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PROTEST: DEFENDING THE RIGHT TO PROTEST IN THE DIGITAL AGE

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Abstract

The right to protest has been a characteristic of the democratic experience, which becomes crucial in the full enjoyment and participation of the rights of the citizens and the duties of the State, the performance of which is owed to the people. In India, the particular historical context in which we evolved as a nation, is perhaps more noted in the flavor of the exercise of the right to protest in various forms and connotations. It is no secret that in this time and age, much of life's happenings have moved to the digital space, and protest too, has moved into the world of pixels. This brings with it several questions when it comes to the exercise of the right to protest in the digital age, and the standards therein. Most pertinently, the paper narrows down the use of the digital means to protest and the stifling of the same, traced through two notable recent events- that of the internet shutdowns in various parts of the country and the farmers protest with its related underpinnings in the digital space. Ultimately, the paper seeks to defend an increasingly endangered right to protest, particularly, in the digital space.

Introduction

The journey of a democracy to a healthy autocracy is often foreshadowed by incidents that reveal the stifling of the right to protest.[1] The voice of the people in a democracy, the voice of the true wielders of power, is expressed through the notes of protest and India, with its chequered history, has valued the right to protest even at the time when oppression reigned

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1 MOISÉS ARCE & ROBERTA RICE, *The Political Consequences of Protest,* in PROTEST AND DEMOCRACY, (University of Calgary 2019).

supreme.[2] From the glorified days of the freedom struggle, where the symbol of daily life, salt, was used as the hallmark of peaceful protest, to the pixelated times of today, where comedians are shackled down for cloaking the truth in humor – we have certainly come a long way in so far as the right to protest is concerned.[3] However, it is pertinent to assess the direction of this path, considering the rights of the individuals and the broader mandate of the interests of the state, especially in national security.

Understanding the right to protest usually begins with the Constitution of India which, being the supreme law of the land, guarantees, though indirectly, a right to protest. Though much has been said about the same, particularly in light of the judicial decisions thereon, the time is ripe for a revisit to the ideals of the Constitution and reassessing the contours of the right to protest. While the term 'protest' itself is absent from the text of the Constitution, it is believed that the right to protest is animated in the contours of Article 19 (1)(*a*) allowing for the freedom of speech and expression and Article 19(1)(*b*) which protects the freedom to assemble peaceably and without arms.[4] These are subject to the reasonable restrictions envisioned under the subsequent provisions and carve out situations encompassing the sovereignty and integrity of India, the security of the state, public order and so on.[5]

The ties it has to the Constitution along with the exigencies of modern times makes the right to protest all the more complex when we seek to translate the same onto the nuances and specific intricacies of the digital world. Incidents like the Arab Spring have shown the power of social media and other digital tools in organizing mass protests and translating it into the real world making it a sublime exercise in evaluating the pressing need to bring clarity into the digital realm and the right to protest.[6] It is also of concern the ways in which social media and such tools can be used to further anti-national elements and threaten the nation as a whole, making this a delicate question to consider.

Aided by judicial wisdom in protecting the right to protest and expanding its reach, the early stream of jurisprudence, particularly when it came to constitutional interpretation, indicated a healthy atmosphere for the voices of protest. However, we are now faced with a series of events that have shocked the collective conscience of the nation; which requires a

2 Dalip Singh, *Protest Movements in India,* 52 The Indian Journal of Political Science 448 (1991).

3 Mallika Soni, *'A Lump of Salt': Significance of Dandi March led by Mahatma Gandhi,* Hindustan Times, (Mar. 12, 2021), https://www.hindustantimes.com/india-news/a-lump-of-salt-significance-of-dandi-march-led-by-mahatma-gandhi-101615525901443.html.

4 India Const. art. 19, cl. 1(a) & art. 19, cl. 1(b).

5 *Id.,* Art. 19(2), Art. 19(3).

6 John G. Browning, *Democracy Unplugged: Social Media, Regime Changed, and Governmental Response in the Arab Spring*, 21 Mich. St. U. Coll. L. Intl L. REV. 63 (2013).

revisit to the right to protest and defending it, particularly in the digital age. It also becomes incumbent to traverse the judicial response to this issue and attempt to align it with the changing contours of the right to protest.

Revisiting Recent Events- The Right to Protest in the Digital Age

In the span of a few months, clouded over by a pandemic, there took place a series of incidents which when assessed from the point of view of the freedom of speech, right to assemble peacefully and in effect, the right to protest; represents an alarming picture. In tracing the events that transpired, including the internet shutdowns and the involvement of digital media in the farmer's protest, the right to protest and its changed appearance is sought to be assessed and hopefully, defended.

The Internet Muffled – Shutdowns and the New Normal

It is perhaps enough to say that India has been referred to as the 'internet shutdown capital of the world'.[7] In an excruciatingly short period of time, an unprecedented number of internet shutdowns were imposed in various parts of the country.[8] And one common thread runs through most of these instances – the shutdowns were ordered as a result of emerging protests or in anticipation of protests. Comprehending this requires a two-pronged approach – one wherein the digital space is seen as a volatile ground where hate and ignorance run amok and the other, where it is seen as a space for healthy dissent and to bring the voices of millions in the country to the fore, in a supreme boost to increase democratic participation. The reality may lie somewhere between these two considerations and more often than not, we have been witnessing to the devastating and truly unbelievable potential of the digital space. But does this warrant a presumptuous encroachment of the constitutionally guaranteed right to protest? In shutting down the internet, thereby cutting off access to communication tools and information channels, and stifling the right to protest, does this, in any way satisfy the tests laid down by the judiciary to assess the legality of such actions? A corollary arises here – what would be the clear and present danger, why should there be a question of proportionality, when there is no one to hear the voice of protest?

Perhaps the variance at which the events have happened is attributable to the way in

7 The Hindu, *Parliament proceedings - India is 'Internet shutdown' capital of world: Anand Sharma,* (Feb. 5, 2021), https://www.thehindu.com/news/national/india-is-internet-shutdown-capital-of-world-anand-sharma/article33761366.ece. *See also* BBC, *Why India Shuts Down The Internet More Than Any Other Democracy?,* (Dec.19, 2019), https://www.bbc.com/news/world-asia-india-50819905.

8 The Wire, *Over 100 Instances of Internet Shutdown in India in 2020, Says New Report,* (Mar. 4, 2021), https://thewire.in/tech/over-100-instances-of-internet-shutdown-in-india-in-2020-says-new-report.

which the digital space is viewed, as opposed to its real-time counterpart. The crucial consideration here is that much of the world's discussion is now happening online, in a shift that was accelerated by a pandemic. An interesting parallel can be drawn between the political discussions held in tea stalls in villages in a younger India, and the discussions that happen on social media platforms. The scale is perhaps incomparable, but the spirit of discussion remains. In drawing this out further, imagine a situation where an entire village perhaps is asked to stay within their homes and to not communicate with those around them, which may be in anticipation of several threats to the government. Such an action would be untenable in consideration of the fact that it violates multiple constitutional values and fundamental rights in one go. But why is it that, such an action is done on a large scale in the digital space, by way of internet shutdowns, first in Jammu and Kashmir[9] and later in Delhi[10] seem to be creeping in as the norm?

Digital activism has become a phrase thrown around with both caution and abandon with the sudden resurgence of youth-led and technology driven activism and participation leading center stage in what was once a dry land of silent suffering.[11] The Indian experience seems to reveal a distinction and differential treatment to the right to protest in the digital space and otherwise. This goes in contrast to the principle espoused by the United Nations Human Rights Council which requires that the rights of the people available to them offline have to be protected online as well.[12]

Perhaps we may look back at the time when the internet was down when the service provider was experiencing technical failures or glitches. Today, it takes one order from the government, under rules appended to archaic legislation, to cut off communication with the world, to limit and completely restrict access to what is equated to a voice in the digital world.[13] The political maneuvering behind the current events reflects a return to the earlier

9 Outlook India, *'Fundamental Right': All You Need To Know About Longest Internet Shutdown In Kashmir,* (Jan. 10, 2020), https://www.outlookindia.com/website/story/india-news-sc-says-internet-fundamental-right-all-you-need-to-know-about-kashmirs-longest-internet-shutdown/345478.

10 CNN, *India Cuts Internet Around New Delhi As Protesting Farmers Clash With Police*, (Feb. 3, 2021), https://edition.cnn.com/2021/02/01/asia/india-internet-cut-farmers-intl-hnk/index.html.

11 Digital Activism Decoded - The New Mechanics of Change, (Mary Joyce, ed., 2010).

12 United Nations Human Rights Council [UNHRC], Res. 38/l.10, *The Promotion, Protection And Enjoyment Of Human Rights On The Internet*, U.N. Doc. A/HRC/38/L.10/Rev.1 (July 4, 2018). *See also* UNHRC, Res. 24/5, *The Rights To Freedom Of Peaceful Assembly And Association*, U.N. Doc. A/HRC/RES/24/5 (October 8, 2013).

13 Indian Telegraph Act, 1885, Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.

decades of free India's political history which marks a season for increasing protests.[14]

While recognizing the right to peaceful protest, the Supreme Court in *Amit Sahni v. Commissioner of Police & Others*[15] also took note of the intricacies and the changing contours of protest in the digital age. The Court, interestingly observes –

> *"…we live in the age of technology and the internet where social movements around the world have swiftly integrated digital connectivity into their toolkit; be it for organizing, publicity or effective communication. Technology, however, in a near paradoxical manner, works to both empower digitally fueled movements and at the same time, contributes to their apparent weaknesses. The ability to scale up quickly, for example, using digital infrastructure has empowered movements to embrace their often-leaderless aspirations and evade usual restrictions of censorship; however, the flip side to this is that social media channels are often fraught with danger and can lead to the creation of highly polarized environments, which often see parallel conversations running with no constructive outcome evident."*[16]

While the Court does recognise the impact digitalization has had on protests, the same is interpreted narrowly, perhaps owing to an optimal underestimation of the potential of digital tools, particularly, social media. Nevertheless, the recognition of the changing dynamics and utility of the familiars of the digital age will have immense consequences, at least in the jurisprudential development of the same.

It is interesting to note that in the period separated by a few months, we saw a judgement finding the right to internet as a fundamental right,[17] while the judiciary also delivered the judgement in *Anuradha Bhasin*[18] where the court recommended the setting up of a committee including the members of the government, to assess the merits of an internet shutdown that the very same government had ordered. This is reminiscent of Atlee's words – "democracy means government by discussion, but it is only effective if you can stop people talking."[19]

14 David H. Bayley, *Public Protests and the Political Process in India*, Pacific Affairs, (University Of Columbia) 1969, 10.

15 Amit Sahni v. Commissioner of Police & Others, AIR 2020 SC 4704.

16 *Id.,* ¶ 18.

17 Faheema Shirin R.K. v. State of Kerala, AIR 2020 Ker 35.

18 Anuradha Bhasin v. Union of India, AIR 2020 SC 1308.

19 Clement Richard Atlee, British Statesman and former Prime Minister, Speech at Oxford (June 14, 1957).

The Farmers' Protests – The Differential Right To Protest

From all that has been said about the farmers' protest in India, it is perhaps hard to categorise it as an isolated incident. Particularly viewed from the angle of the right to protest, it is evident that the protests were just an eruption of emotions by people who had been slowly leached of their rights. This gradual crescendo culminated in a series of events, which has been subject to intense debate and global scrutiny.[20] In spite of the burning issues that arise in the proposed laws themselves, the protest was especially characterized by an invasion into the digital space and subsequent crackdown on the same, which forms the area of focus in this paper.

Perhaps the most characteristic impact of the clash between individual's rights and the government came up in the recent toolkit issue, where materials expressing opinions on the farm laws were drawn up and allegedly circulated on WhatsApp groups and with environmental activists outside India. In an astonishing stamping exercise, the whole event was characterized as a 'global conspiracy' and aimed at promoting 'disaffection against India' and encouraged incitement of violence.[21] At the root of the issue lie ubiquitous tools of the digital age – a Google doc, hyperlinks, websites, WhatsApp groups, Zoom calls and electronic devices.

The issue here can be broken down into smaller parts of a whole. If the tools in question are taken into perspective, it can be seen that these are tools that are commonly used by everyone, ranging from kindergarten students to the upper echelons of the government and the power that such tools hold, in terms of reach and ease of communication cannot be ignored. Following the line of logic in the toolkit issue, there is essentially a dangerous precedent in terms of governmental action where anyone, anywhere, in possible harmless use of a document can be questioned, detained and labelled anti-government owing to the way it was perceived or the extent to which it was shared. In either of these situations and perhaps more permutations and combinations of such instances, there is one commonality. The individual herein is made to bid adieu to their constitutionally protected rights, for reasons that are vague, out of their control or those which they might not even be made aware of until they find themselves in a jail cell. Applied to a larger set, the right to protest is severely threatened, especially in the absence of proper procedural checkboxes to

20 Natasha Behl, *Can India's Protesting Farmers Restore its Democracy?,* (Dec. 8, 2020), https://www.washingtonpost.com/opinions/2020/12/07/can-indias-protesting-farmers-restore-its-democracy/. *See also* Al Jazeera, *Indian Farmers Brave Tear Gas as they Protest Aganst 'Black Laws',* (Nov. 26, 2020), https://www.aljazeera.com/news/2020/11/26/india-farmers-march-to-delhi-against-new-laws.

21 State v Disha A. Ravi, Bail App. No. 420 of 2021, MANU/OT/0008/2021, ¶ 3,4.

safeguard the individual's rights.

Turning back to the Constituent Assembly Debates, particularly where the discussion on the right to assemble peacefully and without arms was discussed, we find that the learned Jaipal Singh Munda, brought up the consideration that the term 'without arms' might be detrimental to certain communities which carried items like bows and arrows as a normal part of their life and which could be construed as exceeding the limits of the constitutional safeguard.[22] The same concern can be reinterpreted in the digital age where the 'arms' so mentioned may in fact be keyboards and websites and in common use by a majority of people.

We also find a labelling exercise where the voices raised against the farm laws were labelled as a 'larger conspiracy to perpetuate violence by secessionist forces and the protest against the farm laws was merely a facade to conceal the real sinister designs'.[23] Though the legal battle in this regard is far from over, the court finds that investigation authorities 'cannot be permitted to further restrict the liberty of a citizen on the basis of propitious anticipations.[24] Does the intention of the voice matter? In the Twitter Joke Trial a tweet meant as a joke, (which had violence against an airport mentioned therein) was seriously prosecuted which notably drives home the point that the intention of the person doesn't really matter.[25] Applied to the farm laws scenario, it may hold true as well, considering that there are larger state interests like security are claimed to be at stake. The question of intention and the blurring of the same ensures that the line between fun and serious is often not demarcated before action is taken.[26] Caricatures, cartoons[27] and jokes[28] have also come under scrutiny, and have been shown to be enough to stifle the freedom of speech, further highlighting these critical issues. Again, it would become pertinent to assess if the

22 Constituent Assembly Debates, December 2, 1948 *speech by* Jaipal Singh Munda, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02, ¶ 7.65.

23 State v Disha A. Ravi, Bail App. No. 420 of 2021, MANU/OT/0008/2021, ¶ 21.

24 *Ibid*. ¶ 27.

25 Paul Chambers v. Director of Public Prosecutions, [2012] EWHC 2157 (QB). See also Kelsey et. al., *Discipline And Resistance On Social Media: Discourse, Power And Context In The Paul Chambers 'Twitter Joke Trial',* http://orca.cf.ac.uk/70258/1/Kelsey%20and%20Bennett%20-%20Discipline%20and%20resistance%20on%20social%20media.pdf.

26 Sahana Udupa, *Nationalism in the Digital Age: Fun as a Metapractice of Extreme Speech,* 13 International Journal of Communication (2019).

27 Outlook India, *Contempt Proceedings Against Comic Illustrator Rachita Taneja For Criticising Supreme Court,* (Dec. 2, 2020), https://www.outlookindia.com/website/story/india-news-contempt-proceedings-against-comic-illustrator-rachika-taneja-for-criticising-supreme-court/365970.

28 BBC, *Munawar Faruqui: Bail For Jailed India Comic Who Did Not Crack A Joke,* (Feb. 5, 2021), https://www.bbc.com/news/world-asia-india-55945712.

situation could be diffused by reading in a requirement of intention in such cases. But in the digital space, this intention becomes harder to read, as millions of users interact with the content and might spur action in a myriad of ways, making it harder to assert the individual intention from the purported effects it has on the larger set.

In executing a sharp detour, we may consider the other side of the debate. India is, and has been, volatile in every sense of the term.[29] It becomes a duty of paramount importance to hold together the threads that bind this country together in light of the sheer diversity and conflicting interests that abound on its soil. The digital world, interpreted from this angle, brings in a fertile ground for the spread of misinformation, fake news and incitement to violence. Where tensions run high and a spark is all that is needed, the digital space is the perfect ground to allow hatred and violence to spread like wildfire. Revisiting the earlier judicial observation (that investigation authorities 'cannot be permitted to further restrict the liberty of a citizen on the basis of propitious anticipations') it can perhaps be argued that the said observation was not inclusive of the nature of the digital space and the implications thereof. If the entire issue was relooked at, purely from the angle of the digital age and its intricacies, then the whole debate comes to revolve around the potential threat that even the most seemingly harmless activities done in the digital world pose.

While these events have been raging on, there was also the much-debated matter of the suspension of a number of Twitter accounts.[30] While the instructions from the concerned ministry were to be considered in the probability of the threat to the sovereignty and integrity of India, it is the process in which it was done that was perhaps problematic. If we consider social media to be a platform for the exercise of one's right to freedom of speech and expression, then a blanket suspension without mechanisms like proper notice and hearing fumbles with this right. Twitter itself has highlighted its self-proclaimed free speech advocacy and the potential effect of the governmental requests, and in effect, it seems like a balance that was sought to be struck on the part of the platform which sought to substantiate its actions as in evolving a via media that seems to have quelled the flames somewhat.[31] But this leaves many crucial questions unanswered. For instance, Twitter claimed that

29 Bidyut Chakarabarty, Indian Politics and Society Since Independence, (Routledge 2008).

30 The New York Times, *Twitter Blocks Accounts in India as Modi Pressures Social Media,* (Feb. 10, 2021), https://www.nytimes.com/2021/02/10/technology/india-twitter.html. See also BBC, *The Indian Government's War With Twitter,* (Feb. 12, 2021), https://www.bbc.com/news/world-asia-india-56007451.

31 Twitter Safety, *Updates On Our Response To Blocking Orders From The Indian Government,* (Feb. 10, 2021),https://blog.twitter.com/en_in/topics/company/2020/twitters-response-indian-government.html.

the suspension was on the basis of a 'properly scoped request from an authorized entity.[32] This however, does not mitigate the procedural safeguards built into the protection of an individual's constitutionally protected right where the suspended account owners were not notified of the reasons for suspension or to defend themselves in any manner. In revisiting the *Maneka Gandhi* judgement,[33] it becomes pertinent to look at what has transpired and in balancing the purported criteria for imposing this restriction, the manner in which it was exercised, and the ends it sought to achieve.

With the constitutional values at stake, the judicial response in this regard has to be assessed. The right to protest in itself has been recognized within the constitutional framework by the courts in several precedents including that of *Ramlila Maidan Incident v. Home Secretary, Union of India and Others*[34] and found that there was a duty on the part of the state to aid in the right of protest of the citizens.[35] It is also too soon for the memories of the CAA Protests and the Delhi Riots to fade from our minds and there too, state action was heavily questioned. The role the digital space played in these instances also offers much insight into the developing contours of protests and the threats inherent therein, particularly when the questions involved are voices against the governmental policies and actions.

Similar is the case with the peculiar interpretation of protests by limiting it 'designated spaces' and curtailing 'indefiniteness'[36] which, interestingly enough becomes the hallmarks of the digital world where there seems to be no traceable beginning or end to dissent or protest and clearly, where there cannot be a designated space as such.

Conclusion

Digital tools have exhibited a great potential in bringing the masses closer to the democratic process and in providing 'remarkable opportunities' for increasing and encouraging public participation.[37] It is also argued from one side that the potential for digital tools to be employed in protests is severely hampered by the fact that they have to be specifically

32 The Guardian, *Twitter Suspends Hundreds Of Indian Accounts After Government Demand*, (Feb. 2, 2021), https://www.theguardian.com/world/2021/feb/02/twitter-suspends-hundreds-of-indian-accounts-after-government-demand.

33 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

34 Ramlila Maidan Incident v. Home Secretary, Union of India and Ors, (2012) 5 SCC 1, ¶ 245.

35 Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, (1973) 1 SCC 227.

36 Arghya Sengupta, *The Supreme Court Judgment in Shaheen Bagh is Not Binding Law,* (Nov. 20, 2020), https://vidhilegalpolicy.in/blog/the-supreme-court-judgment-in-shaheen-bagh-is-not-binding-law/.

37 Barry R. Schaller, *The First Amendment in the Digital Age: Protecting Free Speech (and Other Values)*, 25 Sacred Heart University Review 1 (2009), ¶ 14.

honed as vehicles to carry protest, as in their normal form, they happen to be very diverse objects.[38]

As affirmed in *Anita Thakur and Ors. v. Government of Jammu & Kashmir* the courts have recognized that 'a distinguishing feature of any democracy is the space offered for legitimate dissent.'[39] It has also been laid down by the judiciary that the right to protest, '*is crucial in a democracy which rests on participation of an informed citizenry in governance. This right is also crucial since it strengthens representative democracy by enabling direct participation in public affairs where individuals and groups are able to express dissent and grievances, expose the flaws in governance and demand accountability from State authorities as well a powerful entity. This right is crucial in a vibrant democracy like India but more so in the Indian context to aid in the assertion of the rights of the marginalized and poorly represented minorities.'*[40]

Several moves made by the government including the Data Protection Bill[41] and the 2021 Intermediary Rules under the Information Technology Act[42] indicate a growing tendency to clamp down on the digital space and to restrain movement and freedom within the same, while also allowing much leeway for the government and its agencies.[43] While there are legitimate concerns that the government is trying to meet while laying down such measures, it is contended that the same cannot be in tune with the democratic principles that India aspires to hold up.[44] Though it is accepted that the digital age is murky at best, which evolves, mutates and transforms at a pace that legislations find hard to keep up with, the actions taken in this regard seem to be reflecting the stance of the rulers who wish to take the easy way out. After all, who can protest using digital tools, if access to the internet and telecommunication networks is, in itself, entirely cut off?

Democracy is a delicate balancing act. In a country like India, which is both volatile and vulnerable, the impetus would certainly fall on the government to stifle protest, particularly

38 Sandra González-Bailón & Ning Wang, *Networked Discontent: The Anatomy of Protest Campaigns in Social Media,* 44 Social Networks (2016), https://www.sciencedirect.com/science/article/pii/S0378873315000659?via%3Dihub.

39 Anita Thakur and Ors. v. Government of Jammu & Kashmir, (2016) 15 SCC 525, ¶ 12.

40 Mazdoor Kisan Shakti Sangathan v. Union of India, AIR 2018 SC 3476, ¶ 54.

41 The Personal Data Protection Bill, 2019, 373 of 2019.

42 Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules, 2021.

43 Torsha Sarkar, *New Intermediary Guidelines: The Good and the Bad,* DTE, (Feb. 26, 2021), https://www.downtoearth.org.in/blog/governance/new-intermediary-guidelines-the-good-and-the-bad-75693/.

44 C. Raj Kumar*, Human Rights Implications Of National Security Laws In India: Combating Terrorism While Preserving Civil Liberties,* 33 Denver Journal of International Law and Policy 195 (2020).

in the digital space where things can quickly get out of hand. Here, it becomes vital to distinguish the ideal that democracy is not a balancing act between the government and the people. It is a balance between the interests of the people and the constitutional rights that are owed to them.

A brief glimpse at India's history would reveal that at any time when the constitutional rights were threatened, it was the judiciary that stepped in to protect the people of the Indian soil. While the judiciary has had a chaotic trajectory in recent times, it is hoped that a resurgence of judicial activism will step into the causes of the digital age, before it is too late. Adapting constitutional rights to the digital age is indeed an uphill task, particularly when a quandary of interests has to be balanced, as seen in the case of the right to protest. Nevertheless, a balance has to be struck and the characteristic prudence should perhaps make way for a healthier atmosphere for the voice of dissent. This requires upholding the constitution as supreme, and refusing to chip away at the rights proudly wielded by the people. As a nation that was wrought with the mantle of protest, it is important that the legacy be carried forward, regardless of the age we are in.