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An Approach Towards Balancing Fundamental Rights: Amit Sahni v/s Commissioner of Police

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Abstract

On October 7, 2020, the Supreme Court of India delivered a landmark judgement in the case of Amit Sahni v. Commissioner of Police. This ruling was pronounced in the backdrop of several protests organized by citizens to voice their dissent against an allegedly discriminatory central legislation. In this verdict, the Supreme Court acknowledged that the right to express discontentment against governmental actions is a fundamental right, albeit not exercisable in a manner that indefinitely occupies public spaces or is detrimental to the rights of other citizens. As demonstrations remain an integral part of India's political landscape, the Supreme Court's attempt to strike a 'balancing' act between competing fundamental rights is of great constitutional importance. This case comment is an attempt to undertake a critical examination of the judgement and ascertain whether the jurisprudence developed is consistent with the constitutional scheme. This case comment shall scrutinize the judgement by firstly studying the Supreme Court's ruling on various issues. It shall then proceed to critically evaluate the Supreme Court's reasoning as against established precedents and doctrines. Finally, this essay shall conclude by highlighting the way forward for the rights of demonstrators in India, post the Amit Sahni v. Commissioner of Police judgement.

Introduction

In early 2020, as the COVID pandemic unleashed its wrath around the world, the Indian populace found itself fighting two battles at once. Not only did the people face

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an unprecedented public health crisis, the entire country, including Delhi, but was also staggered by widespread protests.[1] On 12th December 2019, the Indian Government enacted the Citizenship Amendment Act ("CAA").[2] The CAA was criticized by scholars and politicians for being *allegedly* discriminatory.[3] Against this enactment, a large women led congregation assembled at Delhi's Shaheen Bagh to voice their discontentment against the law.[4] As the demonstrations gained momentum, members of civil society raised concerns over the road blockades by the protesters, resulting in increased traffic and inconvenience to commuters.[5] However, as the pandemic's wreckage became uncontrollable, in March 2020, the government was constrained to impose a nationwide lockdown.[6] Shortly thereafter, the demonstrators abandoned the protest site owing to the mandatory requirement of adherence to social distancing norms. Months after the protests ceased, the Supreme Court heard a petition which sought the removal of the protestors. The primary argument posited by the petition was that the annihilation of public spaces by the protestors is impermissible within our constitutional scheme. A three-judge bench of the Supreme Court, led by Justice S.K. Kaul, in *Amit Sahni v. Commissioner of Police & Ors.*[7] ("Shaheen Bagh judgement"), decided in favour of the petitioner and attempted to strike a balancing act between two competing fundamental rights — free speech and free movement.

As protests remain an integral part of India's political arena, the jurisprudence laid down by Supreme Court in the Shaheen Bagh judgement will have wide ramifications on determining the validity of similar demonstrations, most notably, the farmers' protest, in times to come. Hence, this case-comment is an attempt to undertake a comprehensive study of the judgement. The structure of the case-comment is as follows. The paper shall begin by laying down the facts of the case and trace its journey before reaching the Supreme

1 *Anti-CAA protests escalate across India*, The Hindu Business Line, (Dec. 19, 2019), https://www.thehindubusinessline.com/news/national/anti-caa-protest-internet-shut-down-in-parts-of-delhi/article30346740.ece.

2 The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).

3 Gautam Bhatia, *It is everybody's Constitution,* The Hindu, (Jan. 1, 2020), https://www.thehindu.com/opinion/lead/it-is-everybodys-constitution/article30446190.ece.

4 *Shaheen Bagh: The women occupying Delhi street against citizenship law*, BBC News, (Jan. 4, 2020), https://www.bbc.com/news/world-asia-india-50902909.

5 *People have right to protest but can't block roads, says SC on Shaheen Bagh protest*, Hindustan Times, (Feb. 18, 2020), https://www.hindustantimes.com/india-news/people-have-right-to-protest-but-can-t-block-roads-says-sc-on-shaheen-bagh-protest/story-OJkbNvQMt0cLiUQ0J5rDJN.html.

6 Nistula Hebbar, *PM Modi announces 21-day lockdown as COVID-19 toll touches 12*, The Hindu, (Mar. 24, 2020), https://www.thehindu.com/news/national/pm-announces-21-day-lockdown-as-covid-19-toll-touches-10/article31156691.ece.

7 Amit Sahni v. Commissioner of Police & Ors., (2020) 10 SCC 439. (Hereinafter referred to as, "Shaheen Bagh Judgement").

Court. In the second part, the paper shall examine the Supreme Court's treatment of the case and examine its findings on various issues of constitutional importance. The third part of the case comment shall proceed to critically analyze the reasoning of the Court and in the fourth and final part, the paper shall conclude by highlighting the way forward.

Facts

As the events leading up to the Shaheen Bagh judgement are etched in public memory, the paper shall briefly summarize the factual scenario of the case, before proceeding to analyze the rationale of the judgement. The case traversed across jurisdictions, including the Delhi High Court, and the Supreme Court, before reaching its determinative end. In the subsequent sections, the paper shall examine the rulings of both, the Delhi High Court and the Supreme Court.

Findings of The Delhi High Court

Prior to arising for determination before the Supreme Court, the matter was dealt by the Delhi High Court. In *Amit Sahni v. Commissioner of Police & Ors.,*[8] ("Amit Sahni"), the petitioner sought the police authorities' aid in opening up the Kalindi Kunj-Shaheen Bagh Stretch, in addition to the Okhla underpass, which allegedly remained inaccessible due to the ongoing CAA protests. A division-bench of the Delhi High Court, led by the Chief Justice, ordered the police authorities to react in accordance to law and order and work towards opening the roads. It was also observed that, *"the larger public interest as well as the maintenance of the law and order"*, had to be balanced.[9] However, the Court refrained from issuing any specific direction, as the volatility of the situation required spontaneous decisions by law-enforcement authorities, capturing the pulse of the rapidly changing situation.[10] Accordingly, the Writ-Petition was disposed off on the first day itself.

It is apposite to note that the Delhi High Court, without attempting to delve into a thorough constitutional analysis, attempted to navigate a path, wherein both, the demonstrators, and the policing authorities, have the liberty to act in furtherance of the larger public interest. By not ordering the immediate suspension of the protests, the Court permitted the demonstrators to exercise their free speech, and simultaneously, empowered the police to take necessary steps to prevent any unexpected aggravation of the situation.

8 Amit Sahni v. Commissioner of Police & Ors., 2020 SCC OnLine Del 117.

9 *Id.* at 5.

10 *Id.* at 6.

The Supreme Court's Ruling

The petitioner, however, unsatisfied by the Delhi High Court's judgement, knocked on the doors of the Supreme Court by way of a Special Leave Petition ("SLP"). The Supreme Court, in order to develop an *"out of the box solution"*,[11] had appointed two interlocutors, namely Senior Advocate Sanjay Hegde and mediator-trainer Sadhana Ramachandran, to interact with the protestors and arrive at a common-ground of resolution.[12] Despite the interlocutors' efforts, no settlement could be reached and the Supreme Court, based on the findings of the report, noted that *"the views reflected in private conversations with the protestors were somewhat different from the public statements made to the media and to the protesting crowd in attendance"*.[13] Though the Supreme Court's effort at mediation provided to be unsuccessful, the pandemic came in as a *force majeure* and halted all activities. In pursuance of the nationwide lockdown, the protests at Shaheen Bagh, and elsewhere, ceased.

For all practical purposes, the petition before the Supreme Court had become infructuous as the intended purpose of making protestors vacate the site was achieved by the pandemic. This was acknowledged by the three-judge bench hearing the matter, led by Justice S.K. Kaul. It was noted, *"really speaking, the reliefs in the present proceedings have worked themselves out"*.[14] Despite the relief sought in the petition already being realized, the Supreme Court decided to pass rulings *"on the subject on account of its wider ramifications"*.[15]

Therefore, the Supreme Court elucidated on the issue before it for determination, that is, whether the right to protest can be restricted on the ground that it causes inconvenience to commuters. Supreme Court's observations and holdings were on a diverse set of questions, hence, in the subsequent sections, the paper shall engage with them independently.

On Protests

The Supreme Court recognized that the roots of India are buried deep in protests and independence was attained only after consistent resistance against the colonial rulers.[16] However, the aggressive forms of protest necessary in the by-gone era, are not sustainable

11 *Supra* note 7, at 9.
12 *Id.*
13 *Id.* at 10.
14 *Id.* at 12.
15 *Id.* at 13.
16 *Id.* at 16.

in a modern, constitutional democracy. The right to protest is located in Articles 19(1)(a)[17] and 19(1)(b)[18] of the Constitution, namely the right to free speech and expression and the right to assemble peacefully without arms. In any participative democracy, citizens are entitled to participate in the democratic processes of the country so as to enable them to exercise their right to choice. It was rightly pointed out that the right to protest, similar to all other fundamental rights, is not absolute and subject to several 'reasonable restrictions' enumerated in Articles 19(2) and 19(3) of the Constitution.[19]

An interesting observation, vis-a-vis protests, was furthered by the Supreme Court in the Shaheen Bagh judgement. While discussing the case of *Mazdoor Kisan Shakti Sangathan v. Union of India & Anr.*,[20] which was about regulating protests at Jantar-Mantar, the Court noted that fundamental rights do not exist in compartmentalized isolation, rather interact with each in a synergy. In such a situation, it is possible that two competing fundamental rights clashes with each other. To resolve this tension, constitutional courts are required to refrain from giving primacy to one fundamental right over the other, rather strike a harmonious balance between the two competing rights, so that both of them can thrive in mutual co-existence. In the Shaheen Bagh case, the two competing rights were the right to free speech and the right to assemble peacefully, as opposed to Indian citizens' right to move freely anywhere in the country granted under Article 19(1)(d).[21] Hence, a balancing act was necessary to adjust the right of protestors with the right of commuters to move around unhindered.

17 India Const. art. 19, cl. 1 — *(1) All citizens shall have the right—*
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions [or co-operative societies];
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;(g) to practise any profession, or to carry on any occupation, trade or business.

18 *Id.*

19 India Const. art. 19, cl. 2. — (2) *Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*
(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

20 Mazdoor Kisan Shakti Sangathan v. Union of India & Anr., (2018) 17 SCC 324.

21 *Supra* note 17.

On public spaces and restrictions

This brings us to the Supreme Court's articulation of the nature of the Shaheen Bagh protests and how it chose to balance it against the larger public interest. The Supreme Court noted that while the right to protest is an essential part of Indian polity, protestors cannot be allowed to takeover public spaces indefinitely.[22] The Supreme Court held, *"We cannot accept the plea of the applicants that an indeterminable number of people can assemble whenever they choose to protest"*.[23] The Supreme Court further expressing its disagreement with the alleged permanent occupation of public spaces by the protestors, said, *"We have, thus, no hesitation in concluding that such kind of occupation of public ways, whether at the site in question or anywhere else for protests is not acceptable and the administration ought to take action to keep the areas clear of encroachments or obstructions"*.[24] The Court also expressed displeasure with the way the Delhi High Court disposed off the Writ-Petition and noted that it should have monitored the matter.[25] Finally, the Court noted that all protests arising in the future shall be subject to the legal principles enunciated in the Shaheen Bagh judgement.[26]

Analysis

The judgement has marked a paradigm shift in the understanding of protest jurisprudence in India. By holding that future demonstrations shall be subject to principles enunciated in the Shaheen Bagh judgement, its ramifications become far-reaching and wide. In the existing situation, where several other demonstrations, including the months-long farmers protest is underway, an analysis of the Shaheen Bagh judgement is warranted. The paper, in the subsequent sections, shall assess the soundness of the Shaheen Bagh judgement and attempt to show that the Supreme Court missed an opportunity to lay down a comprehensive test of balancing.

Rule of Restraint

A fundamental principle of constitutional law is that rights determination must be a fact-

22 *Supra* note 7, at 17.
23 *Id.*
24 *Id.* at 19.
25 *Id.* at 20.
26 *Id.*

based exercise.[27] In *Government of NCTD v. Inder Pal Singh Chadha*,[28] it was held that constitutional issues must not be determined unless the facts before a court make it absolutely necessary to do so. No constitutional issue can ever be decided in a vacuum, and more importantly, a writ-court confines itself to the narrow points raised before it.[29] Until a constitutional court does not have access to all the relevant facts, the adjudication process would remain marred with inconsistencies. A repository of complete facts allows courts to visualize an issue comprehensively and further its rights-reasoning in a structured manner. On the other hand, when the judiciary decides constitutional issues in the abstract, without due regard to the facts, the reasoning is often oversimplified as judges, in the absence of complete facts, have to rely on their limited conception of the future possibilities. As held by the Supreme Court in *State of Madras vs V.G. Row*,[30] ("V.G Row) reasonable restrictions on a fundamental right have to be applied after duly considering *"all the circumstances of a given case"*.[31] For the sake of completeness, in the V.G. Row case, the Supreme Court struck down an impugned section of the Criminal Law Amendment (Madras) Act, 1950 as it did not conform to Article 19(4) of the Constitution.

Notably, the Shaheen Bagh judgement pursued a point of constitutional interpretation, when it did not need to. As mentioned earlier, the Supreme Court had noted that *"the reliefs in the present proceedings have worked themselves out"*.[32] Hence, in such a scenario, where the petition was rendered infructuous, the court should have exercised restraint and not have found the need to, *"pen down a few more lines for clarity"*.[33] The endeavor of the court to determine whether the protestors caused inconvenience to the commuters was thus analyzed in the abstract and was against the rule of restraint.

Improper Application of Balancing

It is now established that the question before the Supreme Court in the Shaheen Bagh judgement did not require determination. However, the Court still pursued the issue and engaged in constitutional analysis. In this section, the paper shall test whether the Supreme

27 Shrutanjaya Bhardwaj, *"Balancing" Dissent, Protest and Urban Mobility: The Shaheen Bagh Judgment*, The Centre for Advanced Studies in Human Rights, The Human Rights Blog, (Nov. 23, 2020), https://casihrrgnul.wordpress.com/2020/11/23/balancing-dissent-protest-and-urban-mobility-the-shaheen-bagh-judgment/.

28 Government of NCTD v. Inder Pal Singh Chadha, (2002) 9 SCC 461.

29 *Supra* note 27.

30 State Of Madras vs V.G. Row, AIR 1952 SC 196.

31 *Id.* at 15.

32 *Supra* note 14.

33 *Supra* note 7, at 13.

Court applied the balancing test appropriately. To reiterate, the issue before the Supreme Court was whether the fundamental right to peaceful assembly and free speech be restricted if it is causing inconvenience to commuters.

The contemporary elucidations on the doctrine of balancing can be traced back to the case of *Subramanian Swamy v. Union of India*,[34] where the Supreme Court while rejecting a challenge to the constitutional validity of criminal defamation held that Article 19(1)(a) has to be 'balanced' against the right to reputation under Article 21. The normative understanding of the doctrine of balancing suggests that when one fundamental right conflict with another, both of them have to be harmoniously construed.[35] Balancing presupposes the equal standing of fundamental rights. As a subordinate fundamental right need not be balanced, it can simply be 'trumped' by a superior fundamental right.[36] Some scholars have argued that Article 25, right to freedom of religion, is placed on weaker footing within Part-III of the Constitution, owing to its language which makes the right subject, "*to the other provisions of this Part"*.[37] The "subject to" clause in Article 25 is unique as the members of the Constituent Assembly chose to limit only the right to freedom of religion as against *"other provisions of this Part"*.[38] However, the position of Article 25 is an exception, and all other *equal* fundamental rights have to balance in a manner where they can meaningfully coexist.[39]

The obstacle with the doctrine of balancing is that it has never properly been described by the judiciary and is invariably applied to restrict free speech against unenumerated rights under Article 21, the ambit of which, is ever growing.[40] This results in the judiciary 'trumping'

34 Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

35 Gautam Bhatia, *The "Balancing" Test and Its Discontents*, Indian Constitutional Law and Philosophy, (May 20, 2016).

36 Shrutanjaya Bhardwaj, *"Balancing" Away Free Speech: Some Thoughts*, Socio Legal Review, (Dec. 16, 2020), https://www.sociolegalreview.com/post/balancing-away-free-speech-some-thoughts.

37 India Const. art 25. *(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

38 *Id.*

39 Shrutanjaya Bhardwaj, *Individual Religious Freedom is Subject to Other Fundamental Rights*, (2019) 7 SCC J-29.

40 *Supra* note 36.

fundamental rights, that is, prioritizing one right over the other, rather than harmoniously balancing them. The Supreme Court, in the Shaheen Bagh judgement, appears to have 'trumped', rather than 'balance', the competing fundamental rights at stake. The reasons for this argument are as follows. Firstly, the Supreme Court did not identify the right or law, against which it was balancing the fundamental rights to free speech and peaceful assembly. The grounds of limiting the right to free speech and peaceful assembly are exhaustively delineated in Articles 19(2) and 19(3) of the Constitution. By not engaging in a thorough analysis of why these rights need to be restricted beyond the permissible constitutional limits, the Court has left several important questions unanswered. Questions like, is mild inconvenience to commuters enough to restrict demonstrations, or the implications of availability of alternate routes, have found no place in the judgement, hence, leaving the door wide open for speculation on future instances. Restricting fundamental rights, without meeting the conditions under Articles 19(2) and 19(3) cannot be categorized as a balancing act.

Secondly, balancing is an exercise that must occur only in accordance with the doctrine of proportionality.[41] The doctrine suggests that rights can be restricted only when no other alternatives are available in the facts and circumstances of the case. Furthermore, the doctrine of proportionality requires the Court to adopt reasoning that is least restrictive to a fundamental right.[42] Thus, it is a settled position of law that balancing does not empower courts to arbitrarily overpower one fundamental right to accommodate another. In the absence of an appraisal of evidence to determine inconvenience caused to commuters, or an attempt to find a path that curtailed the right to free speech and peaceful assembly in the least restrictive way, the Supreme Court has applied the doctrine of balancing improperly.

Conclusion

The Supreme Court, in the Shaheen Bagh judgement, missed an opportunity to properly define the contours of the doctrine of balancing. Though the Supreme Court endeavored to uphold tranquility by ensuring public spaces remain accessible to all, its rationale could have been strengthened by a thorough analysis of constitutional issues, rather than simply dealing in the abstract. The Supreme Court had an opportunity to rectify this error when

41 Arsh Rampal, *Guest Post: The Shaheen Bagh Review Order – An Unreasonable Restriction on the Right of Assembly*, Indian Constitutional Law and Philosophy, (Mar. 30, 2021), https://indconlawphil.wordpress.com/2021/03/30/guest-post-the-shaheen-bagh-review-order-an-unreasonable-restriction-on-the-right-of-assembly/.

42 Modern Dental College & Research Centre v. State of Madhya Pradesh, 2016 SCC OnLine SC 373.

a revision petition was filed against its judgement in the Shaheen Bagh case.[43] However, the Supreme Court, by the same three-judge bench, led by Justice S.K. Kaul rejected the review petition and held that it's earlier ruling, *"does not suffer from any error apparent warranting its reconsideration"*.[44] By the virtue of this dismissal, the Shaheen Bagh judgement and its precarious jurisprudence, has attained finality. It is indisputable that no demonstration, protest, or sit-in can hold public spaces — meant for collective use of the citizenry — under hostage. However, the Supreme Court, by only cursorily examining the rights at stake, has left many questions unanswered. It remains to be seen how the Shaheen Bagh ruling forms and shapes protests in the future.

43 Debayan Roy, *Supreme Court judgment on Shaheen Bagh protests "judicial sanction" for "police excesses": Review petition in SC*, Bar & Bench, (Nov. 16, 2020), https://www.barandbench.com/news/litigation/supreme-court-shaheen-bagh-judgment-right-protest-review-petition-police.

44 Kaniz Fatima v. Commissioner of Police, Civil Appeal No. 3282/2020.