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IN SEARCH OF RIGHTS JURISPRUDENCE

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Abstract

The paper lays emphasis upon the responsibility of the state to balance rights not only between the individuals but also between individuals and the state. The requirement of balancing reasonable restrictions with fundamental rights has been discussed in the *Anuradha Bhasin* and *Puttaswamy* cases which strikes at the root of executive overreach and insists on constant administrative review. Moreover, in examining the reasonable restrictions permitted under the Indian Constitution the court uses approaches similar to that of the United States Supreme Court but the provisions in the Bill of Rights are also not absolute and caution should be exercised while implementing the rule of proportionality. No constitutional rights are absolute and pose challenges in times of national emergencies, the state is forced into a dilemma between competing values and the sacrifice of one to the other, hence for harmonious co-existence the legislature and the authority should always bear in mind the purpose to be served and the interest of the people impacted.

I Introduction

STUDENTS OF jurisprudence at Oxford in the 1980s had a fascinating and immensely rewarding time following the lectures of Professor Ronald Dworkin who had succeeded Professor H. L. A Hart as the professor of jurisprudence. His seminal work *'Taking Rights Seriously'*[1] was published in the year 1975 and has since been the foundation of the provocative rights thesis challenging the positivist school entrenched at Oxford and elsewhere before Dworkin appeared on the scene. In *Anuradha Bhasin* v. *Union of India* ('Anuradha Bhasin')[2] and the follow up matters in the case of *Foundation for Media Professionals* v. *UT of Jammu and Kashmir* ('JK 4G matters'),[3] the Supreme Court of India briefly touched upon Dworkin's thesis and dismissed it for its 'all or nothing' rule-based approach as opposed to the more malleable principle-based approach of other scholars which according to the Supreme Court permits balancing of rights (not between individuals but between individual and society). That would make the exercise a utilitarian one seeking to back the 'greatest good of the greatest number' approach.

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1 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

2 *Anuradha Bhasin* v. *Union of India* (2020) 3 SCC 637.

3 *Foundation for Media Professionals* v. *UT of Jammu and Kashmir* (2020) 5 SCC 746.

Unfortunately, that is a misreading of the rights thesis because much of the model used by Dworkin relies a great deal upon the distinction between 'policy' and 'principle' (the former being malleable and the latter analytically inevitable but required to be discovered) to arrive at what rights people have. The understanding of Dworkin reflected in the judgment is in fact something that he found in H.L.A. Hart's model of judicial decision making and rejected it as an inadequate description of the legal system we follow. How competing rights are to be balanced is not in any way rejected by Dworkin. His work is focused on discovering how the need for balance is to be judicially addressed.

II Fundamental rights and the Supreme Court of India

In the contemporary period, applying the correct understanding of Dworkin is necessary: Rights in times of emergencies, national security challenges as well as contours of public dissent against government policies; the COVID-19 pandemic is assumed to have both elements. Some of the recent judicial responses makes one wonder if the ghost of *ADM Jabalpur* v. *Shivkant Shukla* ('ADM Jabalpur')[4] is back to haunt us. It may well be that the return to *ADM Jabalpur* might be in isolated pockets given that the Supreme Court continues to show resistance to official attempts to curb free speech. The unpopular judgment itself has been overruled *albeit* 25 years after it was delivered, but it is yet unclear whether the reasoning that supported that judgment too has been entirely rejected by the Supreme Court.

Justice D. Y. Chandrachud speaking for majority in *Puttaswamy*[5] put the much-criticized internal emergency period judgment to rest by formally overruling it:[6]

> The judgments rendered by all the four Judges constituting the majority in ADM, Jabalpur[7] are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in Kesavananda Bharati,[8] primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilised State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave

4 *ADM, Jabalpur* v. *Shivkant Shukla*, AIR 1976 SC 1207.

5 *Justice K. S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

6 *Id.* at 23.

7 *Supra* note 4

8 *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.

> individuals governed by the State without either the existence of the right to live or the means of enforcement of the right**.** The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article 372 of the Constitution. Khanna, J. was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the State on whose mercy these rights would depend[...] ADM, Jabalpur must be and is accordingly overruled […].

The passage above has an interesting contrast between two approaches, the first being somewhat narrow in holding that liberty of the citizen cannot be encroached without the 'authority of law', and the other placing rights as pre-constitutional and inalienable.

Anuradha Bhasin[9] assumed at one level, the contrast between Indian and the United States (US) jurisprudence based on the absolute nature of the US Bill of Rights and the reasonable restrictions made permissible in the context of the Indian Constitution. To quantify the reasonableness of restrictions, the court looks at the Directive Principles of State Policy (that presumably provide one measure of public interest). Additionally, the court has also developed the proportionality test, either because the reasonableness test was elusive or because proportionality helps in quantifying it. The requirement of balancing various considerations brings us to the principle of proportionality. The test developed in recent years is explained at some length in the judgment that needs to be reproduced extensively. In the case of K.S. Puttaswamy,[10] the court observed:[11]

> Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law[...].

Further, in the case of *CPIO* v. *Subhash Chandra Aggarwal*,[12] the meaning of proportionality was explained as:[13]

> It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary

9 *Supra* note 2.

10 *Supra* note 5.

11 *Id.* at 504.

12 (2020) 5 SCC 481.

13 *Id.,* para 224.

> to fulfill the legitimate interest of the countervailing interest in question[...]

At the same time, we need to note that when it comes to balancing national security with liberty, we need to be cautious. In the words of Lucia Zedner:[14]

> Typically, conflicting interests are said to be 'balanced' as if there were a self- evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other ... Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.

The proportionality principle can be easily summarized by Lord Diplock's aphorism 'you must not use a steam hammer to crack a nut, if a nutcracker would do?' [Refer to *R* v. *Goldsmith*, [1983] 1 WLR 151, 155 (Diplock J)]. In other words, proportionality is all about means and ends.

The suitability of proportionality analysis under Part III, needs to be observed herein. The nature of fundamental rights has been extensively commented upon. One view is that the fundamental rights apply as 'rules', wherein they apply in an 'all-or- nothing fashion'. This view is furthered by Ronald Dworkin, who argued in his theory that concept of a right implies its ability to trump over a public good. Dworkin's view necessarily means that the rights themselves are the end, which cannot be derogated as they represent the highest norm under the Constitution. This would imply that if the Legislature or the Executive act in a particular manner, in derogation of the right, with an object of achieving public good, they shall be prohibited from doing so if the aforesaid action requires restriction of a right. However, while such an approach is often taken by American Courts, the same may not be completely suitable in the Indian context, having regard to the structure of Part III which comes with inbuilt restrictions.[15]

However, there is an alternative view, held by Robert Alexy, wherein the 'fundamental rights' are viewed as 'principles', and are portrayed in a normative manner. Rules are norms that are always either fulfilled or not; whereas principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. This characterisation of principles has implications for how to deal with conflicts between them: it means that where they conflict, one principle has to be weighed against the other and a determination has to be made

14 *Supra* note 5 at 49.

15 *Id*., para 51.

as to which has greater weight in this context. Therefore, he argues that nature of principles implies the principle of proportionality.[16]

The doctrine of proportionality is not foreign to the Indian Constitution, considering the use of the word reasonable' under article 19 of the Constitution. In a catena of judgments, the court has held 'reasonable restrictions' are indispensable for the realisation of freedoms enshrined under article 19, as they are what ensure that enjoyment of rights is not arbitrary or excessive, so as to affect public interest. The court, while sitting in a Constitution Bench in one of its earliest judgments in *Chintaman Rao* v. *State of Madhya Pradesh,*[17] interpreted limitations on personal liberty, and the balancing thereof, as follows:[18]

> The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. 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 Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality" (emphasis supplied).

The Supreme Court referred *State of Madras* v. *V.G. Row,*[19] which laid down the test of reasonableness and held:[20]

> It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

To describe the rule of proportionality, the court relied on *Om Kumar* v. *Union of India,*[21] which explained as follows:[22]

16 *Supra* note 2, para 52.

17 AIR 1951 SC 118.

18 *Id.*, para 53.

19 AIR 1952 SC 196.

20 *Id.*, para 53.

21 (2001) 2 SCC 386.

22 *Id.*, para 53.

> By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case maybe. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality (emphasis supplied).

The court further relied on recent verdict of *Modern Dental College and Research Centre* v. *State of Madhya Pradesh,*[23] which held that no constitutional right can be claimed to be absolute in a realm where rights are interconnected to each other and limiting some rights in public interest might therefore be justified.[24] The court observed:[25]

> It is now almost accepted that there are no absolute constitutional rights. [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute"]
>
> Examples given are:(a) Right to human dignity which is inviolable, (b) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.

In this case, the apex court while trying to resolve the dilemma of competing rights held that rights and limitations must be interpreted harmoniously so as to facilitate coexistence. The bench observed:[26]

> On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy,

23 (2016) 7 SCC 353.

24 *Id.,* para 54.

25 *Supra* note 23, para 62.

26 *Ibid.*

> though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the 'losing' facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles.

Given the window of reasonableness of restrictions in article 19, one might have thought that proportionality is but a dimension of reasonableness rather than an additional feature. The jurisprudence developed around reasonableness seems to have left the court uncomfortable about its impact on rights and therefore it looked for something more. In a similar fashion having felt the inadequacy of concepts like constitutional values, the court has sought to seek comfort in the concept of constitutional morality.

On the other hand, writing at the time of US preoccupation with terrorism post 9/11 and the invasion of Iraq, Ronald Dworkin in his book[27] took a remarkable liberal position that many contemporary leaders might shy away from and that scholarship in India finds puzzling:

> Rights would be worthless—and the idea of a right incomprehensible—unless respecting rights meant taking some risk. We can and must try to limit those risks, but some risk will remain. It may be that we would be marginally more secure if we decided to care nothing for the human rights of anyone else. That is true in domestic policy as well. We run a marginally increased risk of violent death at the hands of murderers every day by insisting on rights for accused criminals in order to keep faith with our own humanity. For the same reason we must run a marginally increased risk of terrorism as well. Of course, we must sharpen our vigilance, but we must also discipline our fear. The government says that only our own safety matters. That is a counsel of shame: we are braver than that, and have more self-respect.

III Assessment of rights jurisprudence of the courts

Regrettably fear and honour are curiously not factored into any discussion on rights in our situation. Whilst the judiciary attempts to balance a noble sentiment about human rights with the imperative of national security, both real and imagined, the general public assumes that rights become redundant where actual or suspected threats to national security are alleged. Dignity, for them, is not to be associated with anyone who questions our fundamental beliefs about national integrity as that position includes a surrender of dignity. It is wise to draw a line between those who advocate and participate in violence to achieve their unwholesome objectives and those who merely

27 Justine Burley (ed), *Terror and the Attack on Civil Liberties* (New York Review of Books, Nov. 6, 2003).

support the idea but explicitly or implicitly abjure violence. Of course, being in the hot seat of administration, one seldom has the leisure or clarity of moral vision to draw the important dividing line between support for violent methods and mere disagreement about objectives, even if expressed forcefully. The law on this has been clear for ages since the Supreme Court handed down judgments in *Ram Manohar Lohia,*[28] *Kedar Nath Singh,*[29] and *Romesh Thapar*.[30] There too is the difficult philosophical and practical consideration about the nature of freedom and liberty. The establishment is either uncaring of the distinction or simply finds it politically convenient to abstain from drawing the distinction. But, if the courts and other institutions like the National Human Rights Commission of the country show reluctance to draw that distinction or fail to sufficiently identify it, the fundamental pillars of democracy will collapse in a heap. Although in theory, the distinction between peaceful protest gatherings and unlawful assemblies is easy to draw, it takes but a whim of the powers that be and the local police to switch labels and subject a gathering to the rigour of dispersal directions leading up to use of force and arrest of demonstrators. In *Puttaswamy,* Justice D Y Chandrachud speaking for the majority took a view on Ronald Dworkin which was quite different from Justice Ramana's view in *Anuradha Bhasin*:

> Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation [...].

The idea that individuals can have rights against the state that come prior to the rights created by explicit legislations has been developed as part of a liberal theory of law propounded by Ronald Dworkin. In his seminal work titled 'Taking Rights Seriously', he states that:[31]

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.

Dworkin asserts the existence of a right against the government as essential to protecting the dignity of the individual:[32]

> It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary

28 *Ram Manohar Lohia* v. *State of Bihar,* AIR 1966 SC 740.

29 *Kedar Nath* v. *State of Bihar,* AIR 1962 SC 955.

30 *Ramesh Thapar* v. *State of Madras,* AIR 1950 SC 124.

31 *Dworkin Supra* note 1, para 44.

32 *Ibid.*

> to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence.

Dealing with the question whether the government may abridge the rights of others to act when their acts might simply increase the risk, by however slight or speculative a margin, that some person's right to life or property will be violated, Dworkin says:[33]

> But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle.

If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned. Dworkin states that judges should decide how widely an individual's rights extend. He states:[34]

> Indeed, the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are […]

This has been a complex argument, and I want to summarize it. Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the State. The different clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular concepts; therefore, a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.

The *Anuradha Bhasin* case

In the *Anuradha Bhasin* case, the main issue was about the conditions for imposing section 144 of the Cr PC keeping in mind the imperative of not stifling freedom of expression. Therefore, the court looked at balancing the State interest of security with the citizen's right to use the internet for communication. So, one might be able to say that there was what American jurisprudence refers to as 'compelling state interest', though in fact the State had failed to make a case of any direct or indirect link with terrorism. Looking at the calendar, it was more an apprehension of the immediate public reaction to abrogation of article 370 of the Constitution. Furthermore, within days of the high-powered committee appointed by the Supreme Court having decided for *status quo* for another two months, the Lieutenant Governor of the Union Territory publicly endorsed the need to revive high-speed internet at 4G standard.

An interesting look at rights was done in what is popularly known as the 'right to sleep' case. The matter came to the Supreme Court regarding the incident of police disruption by use of force of asleep followers of Ram Dev in *In re Ram Lila Maidan*

33 *Ibid*.

34 *Ibid*.

Incident ('Ramlila Maidan').[35] Once again section 144 of Cr PC was in question and whether it could be imposed and used against the gathering. Justice Swatantra Kumar began with the generally assumed absolute freedom of expression and traced the steps that the Supreme Court of the US took to impose practical restrictions:[36]

> […] as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of "clear and present danger. However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of "balancing of interests". The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Frankfurter, J. often applied the above mentioned balancing formula and concluded that "while the court has emphasised the importance of 'free speech', it has recognised that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations.

The 'balancing of interests' approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structures of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the 'clear and present danger' and 'preferred position' doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position.[37]

Thus, it is clear that the rights in the Bill of Rights too are not absolute, making them for all practical purposes same or similar to the Fundamental Rights under the Indian Constitution. Yet, these judgments do not resolve the issue of there being a contest between two sets of individual rights or between individual and society represented by the State. The distinction can make all the difference to the outcome. However, the Indian Supreme Court continues to hold that there is a fundamental difference between the two Constitutions. It reiterated this in *Anuradha Bhasin* as well as in the instant case.

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35 In *Re-Ramlila Maidan Incident* v. *Home Secretary ,* Suo Motu Writ Petition (Crl) No. 122 of 2011. (2012) 5 SCC 1.

36 *Id*., para 3.

37 *Id.,* para 4.

On several occasions, the Supreme Court of India has cautioned against using American jurisprudence in interpreting the Indian Constitution. Yet recent judgments have departed from that view as in *Ramlila Maidan* where after reproducing American law developments, Justice Swatantra Kumar went on to underscore the caution:

> In face of this constitutional mandate, the American doctrine adumbrated in Schenck case[38] cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the above noticed restrictions.[39] In Constitutional Law of India by H.M. Seervai (4th Edn.), Vol. 1, the author has noticed that the provisions of the two Constitutions as to freedom of speech and expression are essentially different. The difference being accentuated by the provisions of the Indian Constitution for preventive detention which have no counterpart in the US Constitution. Reasonable restriction contemplated under the Indian Constitution brings the matter in the domain of the court as the question of reasonableness is a question primarily for the court to decide.[40]

However, in examining the reasonableness of restriction permitted by the text of the Indian Constitution, the court nevertheless uses the approach similar to that of the US Supreme Court. Another important facet of exercise of such power is that such restriction has to be enforced with least invasion.

IV The critical issue of right to life and liberty

There are two reasons given by the Indian courts to hold their hand when, in trying conditions, the matter comes up before them as a critical issue of life and liberty so wonderfully amplified in judgments on the articles 19 and 21 of the Constitution. First, that in matters of public safety and national security, the executive knows the best; and second, that fundamental rights are not absolute and are subject to the restrictions enumerated in article 19 (2) and 19(5). Similarly, articles 25 and 26 are subject to conditions mentioned therein such as public order, morality, health social welfare and reform. In other words, article 19(1)(a) rights can be curtailed by the state on the grounds of sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation or incitement to an offence. In the case of article 19(5), interests of general public or any schedule tribe is included. Of course, it can be argued that articles 14 and 21 resemble the absolute nature of the Bill of Rights. Yet the restrictions where they are imposed can only be reasonable and subject to the doctrine of proportionality. To

38 63 L Ed 470: 249 US 47 (1919).

39 *Supra* note 35, para 7.

40 *Id.*, para 7-8. *See also*, *Babulal Parate* v. *State of Maharashtra*, AIR 1961 SC 884: (1961) 2 Cri LJ 16.

be honest, proportionality adds very little to reasonableness but the uneasiness that the court feels about its initial articulation on rights persuades it to qualify it with additional phrases of caution. Thus, after upholding death sentence, it proceeds to add 'rarest of rare', after upholding the state's right to restrict internet 4G, it adds the caution of maximum freedom of the citizen, after upholding personal laws or restrictions thereon, it imposes the proportionality test for validity. Having spoken of constitutionalism and constitutional values, but uneasy about the internal tensions, the court has introduced the concept of constitutional morality. As we will see below, this concept too requires considerable refinement it can mean different things to different people.

Ultimately, the court will have to examine the rights people have in terms of whether the contest is between individuals or between an individual and society but of course keeping the constitutional scheme in mind. It might be pertinent to consider that in the US Bill of Rights (the 10 Amendments to the Constitution) as stated above, there is no exception of reasonable restrictions. Yet when and where required, the court would read a necessary restriction on rights as in the case of incarceration of Japanese during the World War II. The internment of persons of Japanese ancestry during the World War II after Pearl Harbour sparked a constitutional and political debate. During this period, three Japanese-American citizens challenged the constitutionality of the relocation and curfew orders: Petitioners Gordon Hirabayashi, and Fred Korematsu, were unsuccessful but Mitsuye Endo, after a lengthy battle through lesser courts, was determined to be 'loyal' and allowed to leave the Topaz, Utah, facility. Justice Murphy of the Supreme Court expressed the following opinion in *ex parte* Mitsuye Endo:[41]

> I join in the opinion of the Court, but I am of the view that detention in Relocation Centres of persons of Japanese ancestry regardless of loyalty is not only unauthorised by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my dissenting opinion in Fred *Toyosaburo Korematsu* v. *United States*, 323 U.S. 214 , 65 S.Ct. 193, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.[42]

A recent majority opinion of the US Supreme Court upholding President Donald Trump's travel ban,[43] also overturned a long-criticized decisions that had upheld the

41 323 U.S. 283 (1944).

42 *Ibid*.

43 *Arab American Civil Rights League (ACRL)* v. *Trump*, the Department of Homeland Security, and U.S.Customs and Border Protection, 138 S.Ct. 2392, 201 L.Ed.2d 775.

constitutionality of Japanese-American internment during World War II.[44]

Justice Sonia Sotomayor argued, in *Korematsu* v. *United States*,[45] in her dissent, that the rationale behind the majority decision had 'stark parallels' to Korematsu; in both cases, she argued that the government"*invoked an ill-defined national security threat to justify an exclusionary policy of sweeping proportion."* Writing for the majority, Chief Justice John Roberts argued that the case was not relevant to the travel ban before the Supreme Court but went ahead and wrote that it is now overturned:

> The dissent's reference to Korematsu … affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — 'has no place in law under the Constitution.

It would be recalled that Fred Korematsu, a son of Japanese immigrants living in San Francisco, defied the military and the police, remaining with his Italian-American girlfriend while his family was transported to an internment camp in Tanforan, California. He assumed a new identity and had plastic surgery to alter his appearance, but he was caught on 30 May 1942 and taken to Tanforan. The case eventually made it to the US Supreme Court. A year earlier, the Court had upheld the constitutionality of the curfews for Japanese-Americans in *Yasui* v. *United States*[46] and *Hirabayashi* v. *United States.*[47] The cases served as the foundation for the Korematsu case, with the justices ruling 6-3 to uphold his arrest and the internment. Justice Frankfurter in his concurring judgment held:[48]

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centres—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies-we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility

44 *Available at*: https://www.nbcnews.com/news/asian-america/travel-ban-decision-supreme-court-overturns-ruling supporting-world-war-n886681(last visited on Oct. 20, 2020).

45 323 U.S. 214 (1944).

46 320 U.S. 115 (1943).

47 320 *U.S*. 81 (1943).

48 323 U.S. 214 (1944).

> to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders-as inevitably it must-determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot-by availing ourselves of the calm perspective of hindsight now say that at that time these actions were unjustified.

Justice Hugo Black, writing the majority opinion, defended internment on the basis of national security held:[49]

> He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures … and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Justices Frank Murphy, Robert Jackson and Owen Roberts dissented. Murphy J. wrote that the decision was a 'legalisation of racism', while Jackson J warned of its potential consequences:[50]

> The Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens,.....The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. [...]
>
> The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. [...] The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies,

49 *Ibid.*

50 *Ibid.*

> of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups.

However, the Bush and Obama administrations could not get past the courts in dealing with *Al Qaeda* prisoners under laws that truncated their rights as against those applicable to other citizens under the American criminal law.

Unlike the US Constitution and the Bill of Rights textually being unqualified, the Indian Constitution has built in reasonable restrictions as stated above. Yet we know that the rights under the amendments, as seen above, have repeatedly been read subject to the tests of 'real and imminent danger' or 'compelling state interest'. The interesting question is whether in either case, the contest is between the interests of society on one hand and that of individuals on the other, or between one group of individuals against another group (or an aggregation of rights of individuals). *Prima facie*, the Indian Constitution seeks to place the interests of society in the Directive Principles (Part IV) that are unenforceable in courts but play a role in defining rights, being fundamental in the governance. On the other hand, individual rights fall in the fundamental rights (Part III) chapter. Therefore, under the Constitution, the contest must exist between individuals. If that is right, the grounds of restriction mentioned in article 19(2) will have a very weak impact on article 19(1). But textually, the Constitution subjects rights to interests of the general public and decency as well as morality. Taken at face value, there is no fight left in rights if they are to be subjected to the test of morality and decency. The court thus has its task cut out to settle the contours of rights. Having explained the connection between balancing and external limits, it is now possible to clarify the role of balancing in constitutional indeterminacy.

The US Supreme Court in *Grutter* illustrates how balancing remains a major source of indeterminacy in constitutional law. The Michigan Law School introduced an admissions policy that sought to achieve student body diversity through compliance with *Bakke*.

Apart from students' academic grades, a flexible assessment of their talents, experiences and potential was evaluated for each applicant based on personal statements, letters of recommendation, essays describing how the applicant would contribute to law school life among other things. Additionally, the admission office looked beyond grades and scores towards 'soft variables', such as recommenders' enthusiasm and the quality of the undergraduate institution. The policy did not define diversity solely in terms of racial and ethnic status nor restricted the types of diversity eligible for 'substantial weight'. However, the law school's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students was categorically stated.[51]

Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, on being refused admission, filed a suit alleging that the respondents had discriminated against her on the basis of race in violation of the 14th Amendment.[52] She claimed to have been rejected because the law school uses race as a 'predominant' factor, giving applicants belonging to certain minority groups a significantly greater chance of admission. However, the respondents had no compelling interest to justify that use of race. The district court found the law school's use of race as an admissions factor unlawful. The sixth circuit reversed the holding that Justice Powell's opinion in *Bakke* was a binding precedent establishing diversity as a compelling state interest, and that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor".[53] The Supreme Court held that the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the equal protection clause. This analysis is not very different from that in *Anuradha Bhasin* where the court assumed or identified the legitimate state interest of security and held that the restrictions imposed on 4G connectivity to be permissible as they were narrowly tailored.[54]

The difficult constitutional issue is sometimes not the meaning or the application of a relevant constitutional norm, but whether the justification for overriding it is sufficient. This is precisely because, as a conflict-resolution procedure, it does not have an automatic outcome (as a supremacy clause does). Instead, the outcome rather depends on judgment. Reasonable disagreement as to whether a political institution has satisfied the burden of justification for acting inconsistently with a protected right is an important reason why outcomes of some constitutional cases are often highly uncertain. This, of course, is not to deny that in other cases, the antecedent issue of what the relevant constitutional right means is often a quite separate source of uncertainty, given the vagueness of many of the most important rights. For example, in the early abortion

51 *Grutter* v. *Bollinger,* 539 U.S. 306 (2003).

52 *Ibid*.

53 *Ibid*.

54 *See also*, *supra* note 51.

cases, there were two quite separate sources of constitutional uncertainty. The interpretive question of whether the due process clause or any other constitutional provision contains a right to have an abortion (scope or internal limits), and the balancing question of whether, when, and for what objectives a State may justify acting inconsistently with that right (external limits). Similarly, in *Lawrence*,[55] the interpretive issue of whether the due process clause includes a right to engage in homosexual sodomy and the balancing issue of whether Texas had justified overriding the right were separate sources of uncertainty and controversy.[56]

The anti-Vietnam War movement and its protests were dramatic expressions of democratic dissent that inevitably led to constitutional litigation. The two major cases involved classified government documents known as the pentagon papers. These documents outlined the government strategy and goals for the conduct of the war in Vietnam and allegedly included information that could be potentially embarrassing if made public.[57]

First was the case of *New York Times Co.* v. *United States.*[58] The New York Times had obtained a leaked copy of the pentagon papers that it published in a series of articles. The documents suggested that the government had misled the American people about the war. The government purportedly prohibited further publication of the documents, but the US Supreme Court quashed that decision. The court found that the restriction constituted an illegal 'prior restraint' in violation of free press guarantees. It thus affirmed, as Justice Potter Stewart explained later in a 1974 speech, that the First Amendment sought to "*create a fourth institution outside the government as an additional check on the three official branches*" (the executive branch, the legislature, and the judiciary).

In *Gravel* v. *United States,*[59] the court went further and upheld the right of senators to read excerpts from the pentagon papers into the congressional record and also protected the rights of congressional staffers helping members with official duties under the speech and debate clause. However, the court found that the speech and debate clause did not permit members of Congress to make commercial publication of the pentagon papers.

Several cases during the Vietnam War were about anti-war protests that included mixed verbal speeches with symbolic expressions. In *United States* v. *O'Brien,*[60] the Supreme Court upheld the conviction of a man who burned a draft card in protest of the

55 *Lawrence* v. *Texas* 539 U.S. 558 (2003).

56 *Ibid*.

57 The First Amendment Encyclopaedia.

58 403 U.S. 713 (1971).

59 408 U.S. 606 (1972).

60 391 U.S. 367 (1968).

Vietnam War. The court held that the government's interest in preserving the draft outweighed O'Brien's right of symbolic protest. The court created a test that it continues to use in dealing with symbolic speech cases. However, in contrast, in *Tinker* v. *Des Moines Independent Community School District,*[61] the court upheld the right of high school students to wear black arm bands as symbolic acts to protest against the war. Again in *Watts* v. *United States,*[62] the court reversed the conviction of a young African American man who allegedly made threatening comments against President Johnson as a part of an anti-war protest, holding that the statements were more rhetorical hyperbole than truly threatening. Although the case was not directly related to the war, the Vietnam era also marked the landmark decision in *Brandenburg* v. *Ohio,*[63] indicating that the court would not uphold laws suppressing speech that was not likely to result in imminent lawless action. Some benches of the Indian Supreme Court are taking a similar position though we still await a full judgment that expounds that view.

In the Indian case of the LGBTQ community, the judgment of *Navtej Johar*[64] and the privacy judgments have described rights in elevated language and placed them at a very high threshold. However, there seems little impact of these judgments on the police forces of several States persecuting through prosecutions, promising young persons, many of them students, who participated in the CAA protests starting December 2019. It is important for the courts to take a closer look at the criminal justice system that allows the prosecution to conjure up fanciful allegations and rely upon the restrictive provisions of laws made for punishing persons who pose an existential challenge to society and the nation. Prolonged incarceration followed by an indefinite and onerous trial will not only snatch the years of youth but also deprive the country of a whole generation of vibrant talent. Our security infrastructure will do a commendable job to accomplish what we as a nation are committed to prevent our enemy from imposing upon us. Would Dworkin not ask us, "*Are you really so uncaring for your succeeding generation? Are your elegant phrases about dignity and liberty so fragile and hollow? Are you really so afraid and lacking Faith in your ability to survive transitory challenges of adverse opinion and dissent?*" Force cannot be a substitute for faith.

V Conclusion

Respect for the law of the land must come from both sides of the barricades. Our national mettle will be firmed up by the meticulous observations of the principles, the Supreme Court lays down as sacrosanct and not casual imperviousness about injustice because accountability is too little too late.

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61 393 U.S. 503 (1969).

62 394 U.S. 705 (1969).

63 395 U.S. 444 (1969).

64 *Navtej Singh Johar* v. *Union of India*, Writ Petition (Crl) No. 76 of 2016.

Theoretical tilting point in adjudication of rights leans heavily upon the analytical structure for the decisions by judges as opposed to those by policy makers. A short but telling case in point is the judgment in *Shaheen Bagh*[65] matter. In holding that the blocking of the road in the area for 100 days was unacceptable in law, the Supreme Court spoke of a clear distinction between protests against a foreign power during the freedom movement and protest against an elected government. The court of course did not fail to underscore article 19 and right to free speech as well as assembly but then found that the protest could not be held on the roads meant for commuters. Instead designated places could be identified for the purpose. The analysis seems to treat the protestors (core of whom were women) as a group of citizens expressing their dissent to be weighed against the right of society to avail of civic facilities. In other words protest is reduced to an exception to be tolerated in ordered society rather than an intrinsic dimension of societal rights. The problem is that protests can be meaningless and go unnoticed if relegated to identified zones. Over the years, article 21 has been given greater substance by judicial interpretation, thus extending that benefit to persons detained under article 22. Be that as it may, on the Dworkinian analysis, this falls short of the rights thesis and is obviously rooted in individual versus society conundrum.

65 *Amit Sahni* v. *Commissioner of Police,* Civil App. No. 3282 of 2020.