

Review Article

Right to Protest an Analysis of Amit Sahni V Union of India and others 2020

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Abstract

Democracies without protests are a dictatorship. In democracies, the state must not only facilitate the dissent but should develop a culture of constructive dissent, protest, and opposition. The Right to protest has constitutional protection but its application should be used in a manner not to trespass on another right. The judiciary must play a constructive role by providing a harmonious construction approach in case of conflict between the two rights. Once right cannot and should not have predominance over another. However, the dissent shall not be a disorder, and the difference between the two needs to be protected.

It's in this backdrop the paper is an attempt to analyze the position and the judgment given in the above-stated case concerning the right to protest and the role of the apex court in the same. The paper will suggest some suggestions in the backdrop of judgment.

Keywords: Protest; Constitutional culture; Judicial balancing; Pressure tactics.

Introduction

Protestor opposition for the state policies is the heart of mature democracies. Mature democracies or healthy democracies lie in the debates, discussions, oppositions to the policies of the state. Democracies without protest or opposition are autocracies. The constitutional democracies protect the dissent and protect the dissents with constitutional safeguards for the advancement of a healthy democracy. Dissent is the lifeblood for democracy, democracy without dissent is the autocracy. In India, the right to protest is not expressly provided under the Indian constitution but has constitutional legitimacy derived from article 19 of the constitution¹ which provides freedom of speech and expression and freedom to assemble peacefully without arms. Any assembly of people is peaceful so long so it did not

take the law into their hands. Freedom of speech and expression includes freedom of dissatisfaction or freedom of criticism within the bounds of the established legal system of the country. The protest not only is the symptom of vibrant democracy but is a tool to keep the governments within the bounds of the constitution and keeps a check on the working affairs of the state.

Protest is the mode of speech and expression which has been recognized as the fundamental pillar of any constitutional democracy. It's a mode of expression and has to be protected against the usurp or attacks from mighty. Protest as a form of expression is usually used by the weaker against the powerful. People use this right, not for luxury but as a way to express their views or medium of expression and has to be curtailed or limited through constitutionally recognized limitations.

The right has received recognition in various national Constitutions and also recognition in various international documents across the globe. The various watchdog bodies and constitutional courts have played an important role not only in the protection of this fundamental right but also in upholding its dignity across jurisdictions. Protest is not only the strong and influential way to show dissatisfaction towards the affairs of the state but the way to capitalize the global and local attention towards the demands of protesting bodies.

The Allahabad² High court has recently expressed that the Right to dissent is a constitutionally protected Right under article 19 which protects freedom of speech and expression. Expression of dissent doesn't amount to any crime.

International Recognition to Right to protest

The right to protest is also recognized under several international documents and has been equally received widespread momentum for the strengthening of the same. The Right is either expressly or implicitly mentioned under the various celebrated globally acknowledged documents which have become a torchbearer for the drafters of many national constitutions. Article 19 and 20 (1) of the universal declaration of human rights 1948 combined provides for the freedom of opinion and expression and freedom of peaceful assembly and protest. Combined both these articles provide protest as a mode of expression. This right is equally recognized under the European Convention on Human Rights 1950 which came into effect in 1953 under Article 9, 10, and 11 provides the framework which recognizes protest as a mode of speech and expression. Article 9 provides for the freedom of thought while article 10 provides for the freedom of expression and Article 11 provides for the Freedom of assembly. The international covenant on civil and political rights 1966 recognizes freedom of expression, freedom of assembly which combined protects freedom of protest subject to the reasonable restrictions which are necessary for constitutional democracy.

The right has been recognized under various national Constitutions. The first amendment to the United States Constitution provides the freedom of speech, peaceful assembly. Article 21 of Japan's Constitution protects the freedom of speech, assembly, press, and all other forms of expression. Article 19 (a)(b) of the Indian constitution provides the constitutional status to freedom of expression and peaceful protest. In India, by way of judicial interpretation right to protest has been equated

with the fundamental right by the Apex court. The Australian highest court has struck down a law that prohibits the protest around the business establishment. In the year 2014, the Australian state has enacted a law that prohibits the protest in a public place around the business establishments even for a smaller duration with the business premises and argued that it effects the operation of business and they have a right to carry on their business. The violators under the law were provided with 4 years imprisonment and a penalty of up to \$10,000 to anyone who is charged under the act. The High court of Australia has struck down the law on the ground that it violates the freedom of expression which includes the right to protest as well. The court has rejected the arguments advanced in favor of law and held that there cannot be a blanket ban on a protest within certain premises as prescribed under the act. The court has upheld the need and importance of the freedom of expression which has reached the level of the foundational stone of any modern constitutional democracy.

The constitutional Court of South Africa its recent judgment by 7:3 struck down section 18(2) (b) of the Riotous assemblies act of 1956 as it criminalizes the incitement of another person to commit any offense. The court has struck it on the ground of the words used "Any offense" and has held that the free flow of ideas is important and the lifeblood of any constitutional democracies to be the vibrant, stable, and sustainable democracy. The court observed that the freedom of expression is necessary to make the accountable of those who are in power, freedom leads to questioning which should be safeguarded by the courts.

Apart from the above stated internationally acknowledged documents, the right is recognized as fundamental in the global jurisprudence and has been mainly carved out from freedom of speech and expression.

Analysis Amit Sahni v. Union of India and others 2020.

The judgment is important as it was discussed widely in public circles including academic circles. As the judgment by the apex court has directly connected with the right to protest. The moot point in the judgment in the case was how and where to carry out the protest without harming others. The three-judge bench has delivered the 13 pages short judgment and concluded that the Right is not unlimited and has to be balanced with the other's rights. Once right should not harm the right of others. The apex court has relied upon

several judgments including the *Mazdoor Kisan Shakti Sangathan v. Union of India and Anr* the court, in this case, has provided that there is a need for a balance of interest concerning the interest of protestors and interest of residents of Jantar Mantar area where protests were carried out usually. The court deals with the Right to Protest and the Right to inconvenience and has rightly held that the Right to inconvenience cannot be equated to rights. One's enjoyment of fundamental rights should not create innocence for others.

The other question in this judgment gives rise to the question of whether the court can interpret liberally the exceptions of a right guaranteed by the constitution. The greater notion relies on the fact that balance is to be maintained but importance should be attached to the right itself and not the exception attached to the rights. The apex of India has also answered it similarly and has given the predominance of a right over the restrictions and observed through Justice Ravindra Bhat that the rights which the citizens cherish deeply, are fundamental and not the restrictions.

The role of adjudicating authorities in case of conflict of one's fundamental right with other right need to be adjudicated liberally and harmoniously. One's rights cannot be muzzled with others' rights but a harmonious approach needs to be adopted. One's enjoyment of the right should not become the cause of hindrance of another right. The court has stepped the extra mile in the shaheenbagh protest case by appointing arbitrators who have engaged in different rounds of talks with the protestors and have submitted their report in a sealed cover to the bench. However the report of interlocutors was not disclosed in the open court, such practice should be discouraged and is the antithesis to the basic principles of adjudication. Sealed cover jurisprudence must and should be discouraged as it violates the basic principles of any mature adjudicating system.

Following the suit of appointing the committee which engages with the protestors, the honorable chief justice of India S.A. Bobde C.J. remarked orally in a similar manner in farmers protest case on dated 16/17 of December 2020 while hearing the bench of petitions demanding the removal of farmers from the national highway which blocked the highways around Delhi and other parts of the country against the recently passed farmers laws by the government of India. The question here arises do courts should interfere, or appoint arbitrators, or should the court remain stick to the validity of laws only. The question requires examination in detail as it has the

support of both sides. The fundamental question arises does courts should interfere, the author argues that courts should interfere but the essence of protest must not be avoided on the account of other rights. The rights of both are to be equally important but the strict measuring tool cannot be adopted.

In a welfare state, the state has to engage themselves constructively with the protestors rather than allowing courts to step into the shoes of the executive. However, there is no doubt that in case the executive fails to perform their duty the courts must step in. In cases of protest like shaheenbagh or farmers protest the courts should and must not interfere rather than directing the state to engage with the protestors. The apex court has power under article 142 to do complete justice, but this spring should not be used regularly unless required in urgency.

Conclusion

The hallmark of a mature democracy is vibrant, stable, and constructive dissent, and the state must ensure its protection and preservation for the sustainability of Rule of law and ensure transparency in democracies. The Dissent distinguishes a democracy from autocracy. The constitutional protections to the Right to dissent must be ensured and the state and its organs must protect it. The judiciary must not encroach into the shoes of the executive and must ensure the protection of the spirit of dissent. In a democracy, the free flow of knowledge, ideas, expressions must be protected however there are certain issues which arise during the recent past, where the fundamental right to protest and other fundamental right was in the close neck to each other in such situations the courts must adopt a harmonious construction approach rather than stepping into the shoes of the executive or giving pre-dominance of one right over another. The Supreme Court has observed that the Participatory Democracy has been adopted by our constitution, which has two important integral elements which include, public participation in decision making and public information concerning government actions in the public domain.

References

1. Article 19(a), 19(b) of the constitution of India.
2. *Yashwant Singh vs. State of U.P & Ors.* (Criminal Misc. Petition No. 13058 of 2020) Date of order 23-

- Nov-2020.
3. Everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
 4. Everyone has the right to freedom of peaceful assembly and association.
 5. Universal declaration of Human rights was adopted on 10-December-1948.
 6. Article 19 of ICCPR 1966.
 7. Article 21 of ICCPR 1966.
 8. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances.
 9. RamlilaMaidan incident v. Home secretary Union of India 2012.
 10. Brown v. Tasmania (2017) HLA 43. High Court of Australia.
 11. Tasmania workplace protection from protestors Act 2014. Section 6.
 12. Economic Freedom Fighters vs. Minister of Justice and Correctional service and another's (2020) ZACC 25.
 13. J. Sanjay Krishnan Kaul, J. Aniruddha Bose and J. Krishna Murari delivered the judgment on 07-october-2020.
 14. (2018) 17 SCC 324.
 15. Sunil Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1, para 86.
 16. Rajeev Suri vs. Delhi Development authority and Ors. (Date of Judgment 05- January-2021.)
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