Distorted Balancing of Fundamental Rights by the Indian Judiciary: A Constitutional Appraisal of Non-Violent Disruptive Protests

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Introduction

The recent Agnipath military recruitment scheme released by the Government has proven to be a powder keg for civic protests. Within a week of the Defence Ministry's announcement of the scheme, the protestors wreaked havoc across the entire nation. In Bihar and Telangana, trains and railway stations were set on fire by the infuriated mobs of youth causing damage to both life and property while also disrupting economic activities.[1] At the same time, incidents of arson and stone-pelting were reported from Punjab, Jharkhand and Uttar Pradesh indicating the egregiously violent turn many of these protests had taken. However, several dissenters have meanwhile resorted to rather peaceful methods of protest such as organizing *Paidal Yatras* and calling for *Bharat Bands*.[2] While these modes of protest have largely remained non-violent, they have caused immense disruption to daily life. After the public agitations against the Citizenship Amendment Act 2019 and the recently rolled back set of Farm Laws, the Agnipath protests become the third major incident of public uproar jolting the policies of the current NDA government since 2020.

While some modes of protest, such as the burning of vehicles and public property are patently illegal, others fall into a more legally nebulous domain. The purpose of this piece is to examine the prior jurisprudence on Article 19(1)(a) and Article 19(1)(b) guaranteeing the rights of protestors and excavate the constitutionally sound grounds for restricting protests in light of Agnipath. As a caveat, this paper does not engage with the merits of the protests under scanner, but more broadly, attempts to appraise the legality of non-violent but disruptive protests such as causing 'Chakka Jams', blockading roads or delaying trains.

When can the rights under Article 19(1)(a) or Article 19(1)(b) be restricted?

The textual understanding of the right to protest under Article 19(1)(a) and 19(1)(b) is that they can only be restricted on the grounds enumerated in 19(2) and 19(3), as was recently held in *Shreya Singhal*.[3] Similarly, in *Sakal Papers*,[4] it was held that Article 19(2) exhaustively lists all

[1] 'Agnipath Protests Continue, 1 Killed in Police Firing at Secunderabad Station' (*The Wire,* 17 June 2022) <https://thewire.in/security/agnipath-protests-continue-on-day-3-trains-set-ablaze-in-up-bihar-and-telangana> accessed 22 June 2022.
[2] 'Agnipath Protest: Khaps to Start Paidal Yatra on June 27' (*The Indian Express*, 22 June 2022) <https://indianexpress.com/article/cities/chandigarh/agnipath-scheme-protests-punjab-khaps-paidal-yatra-farmer-leaders-7983310/> accessed 24 June 2022.
[3] *Shreya Singhal v Union of India* 2015 SCC OnLine SC 248.
[4] *Sakal Papers Pvt. Ltd. v Union of India* (1962) 3 SCR 842.

possible restrictions on Art 19(1)(a). In practice, however, the Supreme Court has affirmed restrictions on Article 19(1) rights on the basis of other fundamental rights, and even Directive Principles of State Policy. This is popularly termed as the 'Doctrine of Balancing' because it involves balancing one fundamental right with the other. This deviates from the prior jurisprudence by bringing up additional grounds for restricting Article 19(1)(a) than those given in Article 19(2). This piece will delve more deeply into this doctrine and its validity ahead.

Can Non-Violent Disruptive Protests be Restricted under Article 19(2) or Article 19(3)?

Now, to come to the current question of protests, can they be restricted on any grounds given in Article 19(2) or Article 19(3)? The answer to this question is riddled with inconsistencies, from *Himat Lal*[5] to *Amit Sahni*[6](popularly known as the 'Shaheen Bagh' case). The only ground within Article 19(2) or 19(3) that can perhaps be invoked to restrict protests is that of 'public order'.

The jurisprudence over this phrase largely seems to be inconclusive as courts, historically, have been caught up in a rigmarole while interpreting and narrowing down its broad language. In *Ramji Lal Modi,*[7] the court gave it a very expansive reading to include any action of the government "in the interest of public order". However, the court at the same time accepted that "in some cases, those activities may not actually lead to a breach of public order". Therefore, even prospective activities, which in the government's noble opinion 'might' be a threat to public order, can preemptively be restricted or penalized. Such an expansive interpretation can pose a chilling effect to free speech. The position was qualified in *SP v Ram Manohar Lohia*[8] where a condition of a "proximate and direct nexus" between the imposed limitation and public order was added. Further, in *Ram Manohar Lohia v State of Bihar*,[9] the constituents of public order were narrowly read by differentiating it from the larger circle of "law and order" in which public order was a smaller subset. However, even these qualifications didn't completely clarify the position and left a good deal of ambiguity. It was ultimately in the landmark verdict of *Shreya Singhal* that the court made it evident that the ground of 'public order' could be invoked to limit Article

[5] *Himat Lal K. Shah v Commissioner of Police, Ahmedabad* 1973 SCC (1) 227.
[6] *Amit Sahni (Shaheen Bagh, In re) v. Commissioner of Police (*2020) 10 SCC 439.
[7] *Ramji Lal Modi v State of UP* 1957 SCR 860.
[8] *Superintendent, Central Prison, Fatehgarh v Dr. Ram Manohar Lohia* (1960) 2 SCR 821.
[9] *Ram Manohar Lohia* v *State of Bihar* (1966) 1 SCR 709.

19 only in instances of "clear and present danger". This was inspired by the standard of "clear and imminent danger" as in the American jurisprudence[10] which according to the apex court had been incorporated in spirit in the verdict of *Rangarajan v Jagjivan Ram.*[11]

In our opinion, this interpretation of public order which conditions a fairly high threshold of present or potential violence in order to be invoked, is the correct interpretation. This interpretation is one that your run-of-the-mill, non-violent protests would clearly fail to meet. Thus, the distinction between public order and general public interest keeps the disruptive yet non-violent protests beyond the ambit of public order and consequently Articles 19(2) and 19(3). Then still, how have protests like the *Shaheen Bagh* been restricted, despite not meeting the public order limitation?

Invoking the 'Balancing Doctrine'

Although the courts have been fairly reticent in invoking this doctrine explicitly, the only real ground for restricting non-violent protests, like the Shaheen Bagh protests can be found solely with respect to other fundamental rights. In the *Shaheen Bagh* case, Justice Kaul explicitly reject the protestor's arguments that 19(1)(a) and 19(1)(b) rights can only be restricted on the public order ground in 19(2) and 19(3), which was clearly not met. Instead, the court held that the "*rights of protestors were to be balanced with that of commuters*."[12] While the language is obtuse and the reasoning to justify this scant, it can be inferred that here, the right to free movement of the commuters, under Article 19(1)(d) and under Article 21, was used to restrict the rights of protestors. Similarly, vague reasoning was applied by Justice Matthew in his concurring opinion in *Himat Lal* where he attempted to justify restrictions on non-violent public protests on the grounds that they need to be balanced with the other functions of civic spaces, stating that "*The real problem is that of reconciling the city's function of providing for the exigencies of traffic in its streets and for the recreation of the public in its parks, with its other obligations, of providing adequate places for public discussion.*"[13] Although this was less explicit in its balancing, the primary conflict between competing rights appears to be the same as in *Shaheen Bagh*. In

[10] *Shreya Singhal* (n 3), [37].
[11] *S. Rangarajan v. P. Jagjivan Ram* (1989) 2 SCC 574.
[12] *Amit Sahni* (n 6) [16].
[13] *Himat Lal* (n 5) [70].

Mazdoor Kisan Shakti Sangathan v. UOI,[14] the Supreme Court explicitly undertook the process of Balancing Fundamental Rights. This was in light of protestors using loudspeakers during their protests at Jantar Mantar, which was contended to violate the rights of residents near the Jantar Mantar area, under Article 21. The court held that in this case, the rights of residents under Article 21 must be balanced with the rights of protestors under Article 19(1)(a) and 19(1)(b) to justify restriction and regulation of the protestors. While such an exercise appears to be a practical and in fact intuitive solution, we argue that it rests on a flawed understanding of the prior jurisprudence and perhaps original intent of the framers, which consider Articles 19(2) and 19(3) as exhaustive in limiting Article 19(1)(a) and 19(1)(b) respectively.

A Counter-Intuitive Critique of the Balancing Doctrine

Intuitively, it seems quite reasonable to restrict one fundamental right on the basis of protecting someone else's fundamental right. It would appeal to common sense that protestors can't be given absolute freedom to indefinitely obstruct roads and vandalize public transport vehicles that cause sustained inconvenience to commuters who themselves enjoy a fundamental right to move freely. This seems intuitively correct, however, there are deeper debates to consider. As Gautam Bhatia points out, the absence of a 'public interest' limitation in the grounds mentioned under Article 19(2) and Article 19(3) hints that the right to freedom guaranteed under Articles 19(1)(a) and 19(1)(b) was never intended to be restricted simply for social interests like easy commutation.[15] Moreover, he argues that Article 19(2) by itself is an act of balancing Article 19(1)(a) against other fundamental rights as intended by the framers, so it would be disingenuous to come up with more grounds for the same. For example, the 'defamation' limitation on Article 19(1)(a) is by itself a balancing act between the right under Article 19(1)(a) and the right to a reputation guaranteed by Article 21. Hence, we shall argue that the balancing act is encoded within the existing constitutional limits, and the exercise to excavate more limits from other fundamental rights would be contrary to the purpose of Article 19(2) and Article 19(3).

The Vertical Challenge to Balancing

[14] *Mazdoor Kisan Shakti Sangathan v. Union of India* (2018) 17 SCC 324.
[15] Gautam Bhatia, 'The "Balancing Test" and its Discontents' (*Indian Constitutional Law and Philosophy*, 20 May 2016) <https://indconlawphil.wordpress.com/category/constitutional-interpretation/balancing-rights/> accessed 25 June 2022.

Another important challenge to the balancing doctrine is that it rests on a conceptual impossibility. Most Part III rights, including Article 19, are enforceable against the state, not against other people, as they are 'vertical' rights. Although intuitively, the rights of commuters seem to be in conflict with that of the protestors, this argument fails to pass muster legally as the right to free movement can only be enforced against the state and not any private individual (here, the protestors). Shrutanjaya Bhardwaj elaboratively frames this in the form of a conceptual problem – Article 19(1)(a) i.e., the right to have their speech not interfered with *by the state* and Article 19(1)(d) i.e., the right to not have their mobility restricted *by the state*, can never be in conflict unless the rights are enforceable horizontally, which they are not.[16] Hence the 'balancing' becomes impossible considering that they are both vertical rights.

Evolution of Jurisprudence in Sahara v. SEBI and The Doctrine of Proportionality

In the landmark judgment of *Sahara v. SEBI*,[17] the Supreme Court adjudicated a matter involving a conflict between Article 21 and Article 19. During the proceedings of the court, a television reporter divulged sensitive details of a proposal between the parties which were not intended to be revealed to the public, and thereby caused detriment to the parties involved. The concerned parties of the proposal claimed that their Article 21 rights had been violated by this disclosure, while the television channel maintained that it was exercising its constitutional right to report court proceedings under Article 19(1)(a). The court recognized both the rights and undertook a balancing exercise between the two to reach an optimal solution. In this process, the holding of the court can be inferred to have imposed two broad limitations on balancing fundamental rights. *Firstly,* the conflict between the two fundamental rights must be irreconcilable, i.e., the operation of one fundamental right must pose a 'real and substantial' risk to the operation of the other. If the risk is marginal, or if the two can be harmonized, then balancing must not be invoked. *Secondly*, the court emphasized the need of maintaining ***proportionality*** while restricting either of the rights at the behest of the other. It held that the balancing process must examine whether there can be other 'reasonable alternative methods' to balancing, while ensuring that the 'salutary effects' of any restriction must be greater than its detrimental effect.

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[16] Shrutanjaya Bhardwaj, '"Balancing" Away Free Speech: Some Thoughts' (*Socio Legal Review*, 12 Dec 2020) <https://www.sociolegalreview.com/post/balancing-away-free-speech-some-thoughts> accessed 19 June 2022.
[17] *Sahara India Real Estate v Securities & Exchange Board of India* 2012 (8) SCALE 541.

While the courts post-*Sahara* have, to some extent, considered the first prong of there being a real and substantial risk, they have failed to consider the proportionality elements. To understand this better, it would be wise to dive a bit deeper into the doctrine of proportionality. In the earlier cases of *Chintaman Rao*[18] and *VG Row,*[19] the Supreme Court had emphasized on the restriction being "reasonable", as the text demands. Although this word was qualified into certain standards – nature and scope of the right, the extent of infringement, and proportionality – no clear "test" was demarcated. It was only in 2016, when the SC in the case of *Modern Dental College,*[20] first laid a '4-Prong Proportionality Test' to test any restriction imposed on Article 19. To elaborate, the 4 prongs were as follows –

1. Purpose – The purpose sought to be achieved shall be proper and legitimate
2. Suitability – There shall be a rational and proximate nexus between the objective and the restriction
3. Necessity – The restriction shall be absolutely necessary i.e., there shall be no less restrictive approach to achieve the same goal
4. Balancing – There should be a proper balance between the harm caused by restricting the right and the importance of attaining the objective

Linking this doctrine to the question at hand, it shall be argued that invoking another Fundamental Right or DPSP can only be used to satisfy the first prong of this test i.e., of a proper purpose. The restriction must still meet the requirements of suitability, necessity and balancing. For example, consider that the state wishes to restrict the people's right to protest citing the inconvenience caused to commuters who have a constitutionally protected fundamental right of free movement under Article 19(1)(d). Merely the fact that the commuters' rights to movement are guaranteed under Part III will by itself not justify the restriction. The state shall have the burden to prove that restricting the protests was the least intrusive remedy to protect the commuters' rights. If let us say, there existed another route that the commuters could have taken without any significant inconvenience, then it can very well be argued that the state's action will fail to be 'reasonable' and be held unconstitutional vide Article 19. Therefore, the judiciary must

[18] *Chintaman Rao v State of MP* 1950 SCR 605.
[19] *State of Madras v V.G. Row* 1952 SCR 597.
[20] *Modern Dental College and Research Center v State of Madhya Pradesh* (2016) 7 SCC 353.

further apply the tests of suitability, necessity and balancing to fulfill the proportionality doctrine in its entirety while balancing Article 19 rights with other fundamental rights.

Conclusion

The Agnipath protests have reignited a perennial constitutional question, i.e., where do we draw the limits to our rights from. With the balancing doctrine, the limits to Article 19 rights can be drawn from seemingly limitless frontiers. For example, in *Mohd. Hanif Qureshi*[21] (popularly known as the 'cow slaughter case'), the balancing was not between two fundamental rights, but the directive principle to preserve milch cattle and the right to profession. The Doctrine of Balancing, therefore, opens new and pernicious ways to restrict fundamental rights with minimal justifications and regard to the extensive proportionality jurisprudence developed in India. While abandoning the balancing doctrine entirely seems too big an ask, perhaps the judiciary would be wise to limit the application and introduce an element of proportionality within it.

[21] *Mohd. Hanif Quareshi & Ors Vs. The State of Bihar* [1958] INSC 46.