

EDITORIAL NOTE

ELECTORAL BONDS AND BEYOND: EVALUATING THE SUPREME COURT'S APPROACH TO CONFLICT OF RIGHTS

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This note examines the Supreme Court's approach to resolving conflicts between fundamental rights, particularly after the recent Electoral Bonds decision. The 'double-proportionality test', while an improvement, lacks a doctrinal foundation and can lead to arbitrary decisions on constitutional questions. There are several issues with the Indian judiciary's methodology to determine a conflict of rights, leading to a risk of arbitrary judicial policymaking. The note identifies key issues in Indian jurisprudence, including the absence of an objective metric to determine a conflict between fundamental rights as well as a context-specific approach to resolving them. The note proposes a criteria for determining genuine conflicts and the need for contextualisation when carrying out any balancing exercise. This note advocates for a structured and principled approach to adjudicating conflicts between fundamental rights, prioritising contextual analysis over abstract value judgement.

I. INTRODUCTION

In February 2024, in *Association for Democratic Reforms v. Union of India* ('Electoral Bonds Case'), the Supreme Court of India ('SC') struck down the Central Government's 2018 Electoral Bond Scheme as unconstitutional.¹ This case involved the SC's resolution of a conflict between two fundamental rights — the right to information of voters under Article 19(1), and the right to privacy of political contributors under Article 21.²

The SC adjudged both rights as being equally important and thus attempted to balance the two. In doing so, it evolved the 'double-proportionality' test to evaluate the impact of the Electoral Bonds Scheme on the two rights. As will be explained, this is notably distinct from the standard 'proportionality test', which seeks to assess whether a restriction on a fundamental right because of a legislative action is justified.³ Double-proportionality specifically evaluates legislative measures that 'create' conflict between Part III rights.⁴

In the Electoral Bonds Case, the SC aptly summarises two 'modalities' followed by Indian courts to resolve conflicts between Part III rights. The first is to circumscribe one right in a way such that there is no 'real' conflict between rights.⁵ The second modality involves comparing values that the impugned rights espouse and giving weightage to the right, which

* Editors, NUJS Law Review, 2024-2025.

¹ *Association for Democratic Reforms & Anr. v. Union of India & Ors.*, 2024 INSC 113, ¶216.

² *Id.*,

³ Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, Vol. 3(2), U. OXHRH J., (2020), 56 ('Chandra').

⁴ Chiranth Mukunda, *The Supreme Court's Electoral Bonds Judgment – III: A Critique of Double Proportionality*, CONSTITUTIONAL LAW AND PHILOSOPHY, March 25, 2024, available at <https://indconlawphil.wordpress.com/2024/03/25/the-supreme-courts-electoral-bonds-judgment-iii-a-critique-of-double-proportionality-guest-post/> (Last visited on July 14, 2024) ('Mukunda').

⁵ *Association for Democratic Reforms v. Union of India*, 2024 INSC 113, ¶147.

further a larger public interest.⁶ The authors will examine both these modalities over the course of this note

This note will argue that the SC’s approach to double-proportionality is based on a doctrinally unsound premise and opens up the possibility of a judicially-constructed assessment of state policy. Part II analyses the current position of Indian constitutional jurisprudence in defining a ‘conflict’ of fundamental rights. The authors argue that there is no uniform metric followed by Courts to identify a ‘genuine conflict’ in the first place, which necessarily results in a misplaced proportionality assessment. Part III attempts to define the criteria for a genuine conflict, based on more objective questions. Part IV argues that there exists a problem of ‘polyvocality’ under current jurisprudence on proportionality, and suggests the relevance of appropriate contextualisation based on individual facts. Part V continues this argument to explain the principled distinction between balancing and proportionality. Part VI concludes the note.

II. THE ‘CONFLICT’ OF FUNDAMENTAL RIGHTS

Due to the interconnected nature of fundamental rights, the occurrence of conflicts is inevitable. Conflict of fundamental rights occurs when the facts of the case fulfil one or more conditions or values of both fundamental rights.⁷ Indian Courts have witnessed such instances of conflicts, particularly with religious fundamental rights placed against other fundamental rights.

Part III of the Constitution does not give guidance as to how conflicts between fundamental rights are to be resolved.⁸ Article 25, which provides for the right to freedom of religion, is limited by “other provisions of Part III”,⁹ implying that a constitutionally framed hierarchy exists with respect to this right, as against other Part III rights. This is not, however, the case with other rights. Therefore, a purely textual reading would not help us resolve a conflict between other fundamental rights. For other fundamental rights, the Constitution itself provides a ‘closed list’ of restrictions.

A ‘closed’ list implies that any restrictions must be allowed by constitutional principles. Any balancing act using factors not specifically enumerated is not permitted. For instance, for freedom of speech under Article 19(1)(a), any restriction must flow from Article 19(2).¹⁰ The jurisprudence has been unequivocally clear that *any* restriction to Article 19(1)(a) has to mandatorily stem from an expressly mentioned ground under Article 19(2). This would preclude any act of balancing from imposing tacit restrictions on Article 19(1)(a).

⁶ *Id.*, ¶148; *See also* Mr. ‘X’ v. Hospital ‘Z’, (1988) 8 SCC 296; *Asha Ranjan v. State of Bihar & Ors.*, (2017) 4 SCC 397, ¶¶48, 49.

⁷ Jorge Silva Sampaio, *Proportionality in its Narrow Sense and Measuring the Intensity of Restrictions on Fundamental Rights* in *THE PRINCIPLE OF PROPORTIONALITY IN LAW: AN ANALYTICAL PERSPECTIVE*, 82 (David Duarte & Jorge Silva Sampaio eds., Springer, 2018).

⁸ Anubhav Khamroi, *Constitutional Silences, Balancing of Rights, and the Concept of a “Neutralising Device”*, *CONSTITUTIONAL LAW AND PHILOSOPHY*, November 9, 2019, available at <https://indconlawphil.wordpress.com/tag/balancing-rights/> (Last visited on June 5, 2024) (‘Khamroi’).

⁹ *The Constitution of India, 1950, Art. 25*; Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, Vol. 17, *S. ASIAN MULTIDISC. J.*, (2018), 3.

¹⁰ *See Sakal Papers v. Union of India*, (1962) 3 SCR 842 (The Court held that ‘public interest’ is not a ground expressly enumerated under Art. 19(2) and thus could not form a basis for restriction); *See also Indian Express v. Union of India*, 1985 AIR 515 (the Court examined constituent assembly debates to include how Art. 19(2) was intended as an exhaustive list and reading ‘public interest’ into the list of restrictions would contradict the intention of the drafters).

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Nonetheless, there have been instances of conflict between fundamental rights that are not related to religion, particularly Articles 19 and 21.¹¹ The right to freedom of speech has been in conflict with a variety of derivatives of the right to life, including the right to reputation,¹² the right to live peacefully,¹³ the right to a fair trial,¹⁴ etc.

With these emerging conflicts between multiple Part III rights and an apparent constitutional silence as to a hierarchy thereof, courts have adopted ad hoc balancing tests to reconcile conflicts and arrive at ‘acceptable’ solutions. However, in most instances, the court’s objective to balance fundamental rights is ultimately accomplished by prioritising the values of one right over another in each case.¹⁵ What is important is to develop a sound doctrinal foundation that assists jurisprudence to cohesively develop to appropriately resolve constitutional dilemmas.

It is intuitive that any act of balancing must take place only when there is a ‘real’ or ‘genuine’ conflict between rights. This is also the first modality that the Electoral Bonds Case refers to. Across decisions, however, there is a lack of clarity in identifying a ‘genuine conflict’ between Part III rights. The approach that the SC seems to suggest is that the application of one right is such that it circumscribes the application of the other. Yet, the jurisprudential basis for such circumscribing is heavily unclear.

To argue its case, the Electoral Bonds Case cites SC’s methodology in *Re: Noise Pollution*. While considering the issue of noise pollution, the Court characterised the situation as a conflict between freedom of speech and the right under Article 21 to lead a “peaceful, comfortable and pollution-free life”.¹⁶ The problem begins at this stage itself. The entire question could have been done away with simply by referring to “time, place and manner” regulations in free speech jurisprudence, which look at the manner and not the content of speech, and thus do not infringe Article 19(1)(a) at all.¹⁷

Neither would there have been a need to engage in any balancing, since there would have been no conflict to begin with, either real or illusory. The Court, however, chose to argue that the right under Article 19(1)(a) is not absolute and thus must yield to Article 21, in view of others’ “right to listen and decline to listen”.¹⁸

Effectively, while Electoral Bonds Case states that Noise Pollution identified that there is no real conflict, the reasoning employed essentially relies on an interaction between Article 19(1)(a) and Article 21, such that there was a *de facto* characterisation of a conflict and the exercise of an *ad hoc* balancing test.

¹¹ Kaushal Kishore v. State NCT Of Delhi, AIR ONLINE 2019 DEL 77; Justice K.S. Puttaswamy (Retd) v. Union of India, 2019 (1) SCC 1; Union of India v. Motion Pictures Association, (1999) 6 SCC 150/

¹² Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

¹³ Noise Pollution (V), In re, 2005 SCC OnLine SC 1046.

¹⁴ Sahara India Corporation v. Securities and Exchange Board of India, (2012) 10 SCC 603.

¹⁵ Nikhil Pratap, CONFLICTING FUNDAMENTAL RIGHTS UNDER THE INDIAN CONSTITUTION: ANALYZING THE SUPREME COURT’S DOCTRINAL GAP, (LLM, Columbia Law School, 2022) (‘Pratap’); I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

¹⁶ Noise Pollution (V), In re, 2005 SCC OnLine SC 1046, ¶11.

¹⁷ Time, place and manner regulations are widely recognised in the U.S. First Amendment jurisprudence which is content-neutral, since it does not impact the content of the speech itself. They are not considered as ‘restrictions’ to free speech *per se*. See Richard A. Posner, *Free Speech in an Economic Perspective*, CHICAGO UNBOUND, (1989), 16; See also Ramlila Maidan Incident, in Re, 2012 SCC OnLine SC 186, ¶316 (A system of licensing as regards the time and manner of holding public meetings on public streets has not been regarded as an infringement of a fundamental right of public assembly or free speech).

¹⁸ Noise Pollution (V), In re, 2005 SCC OnLine SC 1046, ¶11.

Electoral Bonds Case further cites *Subramaniam Swamy v. Union of India* to support its point on the first modality. In this case, the SC, while assessing the constitutionality of §§499 and 500 of the Indian Penal Code ('IPC'), provisions criminalising defamation, framed it as a conflict between Article 19(1)(a) and the right to reputation flowing from Article 21.¹⁹

Relying on Article 21, it introduces the idea of 'constitutional fraternity' to defend the constitutionality of criminal defamation under the IPC.²⁰ It must be noted that upholding a 'criminal' provision for defamation, was done via recourse to this idea of constitutional fraternity. None of this would have been required since Article 19(2) clearly defines defamation as one of the grounds on which freedom of expression can be restricted.

Similarly, in the wake of the protests against the Citizenship Amendment Act, 2019, in *Amit Sahni v. Commissioner of Police* ('Shaheen Bagh'), the Court restricted freedom of speech and movement of protesters while balancing it against the rights of commuters,²¹ without specifically identifying what the nature and scope of the latter's right were. The Court again undertook a 'balancing of interests' of protestors and commuters and held that the administration ought to take action and keep areas clear of demonstrations and obstructions.²²

These instances clearly show this act of balancing means the list of potentially permissible grounds for restricting rights (such as speech) is virtually indefinite.²³ Resultantly, the balancing test deployed in the above instances does not have a consistent jurisprudential or constitutional basis, leading to arbitrary restrictions on Part III rights. This balancing inevitably involves reliance on ideological foundations and extra-constitutional values to 'resolve' the conflict, leading to judicially created restrictions.²⁴

To address these issues, a sound methodology for identifying and resolving conflicts is essential. The critical first step is establishing clear criteria to determine when a genuine conflict exists between fundamental rights. Only in cases of genuine conflict should balancing be considered. The following section explores how to identify such conflicts, laying the groundwork for a more principled approach to questions of balancing and proportionality.

III. IDENTIFYING A GENUINE CONFLICT

It follows that if there is no conflict, the tendency to apply the balancing test will reduce, and so will the reliance on a subjective, *ad-hoc* balancing test. The question of weighing interests will become relevant only when a true conflict is identified.²⁵ The authors will attempt to explain what such a true conflict of fundamental rights looks like.

¹⁹ *Subramaniam Swamy v. Union of India*, (2016) 7 SCC 221, ¶144.

²⁰ *Id.*, ¶152.

²¹ *Amit Sahni v Commissioner of Police and others* Civil Appeal No. 3282 of 2020.

²² *Id.*, ¶¶16, 19.

²³ See Shrutanjaya Bhardwaj, "Balancing" Away Free Speech: Some Thoughts, SOCIO LEGAL REVIEW, December 12, 2020 available at <https://www.sociolegalreview.com/post/balancing-away-free-speech-some-thoughts> (Last visited on June 9, 2024)

²⁴ V. Venkatesan, *Supreme Court's Shaheen Bagh Judgment Will Lead to Fresh Curbs on Right of Peaceful Protest*, THE WIRE, October 8, 2020, available at <https://thewire.in/law/supreme-court-shaheen-bagh-judgment-fresh-cubs-right-of-peaceful-protest> (Last visited on June 9, 2024); Padmavathi Prasad & Dharshini Sugumaran, *The Shaheen Bagh Judgment and What it Means for the Right to Protest in India*, LAW AND OTHER THINGS, November 18, 2021, available at <https://lawandotherthings.com/the-shaheen-bagh-judgment-and-what-it-means-for-the-right-to-protest-in-india/> (Last visited on June 9, 2024).

²⁵ Federica Gionavella, CONFLICTING RIGHTS IN BALANCE (Elgar Online, 2017).

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Genuine conflicts involve fundamental norms that are incompatible with their exercise.²⁶ The exercise of one necessarily has to come at the cost of another. Conversely, the State also finds itself under incompatible duties, since fulfilling one positive obligation would necessarily lead to the dereliction of the other, at least in some respect.²⁷ In such circumstances, a balancing exercise must mandatorily take place, since a resolution would need some priority of values. How the SC has engaged in this exercise and the authors' assessment will be discussed in Part IV.

First, a conflict between a fundamental right and an individual or collective interest not protected by a fundamental right is not a genuine conflict.²⁸ In such cases, there may appear to be conflicting rights, but upon closer examination are no more than a traditional exercise of a human right against a public interest.²⁹

Even as there may superficially seem to be a conflict between two fundamental rights, a proper characterisation would easily distinguish between where the conflict is 'real' as opposed where it may be more 'indirect' or 'hypothetical'.³⁰ In the *Re: Noise Pollution*, the Court could have squarely characterised the issue using non-content based restrictions on Article 19 — on which clear jurisprudence exists — as opposed to framing it as a conflict against Article 21, i.e., the right of people to a pollution free environment. Similarly, the Court, in the context of the CAA protests, could have examined similar place-time-manner restrictions, as explained previously.

This would have further allowed the Court to potentially engage with "degree of tolerance"³¹ jurisprudence vis-à-vis public demonstrations, which are considerably more objective as opposed to balancing.³² The decision of the Court to view this as a conflict with the commuter's fundamental right to movement ostensibly implied a restriction that went beyond established jurisprudence and restrictions under Article 19(2), allowing for extra-constitutional restrictions basis a balancing or 'neutralising device'.

The theoretical rationale behind this exclusion is as follows. When public interest or public order is invoked as a justification to restrict a certain right, the particular human right that is involved in protecting such public interest is uncertain and often speculative.³³ The entire exercise of the restriction is thus hinged on a 'probability' of protecting the other right. In the absence of concrete material that the fundamental rights of

²⁶ Lorenzo Zucca, *Laws, Dilemmas and Happy Endings* in *WHEN HUMAN RIGHTS CLASH AT THE EUROPEAN COURT OF HUMAN RIGHTS: CONFLICT OR HARMONY?* (Stijn Smet & Eva Brems eds., OUP, 2017).

²⁷ Stijn Smet, *On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights*, Vol. 17(3), *HUM. RIGHTS LAW REV.*, 520 (2017).

²⁸ A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, Vol. 62, *MLR*, 671 (1999).

²⁹ Stijn Smet, *RESOLVING CONFLICTS BETWEEN HUMAN RIGHTS: THE JUDGES DILEMMA*, 44 (Routledge, 2017).

³⁰ J. Bomhoff, *'The Rights and Freedoms of Others': The ECHR and its Peculiar Category of Conflicts Between Individual Fundamental Rights*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS*, 619 (Eva Brems ed., Intersentia, 2008).

³¹ For instance, it is an established principle in the European Court of Human Rights that there must be a certain degree of tolerance towards ordinary public life being disrupted because of demonstrations, else freedom to protest and assembly will lose all meaning. Restrictions on protest have a direct and severe impact on the right of freedom of expression of persons involved, *see Oya Ataman v. Turkey*, Application No. 74552/01, December 5, 2006 (Eur. Ct. H.R.) ¶42.

³² Ronald J. Krotoszynski, Jr., *The European Court of Human Rights: Privacy Rights in Europe: Reconciling Privacy and Speech in the Era of Big Data* in *PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE* (Ronald J. Krotoszynski Jr ed., Oxford University Press, 2016).

³³ Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (Harvard University Press, 1977).

identified groups are at stake, this would not qualify as a genuine conflict. This is even more pressing in view of the ever-expanding scope of the nature of Article 21.³⁴

Virtually every public interest or public order restriction can be traced to some right under Article 21, and *ergo*, by extension, every situation involving any restriction on a fundamental right can be viewed as a conflict against Article 21. This is inevitably what the SC did in *Re: Noise Pollution*, Subramaniam Swamy and Shaheen Bagh decisions. As explained above, this opens floodgates to a situation where extra-constitutional restrictions begin to be imposed on Part III rights, in a purported attempt to balance them against Article 21.

Second, if the fundamental right seemingly clashes with another fundamental right, but its application may be validly narrowed on the basis of established restrictions to such right, there is no genuine conflict. For instance, in cases involving freedom of speech under Article 19(1)(a), Article 19(2) already precludes from its ambit defamatory speech.³⁵ This would imply that the clash identified in Subramaniam Swamy is merely illusory since it is also resolved by taking resort to Article 19(2). The only question that would thus remain would be to determine, on merit, if the speech in question amounts to defamation. That, of course, is a subjective exercise dependent on facts and not an evaluation of conflicting rights.

From the above discussion, certain key identifiable features emerge that help characterise a genuine conflict between Part III rights. There must be clearly identifiable fundamental rights exercisable by identifiable groups. They must then not fall into either of the two categories excluded above. Literature on conflict of rights also adds another layer to this process. It is conceivable that the existence of fundamental rights imposes a corresponding duty upon the state to ensure its protection, either as a negative or a positive obligation.³⁶

In case of a genuine conflict, the situation must be such that the duties of the state must be incompatible.³⁷ If the duties may be concomitantly discharged, there is no real conflict. It is also acknowledged that a genuine conflict of fundamental rights cannot be resolved *in abstracto*, i.e., in principle.³⁸ A general, abstract question, as to whether fundamental rights conflict, cannot be conclusively answered without reference to specific facts and circumstances.

Having established the criteria for identifying genuine conflicts, the next part explores how courts should attempt to balance the same.

IV. ATTEMPTS TO BALANCE FUNDAMENTAL RIGHTS

The approaches adopted by courts to deal with the conflict of fundamental rights have always been subject to scrutiny.³⁹ It has been argued that the Courts fail to adhere to any structural and methodological techniques to adjudicate conflict of fundamental rights.⁴⁰ In most of the instances, the Courts have ‘balanced’ the fundamental rights. However, as

³⁴ See *K.S. K.S Puttaswamy v. Union of India*, (2019) 1 SCC 1; *Subhash Kumar v. the State of Bihar*, 1991 SCR (1) 5; *M.K. Ranjitsinh and Ors. v. Union of India And Ors.* WP(C) No. 838/2019.

³⁵ The Constitution of India, 1950, Art. 19(2).

³⁶ Smet, *supra* note 27, 47.

³⁷ Adina Preda, *Are There Any Conflicts of Rights*, Vol. 18(4), ETHICAL THEORY MORAL PRACT., 679 (2015).

³⁸ David Martinez Zorrilla, *The Structure of Conflicts of Fundamental Legal Rights*, Vol. 30(6), L. & PHIL., 729-749 (2011).

³⁹ Chandra, *supra* note 3, 58; Khamroi, *supra* note 8.

⁴⁰ Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, Vol. 8(2), INT’L. J. CONST. L., 298 (2010); Pratap, *supra* note 15.

explained above, balancing fundamental rights is an exemplification of constitutional silence, as the Constitution does not specify any balancing technique in case of a conflict.⁴¹ Consequently, the Courts have implemented a variety of balancing strategies that have frequently proven to be arbitrary.

Balancing of fundamental rights is understood as a technique to give equal space in the constitutional scheme to the rights that hold equal importance.⁴² However, in many instances, the balancing exercise is faced with the issue of incommensurability. Incommensurability refers to the lack of a common metric that can be applied to weigh the rights against each other since they have significantly different values.⁴³ This can also be due to the absence of genuine conflict.

Nonetheless, there are various doctrines employed for balancing two fundamental rights across India, including the usage of neutralising devices. In *Sahara India Corporation v. Securities and Exchange Board of India*,⁴⁴ the SC evolved a two-pronged standard to balance fundamental rights using neutralising devices. This two-pronged test includes the ‘necessity test’, i.e. whether there is any reasonable alternative measure available, and the ‘proportionality standard’, which involves ensuring that the benefits of the balancing measures outweigh the detriment caused to the operation of the right/freedom, which is sought to be limited. Devices to neutralise conflicting rights could include retrial, change of venue, postponement of trial etc.

However, due to the lack of any yardsticks, the different approaches adopted by different judges provide wide discretion to judges, which eventually leads to polyvocality. ‘Polyvocality’ refers to the inconsistency and ‘patchwork jurisprudence’ of the same court where the judges have different and sometimes contradictory views on similar issues.⁴⁵ Even with respect to the neutralising devices, it is not possible to have a straightjacket formula as they are case and facts-specific.⁴⁶ This raises questions regarding the device’s usage, which has the potential to increase arbitrariness in the balancing adjudication.

Another concern for balancing, as mentioned previously, is the requirement of sufficient indulgence with the facts of the case. Courts often treat constitutional rights as highly abstract legal standards, thereby, failing to consider the applicability of facts as well as the level of conflict of fundamental rights.⁴⁷ The Indian jurisprudence on conflict of fundamental rights has also evolved to give importance to the facts of the case. For instance, the appropriate application of the proportionality test as established in *Sahara* requires the Court to effectively examine the facts of the case and the corresponding impact of their verdict.

Nonetheless, it has been observed that the Courts frequently refrain from sufficiently analysing the facts of the case and instead rely on the implicit hierarchy of values within the rights in question to render their decisions. For instance, referring back to *Re: Noise*

⁴¹ Khamroi, *supra* note 8.

⁴² *Sahara India Corporation v. Securities and Exchange Board of India*, (2012) 10 SCC 603, ¶42.

⁴³ Samantha Knutson Jex, *A Balancing Act: Overcoming Incommensurability in Rights Adjudication*, Vol. 36(9), BRIGHAM YOUNG UNIVERSITY PRELAW REVIEW, 109 (2022) available at <https://scholarsarchive.byu.edu/byuplrvol36/iss1/9> (Last visited on July 22, 2024).

⁴⁴ *Sahara India Corporation v. Securities and Exchange Board of India*, (2012) 10 SCC 603.

⁴⁵ Gautam Bhatia, *What is the Role of a Judge in a Polyvocal Court?*, CONSTITUTIONAL LAW AND PHILOSOPHY, April 1, 2017, available at <https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/> (Last visited on July 21, 2024).

⁴⁶ Khamroi, *supra* note 8.

⁴⁷ Pratap, *supra* note 15.

Pollution,⁴⁸ the Court was dealing with a petition for the rigorous enforcement of laws to impose night curfews on the use of loudspeakers for public events like festivals, election rallies, etc. The Court first identified a conflict between the right to life of the petitioner and the right to speech and trade of the business undertakings and other parties.

The Court, without delving into the facts of the case, held that the right to speech does not include aural aggression ‘because’ the same is in violation of the right to the peaceful life of the listener, thereby allowing the rigorous enforcement of laws against the use of the loudspeaker.⁴⁹ Consequently, without delving into the components and restrictions of the right to speech, the Court arrived at its conclusion. Moreover, the Court did not define the threshold for aural aggression — specifically, the decibel level required for noise to be considered aural aggression — an essential aspect of the case. Similarly, Courts have failed to indulge sufficiently with the facts of the cases on several occasions.⁵⁰ Therefore, although the usage of neutralising devices might be beneficial for balancing exercise, the same cannot be efficiently implemented without the necessary contextualisation.

Similar to the conflicts between fundamental rights, human rights are also in conflict frequently. Various theories have been employed in the human rights jurisprudence to move beyond the ‘priority-to-rights’ model, a traditional method based on the hierarchy of human rights.⁵¹ In his book, Smet formulates a structured balancing test which gives importance to the holistic reasoning derived from various criteria based on the values, interests, and facts of the case.⁵² It includes considerations such as the impact of the conflict with respect to the damage caused to the rights, among other considerations. The test also accommodates situations where an additional right might be relevant to the conflict. Notably, the test emphasises the contextualisation of the conflict. While the authors acknowledge the differences in the treatment of human rights and constitutional fundamental rights, such a test, which focuses on the facts of the case and contextualisation, could further enhance the established jurisprudence on the subject.

V. DIFFERENCE BETWEEN BALANCING TEST AND PROPORTIONALITY: SIGNIFICANCE OF CONTEXTUALISATION

The contextualisation of a conflict is more significant for the balancing test than the proportionality test. While there is an established distinction between the proportionality test and the balancing test,⁵³ the Indian Courts have considered the proportionality test (both single and double proportionality tests) as a way to balance a conflict of fundamental rights.⁵⁴ The Supreme Court in Electoral Bonds Case highlighted the four steps of the double-proportionality test (which are the same as the proportionality test). The first prong entails assessing whether the impugned measure is a suitable method for furthering both rights

⁴⁸ Noise Pollution (V), In re, 2005 SCC OnLine SC 1046.

⁴⁹ *Id.*

⁵⁰ K.S Puttaswamy v. Union of India, (2019) 1 SCC 1; Union of India v. Motion Pictures Association, (1999) 6 SCC 150; Mazdoor Kisan Shakti Sangathan v. Union of India, (2018) 17 SCC 324.

⁵¹ Frederick Schauer, *Proportionality and the Question of Weight* in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, 173 (Cambridge University Press, 2014); Matthias Klatt, *An Egalitarian Defense of Proportionality-based Balancing: A Reply to Luc B. Tremblay*, Vol. 12(4), INT. J. CONST. L., 891–899 (2014).

⁵² Smet, *supra* note 27, 141.

⁵³ Virgílio Afonso da Silva, *Balancing may be Everywhere, but the Proportionality Test is not*, GLOBAL CONSTITUTIONALISM (2023) available at <https://doi.org/10.1017/S2045381723000187> (Last visited on July 21, 2024).

⁵⁴ Association for Democratic Reforms v. Union of India, 2024 INSC 113, ¶146.

(rational connection stage), the second determines if it is the least restrictive and equally effective method to achieve both rights, and the third prong assesses whether it has a disproportionate impact on either right.⁵⁵ Evidently, the last step examines the disproportionate impact of the “measure” on the right, which resembles the balancing test.⁵⁶

The proportionality test originated in Germany,⁵⁷ as a tool to introduce individual rights into the authoritarian legal system.⁵⁸ This test, widely adopted across jurisdictions to adjudicate constitutional law and human rights law matters,⁵⁹ employs a structured approach across jurisdictions that does not specifically address the incommensurability of Fundamental Rights.⁶⁰ On the other hand, the balancing test originated in the United States to counteract absolutism in the protection of rights by considering and weighing them against other competing interests.⁶¹ Consequently, incommensurability of values, which refers to the challenge of comparison between the two values that lack a comparable metric, has been a key concern in the balancing test rather than the proportionality test. Accordingly, contextualisation plays a seminal role in the balancing test.

In case of a conflict between two fundamental rights, the single proportionality test is not suitable due to its inability to address the incommensurability of rights. Further, single proportionality tends, due to its inherent nature, to prioritise the right under restriction over the competing right. This is because the single proportionality standard has been designed to minimise the restrictions on the fundamental right.⁶² Consequently, the Court formulated the double proportionality test in *Electoral Bonds*.⁶³ This involves examining the criteria/ the steps of the proportionality test on restrictions of both rights, thereby addressing the incommensurability of fundamental rights. Consequently, the double proportionality test has the essential element of a balancing test.

In the *Electoral Bonds Case*, the two conflicting rights were the right to information of the voter under Article 19 and the right to privacy of the donor under Article 21 due to the electoral bonds policy. The Court framed the issue by questioning the suitability of the electoral bonds policy in furthering the right to privacy and the right to information.⁶⁴ Consequently, the Court observed that the measure restricting the right to information was suitable was appropriate for safeguarding the donor's right to privacy. However, this same measure could never be suitable for realising the right to information as the policy of non-disclosure naturally safeguards the confidentiality of donors. Hence, the framing of the issues failed to apply principle of proportionality separately to the rights.⁶⁵

⁵⁵ Kanishk Srinivas, *Analysing ADR v. UoI: A Case for Conjunctive Double Proportionality*, LAW AND OTHER THINGS, April 5, 2024, available at <https://lawandotherthings.com/analysing-adr-v-uoi-a-case-for-conjunctive-double-proportionality/> (Last visited on July 21, 2024).

⁵⁶ *Association for Democratic Reforms v. Union of India*, 2024 INSC 113, ¶ 157

⁵⁷ Vicki C. Jackson & Mark Tushnet, *Introduction* in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 1* (Cambridge University Press 2017).

⁵⁸ Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, Vol. 8(2), I-CON, 263, 271 (2010) (‘Eliya & Porat’).

⁵⁹ Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, Vol. 47(73), COLUM. J. TRANSNAT’L L., 161 (2008); David Beatty, *THE ULTIMATE RULE OF LAW*, 159-188 (Oxford University Press 2004); David Law, *Generic Constitutional Law*, Vol. 89, MINN. L. REV., 652 (2005).

⁶⁰ Eliya & Porat, *supra* note 59.

⁶¹ *Id.*

⁶² *Association for Democratic Reforms & Anr. v. Union of India & Ors.*, 2024 INSC 113, ¶153

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Mukunda, *supra* note 4.

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Evidently, this signifies the lack of contextualisation while balancing the rights as the court failed to consider the unique context in which the electoral bonds policy has been inherently designed to protect the right to privacy of the donor making it impossible to simultaneously advance right to information. The Court failed to apply those elements of the balancing test which form the true essence of the double proportionality test. Instead, the Court applied a modified version of the single proportionality test. In the opinion of the authors, this failure can be attributed to the lack of distinction between the proportionality test and the balancing test.

VI. CONCLUSION

The Supreme Court's ruling in Electoral Bonds Case is an important development in constitutional law, specifically in addressing disputes between fundamental rights. The Court sought to achieve a balance between the voters' right to information and the political contributors' right to privacy by formulating and employing the double-proportionality test. Nevertheless, the Court's approach in this regard and in previous rulings about conflict of fundamental rights lacks a solid doctrinal foundation and has the potential to enable arbitrary judgements. The Court's inclination to conduct balancing exercises without a well-defined and regular approach can lead to unjust outcomes. To achieve a principled and objective balance of fundamental rights, it is crucial to identify genuine conflicts and utilise a structured and context-sensitive framework. The double-proportionality test, although a positive development, necessitates further improvement and a need to prioritise contextualisation of the facts of the case rather than the general values attributed to the rights.

IN THIS ISSUE

The NUJS Law Review has had the honour of collaborating with a stellar set of authors for this issue. With the indefatigable efforts and support of its associate members, the Editorial Board is immensely proud to present Volume 17(1) of the NUJS Law Review.

Rohan Karan Mehta in their paper titled “‘Medieval’ Law in ‘Modern’ Tech: Bailment and Indian Crypto Exchanges” argues that India’s approach to regulating cryptocurrencies has been piecemeal, despite growing significance in global finance. The paper focuses on the legal relationship between cryptocurrency exchange and its users in India. The author argues that the relationship may best be described as bailment, resulting in important implications for user protections and legal recourse, especially in cases of exchange insolvency. By examining user agreements, analysing the law on bailment, and comparing approaches in other jurisdictions, the paper aims to provide clarity on the legal status of cryptocurrency holdings in India and contribute to the ongoing debate on the subject.

Ria Bansal and Anmol Agarwal their paper titled “Licensing Royalty Rates and Relevant Market Concerns: The ‘Relevance’ of Preparing the Field before the Match” comprehensively evaluate the role of the Competition Commission of India in cases involving abuse of domination by patent holders. Carefully navigating between the sphere of operations of the Patents Act and the Competition Act, they argue that an assessment of the relevant market is essential to aptly determine FRAND rates. They argue that the Patents Act, as it stands, is insufficient to adequately address the regulatory and antitrust concerns arising from abuse of patent rights. Given its experience conducting market demarcations and examining the substitutability of goods, the Competition Commission will play a key role in this method. Exploring this intersection between IP and competition law, the authors draw from foreign jurisprudence to suggest a metric to appropriately determine FRAND rates after examining the relevant market.

Divya Sethuraman & Priyanshi Kothari in their paper titled “The Inconsistent Adjudication of Independent Directors’ Liability and its Impact on their Role and Responsibilities” examine the inconsistent adjudication of independent directors’ liability in India, focusing on interpretations of §149(12) of the Companies Act, 2013. They identify two contrasting approaches: the ‘day-to-day functioning’ test, which often exonerates independent directors, and a more thorough analysis of directors’ diligence. They argue that the former approach misunderstands the role of independent directors and ignores the diligence requirement mandated by law. They advocate for adopting the latter approach, which aligns with recent regulatory developments and better serves the intended purpose of independent directors in protecting minority shareholders’ interests. The paper highlights how this judicial inconsistency further complicates the already unclear landscape of independent directors’ roles and responsibilities.

Thejas Velaga & Aastha Gupta in their paper titled “Airline Insolvency in India: Balancing Interests between the Insolvency and Bankruptcy Code and the Cape Town Convention” examine the repercussions of Go First Airlines’ insolvency on India’s aviation sector, focusing on the challenges faced by aircraft lessors due to the moratorium under the Insolvency and Bankruptcy Code. It analyses the legal framework governing airline insolvency and aircraft repossession, including recent governmental interventions. The paper critically evaluates policy alternatives, particularly the implementation of the Cape Town Convention, arguing that it may not be a comprehensive solution. Instead, it proposes a modified version of

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Alternative C of the Luxembourg Protocol as a more suitable approach for India, balancing national interests with lessors' rights while emphasising the need for an adaptive institutional framework to support legislative changes.

Debayan Bhattacharya in his paper titled “Superleague and International Skating Union: Lessons for Indian Competition Law” examines the intersection of competition law and sports regulation, focusing on recent European Union (‘EU’) cases and their implications for Indian competition law. It analyses the European Court of Justice’s decisions in the Superleague and ISU cases, which address the balance between legitimate sports regulation and anti-competitive practices. The author argues that Indian competition law can benefit from these EU precedents, particularly in three areas: assessing the legitimacy of regulatory objectives, evaluating the justification for player bans, and considering a sport's commercial viability. The paper suggests that incorporating these insights could enhance the analysis and consistency of Indian competition law in sports-related cases.

We hope the readers enjoy reading these submissions and welcome any feedback that our readers may have for us. We would also like to thank all the contributors to the issue for their excellent contributions, and hope that they will continue their association with the NUJS Law Review!

Truly,

Board of Editors,

The NUJS Law Review