process of Law: USA & India", 10 International Journal of Humanities and Social Science Invention 2319.
7. Raag Yadava, "Taking Rights Seriously - The Supreme Court on Strict Scrutiny", 22 *National Law School of India Review* 161 (2010).
8. Mahendra P. Singh, Ashoka Thakur v. Union of India: Divided Verdict on an

[37] The Constitution of India, Article 15(4) and 15(5).

ISSN: 2582-6433

Undivided Social Justice Measure, 1 NUJS L. REV. 193 (2008).

9. Seervai H.M, Constitutional Law of India, 424 (Universal Law Publishing, New Delhi 2015).
10. Padmanabh Samarendra, Religion, Caste and Conversion: Membership of a Scheduled Caste and Judicial Deliberations 51 *Economical and Political Weekly* 41 (2016).
11. George Schedler, "Does Strict Judicial Scrutiny Involve the Tu Quoque Fallacy?" 9 Law and philosophy 273 (1990).

LIST OF CASES

1. United States v. Carolene Products, 304 U.S. 144, (1938).
2. Lochner v. New York, 198 U.S. 45 (1905).
3. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
4. Roe v. Wade, 410 U.S. 113 (1973).
5. Griswold v. Connecticut 381 U.S. 479 (1965).
6. Planned Parenthood v Casey, 505 U.S. 833 (1991).
7. A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
8. Maneka Gandhi v. Union of India, AIR 1978 SC 597.
9. Om Kumar And Ors vs Union Of India, (2001 (2) SCC
10. Canara Bank vs V.K. Awasthy, (2005) 6 SCC 321.
11. Saurabh Chaudri v. Union of India, 11 SCC 146(2003).
12. Ram Krishn Justice S.R. Tendolkar and Ors, AIR 1958 SC 538.
13. Gratz v. Bollinger, 539 U.S. 244, (2003).
14. Anuj Garg & Ors vs Hotel Association Of India & Ors, AIR 2008 SC 663.
15. Ashok Kumar Thakur v. Union of India, 6 SCC 1 (2008).
16. Naz Foundation vs Government Of Nct Of Delhi, 160 DLT 277(2009).
17. Soosai Etc vs Union Of India [1985] AIR 733.
18. Dravida Munnetra Kazhagam v. Union of India and Ors.