

Farrah Ahmed and Tarunabh Khaitan:

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Selective Under-Enforcement of the Law

In recent years, Indian governments have been accused of using regulations governing property, construction and finance to punish political dissenters. Most recently, the Uttar Pradesh government has been accused of punishing Muslim protesters by [demolishing their homes](#) using such regulations. In a society that aspires to be governed by the rule of law, all public action must comply with the law.

These are some of the possible constitutional and administrative grounds of challenging the demolitions as potentially unlawful, even assuming that the properties were in breach of regulations *and* demolitions were a permitted enforcement action under the rules:

- (i) even an illegally built house cannot be demolished without following a [fair procedure](#), including giving notice to the residents and owners, and the opportunity to be heard;
- (ii) an otherwise lawful demolition may be rendered unlawful if it is undertaken for a [mala fide purpose](#), such as the purpose of punishing the owner for participating in a protest;
- (iii) law-enforcement that targets a particular social group may also be illegal because it breaches the guarantee of non-discrimination under Article 15 of the Constitution;
- (iv) if the demolition will breach anyone's fundamental right to shelter, that needs to be accounted for by law-enforcing officers;
- (v) any demolition also needs to comply with the limitations imposed by the constitutional right to property under Article 300A.

We agree that these are all valid reasons to test whether the recent spate of demolitions in India are legal. In this post, we argue that:

*(vi) selective under-enforcement of any law may also be **arbitrary**, and therefore illegal, unless certain conditions are satisfied.*

State capacity for law enforcement is variable. In contemporary times, with the huge expansion of the state's remit, and correspondingly of laws that need enforcement, no

state can feasibly enforce all its laws against all breaches by all persons at all times. Nor would such a hyper-legalistic state be desirable, even if it were feasible. While a handful of laws are sometimes over-enforced by zealous officers, under-enforcement tends to be the norm for most laws.

No administration can ensure perfect compliance with every regulation governing building standards or preventing encroachments on public land. Especially in India, where encroachments and construction which fall short of such standards is common, deciding which breaches to address and how to address them, is a matter of discretion. The question then becomes whether that discretion was exercised lawfully, assuming that demolition was countenanced by some legally-valid regulation. Just as the prosecutorial discretion to determine which accused persons should face trial and who may go free cannot be exercised arbitrarily, any selective under-enforcement of law needs to be justified with relevant reasons.

Ever since *EP Royappa v State of Tamil Nadu* (1974 AIR 555), [Article 14](#) of the Indian Constitution has been understood to include protections from arbitrary action, including arbitrary under-enforcement of law. The test for arbitrariness has never been explicitly stated, but it can be discerned from close reading of Supreme Court cases. One of us, Farrah Ahmed, [has offered an account](#) (summarised below) of two ways in which a decision – including to enforce a law in one situation rather than another – might be arbitrary. Both involve the decision-maker not responding appropriately to the reasons that apply to the decision to enforce.

First, a decision might be arbitrary when the decision-maker is *indifferent* to the true reasons that apply for or against it. Imagine that a public official has limited resources to enforce building regulations via demolitions. Some violations of the building regulations are dangerous and harmful – they put residents in imminent danger. Other violations are minor and create little harms or dangers. Imagine that the costs of distinguishing between the harmful and harmless violations are small. If the public official demolishes buildings by picking at random, by roll of the dice, her decision is arbitrary as she is indifferent to the reasons that apply to the decision about how to prioritise the resources she has for enforcement.

A second way a decision might be arbitrary is when the decision-maker knows or believes that the *purported* reasons for a decision do not really justify the decision, but she makes the decision anyway. For instance, if the same public official *claims* to demolish based on the harmfulness of the illegal construction, when in fact she decides on *animus*, or a protected characteristic (religion, sex, caste, political opinion etc.), this decision is also arbitrary.

As the Indian Supreme Court has acknowledged in the context of colourable legislation, decision-makers making an illegitimate decision typically ‘cloak’ or ‘veil’ their motivating reasons with [purported reasons](#) which are “[a mere pretense or disguise](#)” so that the decision appears legitimate. Arbitrary decisions are often similarly clothed in pretextual purported reasons.

On this account of arbitrariness, the test for whether a decision is arbitrary is whether there is a *credible* way to make sense of the decision without attributing to decision-maker either:

- indifference to the true reasons that apply to the decision (as in the dice-roll example) or
- belief or knowledge that the *purported* reasons for the decision do not really justify it (i.e. they are pretextual)

To put it roughly, arbitrary decision-making displays a kind of indifference to the relevant reasons and justifications that apply to the question of where enforcement resources should be prioritised.

In order to show that its under-enforcement of building regulations is not arbitrary, therefore, the relevant public authority will need to show either:

- (i) that it proceeds against all breaches of the regulations that come to its notice, following the same procedure, with the same alacrity and severity, or
- (ii) that although it under-enforces the regulations to optimise its available resources, the selected targets, and the manner in which it proceeds against them, are determined based on relevant and justified considerations.

If it cannot show either of these, its selective under-enforcement of the law would be arbitrary, and therefore unlawful. Such selective under-enforcement of vague and capacious laws is especially worrying because—as [Dr Alvin Cheung](#) argued in his JSD thesis submitted to the NYU—it has become a common tool for [democratic deconsolidation in many democracies, including India](#). It is imperative, therefore, that when the state invokes the law against its political opponents or members of vulnerable social groups, the judiciary tests not only the state’s formal compliance with the letter of the law but also its compliance with all relevant constitutional and administrative principles.

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