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Conflicting Fundamental Rights Under the Indian Constitution: Analyzing the Supreme Court's Doctrinal Gap

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**CONFLICTING FUNDAMENTAL RIGHTS UNDER THE INDIAN CONSTITUTION:
ANALYZING THE SUPREME COURT'S DOCTRINAL GAP**

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ABSTRACT

The Constitution of India recognizes a wide variety of fundamental rights: civil and political, socio-economic, and group rights. A conflict between these rights is a common occurrence. The Supreme Court of India's method of resolving conflicts has been ad-hoc, nebulous, and vague. The Court rarely locates the conflict at a granular level and, on the rare occasion that it does, the decision lacks comprehensive reasoning. This paper attempts to demonstrate the doctrinal, structural, and reasoning gap in the Court's jurisprudence. The paper does so by analyzing a subset of cases where the Court has adjudicated on conflicts between the right to life and dignity and the right to speech and assembly.

The paper starts by briefly describing two contrasting normative models of rights-adjudication: the 'specification' model and the 'balancing' model to set a benchmark for rights-conflict adjudication (Part II). Then, the paper explains the framework of fundamental rights in India and how these rights conflict (Part III). It points out the doctrinal inconsistency in the Court's approach while adjudicating rights conflict and discusses the problems in the Court's reasoning (Part IV). Thereafter, the paper examines the urgent need to resolve these issues (Part IV and Part V). Finally, in Part VI, the paper suggests a comprehensive analytical framework to narrowly locate the conflict of rights in the facts of the case and structure the rights-balancing exercise.

CONFLICTING FUNDAMENTAL RIGHTS UNDER THE INDIAN CONSTITUTION: ANALYZING THE SUPREME COURT'S DOCTRINAL GAP

I. INTRODUCTION

Recently, a petition in the Supreme Court of India (“The Court”) sought restrictions on protests on a national highway and the Court canvassed it as a conflict between two Fundamental Rights: the protestors’ right to assembly and the commuters’ right to movement.¹ Similarly, when a law excluding menstruating women from accessing temples was challenged, the women’s individual right to equality in professing and practicing religion was apparently in conflict with the temple’s right to manage its affairs.²

The Court’s framing of issues in these cases is not novel; it frequently decides conflicts of constitutional rights. Rights-conflicts are unavoidable under the Indian Constitution because of two reasons: *First*, the Constitution recognizes a wide range of justiciable Fundamental Rights: (i) civil and political individual rights, like the right to freedom of speech³, right to practice and profess religion,⁴ and right to life and liberty⁵; (ii) socio-economic individual rights, both enumerated and unenumerated (but judicially recognized)⁶; (iii) right to equality and the right against discrimination⁷; and (iv) group rights, like a religious denomination’s right to manage their affairs⁸. *Second*, these rights have both negative and positive components; namely, they “prevent [] the State from interfering with individuals” and also “require[e] the

¹ Amit Sahni v. Commissioner of Police, (2020) 10 SCC 439 (India) (referring to the right to movement under Article 19(1)(d) of the Constitution).

² Young India Lawyer’s Association v. State of Kerala, (2019) 11 SCC 1 (India).

³ India Const. art. 19, cl. 1.

⁴ India Const. art. 25, cl. 1.

⁵ India Const. art. 21.

⁶ See India Const. art. 21A.

⁷ India Const. art. 14; India Const. art. 15.

⁸ India Const. art. 26; India Const. art. 29; India Const. art. 30.

State to take positive action.”⁹ The positive and negative aspects of rights often compete or conflict with each other.

When faced with such conflicts, the Court has lacked uniformity or structural consistency in its approach. The Court’s balancing process has been ad-hoc; it typically involves the following steps: A petitioner approaches the Court with the claim that a law or state action has infringed her constitutional right. The state defends the law by invoking a competing fundamental right; it claims that the challenged law must survive the challenge because it enforces a positive constitutional right. The Court articulates the dispute as a contest of competing Fundamental Rights (such as the right to life v. right to privacy or right to speech v. right to movement). Thereafter, the Court chooses one right as the categorical and unconditional winner in the contest. In most cases, the winner is a right that the Court presumes to further ‘collective interests.’ The competing right, usually an individual (civil-political) right, loses wholesale; even when, in fact, no conflict exists.

On closer scrutiny of these cases, one encounters many questions: Is the state, in fact, acting on its positive constitutional obligation arising from positive rights? How did a state action affect negative rights and to what extent? Could the state have achieved its aims without implicating the negative right? Rarely does the Court answer these questions. Sometimes the Court fails to identify the narrow positive right on which the state is acting. At other times it fails to establish a nexus between the constitutional right and the state action. And in most cases, it fails to analyse the necessity of the state action.

The balancing exercise is inconsistent, nebulous, and vague. In some cases, the Court has ‘balanced [rights] harmoniously’¹⁰ and in others, it has set out a ‘neutralizing device’¹¹ test.

⁹ SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED 42-49 (2008) (An account of positive and negative human rights).

¹⁰ *Young India Lawyer’s Association v. State of Kerala*, (2019) 11 SCC 1 (India) (In his separate opinion, Chandrachud J. pointed out the need to harmonise different provisions under Part III of the Constitution).

¹¹ *Sahara India Corporation v. Securities and Exchange Board of India*, (2012) 10 SCC 603 (India).

While balancing, the Court engages in expansive flourishes on principle, it rarely locates the rights-conflict at a granular level. Even in the rare cases where it does so, it does so mechanically, without comprehensive reasoning.

This paper attempts to demonstrate the doctrinal, structural, and reasoning gap in the rights balancing by the Court. It does so by analyzing a subset of cases where the Court has decided on conflicts between the right to life and dignity and the right to speech and assembly. To begin, Part II of the paper shall describe two contrasting normative models of rights adjudication: the ‘specification’ model and the ‘balancing’ model. The paper shall discuss their structure, logic, heuristics, and justifications with the view to set a benchmark in rights-conflict adjudication and reasoning. In Part III, the paper explains the framework of positive and negative Constitutional rights in India and the manner in which they conflict. Thereafter, in Part IV, the paper analyses how the Court has resolved rights-conflicts. It shall point out the doctrinal inconsistency in the Court’s approach and discuss the problems in the Court’s reasoning in contrast to the benchmark normative models. Part V discusses the institutional consequences of this model *i.e.* how structural aspects proliferate the arbitrariness of the Court’s rights-balancing process. Part VI examines the urgent need to resolve these issues. Finally, in Part VII, the paper attempts to address these problems by suggesting a comprehensive analytical framework to narrowly locate the conflict of rights in the facts of a case and structure the rights-balancing exercise.

II. THEORIES FOR RESOLVING CONFLICT OF RIGHTS

Rights adjudication globally follows two broad templates: I call them the ‘specification’ model and the ‘balancing’ model of rights adjudication. Each of these adjudication methods draws sustenance from different theories of rights, and they have been subject to much debate

and academic writing.¹² This paper does not support any one theoretical conception of rights. The aim here is not to normatively assess these models and discuss their merits and demerits or support any one form of reasoning, but to point out how the Court does not follow either. This section briefly describes the theoretical underpinnings and methodology of these models, only to buttress the paper's central proposition, which is: irrespective of the form of balancing adopted by the Court, it has failed to strictly follow a structure, methodology, and reasoning while balancing rights. As a result, rights adjudication in India, be it under any model, has often been ambiguous and arbitrary.

In the rights specification model, rights are accorded special moral, political and philosophical status and they act 'trumps' all other interests or act as 'side constraints' because of their categorical nature.¹³ Whenever a right comes in conflict with any other interest or value, the right always prevails. Given that they are categorical, rights must be carefully structured; their scope and substance must be specifically defined after considering the context and their relationship with other rights and interests in the society.¹⁴ The proponents of this model adopt the view that rights are grounded in a theory of justice or justification and the boundaries of the right are defined on the consideration of what is just or justified.¹⁵ In a democratic society, a just action by any person in pursuance of their rights cannot conflict with another person's right.¹⁶ Therefore, the definitional boundaries of rights are delimited after

¹² Compare Madhav Khosla, *Proportionality: An assault on human rights?: A Reply*, 8(2) INT'L J. CONST. L. 298 (2010), and Kai Moller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW, 155 (Grant Huscroft et al. eds., 2014) [hereinafter RULE OF LAW], with Stavros Tsakyrakis, *Proportionality: An assault on human rights?* 7 INT'L J CONST L (2009), and Gregoire Webber, *On the Loss of Rights*, in RULE OF LAW, 123 (Grant Huscroft et al. eds., 2014) (for a debate on the merits and demerits of proportionality and rights specification).

¹³ See Webber, *supra* note 12, at 126; Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS, 153 (Jeremy Waldron ed. 1984); ROBERT NOZICK, ANARCHY STATE UTOPIA (1974).

¹⁴ John Oberdiek, *Specifying Rights Out of Necessity* 28 OXFORD JOURNAL OF LEGAL STUDIES, 127 (2008) ("A right, on this picture, can stand against different behaviour in different circumstances, so that what conflicts with a right in one context may not conflict with it in another")

¹⁵ *Id* ("As a single unified inquiry, in contrast to the general conception's bifurcated inquiry, specificationism holds that rights represent the conclusion of all of the reasons bearing on the justifiability of a given action... When rights do make an entrance, on this view, they do so as conclusions about, and not as potential explanations of, the justifiability of certain actions").

¹⁶ Webber, *supra* note 12, at 126.

awarding due weight to the entire spectrum of claim rights and interests that bear on a court's reasoning. As such, conflicts between competing rights are internally resolved before defining the substance of a right. This model is largely followed by constitutional courts in the United States.¹⁷

Adjudication under the rights specification model can be illustrated by the following hypothetical: Let us say that law bans the use of loudspeakers in residential areas. A person 'P' uses loudspeakers for a political rally next to a residential area. The state brings an action against P. P claims that the law is unconstitutional; it bars her from exercising her constitutional right to speech, and her speech includes a right to broadcast her political views over a loudspeaker. The State claims that the law protects residents' privacy rights and the right to enjoy a peaceful environment, free from unwanted noise. The State claims that it has a duty to ensure that Q's right is not violated. A rights-specification court will first define the boundaries of both rights. The court will hold that P's right to speech only applies in public spaces and not private ones. It may say that residents have a reasonable expectation of privacy and peace in residential areas; any speech which disturbs this privacy and solicitude is not constitutionally protected speech. The court may also define what private spaces are and if residential areas fall within such a protected zone.

A rights specification court's decision and its justification may vary based on the context and facts in the case, values of the society, and/or legal precedent from an existing body of law. It will depend on the definition of 'residential areas' under the statute and whether loudspeakers affect the privacy rights of residents. But no matter where it draws the final line regarding free speech and privacy rights; it does so categorically. The boundaries of both the rights in the above hypothetical are delimited and do not conflict with each other. Any potential

¹⁷ See Jamal Greene, *Foreward: Rights as Trumps?* 132 HARV. L.REV. 28 (2018) (an account of the conception of rights in the U.S.).

conflicts in rights are resolved during the exercise of defining the limits and contents of the rights and applying them to the facts. Rights, once defined, have a conclusory status; they act as ‘trumps’ i.e., no matter competing interests, the right shall generally prevail. The reasoning by courts under this model is towards the specification of rights. All competing interests are balanced before the rights are finally and conclusively articulated. But once the rights are articulated, they impose specific preemptory duties on the state. The state has a constitutional obligation to enforce this duty.

In the balancing model of rights, on the other hand, the content and boundaries of the rights are stated generally and broadly.¹⁸ That is, first a broad definition of competing rights is articulated, without taking into account conflicting considerations. Then these broad rights are balanced by a court.¹⁹ Rights are articulated at the level of general values or principles; not as categories with a special normative force. Unlike specified rights under the specification model, they are not immune from balancing.²⁰ A right of a person under this model does not impose categorical duties on another.²¹ The corresponding duty is tentative and are subject to the outcome. The only categorical duty is on a court to consider the conflicting rights and interests while balancing.²²

A balancing court weighs conflicting general rights to decide which one prevails in the specific context of the case. During balancing, the court considers even trivial interests under broad umbrella rights of freedom of speech or freedom of development of personality.²³ Kai Moller calls this process ‘rights inflation’.²⁴ According to his theory, trivial interests and ‘evil

¹⁸ See Tsakirakis, *supra* note 12, at 480 (Tsakirakis speaks of ‘definitional generosity’ when he discusses rights articulation); Aharon Barak, *Proportionality (2)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 740 (Michel Rosenfeld & András Sajó eds., 2012).

¹⁹ See MATTIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 47 (2012).

²⁰ Moller, *supra* note 12, at 156.

²¹ See W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919)

²² See Moller, *supra* note 12, at 168.

²³ Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 7 (2007).

²⁴ See Moller, *supra* note 12, at 157.

activities' related to the general right to autonomy such as the 'right to feed pigeons in a park' or a right to murder must also be recognized and balanced against other interests or rights.²⁵ The most widely accepted doctrine of rights-balancing is the 'proportionality' doctrine. Variations of proportionality have been used in Germany, Canada, Israel, South Africa, and the European Court of Human Rights.

Notwithstanding its variations, proportionality roughly consists of the following steps: (a) A court considers if a particular measure affects a right. A 'prima facie' right is articulated widely, unconditionally, and generally; (b) If the measure affects a right, the court assesses if this interference in the right is 'justified'.²⁶ This second step consists of the following assessment by a court: (i) Legitimate aim: if the interference of a right is in furtherance of a 'sufficiently important' aim.²⁷ (ii) Rational nexus: if the measure interfering with the right is rationally connected to the aforesaid legitimate aim.²⁸ (iii) Necessity: if the measure impairs as little of the affected right as possible. Some courts have struck down State measures when lesser restrictive alternatives were possible, but not used.²⁹ (iv) Proportionality *stricto sensu*: if the effects of the measures are proportionate to the objective of measures *i.e.*, the benefits of infringement of the right must be greater than the loss incurred concerning the protected right or interest.³⁰ The measure is held to be constitutional only when it successfully passes through all the above steps.

One significant question arises here: What happens when the State invokes a positive constitutional right (rather than a mere state interest) to justify interference with a negative constitutional right *i.e.*, the state says that a law infringes a negative right, in fact, protects a

²⁵ See *Id.*, at 159; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 23, 1980, 54 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 143 (Ger.), <http://www.servat.unibe.ch/dfr/bv054143.html> [<https://perma.cc/XQ6Q-6WMR>]

²⁶ See FRANSISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING, 5, 7 (2017).

²⁷ See *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–40 (Can).

²⁸ See *Benner v. Canada*, [1997] 1 S.C.R. 358 (Can).

²⁹ See *Rocket v. Royal College of Dental Surgeons* [1990] 2 S.C.R. 232 (Can).

³⁰ URBINA, *supra* note 26, at 7.

positive right? How then does the court balance competing rights? The process is not dissimilar to the one during rights specification. The court will normatively prioritize one right, principle or value and justify it based on the context, facts in the case, constitutional priorities, principles, and values of the society.³¹ However, a court only makes this value judgment once the law passes the first three steps of the proportionality test. Frequently, the law will not pass the first three steps, but when it does, the court compares the effects of the measures with the benefits of the infringement. This is the stage at which it undertakes moral reasoning.³² The importance of a structured assessment is captured succinctly by Julian Rivers' remark, "the distinct contribution of each stage makes it much easier to adopt an orderly approach to questions of institutional competence (deference) and legitimacy (restraint)."³³

As an illustration, let us consider the previously discussed fact scenario and subject it to the proportionality doctrine this time. The State passes a law banning the use of loudspeakers in residential areas. P challenges the law and claims that the prohibition impacts her right to speech and expression. The State justifies the measure on grounds that the law protects residents' right to privacy. Under the proportionality analysis, the court assesses if the law 'prima facie' affects P's right to speech and expression. A rights-balancing court defines rights broadly and the answer ought to be in the affirmative. Next, the court determines three things: (a) if protecting a person's privacy by banning loudspeakers is a legitimate State aim. (b) If the impugned law has a rational nexus to the stated aim of the law. For this, the Court must assess if the prohibited speech violates another person's privacy and that the definition of residential areas is not overbroad or vague. It must also evaluate if prohibiting loudspeakers in residential

³¹ See MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 111 (2013) (proportionality as justification); See (differentiating between maximization account of proportionality and proportionality as unconstrained moral reasoning. He says that the former account weighs and 'optimizes' rights quantitatively without considering their moral underpinnings while the latter uses unconstrained and unguided moral reasoning.

³² Moller, *supra* note 12, at 298-306. (Khosla says that proportionality is not only about balancing and the first three steps are essential to the comprehensive reasoning).

³³ Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L. J. 174, 195 (2006).

areas will actually protect residents' privacy. (c) Finally, the Court determines whether the law is necessary and passed in a manner that is least restrictive to P's freedoms i.e., there was no lesser restrictive alternative to protect the residents' privacy rights. Only when the answer to all three is in the affirmative, will a court engage in moral reasoning to consider if protecting the Q's dignity is more valuable than protecting P's freedom of speech. This is the stage at which the court will engage in an evaluation of social, constitutional, and legal priorities. The last stage analysis is also contextual and marginal; not a generic principle-level right-to-right comparison. The Court undertakes practical moral reasoning to decide which right should prevail in the specific context of the case. The outcome in each case may change.

Having described the two broad methods of resolving rights conflicts, it is important to understand the nature of constitutional rights in India, the manner in which they conflict, how the Court has resolved these conflicts, and the problems with the Court's reasoning.

III. FUNDAMENTAL RIGHTS IN INDIA: POSITIVE AND NEGATIVE RIGHTS

Today, the Court enforces a thick definition of constitutional rights. These rights include several positive and negative fundamental rights. For example, the Court has interpreted the right to life and liberty (Article 21 of the Constitution) to include the right to live with dignity and "all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities (...)." ³⁴ But such an expansive interpretation of the Fundamental Rights was not obvious when the Constitution was adopted. In its bare text, Article 21 is a negative right which states that "[n]o person shall be deprived of his life or personal liberty except according to a procedure established by law." In fact, most of the Fundamental Rights (Part III) under the Constitution are negative rights. They do not contain the vast array of socio-economic rights that the Indian Court is known to enforce.

³⁴ Francis Coralie Mullin v Administrator, Union Territory of Delhi, (1981) 1 SCC 608 (India).

It is Part IV, the Directive Principles of State Policy ('DPSP'), where one finds the socio-economic and governance objectives of the State, such as a living wage, free legal aid, and welfare. However, the DPSPs are non-enforceable. They were adopted as guidelines for governance and do not create constitutional duties for the State. Over the years, the Court has incrementally infused Fundamental Rights with the contents of the DPSPs.³⁵ The lynchpin in this process is Article 21 of the Constitution, which has now been interpreted to include the right to health, education, shelter, food, sleep, and environmental protection.³⁶ Socio-economic rights, though originally unenumerated, have become such a recognized feature of the Constitution that, in 2005, the Indian Parliament passed a constitutional amendment enumerating the universal right to primary education under Fundamental Rights.³⁷ Most of the socio-economic rights (enumerated or recognized by the Court) are positive rights which impose a corresponding positive duty on the state to enforce them. As a result, the government implements food subsidies and employment schemes in furtherance of the right to food, health, and employment.

Socio-economic rights are not the only source of positive state duty under the Indian Constitution. Civil political rights also impose positive obligations on the state to enforce rights through laws and state action. The right to free speech, for example, not only imposes a negative obligation on the state to not interfere with individual speech. But it also imposes positive corresponding duties on the state. One such duty is that the state must enable citizens to receive government information so that they can fully exercise their right to free speech.³⁸

³⁵ See Gautam Bhatia, *Directive Principles of State Policy*, in THE OXFORD OF THE INDIAN CONSTITUTION, 644 (Sujit Choudhry et al. eds., 2016) (Bhatia calls Part IV a "framework of values that structure and constrain the interpretation and construction of fundamental rights." The article describes the interpretative role of DPSPs in rights adjudication).

³⁶ See Anup Surendranath, *Life and Personal Liberty*, in THE OXFORD OF THE INDIAN CONSTITUTION, 756, 768-773 (Sujit Choudhry et al. eds., 2016).

³⁷ India Const. art. 21A (inserted through The Constitution (Eighty-sixth Amendment) Act, 2002).

³⁸ See *Union of India v. Motion Pictures Association*, (1999) 6 SCC 150 (India); FREDMAN, *supra* note 3, 42-49 (2008) (Sandra Fredman reconceptualises the traditional belief that human rights are right to freedom from state interference and provides a theoretical framework of positive state duties arising from human rights).

For this, the state must create the necessary infrastructure through laws. An example of a positive state action to enforce free speech is the Right to Information Act. The Indian Parliament passed this law in 2005 to increase transparency, and government accountability and strengthen citizens' right to free speech and information. The law sets up a process enabling citizens to seek government information.

The next section of this paper discusses the process of conflicting rights adjudication by the Court. As discussed earlier, there is a wide range of positive and negative constitutional rights that conflict with each other. The most paradigmatic of these are conflicts between socio-economic and civil-political rights. The paper focuses on a subset of such cases, where negative and positive rights under Article 19 (freedom of speech) and Article 21 (right to life) of the Indian Constitution have conflicted with each other or inter se. Amongst the rights discussed in this next section, the Constitution does not textually prioritize one set of rights over the others. As a result, the Court has used its discretion to prioritize values and rights through an interpretative exercise. Even though this paper does not criticize the normative choice of the Court in prioritizing one set of rights or values, it challenges the reasoning and methodology of the Court. If the Court had followed the reasoning process of either right specification or proportionality strictly and properly, it could have avoided the highlighted problems.

IV. BALANCING OF RIGHTS BY THE INDIAN SUPREME COURT: AN UNSTRUCTURED ENDEAVOR

The Court has characterized its duty as that of a “*balancing wheel between the rights*”.³⁹ While resolving rights conflicts, it has used various methods. In most cases, the Court has done a broad right to right balancing at the level of principles and has given categorical preference to one right or value. The criticism of this paper is not that the Court has prioritized the wrong set of principles, or that its moral reasons for choosing these principles are ‘impressionistic’;

³⁹ I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (India).

the Court is fully within its moral authority to articulate a guiding set of values while interpreting the Constitution. And while doing so, it must often rely on a sense of intuitive preference for some rights over others. But when the Court does so, it must strongly reason and justify its decision within the context of the case. As long as the Court undertakes practical moral reasoning that is strongly related to the factual context of the case, it does not matter which principle it chooses or how it structures its reasoning; the Court may choose to adopt either the specification model or the balancing model of analysis. But the Court has not done so. In almost all its cases, it has failed to structure its reasoning according to these models. It has failed to establish “a genuine conflict [] between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity).”⁴⁰ As a result, the Court has rarely contextualized the conflict of rights down to the facts of the case. Rather than systematically approach the problem, it has weighed rights “arbitrarily or unreflectively, according to customary standards and hierarchies.”⁴¹ Some characteristic examples of the Court’s unstructured reasoning have been discussed in this section.

(i) Right of speech v. right to live peacefully

In *In Re Noise Pollution*, the Petitioner approached the Court seeking rigorous enforcement of laws imposing night-time curfews on the use of loudspeakers and firecrackers in religious performances, social occasions, festivals, and election rallies.⁴² Petitioners claimed that loud noises interfered with their rights to enjoy a peaceful environment and the laws prohibiting such interference must be strongly enforced. In its judgment, the Court directed strict enforcement of these laws and issued additional directions to the government on the manner of regulating noise pollution.⁴³ The Court passed directions on acceptable noise levels,

⁴⁰ Kai Moller, *Proportionality: Challenging the Critics* 10 INT’L J CONST L 709 (2013).

⁴¹ JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 259 (1998).

⁴² *In Re Noise Pollution and Restricting Use of Loudspeakers*, AIR 2005 SC 3136 (India).

⁴³ *Id.*

the manner of manufacturing of firecrackers regulation of vehicles, and regulation of industries. The Court's reasoning was grounded in the right to life, which includes the right to live peacefully with dignity. Business undertakings and other parties contended that the Court's directions and strict implementation of the laws affected their rights to speech and trade.⁴⁴

While resolving the conflict in rights, the Court concluded that the right to freedom of speech under Article 19 of the Constitution does not include the right to cause noise pollution or 'aural aggression' because this would violate the right to "a peaceful, comfortable and pollution-free life" of the listeners. It held that, notwithstanding the right to speech, "nobody can be compelled to listen, and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression."⁴⁵

At first blush, the reasoning of the Court on principle seems intuitively obvious, a right to speech obviously cannot include the right to harm others. The outcome of the case also seems intuitive. However, the problem here is not the outcome or the preferences of the Court. The problem is its (lack of) reasoning and factual contextualization. It is the Court's duty to contextualize this dispute as per the facts before them. The Court, however, spent no time doing so; it has presumed a conflict between the two rights.

The Court says that the right to speech does not include the right to 'aural aggression' and that it was the Court's duty to protect others from 'aural aggression', but it does not define 'aural aggression' or delimit the boundaries of free speech comprehensively. The Court does not establish the boundaries of the residents' right to 'a peaceful, comfortable and pollution-free life', or the corresponding state duties to further this right and does not elucidate on the way these rights conflict in the facts of this case. For example, it could have been said that noise over 120db is aural aggression which violates the residents' rights and the State is duty-

⁴⁴ *Id.*

⁴⁵ *Id.*

bound to protect them from any noise over that threshold. However, no such line is drawn, and ambiguous directions are passed.

If the Court had engaged in structured reasoning as described earlier in the paper, it would have defined boundaries of the right and the corresponding duties of the state and located the point of conflict. It did not assess any of the following questions: did the right to speech imposes a corresponding duty on the state to never interfere with their speech? Or were these duties limited, conditional, and subject to restrictions? What were the state duties which conflicted? The Court did not consider if the restrictions on speech were ‘reasonable restrictions’ under Article 19(2) of the Constitution. Had it conducted a granular analysis of this kind, the decision would have been more contextual and case-specific.

Here, one may question the need of analysing the facts in such detail. One may even say: Why does a granular analysis matter; the outcome shall be the same even when the Court prioritizes one right generally? While it is true that the outcome would not change significantly in this specific case, in other cases it would. This case is an easy one, as noise pollution here is clearly affecting residents and the regulated speech does not have strong constitutional protections. But other cases are harder to determine with such generality.

What if residents sought to shut down a religious institution (say a mosque) on grounds of noise pollution? The facts here are significant because religious speech has stronger protection. In such a case, the Court must determine, if (and how) rights conflict. If the Court adopts the reasoning in *In Re noise Pollution* and shuts down a mosque because a resident claims that the prayers cause ‘aural aggression,’ the decision shall be clearly perverse. After all, the azan (prayers) in a mosque is an essential part of a religious practice. Here, it is not sufficient to adjudicate rights at the generality of principles. The Court must determine the legitimate interest of residents. It must decide if there are lesser restrictive alternatives available (compared to shutting down the mosque and prohibiting the right to religious practice

altogether) and if the alleged discomfort of some residents is worth sacrificing the religious right of thousands. But far from a case-by-case factual analysis, the Court has continued its practice of generalised reasoning. In fact, it now widely cites *In Re Noise Pollution* as a precedent for an unconditional principled preference to Article 21 (right to dignity and peaceful environment) over Article 19 (right to speech).

(ii) Right to speech v. right to reputation

A typical example of the Court's undefined and nebulous process of rights balancing is *Subramanian Swamy vs Union of India*.⁴⁶ In this case, the Petitioner had challenged the constitutionality of the criminal defamation law on grounds of its chilling effects on freedom of speech under Article 19(1)(a) of the Constitution. The Court upheld the criminal defamation law in India based on the reasoning that the right to freedom of speech under the Indian Constitution must be balanced with constitutional values of 'fraternity' and the 'right to reputation', which are a part of the unenumerated and judicially recognized 'right to dignity' under Article 21 of the Indian Constitution.⁴⁷

The Court framed the constitutional issue as a broader conflict between competing fundamental rights and values: on one side, the right to freedom of speech of the accused, and on the other side, values of constitutional fraternity and the personal reputation of the complainant. It prioritized the principles of fraternity and dignity over the freedom of speech. The moral reasoning underlying the prioritization was that the dignity of the individual is inextricably linked to the collective interests of constitutional fraternity and that these collective values further individual liberties.⁴⁸ The Court relied on *In Re Noise Pollution*, to support this unconditional and categorical prioritization.⁴⁹

⁴⁶ *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 (India).

⁴⁷ *Id.*, at 322-323.

⁴⁸ *Id.*, at 328-332.

⁴⁹ *Id.*, at 322-323.

The problem with this decision is not its result, but the way the Court conducted the balancing. Putting the cart before the horse, the Court started with an open ended moral comparison between the competing values: individual liberties v. collective interests. According to the doctrine of proportionality, moral reasoning is the final step during balancing and must be preceded by other steps, such as assessment of the measure's rational nexus, its necessity, and its legitimacy. Thus, what should have been the last step in the balancing exercise, was undertaken first, while other steps were dispensed with. Despite explicitly stating the principle of proportionality in the judgment earlier, the Court completely ignored it while balancing. The Court presumed that the criminal defamation statute had a rational nexus with protecting the right to dignity and reputation. It did not analyze whether the effect of criminal defamation on free speech was disproportionate to the reputational protection is accorded. It also did not consider if less restrictive alternative remedies, such as libel and slander, were sufficient to protect dignity.

(iii) Right to protest v. right to enjoy property

The decision in *Mazdoor Kisan Shakti Sangathan v. Union of India & Anr* is yet another characteristic example of the Court's unstructured balancing process.⁵⁰ In this case, the residents of an area where protests were being conducted, sought the protection of their right to peaceful enjoyment of their property. The Court articulated a conflict between the right of speech and association of protestors and the residents' right to peacefully enjoy their property.⁵¹

Relying on *Subramanyam Swamy*, the Court reiterated its principled preference of right to right to life (which includes the right to peacefully enjoy property) over the right to speech and protest.⁵² It unequivocally concluded at a general level of analysis that in cases where two fundamental rights conflict, collective public, and community interests must prevail and that

⁵⁰ *Mazdoor Kisan Shakti Sangathan v. Union of India*, (2018) 17 SCC 324.

⁵¹ *Id* at 367 (holding that peaceful enjoyment of property is protected by the right to life under Article 21 of the Constitution).

⁵² *Id* at 367-368.

the residents' rights outweigh the protestors' rights, because the residents' rights were representative of collective interests.⁵³ The moral reasoning of the conclusion may be faulted for lacking any basis to hold that collective interests fell on the side of the right of residents. However, the greater concern here is the way the court conducted the balancing.

In a manner reminiscent of its previous cases, the Court failed to follow the rigours of the proportionality doctrine and failed to analyse the facts of the case. It devised a mediating device to balance the rights and held that the protests could only be carried out in a regulated and guarded manner in a designated place.⁵⁴ The glaring issue with this judgment's reasoning is the absence of any nexus to show that: (i) this measure would be a proportionate intrusion into the right to protest, (ii) the mediating measure had reasonable nexus to the aims sought to be achieved, *i.e.* it would ensure that residents receive a more peaceful living environment or that (iii) the measure was an alternative that was the least restrictive to the citizen's right to protest *i.e.* no lesser restrictive means were available for the protestors to exercise their right to speech and association freely. The failure to contextualize the cases also misses the stakes of rights involved. Does the right to a peaceful environment of a few residents justify the ban on peaceful protests of thousands for a matter of national importance that affects millions of citizens?

(iv) Right against compelled speech v. right to information

In *Union of India and Ors vs Motion Picture Association*, some film exhibitors challenged 'must carry' regulations which compelled them to play educational documentaries while exhibiting their movies.⁵⁵ They contended that compelled speech was a violation of their right to free speech under Article 19(1)(a) of the Constitution. The court held that a "must-carry" provision that "furthers informed decision-making which is the essence of the fight to

⁵³ *Id* at 369-373.

⁵⁴ *Id.*

⁵⁵ *Union of India v. Motion Pictures Association*, (1999) 6 SCC 150 (India).

free speech and expression, [] will not amount to any violation of the fundamental freedom of speech and expression.”⁵⁶ The Court held that must-carry provisions which were non-partisan, non-propagandist and facilitated disclosure of important information were instrumental to the free speech of the consumers and listeners.⁵⁷ Thus, the limits of the right to speech were defined after considering the listener’s right.

Though the Court gave extensive moral and legal reasoning for its decision, it did not exactly point to the conflict in the competing rights of film exhibitors and listeners. When does the government’s duty to facilitate information exchange supersede its duty to protect film exhibitors’ free speech? The court seems to indicate that any measure furthering information that is non-partisan or not propaganda will suffice. However, there may be instances where such information may not further the decision-making of the listener. The Court failed to show any nexus between the law and its purported aims and if the law furthered the decision-making of film watchers.

(v) Right to press v. right to a fair trial

One case where the Court followed some (even though insufficient) structured manner is *Sahara India Corporation v. SEBI*⁵⁸. The issue before the Supreme Court was whether press publication of private communications about a securities deal between parties violated their right to a fair trial. The Court was confronted with a conflict between the freedom of the press, recognized under Article 19(1)(a) of the constitution, and right to a fair trial under Article 21 of the Constitution but it did not give any precedence (principled or otherwise) to any right. It held that both the rights were of ‘equal weight’.⁵⁹

To mediate the conflict between these rights, the Court devised postponement orders as neutralizing device. It postponed the publication of communications between parties for a

⁵⁶ *Id* at 163.

⁵⁷ *Id*.

⁵⁸ *Sahara India Corporation v. Securities and Exchange Board of India*, (2012) 10 SCC 603.

⁵⁹ *Id* at 728.

limited period. The Court established a three-step test for deploying ‘postponement orders’: (i) Such orders be passed only in cases of ‘real and substantial risk of prejudice to fairness of the trial or the proper administration of justice’; (ii) The order should not be passed when ‘reasonable alternative methods or measures such as change of venue or postponement of the trial will not prevent the said risk’; and (iii) such an order should only be passed ‘when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint.’⁶⁰ As such, the Court laid down doctrinal foundations for balancing rights in the form of this three-step test, even though this test was only applicable to the specific context of postponement orders.

(vi) Right to food v. right to privacy

The first and only case where the Court has used the proportionality doctrine to balance competing rights is *K.S Puttaswamy v. Union of India*.⁶¹ In this case, the constitutionality of a biometric program for accessing State subsidies was challenged. The Court noted the conflict of the negative right to informational privacy with the competing positive right to food of the beneficiaries.⁶² At the balancing stage, it principally prioritized the right to food, which was a part of the right to life, and upheld a substantial part of the program.⁶³ That the Court prioritized the right to life over the right to speech, is not objectionable; the Court has provided principled sufficient justifications and precedent for doing so. The more fundamental question here is, was the biometric program a proportionate intrusion?

While subjecting the measure to the test of proportionality, the Court held that the biometric program prevents wastage of food and is therefore furthers the right to life.⁶⁴ As such, it was a legitimate State interest. The Court, however, did not provide sufficient

⁶⁰ *Id* at 725-727.

⁶¹ *K.S Puttaswamy v. Union of India*, (2019) 1 SCC 1 (India).

⁶² *Id* at 384.

⁶³ *Id* at 312-320.

⁶⁴ *Id* at

justification on how the impugned law was necessary and narrowly tailored to further prevent the wastage of food. Nor did it assess if the law was the least restrictive method to accomplish the objective. If it had done so, it would have probably concluded that the biometric program was not a necessary measure and that the right to life could have been advanced with much fewer intrusions into the right to privacy.

The cases discussed above characterize the process of rights-conflict adjudication in India. The Court has been firm in its reasoning regarding prioritization of the right to life and dignity. However, it has not followed a comprehensive structure to determine the nature and manner of conflict of rights. Keen on advancing its principled preference to protect the right to life and dignity, the Court has frequently omitted preliminary and instrumental steps in the process: identifying how a state measure protects a right and how competing rights conflict at the factual level. The Court's reasoning at a principal level does not always reach the downstream facts.

V. INSTITUTIONAL RISKS OF A MULTI-PANEL POLYVOCAL COURT

The problem of ad-hoc balancing of rights is not unique to India. But given the institutional structure of the Court, ad-hoc nature of rights balancing poses greater risks compared to an *en banc* court with a consistent judicial philosophy. The Court is polyvocal, in that it speaks not as a single court but from different benches of equal authority. They may have different views on the same issue. Often, cases with similar facts go to different benches and result in opposite outcomes. The outcome varies with the philosophy of the judges hearing the case. Given the small size of the bench, the judges' philosophy and discretion have a far greater influence over the outcome compared to a large *en banc* court, where judges may consult and reach consistent consensus opinions.

Variations in the outcome of cases are increased by the Court's powers to tailor various non-traditional remedies and dilute locus standing requirements. Historically, the Court,

through its ‘public interest’ litigation (PIL), has diluted standing requirements for individuals to approach the Court. The Court accepts petitions from public-spirited individuals and exercises a *sua sponte* jurisdiction, whenever it believes that the state has violated the fundamental rights of citizens. Through its PIL jurisdiction, the Court has enforced judicial remedies outside the standard realm of invalidating statutes. For example, it has awarded ‘constitutional tort’ reliefs *i.e.* granted compensation to individuals adversely affected by unconstitutional state action.⁶⁵ The Court has overseen and managed policy decisions by the government in pollution control and the environment, disaster relief, child employment, and sexual harassment.⁶⁶ It has directed the Parliament to pass laws, made interim laws until Parliament has enacted them, and ordered impartial investigations into political issues.⁶⁷

Rights balancing is largely judge-dependant, in that, judges have discretion in prioritizing a set of constitutional values over others. But when a single judge already has wide institutional discretion, the risks associated with unconstrained judicial reasoning are disproportionately high. It would incentivize bad judges to enforce their personal, policy, and political preference unconstrained by precedent or legal guidance because legal doctrine allows them to do so. This is when the need for uniform judicial reasoning is the highest. Without a standard structure of judicial reasoning during rights balancing, such uniformity is difficult to attain, and unreasoned decision-making is bound to occur. The resulting doctrinal inconsistency and lack of structure allow a wide discretion to the individual judge. A judge can invoke a competing fundamental right in every rights challenge by showing that the state interest is connected to a Fundamental Right; even though, at the granular level, the law may not implicate the state interest.

⁶⁵ Madhav Khosla, *Making social rights conditional: Lessons from India*, 8(4) INT’L J. CONST. L. 739 (2010).

⁶⁶ Stephen Gardbaum, *What Makes for More Or Less Powerful Constitutional Courts*, 29 DUKE J. COMP. & INT’L L. 1 (2018).

⁶⁷ See *Vishaka & Others v. State of Rajasthan*, AIR 1997 SC 3011 (India).

The standard of judicial reasoning must thus be one that “could convince someone not already convinced of the outcome”; when judges do not provide sufficient reasons for their judgments, “they fail to do so and simply conduct the balancing in an impressionistic fashion.”⁶⁸ When the judges do not provide practical reasoning based on the facts of a case, their judgments are impressionistic, arbitrary and based on ‘customary standards and hierarchies.’⁶⁹ Such outcomes affect the legal certainty, the rule of law, and public faith in judicial reasoning.

VI. THE NEED TO RESOLVE THE DOCTRINAL GAP

Apart from the institutional reasons in the previous section, unstructured rights balancing also risks other long-term issues. *Firstly*, given the thick formulation of socio-economic rights by the Court and the incremental expansion of a wide array of positive rights, many more such conflicts are bound to arise in the future. The absence of a consistent doctrine will harm values of transparency and predictability in adjudication and may result in unfairness and injustice to parties.

Secondly, constitutional adjudication in India is often a multi-party phenomenon. Various parties often intervene in constitutional cases to present their interests in the dispute. The duty falls on the Court to reach a fair and balanced solution to consider the rights of the various stakeholders. Failure to find a consistent doctrine results in disproportionate harm to certain sections and consequently, a loss of public faith in the judiciary.

Thirdly, if judges invoke rights at the drop of a hat without justifying them factually, the inevitable results will be a weakening of the content of right which loses out in the balancing exercise. This is because when a right is implicated, the threshold for moral reasoning and

⁶⁸ Gardbaum, *supra* note 66.

⁶⁹ *Id.*

justification to allow infringement of a competing right is much lower. Further, discretion without judicial discipline risks the politicization of the Court and affects its legitimacy.

Finally, with the increasing complexities of regulations, the paradigmatic will involve a wide range of rights of diverse parties. These conflicts will only become more frequent and factually complex over time. The structuring process of adjudication will provide the much-needed heuristic tools to wade through these complex litigations.

In the next part, the paper attempts to take the above problems into account and suggest an analytical framework of rights that can facilitate the identification of the conflict of rights and resolve them through comprehensive judicial reasoning. This framework will be useful if the Court engages in the right specification exercise. I do not propose any framework for proportionality balancing because the structure and process of proportionality have been carefully articulated, applied, and tested time over time and are subject to extensive scholarship.

VII. AN ANALYTICAL FRAMEWORK FOR RIGHTS SPECIFICATION

When courts broadly articulate rights and balance them through generalized principle-based reasoning, they increase the likelihood of discretionary outcomes. In such cases, the state has a wide margin to defend laws as instruments to enforce rights. Courts are likely to accept such claims when the state can defend a law even when they establish a remote connection to a broad right. One way to avoid this overbreadth problem is to identify the rights in dispute narrowly. The Court may first identify a right and a corresponding narrow state duty.

According to Hohfeld's analytical framework of rights, every right has a corresponding duty.⁷⁰ If a person 'P' has a right to do X, then person 'Q' has a corresponding and complementary duty to let P do X. The existence of such a duty gives P a claim against Q and

⁷⁰ HOHFELD, *supra* note 21.

the right is called a claim right. A claim right can be a purely negative duty not to impede P's action or a positive requirement to enable P to do X.

In the constitutional context, rights are generally enforceable against the state. The state has a corresponding duty to the right holder. In the above example, P is the right holder and Q is the State. The content, scope, and enforceability of a right and corresponding State duty are determined by the Court, based on the factual context, societal principles, constitutional text, history, and precedence.⁷¹ Indian courts generally follow a common-law method for interpreting the Constitution.⁷² Right-holders have many interests, but not all interests are classified as rights. The state does not have a corresponding duty when interests are not recognized as Constitutional rights.

Rights are both negative and positive. For negative constitutional rights, the state's duty is to not interfere with the right-holder, whereas in the case of positive Constitutional rights, the state's corresponding duty is to act positively to enforce rights. Courts may also hold that negative rights have positive corresponding duties by the state, which is the duty to facilitate an environment where negative rights can be fully enjoyed. For example, a right to a free press may impose a corresponding duty on the state to pass a law on a newsperson's privilege.

When a right holder approaches a court for enforcement of her right, the constitutional court decides if the constitutional duty on the state includes within its scope, the duty which the Petitioner seeks to enforce. On a constitutional challenge to a law or State action, the State may claim that the legitimate interests underlying the law are also the state's constitutional duties to its citizens. It is a court's interpretative function to determine if the state interests underlying the law, are positive constitutional duties. Three broad outcomes are possible hereafter:

⁷¹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 20-22 (1977).

⁷² Cf. Grant Huscroft, *Proportionality and Relevance of Interpretation*, in *RULE OF LAW*, *supra* note 12 (Author argues that courts should avoid common law interpretation when interpreting the bill of rights and proportionality should replace common law interpretation of rights).

- a. A court may decide that the rights holder does not have the claimed constitutional right against the State. As a result, the challenge to the law fails; or
- b. A court may decide that the claim right of the right holder is a constitutional right and thus imposes a corresponding duty on the state; but the state's interest underlying the law is not a constitutional duty. The outcome in this instance would be straightforward: the law is unconstitutional because rights trump ordinary State interests.
- c. The right holder has a constitutional right against the state but, at the same time, the state has a constitutional duty to further the interest underlying the law. This is a case of conflict in rights.

A constitutional court is the competent forum to resolve a conflict of rights. To illustrate the resolution of a conflict, we can use the facts in *Amit Sahni v. Commissioner of Police*⁷³ as an example. The Supreme Court, in this case, articulated a conflict between the right to protest of some people and the right to the free movement of others. Even though the Court did not elaborate on the conflict, the following is a possible manner to analyze the problem:

- a. The Fundamental Right to protest imposes a corresponding negative duty on the State to not interfere in their protests (except in cases of reasonable restrictions) (Let us call the duty 'D1').
- b. The Fundamental Right to free movement imposes a corresponding negative duty on the state to not interfere in their movement (Let us call this duty 'D2').
- c. Both the duties, D1 and D2, are negative and do not conflict with each other because the state interest to ensure protest-free roads is not a constitutional duty.
- d. One may argue that a Fundamental right to free movement includes a bundle of corresponding duties, and one of the duties is that the State creates free highways

⁷³ *Amit Sahni v. Commissioner of Police* (2020) 10 SCC 439

so that citizens can exercise their right to free movement. (Let us call this duty ‘D2.1’). If so, one may argue that D1 and D2.1 conflict. The State can either enforce D1 or D2.1.

The above conflict may be resolved determining a textual or doctrinal order of precedence amongst the rights (lexical order of priority) and choosing one over the other. This involves moral reasoning. The Indian Constitution does not generally establish the priority of one set of rights over the other textually. The Supreme Court has generally decided on an order of priority by an interpretative exercise.

While deciding on an order of priority of constitutional duty, competing constitutional duties must be gerrymandered as far as possible without losing their core, so that the conflict is minimized, and the rights fit like puzzles. The Court must consider if the duty is a core duty or a derivative duty. Derivative duties then may be secondary to core duties. For example, in *Amit Sahni*, the State duty to facilitate the right to free movement may be considered a derivative positive duty arising from the negative right of freedom of movement. One way to resolve this dispute is to say that when this derivative duty D2.1 conflicts with a core duty D1, the latter must prevail.

Some Fundamental Rights under the Indian Constitution have internal restrictions. For example, the right to free speech can be reasonably restricted in the interest of “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.” (Article 19(2) of the Indian Constitution). Similarly, the Right to life is subject to the procedure established by law (Article 21 of the Indian Constitution). It is the Court’s function, while exercising its powers of judicial review, to determine if the conflict of interests is resolvable at this stage before moving to the resolving conflicting rights.

VIII. CONCLUSION

The Indian Constitution recognizes a vast network of competing positive and negative rights, and they frequently battle out before the Court. A crucial analysis of a few paradigmatic rights-conflict cases in the Supreme Court of India establishes that eager to set up constitutional values, principles and rights against each other, the Court has frequently glossed over the granular details of the case. Had it paid greater attention to the context, it would realize that very often conflicts of rights does not exist; often, the Court presumes that it does. The lack of attention to detail exists partly because the Court does not follow any structure or methodology for balancing rights. This is a significant gap in its jurisprudence. The paper has attempted to fill this gap by presenting two contrasting normative models of rights adjudication: the specification model and the balancing model. It has also suggested structural, logical, heuristic solutions to address this gap.

Even though a glaring doctrinal gap exists, in the last decade or so, the Court has adopted the proportionality framework of reasoning and has referred to it frequently. But it is one thing to adopt international models of adjudication and cite them generously and another to apply them thoroughly. The Court needs to pay greater attention to the process of adjudication of rights and this is the compelling need of the hour. As Madhav Khosla says, “while proportionality can do much regarding unjust laws, it can ultimately do very little about poor judging.”⁷⁴

⁷⁴ Khosla, *supra* note 12, at 306.