EDITORIAL: RECONCILING COMPETING FUNDAMENTAL RIGHTS: AN ANALYSIS OF THE DOUBLE PROPORTIONALITY TEST IN *ASSOCIATION FOR DEMOCRATIC REFORMS V. UNION OF INDIA*

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The Electoral Bonds Scheme was introduced to reduce the flow of black money in politics. It allowed authorised banks to issue electoral bonds that could be used to donate to political parties. This scheme also relaxed disclosure requirements and removed caps on corporate donations. The Supreme Court of India ruled that the Electoral Bonds Scheme was unconstitutional, as it limited the public's ability to make informed choices during elections due to the lack of transparency about donors and donation amounts. This undermines the core principles of democracy, such as openness, accountability, and participation. Further, to reconcile the competing rights of donor privacy and the right to information of voters, the Court devised and applied the double proportionality test. This article examines this test and argues that the Court erred in suggesting that this test would not apply when the Constitution provides for a hierarchy between competing rights. It also contends that it is challenging to meet the requirements specified by the Court regarding suitability and necessity. Finally, it suggests that the Court should have emphasised upon the comparative importance of the competing rights.

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INTRODUCTION

The Electoral Bonds Scheme, 2018 (**"EBS"**)[2] was introduced through the Finance Act, 2017 by the then Finance Minister, Mr. Arun Jaitley, as a measure to curb black money in politics. To encourage contributions through legitimate sources, it allowed authorised banks to issue electoral bonds, which could be purchased by individuals or entities wishing to contribute to political parties. Additionally, the EBS relaxed disclosure requirements and removed the cap on corporate contributions. The Supreme Court of India, in its landmark decision of *Association for Democratic Reforms v. Union of India* (**"ADR"**)[3] declared EBS as unconstitutional. It observed that, by concealing the identity of donors and the quantum of their political contributions, the EBS would severely curtail the public's ability to make informed choices during elections. This opacity in political funding would undermine the core principles of transparency, accountability and participation essential to a democracy. The EBS was, therefore, a "*manifestly arbitrary*"[4] and disproportionate restriction on the right to information of the voters.[5]

Nevertheless, the Court recognised that donor privacy is a fundamental right, since information regarding a person's political beliefs and opinions may be misused to suppress dissent.[6] It noted that it is imperative to protect donor privacy to enable individuals to form their political opinions and exercise their freedom of political expression.[7] Hence, it

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[2] The Finance Act, 2017, §§ 11, 137 & 154, The Gazette of India, pt. II sec. I (Mar. 31, 2017); The Reserve Bank of India Act, 1934, § 31(3), No. 2, Acts of Parliament, 1934 (India); The Representation of People Act, 1951, § 29C, No. 43, Acts of Parliament, 1951 (India); The Companies Act, 2013, § 182(3), The Gazette of India, pt. II sec. 1 (Aug. 30, 2013); and, The Income Tax Act, 1961, §13A, No. 43, Acts of Parliament, 1961 (India); These provisions were introduced or amended by the Finance Act, 2017.

[3] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214.

[4] Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶ 51.

[5] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 215.

[6] *Id.* ¶ 134.

[7] *Id.*

formulated the "*double proportionality test*"[8] to reconcile the right to privacy of the donors with the right to information of the citizens. This test may be applied to reconcile competing fundamental rights when the text of the Constitution does not provide for a hierarchy between them.[9] The test comprises three stages. *First*, determining whether the impugned measure is "*suitable*" for furthering both conflicting rights.[10] *Second*, assessing whether the measure is "*necessary*," i.e., it is the least restrictive means to further both competing rights and there are no other equally effective alternatives.[11] *Third*, the evaluation of whether the measure disproportionately impacts either right.[12] This test aims to ensure that equal respect is conferred on competing rights, and is therefore, applied from the perspective of both competing rights.

This article examines the application of the double proportionality standard in this case and assesses the efficacy of the double proportionality test in resolving complex rights conflicts, highlighting its potential shortcomings. Finally, it suggests changes to the test to enhance its efficacy in reconciling competing rights.

RECONCILING COMPETING RIGHTS: AN OVERVIEW OF PRE-*ADR* JURISPRUDENCE

The proportionality principle is the predominant framework for balancing competing rights in most legal systems. This approach treats rights as fundamental principles and seeks to establish a fair equilibrium, ensuring neither is unduly compromised while maximising protection for both, in light of all relevant circumstances.[13] It comprises four stages. The first step is "*legality*." At this stage, it is determined whether the conflict between the fundamental rights has arisen since "*a law*" restricts one fundamental right to safeguard the other. The realisation of one fundamental right serves as a "*legitimate aim*" for restricting the other.

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[8] *Id.* ¶ 145.
[9] *Id.* ¶ 157.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] KAI MOLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (Oxford University Press, 1st ed., 2015).

Thereafter, the "*suitability*" of the means employed to achieve this legitimate aim is assessed by evaluating if there is a "*rational connection*" between the means and the end. The third step involves an examination of "*necessity*." At this stage, the chosen measure is compared with available alternatives on the grounds of efficacy and the degree of limitation it imposes on one right to enforce the other. The chosen measure only passes muster if it is the "*least restrictive*" and there are no "*equally effective*" alternatives available. The fourth and last step involves "*balancing*" the beneficial effects of the chosen measure with its deleterious effects in the given context.

There are slight differences in the application and the formulation of this standard across different jurisdictions. For instance, while in Canada, the analysis ends at the necessity stage if equally effective and less restrictive alternatives are available,[14] in the European Union ("**EU**"), the analysis continues till the final stage, even if less restrictive and equally effective alternative means are available, as other relevant considerations may be taken into account only at this stage to ascertain if a fair balance was struck or not.[15] Likewise, in the UK, the balancing test requires, "*an intense focus on the comparative importance of the specific rights claimed in the individual case.*"[16] Nevertheless, the constitutional courts in all these jurisdictions strive to achieve a fair balance between competing fundamental rights.

In contrast, the constitutional courts in India have had an *ad-hoc* approach to balancing competing fundamental rights. However, in most cases, they have applied a contextual balancing test. Further, unlike the US Supreme Court, which prioritises freedom of speech over other fundamental rights,[17] Indian constitutional courts have refrained from granting

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[14] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 SCR 835 (Can.).

[15] Allan Rosas, *Balancing Fundamental Rights in EU Law*, 16 CAMBRIDGE Y.B. EUR. LEGAL STUD. 347, 351-352 (2014).

[16] McKennitt v. Ash, [2007] EMLR 113.

[17] Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul,* 106 HARV. L. REV. 124 (1992); FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT (Yale University Press, 1st ed., 2017).

automatic precedence to any fundamental right. Instead, they have relied on external factors[18] such as "public interest" rather than constitutional values underlying the competing fundamental rights while balancing them. For instance, in *Mr. X v. Hospital Z,*[19] the Supreme Court prioritised the right to life and health of a woman over the fundamental right to privacy of her fiancée who was an HIV-positive patient. It observed that in a conflict of fundamental rights, the right "*which would advance public morality or public interest*"[20] in the given set of circumstances would alone be preferred. Likewise, in *PUCL v. Union of India*[21] the Court prioritised the right to information of the voters, as it served the larger public interest in that context. As a consequence, one fundamental right had to give way to enforce the other.

However, in other cases, the courts have ensured that the competing fundamental rights were given the maximum possible effect. For example, in *Subhash Chandra Aggarwal,*[22] the Court applied the proportionality standard to balance the right to privacy and judicial independence against public interest in disclosure and judicial accountability. Herein, the respondent had sought information regarding the assets of sitting judges, their correspondence regarding appointments of judges, and the likely influence over their decision. The Court determined that the Right to Information Act, 2005, constituted a justified limitation[23] on the right to privacy. It satisfied the requirements of "*legality*" and "*legitimate aim*" as it is a law that provides for the implementation of the fundamental right to information.[24] Further, it

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[18] The constitutional courts must preferably refrain from assigning priority amongst rights on the basis of external factors like national security or public interest. Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas* in EVA BREMS (ed.), CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19 (Intersentia, 1st ed., 2008).

[19] Mr. X v. Hospital Z, (1998) 8 SCC 296.

[20] *Id.*

[21] People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1.

[22] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶ 87.

[23] Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1. The Court applied the proportionality standard laid out for limiting the fundamental right to privacy.

[24] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶ 42.

passes muster the requirements of "*necessity*" and "*proportionality*" as its provisions[25] permit disclosure of personal information only when public interest in knowing that information clearly surpasses the individual's right to privacy, and there is minimal risk of causing harm to a third party.[26]

The Court clarified that the mere existence of public interest does not prioritise the right to information over the right to privacy. Both rights flow from the Constitution, hence, they must be carefully weighed against each other, considering the specific goals underlying them, and the broader societal benefits that would flow from the disclosure or concealment.[27] For example, in this case, the goal of judicial independence could either be enhanced or compromised by the disclosure of personal information, depending on its specific nature and content.[28] The disclosure of judges' assets for instance would enhance accountability and judicial independence.[29]

Other members of the bench also relied on proportionality standards and emphasised that the fundamental right to privacy, and the right to information are "*co-equals*," neither can take precedence over the other and, they must be balanced.[30] Relying on the balancing test adopted in the UK in "*misuse of private information*"[31] cases, Ramana J. proposed a two-step approach to reconciling the right to information with privacy concerns. *First*, it must be determined whether the information in question carries a reasonable expectation of privacy, considering factors like the

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[25] The Right to Information Act, 2005, §§ 8(1)(j), 11, The Gazette of India, pt. II sec. I (Jun. 21, 2005).
[26] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶¶ 46–62.
[27] *Id.* ¶¶ 72–74.
[28] *Id.* ¶¶ 88–89.
[29] *Id.*
[30] *Id.*
[31] *See* Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22; Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.

information's nature and the individual's status.[32] If such an expectation exists, a subsequent evaluation is necessary to weigh the public interest in disclosure against the individual's privacy rights.[33] This assessment should consider potential benefits and harms to the public, as well as the specific nature and content of the information.[34] Chandrachud J. also relied on *Campbell*[35] to affirm the same. He reiterated that only when the information in question is identified as private and there are countervailing grounds for disclosure, the question of proportionate balancing arises. In this exercise, both the right to privacy and the right to information are legitimate aims and the concerned authority would have to balance both rights carefully such that enforcement of one right must not amount to undue abridgement of the other.[36]

Similarly, in *Sahara India Real Estate Corp. v. SEBI*,[37] a Constitution Bench of the Supreme Court reconciled freedom of press[38] with the right to fair trial.[39] It examined how other countries, like Canada and the UK handle similar cases. It looked at Canadian rulings in *Dagenais*[40] and *Mentuck*,[41] and the UK's approach to balancing freedom of expression with the administration of justice in contempt of court cases.[42] Drawing parallels, it elucidated that none of the values in the Constitution are absolute, and all constitutional values must be "*qualified and balanced*" against other

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[32] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.
[33] *Id.* ¶¶ 36-39.
[34] *Id.*
[35] Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22.
[36] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.
[37] Sahara India Real Estate Corp. v. Securities & Exchange Board of India, (2012) 10 SCC 603.
[38] INDIA CONST., art 19(1)(a), which guarantees Freedom of Speech & Expression which encompasses the freedom of press. *See* Brij Bhushan v. State of Delhi, AIR 1950 SC 129.
[39] INDIA CONST., art. 21, which encompasses the right to a fair trial. *See generally*, P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578.
[40] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[41] R v. Mentuck, [2001] 3 S.C.R. 442.
[42] *See* PNM v. Times Newspapers Ltd. and Others, [2017] UKSC 49.

competing values.[43] It observed that like these jurisdictions, the Indian judiciary may rely on the tests of "necessity and proportionality" to assess whether a prior restraint must be imposed on publication of judicial proceedings to avert any "*real and substantial risk of prejudice to the administration of justice*". Unless the party seeking such a restraint is able to demonstrate such a risk, the open justice principle and consequently, the public's right to know would demand that judicial proceedings must be publicised. Likewise, in *Anuradha Bhasin v. Union of India*,[44] the Court stated that it relies on contextual balancing to "*harmonize competing rights*."[45]

ELECTORAL FUNDING: TRANSPARENCY V. PRIVACY

As discussed earlier, the constitutionality of the EBS was challenged by the Association for Democratic Reforms. Accordingly, the Supreme Court had to ascertain if the right of voters to know where funds to the political party come from, should outweigh the privacy rights of those donating the money. The Court held that the EBS unduly impinges upon the right to information of voters.[46] It undermines the foundational principles of the right to information, such as, "*good governance, transparency, accountability, participatory democracy, and individual self-fulfilment*." Moreover, less restrictive alternatives, such as the Electoral Trust Scheme,[47] could effectively address the concerns of donor privacy and black money in electoral funding. Therefore, it was neither necessary nor proportionate.

A. TRANSPARENCY AS A PRE-CONDITION FOR EFFECTIVE DEMOCRATIC PARTICIPATION

[43] Sahara India Real Estate Corp. v. Securities & Exchange Board of India, (2012) 10 SCC 603.
[44] Anuradha Bhasin v. Union of India, (2020) 3 SCC 637.
[45] *Id.*
[46] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 216.
[47] The Income Tax Act, 1961, § 2(22AA), No. 43, Acts of Parliament, 1961 (India).

A well-informed citizenry is essential for a thriving democracy.[48] Citizens need access to information to understand the actions of their elected representatives, evaluate their performance, and participate meaningfully in the political process.[49] Since voting is "*one of the foremost forms of democratic participation*",[50] the Court observed that voters must have the right to access information that would "*allow them to cast their votes rationally and intelligently.*"[51] Prior to the introduction of the EBS, corporate donations to political parties were subject to caps and stringent disclosure mandates.[52] Political parties were obligated to maintain detailed records, undergo regular audits,[53] and submit comprehensive annual financial reports to the Election Commission of India.[54] The introduction of the EBS through the Finance Act, 2017, marked a significant departure from this regime, eliminating the cap on corporate funding and significantly relaxing disclosure requirements.[55] Under the new regime, corporations were only obligated to disclose the aggregate amount donated for political purposes.[56] The EBS further eroded transparency by exempting political parties from maintaining accounts for funds received through electoral bonds.[57] Additionally, political parties were not obligated to disclose the contributions received through electoral bonds to the Election Commission of India.[58] While the identity of the purchaser of an electoral bond can theoretically be traced through "*know your customer*" records of the issuing bank, the involvement of intermediaries can easily shield the

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48 People's Union for Civil Liberties v. Union of India, (2013) 10 SCC 1; Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294.

49 Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶¶ 65, 71.

50 *Id.* ¶ 77.

51 *Id.* ¶¶ 79, 95.

52 The Companies Act, 2013, §§ 293A, 182, No. 18, Acts of Parliament, 2013 (India); The Income Tax Act, 1961, §§ 80GGB, 80GGC, No. 43, Acts of Parliament, 1961(India).

53 The Income Tax Act, 1961, §§ 13A, 80GGB, 80GGC, No. 43, Acts of Parliament, 1961 (India).

54 The Representation of People Act, 1951 § 29C, No. 43, Acts of Parliament, 1951 (India).

55 The Companies Act, 2013, § 182(3), No. 18, Acts of Parliament, 2013 (India).

56 *Id.*

57 The Income Tax Act, 1961, § 13A, No. 43, Acts of Parliament, 1961 (India).

58 The Representation of People Act, 1951 § 29C, No. 43, Acts of Parliament, 1951 (India).

identity of the real donors.[59] This lack of full transparency raised concerns with the Court about potential undisclosed "*quid pro quo*" arrangements between corporate donors and political parties.[60]

The Court held that the EBS exacerbated political inequality in three ways. *First*, by removing the cap on corporate donations, the scheme enables corporations to wield disproportionate influence over the political process and distort free and fair electoral competition.[61] *Second*, it would hinder effective democratic participation by obstructing voters from making informed decisions.[62] *Third*, it would enable economically affluent persons to influence government policy.[63] Accordingly, the Court held that the EBS was "*manifestly arbitrary*" as its "*real purpose*" diverged from the "*ostensible purpose*" projected by the legislature.[64] It also treated the political contributions between individuals and corporations in the same manner without any consideration for the impact of corporate funding on politics.[65]

B. THE PITFALLS OF THE DOUBLE PROPORTIONALITY STANDARD FOR RECONCILING COMPETING RIGHTS

The Court identified two potential justifications for the EBS, "*curbing black money and safeguarding donor privacy.*" While acknowledging the government's aim to curb black money, the Court found the EBS disproportionate. Given the existence of less restrictive measures like cheques, bank drafts, electronic clearance, and the Electoral Trust Scheme,[66] the Court concluded that the scheme was not necessary to

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[59] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 17.
[60] *Id.* ¶ 103.
[61] *Id.* ¶¶ 46-55, 202-204 & 210.
[62] *Id.* ¶¶ 102-104.
[63] *Id.* ¶ 100.
[64] *Id.* ¶¶ 207-209.
[65] *Id.* ¶ 215.
[66] The Income Tax Act, 1961, § 2(22AA), No. 43, Acts of Parliament, 1961 (India). The Electoral Trust collects political contributions and disburses them. It only reports the no. of contributors, contributions received and how they were distributed between

achieve its stated objective.[67] Notably, the Court conducted this proportionality analysis despite the fact that the right to information flows from Article 19(1)(a) of the Constitution, and may be "*reasonably restricted*" only on grounds mentioned in Article 19(2).

With respect to the legitimate aim of protecting the privacy of political affiliation,[68] a fundamental right, the Court devised and applied the "*double proportionality standard.*"[69] It observed that conflicts between fundamental rights may be resolved by applying this standard, provided the Constitution doesn't explicitly prioritise one right over another.[70] For example, the freedom of religion is subject to limitations imposed by other fundamental rights. Therefore, in cases of conflict, these other rights would automatically prevail.[71] This aspect of the judgment significantly deviates from the existing constitutional jurisprudence. The Indian Constitution is a transformative and organic document.[72] It is a toolkit for re-engineering a society recovering from the injustices of the colonial era. Its provisions are aimed at furthering a social revolution or creating conditions that are necessary for it.[73] The fundamental rights are, therefore, read as a whole.[74] By suggesting that there exists a hierarchy between the fundamental rights in the Indian Constitution, the Court has overlooked their shared constitutional underpinnings.

Moreover, the Court failed to account for the significance of the individuals or entities holding the conflicting rights, which could potentially establish a hierarchy among them. For instance, in this case, the protection of donor privacy was essential for protecting citizens' political affiliation rights, their freedom of thought and self– self-determination; corporations, as non-citizens and juristic persons, lack the

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political parties. Hence, it is impossible to discern who has contributed to which political party.

[67] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 169.

[68] *Id.* ¶¶ 134 – 139, 141.

[69] *Id.* ¶ 145.

[70] *Id.*

[71] *Id.*

[72] Justice (Retd.) K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

[73] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 4 (Clarendon Press, 2d. ed., 1966).

[74] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

constitutional freedoms of expression, association, thought and self-determination. Thus, restricting their privacy did not compromise these fundamental constitutional values. The Court also recognised this asymmetrical impact on rights.[75] This imbalance necessitated a tiered approach to balancing these rights. While both rights deserve equal consideration when the context involves citizen donors, the imbalance in the context of corporate donors warrants a different starting point for analysis in the case of corporate donors.

However, the double proportionality standard ensures that competing rights receive equal consideration right from the first stage of the analysis, i.e., suitability. As mentioned above, at this stage it is assessed whether the chosen measure furthers both competing rights. While it is conceivable that a measure could simultaneously advance both competing rights in certain instances, the present case itself exemplifies a scenario where this is not feasible. The EBS and its alternative, the Electoral Trust Scheme, enhance donor privacy, with the EBS imposing significantly greater restrictions on the right to information. Further, despite stating that the chosen measure must be suitable for furthering both competing rights, the Court proceeded to the next stage of analysis by simply assuming that EBS furthers both donor privacy and freedom of information.[76] Even if we assume it does, it is logically implausible for it to be the least restrictive and equally effective alternative to further both freedom of information and the right to donor privacy. The alternative, the Electoral Trust Scheme too, would not pass muster if the Court examined whether it is a necessary measure for realising both donor privacy and the right to information.

Moreover, the Court has overlooked the possibility of irreconcilable conflicts between fundamental rights. In such scenarios, the application of the double proportionality test might not be feasible. For example, as discussed above in the case of *Mr. X*,[77] safeguarding his fiancée's right to

[75] *Id.* ¶ 213.
[76] *Id.* ¶ 163.
[77] Mr. X v. Hospital Z, (1998) 8 SCC 296.

life and health necessitated a certain degree of intrusion into his privacy. Another such instance is exemplified by the well–known frozen embryos case.[78] Herein, a woman had approached the European Court of Human Rights to challenge the UK law that required the consent of both male and female partners for the IVF process to continue. The Court sympathised with her plight and noted that though she would be denied an opportunity to be a mother, the consent of the male partner in becoming a parent could not be overridden by her right to enjoy family life. In cases like these there is neither a hierarchy or rights, nor is it possible to identify common constitutional values underlying these rights to proportionately balance them in the given context.

Additionally, when applying the proportionality test, the relative importance of the rights must be considered in reference to the given context. While the Court acknowledged the relevance of both donor privacy and the right to information, it failed to explicitly incorporate this assessment into the steps of the double proportionality standard. This is ironic, as the Court proposed the double proportionality standard precisely because it was concerned that the "*single*" proportionality standard would give greater weightage to one right over the other.[79]

Therefore, a more comprehensive framework is required to ensure that the comparative weight of competing rights is explicitly accounted for. This can be achieved by adapting the single proportionality test. *First*, for applying the proportionality standard, the nature of the conflict between the rights in question must be ascertained. The rights in conflict should further some common constitutional values in the given context and must not be in total opposition to one another. For instance, both free speech and privacy further democratic participation, hence, it is possible to reconcile them using the proportionality standard. Conversely, in the context of a practice like Sati, freedom of religion and the right to life cannot be reconciled, as they would further diametrically oppose constitutional values in that context.

Second, as the objective of the proportionality test is to give the maximum possible effect to the competing rights, the nature of both rights,

[78] Evans v. The United Kingdom, 43 E.H.R.R, 21.
[79] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214, ¶ 153.

particularly the constitutional values underlying both rights in a given context must be duly considered. Hence, at the stages of suitability and rationality, a rational connection with the constitutional values underlying each of the rights must be identified. One right would then serve as the legitimate aim for limiting the other.

Thereafter, as is the practice in other jurisdictions like Canada[80] or the UK,[81] at the necessity stage, the necessity of limiting one right to further the other must be ascertained in reference to the underlying context and common constitutional values furthered by the competing rights. Finally, the beneficial effects of furthering one right must be weighed against the deleterious effects of limiting the other and vice-versa in the given context. At this stage, the broader societal impact may be considered as has been done in other jurisdictions like Canada,[82] UK[83] and South Africa.[84]

CONCLUSION

The Supreme Court's decision in *Association for Democratic Reforms*[85] marks a critical advancement in promoting the principles of open government, transparency, and effective democratic participation. However, the formulation of the double proportionality standard complicates the reconciliation of competing rights, often creating insurmountable challenges in application. Adapting the proportionality principle to accommodate the unique challenge of reconciling fundamental rights could provide a more effective and practical framework. The *Dagenais*[86]/*Mentuck*[87] framework from Canada and the jurisprudence

[80] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[81] Naomi Campbell v. Mirror Group Newspapers Ltd. [2004] UKHL 22.
[82] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[83] Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.
[84] NM v. Smith, 2007 (5) SA 250 (CC).
[85] Association for Democratic Reforms v. Union of India, (2024) 5 SCC 214.
[86] Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 (Can.).
[87] R v. Mentuck, [2001] 3 S.C.R. 442.

pertaining to the "*misuse of private information*"[88] in the UK are illustrative. The Court could begin the analysis by assessing the legality of the said measure that limits one fundamental right to further the other. It must ensure that the measure is imposed by law. Thereafter, it must assess the suitability of the measure for furthering one right and limiting the other. Notably, the limitation imposed on one right must have a rational connection with the protection accorded to the other.

Further, it could examine the necessity of restricting one right to realise the other. At this stage, only internal factors like underlying constitutional values should be given consideration. Finally, it could comparatively assess the importance of both competing rights in the given context to determine if the chosen measure is proportionate and constitutional. At this stage, external factors like broader societal interests may be considered to conduct an overall assessment of the pros and cons.

Adapting the single proportionality test in this manner, would thus simplify the process and prevent the creation of insurmountable challenges for legislative measures.

IN THIS ISSUE

The fields of constitutional law, and administrative law and their comparative aspects demand academic rigour from both the authors and the editors. Together, we are in a position to deliver something meaningful to the academic discourse. As the Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (**"CALJ"**) under the Centre for Comparative Constitutional Law and Administrative Law (**"CCAL"**), it gives me immense pleasure to introduce Issue I of Volume IX of our journal to the readers.

In ***Moving from the Basic Structure Towards a Permanent Structure: From Positive Law to Natural Law***, Prof. (Dr.) Devinder Singh, Dr. Deepak Kumar Srivastava, and Surya Dev Singh Bhandari examine the limitations of the basic structure doctrine in ensuring long-term constitutional integrity. Drawing from historical precedents and jurisprudential debates, the authors argue for a transition towards a

[88] Murray v. Express Newspapers Ltd. [2008] EWCA Civ. 446.

'permanent structure' rooted in natural law principles, offering a framework that could better safeguard fundamental constitutional values from transient political upheavals. The authors explore how legal history—from Nazi Germany's misuse of constitutional mechanisms to consolidate absolute power to postcolonial India's constitutional amendments—illustrates the fragility of constitutional safeguards in the face of political opportunism. Engaging with jurists like Hans Kelsen, Carl Schmitt, and Maurice Hauriou, they propose an alternative: a hierarchical framework that situates constitutional values within a 'permanent structure' rooted in natural law philosophy. This, they argue, would limit even a future constituent assembly's ability to undermine certain fundamental rights and democratic principles.

Dr. Uday Shankar, Sricheta Chowdhury and Sourya Bandyopadhyay in ***'Governed by Whom?' – Redefining the Role of Higher Judiciary, Diversity and Judicial Legitimacy in the Indian Context***, explore the expanding authority of the Supreme Court and High Courts. The paper interrogates how judicial power has evolved, often stepping into governance spaces left vacant by the legislature and executive, raising fundamental questions about democratic legitimacy. The authors analyse the intersection of judicial activism and legitimacy, emphasizing how the collegium system—despite its commitment to independence—lacks transparency in judicial appointments. The article evaluates whether increasing gender and social diversity in judicial selection can enhance public trust in the judiciary while maintaining its independence. Engaging with jurisprudential debates and comparative constitutional frameworks, the authors propose that a more representative and transparent judiciary could resolve the legitimacy concerns facing India's higher courts.

Dr. Ashit Srivastava and Aashutosh Jagtap, in '***Linguistic-cracy'***, examine the phenomenon of state-sponsored language discrimination. The article delves into how language has historically been wielded as a mechanism of governance, sometimes even serving as a means of oppression. The authors introduce the concept of linguistic theocracy, arguing that just as religion has been used to establish state identity,

language too has been leveraged to create exclusionary governance structures. The paper navigates through comparative case studies, including the imposition of Urdu in East Pakistan, Canada's Francophone immigration policies, and the European Union's handling of linguistic rights. Through these examples, the authors illustrate the tensions between cultural majoritarianism and minority linguistic protections. Engaging with constitutional safeguards from India, the European Court of Human Rights, and the International Covenant on Civil and Political Rights, they assess how legal frameworks either uphold or undermine linguistic diversity.

In ***'Securitization, Belonging and Citizenship Revocation in India',*** Atreyo Banerjee examines the statutory and judicial frameworks that underpin the termination and deprivation of citizenship under the Citizenship Act, 1955. By meticulously tracing the historical debates from Partition to the present day, the article unravels the ways in which executive supremacy and overlapping legislative regimes create a labyrinth of discretionary power, often at the expense of procedural fairness. With a keen eye on both archival records and recent judicial pronouncements, Banerjee illustrates how narratives of existential threat and the drive for national security have been mobilized to justify the exclusion of marginalised groups and to circumvent robust judicial oversight. The study not only exposes the legal ambiguities—such as the contested notion of 'voluntary' foreign citizenship acquisition—but also calls for a fundamental reimagining of India's citizenship regime to restore accountability and uphold democratic values.

In ***'Does the Political Question Doctrine Have a Place in the Indian Constitutional Setup?: An Analysis Through the Lens of Landmark Supreme Court Decisions'***, Arjun Sagar offers a meticulous examination of how the Indian Supreme Court has navigated the murky terrain of political questions. Sagar scrutinizes landmark cases that illuminate the doctrine's fluctuating role—from constitutional amendment disputes and state-emergency controversies to the justiciability of ordinance promulgations and foreign policy matters. The article seeks to determine the political question doctrine's place in the Indian constitutional set-up. Rooted in American constitutional jurisprudence, this doctrine compels judicial abstention in matters

deemed more appropriate for resolution by the political branches, even as its precise scope remains contested. By engaging with diverse theoretical approaches and contrasting them with evolving judicial practice, his analysis reveals the inherent tensions between upholding judicial review and respecting the prerogatives of the political branches.

Finally, Aditya Rawat in the wake of ongoing debates about decolonization and the search for a uniquely indigenous constitutional narrative, reviews ***Arghya Sengupta's 'The Colonial Constitution – An Origin Story'*** which has emerged as a provocative intervention. Rawat's review thoughtfully engages with Sengupta's central thesis—that India's constitutional framework, far from being a pristine product of post-colonial aspiration, is deeply entangled with colonial knots that continue to influence its interpretation and practice. Rawat situates Sengupta's work against a backdrop of persistent calls for decolonial constitutionalism, where even celebrated texts are re-examined through the lens of historical subjugation and epistemic dominance. In doing so, the review opens a critical dialogue on whether the colonial inheritance of legal structures necessitates a complete reimagining of India's constitutional identity, or if it can be reclaimed and repurposed to serve contemporary democratic aspirations. This introduction sets the stage for a nuanced exploration of the work's merits and its limitations, inviting readers to rethink the origins—and the future—of India's constitutional order.

CCAL ACTIVITIES

Over the last seven months, CCAL has undertaken several activities aimed at fostering interest and development in the fields of constitutional law and administrative law. The endeavour of the Centre to encourage discourse on the subject matter of constitutional and administrative law is furthered by hosting our annual National Seminar on Constitutionalism in Contemporary Times, guest lecture events, Writ[e] & Talk podcast and the regular publication of articles on topics of contemporary relevance on our blog "*Pith and Substance: The CCAL Blog*".

The Centre for Comparative Constitutional and Administrative Law hosts its podcast, "*Writ[e] and Talk*." This podcast features in-depth interviews with the authors of various articles. It allows listeners to take them beyond the written word, by delving further into the concepts, arguments, and analyses underlying published works. The same is hosted by Ms. Sayantani Bagchi, and our student members. Listeners can subscribe to our podcast on YouTube, Google Podcasts, and Spotify. This came as a further development to talks that were organised by the centre which saw several luminaries over the span of 4 years such as Dr. Seema Kazi, Dr. Rowena Robinson, Dr. Prashant Narang to name a few.

In pursuance of the same, this semester, we had the pleasure of hosting Professor Adrienne Stone, hosted by Ms. Kovida Bhardwaj, in her book chapter *Freedom of Expression and the Constitutional Canon*, published in *Global Canons in an Age of Uncertainty: Debating Foundational Texts of Constitutional Democracy and Human Rights*. She examined the landmark freedom of expression cases across jurisdictions, analysing how these cases collectively form a constitutional "canon". She explored how this canon reveals diverse conceptions of free speech rooted in the core constitutional values of liberty, equality and dignity. The discussion revolved around critique and engagement with the canon itself, offering a comparative and contextual analysis, while emphasizing its educational potential.

Our podcast is available on Spotify, Google Podcasts and YouTube. Transcripts of the episodes and links to relevant reading material can be found on our blog, Pith & Substance: The CCAL Blog.

The centre also had the pleasure of hosting Dr. Upendra Baxi, who gave a lecture with his profound analysis of 'evasive' jurisprudence in constitutional interpretation and offered deep insights into the nuances of judicial reasoning and its impact on constitutional law. His vast expertise and scholarly engagement stimulated critical discussions, leaving participants with a more refined understanding of the complexities inherent in constitutional jurisprudence. The University was also visited by Farhan Zia for their lecture on Queerness, Human Rights and the Law.

The centre aims to encourage dialogue and make academia accessible, by simplifying ideas and constitutional theory, for students and people from a non-legal background to understand the same.

For Constitution Day, the Centre hosted an Intra-University Essay Writing Competition for students of the university, inviting them to critically engage with the ethos of the Constitution, highlighting the legacy of Indian jurists whose contributions to the evolution and interpretations to the Constitution have been invaluable. This year, our 3rd edition, invited students to write on Justice HR Khanna.

Last, as a first-time feat, the Centre, in collaboration with the Constitutional Law Society at National Law University Jodhpur hosted the first offline and 3rd annual National Seminar titled '*Constitutionalism in Contemporary Times*', on 7th September, 2024. The seminar saw around 40 participants, spanning students to academicians, presenting their papers in front of a panel of appraised legal luminaries such as Dr. Niranjan Sahoo, Dr. Nizamuddin Siddiqui, Dr. Shameek Sen, Dr. Shivaraj Huchanavar, Dr. Max Steur and Dr. Seema Kazi.

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Manugonda Soumya, Dhruv Singhal, Kovida Bhardwaj, Mohak Dua, Mudit Mangalam Pandey, Aadisha Dhaliwal, Aashirya Malik, Adithya Talreja, Amita Kaka, Anand Shankar, Gurmehar Singh Bedi, Manishka Baweja, Mayank Sinha, Paavani Kalra, Prabhav Chaturvedi, Suhana Gandhi — have been assets to our team.

We would like to express our gratitude to Mr. Gyan Bissa and the University's IT department for maintaining our website and providing us with sufficient resources. The Board also recognises the vital part performed in processing each application and ensuring the efficiency of the process by the University's Students Section. On behalf of the Board, we must also thank our authors for taking the time to contribute to this issue. The topics covered in this issue are of contemporary relevance to Indian Constitutional Law as well as theoretical underpinnings of the Constitution.

We are grateful to the writers for their persistence and cooperation throughout the editing process, which made the timely and smooth release of this issue possible. The Board hopes that readers will find this issue to be a useful resource and that it will encourage informed discussion on the topics of administrative law and constitutional law. Should our readers have any queries, suggestions or feedback for us, write to us at: **editorcalq[at]gmail[dot]com.**

Himanshi Yadav

Editor-in-Chief