



## JUDICIALLY UNRECOGNIZED BLOCK OF A PROPORTIONATE STRUCTURE: NECESSITY ANALYSIS

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### ABSTRACT

The empowerment which one realizes by virtue of the right(s) is not complete unless the infringement of the same is not guarded 'substantively'. The Indian Constitution has always been found on the forefront for the protection of its people's rights but its 'caretakers' have not always been so considerate. Pertaining to the subject-matter of the Research Paper, Indian courts have been peculiar in their understanding and learning, intermittent in their subjectivity and resultant ambiguous application of the Constitutional protective measures, when it comes to the infringement of people's rights.

The Proportionality Test is such legal framework which provides the right-holder with multi-facet stages that are required to be passed by such law in order to override the right. Over the years, the necessity prong of the test has not been delved into much and by and large, a single notion of proving the necessity of a law amongst other alternatives

has been subsisting. The same is the scope of my Research Paper, wherein, I will be framing a template based on which certain case law will be screened in order to know that whether and how the necessity test can be applied.

### I. INTRODUCTION

Dr. B.R. Ambedkar has considered Article 32 as the Heart and Soul of the Indian Constitution and in case of its infringement, Supreme Court is the final arbiter in that regard. Now, if the State did not have any *legitimate backing* for the promulgation of the impugned law, with no *rational nexus* between infringement of a right and infringing such right for achieving a desired goal, *unnecessarily* picking such law by overlooking other available feasible alternatives to it and lastly, no *balancing* was meted out of the benefit-harm that such law will entail, hereupon, the ball will keep rolling down in the court of the State as well as that of the right-seeker, as when they will approbate and reprobate respectively to the aforesaid stages of the proportionality review.

The break-up of my research paper is as follows- where Part I is the introduction



itself, Part II is a brief on four prongs of the proportionality test along with concerns related to the necessity prong in particular, Part III is dealing with the elements of the necessity test, the section following Part III outlines application of elements of the necessity test on certain case law and the last Part is final reflections on the Supreme Court's working of the necessity stage.

Before I begin with the next part of my submission, there are few methodological points that are required to be broached up. The research paper employs a Dissection Doctrinal Analysis technique for parsing through the judgments. This is so, because I am engaging with the necessity prong of the proportionality test and also, my analysis does engage with the case law to the needed extent, however, I would be going beyond that. Being cognizant of the position of the Indian Supreme Court in the Indian democracy, as a rights protector and final arbiter of the Constitution, only its judgements will be studied for the study at hand. My data is a collection of Supreme Court case law from 2016-2020. 2016 is the chosen baseline because the proper multi-staged proportionality test was judicially acknowledged for the first time in that year.

Accordingly, I have chosen cases that particularly deal with proportionality and cases having a mere passing reference or only one component have been discussed does not qualify it to be included in the dataset. All things considered balancing does not form a part of the dataset since my analysis emphasize on the necessity prong alone. The judgments have been processed qualitatively before qualifying in the dataset.

In order to identify my chalked-out parameters, I have used SCC Online which is a private reporter and since it is a private reporter, it is unbound to report all Supreme Court cases. Therefore, certain unreported judgments using the four-prong proportionality analysis stand at the stated risk of exclusion. In total, there are 19 case law that have mentioned about the proportionality test, out of which, in 13 case law, the court mentioned about the four-prong test to adjudicate the validity of rights-impairing measure and in 8 case law, the court devised the proportionality test for final determination on the matters of fundamental rights. Bearing this template in mind, I would begin with the next part of my submission.

## II. AN UNDISPUTED CONCEPT OF



### SUFFICIENCY: NECESSITY TEST

Having regard to the concept of proportionality test (hereinafter referred to as 'test'), the constituents of the test gain significance immediately when a right-infringing measure has to be scrutinized and gain value in the order of their arrangement which has been mentioned in the previous part of this research paper. Keeping Aharon Barak's work in mind, an order has already been contemplated whereby one has to adhere to all the four elements of the test and cannot overlook any of them or substitute one's importance with that of the other. The preceding reason is that each element or constituent of the test has a distinct meaning and thereby, a distinct approach of screening the validity of the impugned law. The four elements of the test are, first is legitimate goal, followed by rational connection, necessity and balancing.

Now, the first two steps of the test, that are legitimate goal and rational nexus respectively, can barely be overlooked by virtue of the fact that the 'object' of the law and the 'interference' to achieve such object will somehow find a place in the determination of the validity of the law. But

the other two prongs of the test are sometimes less considered and are dispensed in their application to a particular scenario. In the latter part of this research paper, I will be discussing certain judgments wherein the first two stages have been dealt with in great detail along with the balancing stage (last stage) which has acquired profound importance in the recent past but the same is not the case with the necessity prong (third stage) and it will be manifest from the evaluation of the aforesaid judgements. Thus, the less recognized importance of the necessity test will form the subject-matter of this research paper.

Two concerns have been attached with the necessity test, that are, firstly the necessity prong of the test has largely remained 'undisputed' up till now because it has not been adopted in totality unlike the other three prongs. Secondly, when we assert upon the necessity of a law, it also brings into light the 'sufficiency' of such law and with a precaution that both the terms cannot be used interchangeably. What may be necessary does not essentially be sufficient. When we will be able to figure out that what an impugned law constitutes is necessary as well as sufficient *to fulfil the desired purpose of*



*law*, then only we can refrain ourselves from adding more than sufficient material to the law and thereby making it unnecessary. Though, both the concepts of necessity and sufficiency are independent in nature but have to be applied together in a particular case.

This takes us to the next part wherein I will state the Aharaon Barak's theoretical framework of the necessity stage based on which we can ascertain that whether in a particular case, the necessity prong has been applied correctly and adequately or not.

### III. ELEMENTS OF THE NECESSITY TEST

After the law has passed first two stages, the necessity test is required in order to know that whether the right-infringing measure is necessary for achieving the purpose of such law. Now, the necessity of the law will be subjective in nature as the court needs to satisfy itself before reaching to a conclusion. Firstly, the sufficiency test, which is a facet of the necessity test itself has to be satisfied. The court needs to look into the means or manner devised by the law to achieve its purpose and then demarcate a line up till which the scope is sufficient to achieve the very purpose of law and thus, anything

covered beyond that line is not required and makes the law unnecessary to that extent. Secondly, after we have carved out the sufficient part of the law that is required to achieve the purpose, the court has to look upon the alternatives that are available to such tailored out or sufficient part of the law and provided that, such alternatives shall achieve the purpose of the law to the same extent as the means devised by the impugned law does. Lastly, if such alternatives are found, the court has to see that they don't impose *greater burden* on any of the parties than what was inflicted earlier. Since the elements have been specified but there are various other relevant considerations that will get attached to each element in the process of applying the necessity test. Such considerations vary from case to case depending upon the facts and circumstances of each case and may change the dynamics in the context of application of the test as a whole.

In the next part, I will be evaluating case law from the lens of the elements framed in this part.

### IV. CASE LAW AND THE NECESSITY ANALYSIS



In this part, I will be dealing with case law falling in the period from 2016-2020. Alongside, I will give my observations and recommendations to such case law. I have divided case law into two sections, one comprising of case law wherein the necessity test was upheld and true interpretation was assigned to it while the other would constitute such cases where the court did not pay the required heed to the necessity prong.

#### A. CASE LAW UPHOLDING THE NECESSITY TEST

##### 1. **Internet and Mobile Association of India v. Reserve Bank of India (RBI)**<sup>1</sup>

In this case, RBI issued a circular directing such banking companies that are regulated by it to stop providing services to those entities which deal in crypto or digital currencies (DC's) by stating that such businesses are a threat to the healthy economy of the country. Also, certain specific reasons supporting the above contention were found from various reports which stated that trade in DC's is a

road to money laundering, excessive financing of terrorist activities and vitiating the existing digital payment system. The petitioner challenged the impugned circular under Article 19(1)(g)<sup>2</sup> of the Indian Constitution as he was running a virtual currency exchange (VCE) and the same came to a halt due to the issuance of the circular.

The court in the light of the proportionality test held that since no such large-scale illicit activities have taken place in the last 5 years which have impacted the banking sector or the economy and the RBI itself has stated that it does not intend to prohibit the DC's but to restrain the VCE's which act as intermediaries between the buyer and seller until the consideration-transfer process gets completed, there is no point of cutting down the banking services to such VCE's as there is no potential threat up till now. Therefore, the court directed the RBI to defreeze the petitioner's

<sup>1</sup> (2020) SCC 275

<sup>2</sup> A. 19(1)(g)- to practise any profession, or to carry on any occupation, trade or business



account and allow him to continue with the services.

**What if** the VCE's actually imposed a serious threat to the security and law and order of the country and the same would have also been manifest from the recent history, had it been appropriate then as well to disallow the ban on VCE's and thereby giving more importance to Article 19(1)(g). In my opinion, such should not be the case then. In **Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior**<sup>3</sup>, the Israeli citizenship law prohibited the entry of spouses where if one of them belonged to Israel and the other to an occupied territory like the West Bank. The reason was that a person entering into Israel from such occupied territory assisted in terrorist activities. The majority in this case struck down the opinion so raised that every resident of such occupied territory entering into Israel can be individually reviewed rather than imposing a complete ban on the

entry of occupied territory residents and was considered as a less restricting means.

But the court was of the opinion that individual review policy would not *suffice* the purpose of law to the same extent as a complete ban does because it leaves room for the intruders to enter Israel by using deceptive means. Now, here the sufficiency test was not fulfilled by the alternative means so opined and thereby, a complete ban was found to be necessary for achieving the purpose of law. Bringing the case of VCE's on the same footing, the position will not be much different as that in the *Adalah's* case. Since the security and economy of the country cannot be compromised by giving undue importance to Article 19(1)(g) and the same was upheld in the **Md. Faruk v. State of Madhya Pradesh**<sup>4</sup>, where it was stated that a law imposing restriction on Article 19(1)(g) has to be proved by the State that it is in the interest of the general public. Therefore,

<sup>3</sup> HCJ 8276/05

<sup>4</sup> (1969) 1 SCC 853



preserving the security and economy of the country is in no less interest of the general public.

Also, the *alternatives* to ban on VCE's are introducing regulatory measures such as the *Crypto-Token Regulation Bill, 2018* but it would not be feasible to opt for such legislation now. India is vigorously transforming into a digital space and to combat or control digital crimes, we need equal amount of digital knowledge and intelligence which the law-enforcement agencies of our country are not bearing currently. Though, such regulatory measure would help in combatting digital crimes but seeking to the current scenario, it would only create unnecessary *burden* on State without even providing fruitful results. In order to develop a strong machinery in this behalf, *sufficient* time is required and until that happen, a ban seems to be the best measure in this regard rather than allowing the digital intruders to vitiate the nation's machinery.

Though, we are not faced with a threat like the one discussed above but since we are evolving digitally every now and then like the emergence of VCE's, it is the exigency of time that we shall come up with a stringent law like the one mentioned above. It is necessary to promote as well as control the evolving space of the digital world as the security and development of a country have to go hand in hand.

2. **Kerala State Beverages (M & M) Corporation Ltd. v. P.P. Suresh & Ors.**<sup>5</sup>

<sup>5</sup> (2019) 9 SCC 710



In this case, Article 16<sup>6</sup> and 21<sup>7</sup> of the Indian Constitution gained significance. Here, the Kerala government took a decision to ban the sale of arrack and pursuant to which, the abkari workers got unemployed. Aggrieved by such situation, the government announced that since the Kerala State Beverages Corporation Ltd. started the arrack outlets which turned futile due to ban on arrack in

the State, such unemployed abkari workers will get employment on 25% of all daily wage employment vacancies arising in future. Also, the government provided each such aggrieved worker with Rs. 30,000, provident fund pension and DCRG. However, the government modified its order of re-employment due to lack of vacancies as there being large unemployed youth in the State. But to compensate for the breach of

<sup>6</sup> A. 16- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

<sup>7</sup> A. 21- Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law



promise, the government announced that the dependent sons of the arrack workers will be earmarked for the 25% of all daily wage employment vacancies arising in future in the corporation. Subject to this, the arrack workers who were promised for re-employment invoked Article 16 as they were promised for an opportunity in public employment and after not getting the same, they were not able to sustain their lives which consequently led to the invocation of Article 21.

Now, the court said that since it became impossible for the State to re-employ them, their dependent sons were promised to get the same opportunity of employment and was thus, *balanced* with what they were promised for. Looking from the lens of the necessity test, it was *sufficient* for the aggrieved workers that their dependent sons get a job assurance in the corporation along with other monetary benefits which they received prior to the filing of petition. Also, the most feasible

*alternative* for the State was the one that the State picked for, i.e. to give employment opportunity for the workers' dependent sons on vacancies arising in future. The policy adopted by the State did not create any *burden* on either of the parties as the aggrieved workers were provided with such amount of compensation so that they can sustain their lives for the time being and for the future, their dependent sons will get jobs.

Since in this case, the most important task was to balance two competing rights of employment, one of the aggrieved workers and the other of the general public, the State balanced such rights by modifying its earlier decision. However, it is necessary to review the State's decision from the lens of the balancing test as two competing rights are to be balanced.

**3. Modern Dental College and Research Centre and Others v. State of Madhya Pradesh and Others<sup>8</sup> and Christian Medical**

<sup>8</sup> (2016) 7 SCC 353



**College Vellore Association v. Union of India and Others<sup>9</sup>**

I have placed both the cases together as they are sharing a common subject-matter and to an extent, the rights in question are also common. In both the cases, the State came up with a law to provide that there will be a Common Entrance Test (CET) in the case of Modern Dental College and National Eligibility-cum-Entrance Test (NEET) in Christian Medical College case, along with the provision of fixation of fees. Since the law was formulated for all, it included private professional educational institutions (hereinafter referred to as ‘institutions’) and their

control over the admissions and the fixation of fee was now not completely in their hands. Though, in the Christian Medical College case, fixation of fee was not the central issue but the case was only limited to the extent of regulating admissions to such institutions.

The institutions challenged the impugned laws in both the cases primarily on the grounds of Article 1(1)(g), 26<sup>10</sup> and 30<sup>11</sup> of the Indian Constitution. Before the validity of such laws are screened through the necessity test, it is important to note that in the case of **T.M.A Pai Foundation v. State of Karnataka<sup>12</sup>**, the court brought the educational institutions within the

<sup>9</sup> (2020) SCC 423

<sup>10</sup> A. 26- Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;  
(b) to manage its own affairs in matters of religion;  
(c) to own and acquire movable and immovable property; and  
(d) to administer such property in accordance with law

<sup>11</sup> A. 30- Right of minorities to establish and administer educational institutions

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language

<sup>12</sup> (1994) 2 SCC 734



domain of occupation and thus, the right to establish and administer the educational institutions also becomes a part of occupation. This led the institutions to invoke Article 19(1)(g) and the other aforesaid related provisions. However, the above rights did not find an upper hand in either of the cases for the sole reason that education has become a business more than just an occupation as the institutions have become malicious in their administration. Such institutions are heavily relying on profiteering aspect, by giving admissions in return for high capitation fee and this becomes a hurdle in the admission of meritorious students.

Now, the *sufficiency* prong of the necessity test helps in upholding the impugned law. Since the State has only hit upon those factors which are the primary sources of maladministration in such institutions, i.e. regulation of admission and fee structure. If the court would have allowed the State to assign the staff on its own and to

completely make the institution work on its directions, then the law would have failed the sufficiency test and would have become unnecessary.

If we talk about the *alternatives* to such regulation of institutional administration, one can already find them in operation. The State only mandates a common test for all and a fixed structure of fee but at the same time, allows the institution to put forth its relevant considerations in the assessment of fee like the place of institution, facilities provided, nature of course, composition of the management quota, etc. The regulatory framework and the alternatives so devised in the nature of institution's say in its controlled administration, does not impose any *burden* on the institution. Ultimately, the institution is still being provided with the same number of students along with the appropriate fee and such common exam will be conducted with the shared efforts of the State and the institution.



Also, as far as it is about the right of minority institutions under Article 30, they will also be having an equal say in the matter of number of students belonging to minority groups being allowed to a minority institution. However, again, there are two competing interests prevailing in both the cases, one, of the minority and non-minority private institutions and the other is that of the meritorious students who are not able seek admission due to mal practices in administration, the best would be to resort to the balancing stage and then give due importance to both the rights.

**4. Excel Crop Care Limited v. Competition Commission of India and Another<sup>13</sup>**

The present case is related to the issue of 'Bid Rigging' or 'Collusive Bidding'. The appellant bidders were accused of raising identical

bids and thereby colluding with each other. When it came before the court to decide the penalty under section 27(b)<sup>14</sup> of the Competition Act, 2002, the question under consideration was that whether "relevant turnover" will be undertaken for determining the amount of penalty or the "total turnover". The court held that relevant turnover will be considered for determining the quantum of penalty.

Applying the necessity test in this regard, one cannot be inflicted with penalty for such profits that he had earned from any other source, other than collusive bidding and thus, considering any such profits in the determination of penalty would be more than *sufficient* and unnecessary. There does not seem to be any *alternative* as an offender can only be accused for the offence that

<sup>13</sup> (2017) 8 SCC 47

<sup>14</sup> Section 27(b)- impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the *turnover* for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the

Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;



he has committed and for nothing more than that, otherwise the same would be a violation of right to life under Article 21 of the Indian Constitution. There is no issue of burden in this case.

**5. Central Public Information Officer, Supreme Court v. Subhash Chandra Agarwal<sup>15</sup>**

In this case, the respondent filed three applications which were based on right to information. The first application dealt with the information regarding appointment of judges, the second was relating to the information of the assets held by

the judges and the third application was with respect to the correspondence exchanged with the Chief Justice of India which was related to the collusive act of a Union Minister and a lawyer with a judge of the Madras High Court. The court held that the information regarding the declaration of assets was a “personal information” and cannot be disclosed. As far as it is about the other two applications, the court said that since there were third parties involved, a compliance shall be made with section 11 of the Right to Information Act, 2005<sup>16</sup>.

<sup>15</sup> (2020) 5 SCC 481

<sup>16</sup> Section 11- Third party information—

(1) Where a Central Public Information Officer or the State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information: Provided that except in the case of trade or commercial secrets protected by law, disclosure

may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is served by the Central Public Information Officer or State Public Information Officer, as the case may be, under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within forty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is



Now, I will examine the validity of each piece of information in the light of the necessity test that whether such information shall be disseminated or not. Before applying the necessity test, it is important to note that such information must be of a personal nature and it shall only be publicized if it is in the public interest, seeking to section 8 of the Act<sup>17</sup>. The first application regarding the appointment of judges certainly affects the public interest, particularly, the persons working in the law field. Now, according to the sufficiency test, to what extent the

information is *sufficient* to be disclosed in this regard depends on the nature of public interest. It is extremely difficult to know that what all the recipients of information want to know. Thus, the only recourse or an *alternative* available here is that to give a *basic information* regarding the appointments like basic requirements regarding experience, specialization, commitment towards work as well as towards the society, general of idea of evaluation, etc. Also, the dissemination of such information will not put any burden on the Central Information

given is entitled to prefer an appeal under section 19 against the decision.

<sup>17</sup> Section 8- Exemption from disclosure of information—

- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
- (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
- (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
- (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third

party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

- (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
- (f) information received in confidence from foreign government;
- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
- (h) information which would impede the process of investigation or apprehension or prosecution of offenders;

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Commission (CIC) as there is no such empirical research to be done.

The second application regarding the declaration of assets ought to be a personal information as it is something done by a judge outside the course of employment and is no such offence unless the contrary is proved. Thus, any such information cannot be brought in open because it's disclosure would not affect the public interest in any manner and is a bare transgression of the right of privacy of a judge which is a pivotal part of Article 21. The lack of public interest predominantly excludes the application of the necessity test and there is no need to delve into it.

The third application concerning the collusive activity of a lawyer and a Union Minister with the judge of a High Court is certainly personal in character but by being personal in nature, is it correct to not to disclose such information. No, though it is personal in nature does not restricts it from disclosure only by virtue of its character. There is a difference in the nature of information in the

second application and in this one. The assets of a judge are not material for the public interest but if a representative of people, a defender and an arbiter of rights is indulged in such activity which is necessary for the public to know that by whom they are represented, advocated or adjudicated by. Now, the question is that how much information is *sufficient* to serve the public interest. In my opinion, the whole of such correspondence shared between them shall be disclosed because if any omission is done thereby, would not serve the public interest completely.

Also, there is no feasible *alternative* in this regard as public interest cannot be compromised by showing any kind of deference in this regard. Since we are living in a democratic country and under the umbrella of rule of law. Certainly, there will not be any *burden* in disclosing such information but there might be a burden on the State as it would go against their reputation and will also vitiate the respect for the office such



person is holding. But in my opinion, there is no greater interest than the public interest barring the exceptions and this case is no such exception as there is a question of law involved.

Again, in this case as well, there is a conflict between two interests and a balance can only be brought, if we will look from the lens of the balancing test.

**6. Subramanian Swamy v. Union of India<sup>18</sup>**

In this case, the petitioner directly brought a conflict before the court between section 499<sup>19</sup> of the Indian Penal Code (IPC) and Article

19(1)(a)<sup>20</sup> of the Indian Constitution. According to him, our freedom of right and expression cannot be restricted in the name of defamation.

The court upheld the constitutionality of section 499 IPC by stating that freedom of speech and expression is not an absolute right and there are restrictions under Article 19(2)<sup>21</sup>, whereby one cannot under the pretext of free speech defame another person by infringing his right, unless the same has been done in *public interest* and for a *good cause*.

Under the necessity test, the sufficiency test will certainly favour

<sup>18</sup> (2016) 7 SCC 221

<sup>19</sup> Section 499- Defamation—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Explanation 1—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3—An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4—No imputation is said to harm a person’s reputa-tion, unless that imputation

directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgrace-ful.

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<sup>20</sup> A. 19(1)(a)- to freedom of speech and expression;

<sup>21</sup> A. 19(2)- Nothing in sub clause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence



the decision of the court as one can speak his heart out but not by trampling upon the reputation of the other person as contemplated in the case of **D.C. Saxena v. Chief Justice of India**<sup>22</sup>. For example, if X is aware of the fact that Y is suffering from a venereal disease and is about to get married to Z, in good faith and for the well-being of Z, discloses to Z about Y's disease which he is concealing from Z, such would not be considered as defamation as it will fall under the Ninth Exception of section 499 IPC. However, if the reverse happens whereby Y was not suffering from any such disease and X was aware of such fact but with a malicious intent defamed Y in the eyes of Z which obliterated his marriage and thus, brings this case within the ambit of section 499 IPC.

The only thing which one can consider in a case of defamation depends on the facts and circumstances of such case. If it is

*sufficiently manifest* in the eyes of law that a person has acted malafide in order to defame someone, then he cannot invoke the ground of free speech and expression by breaching other person's right to live with dignity under Article 21. Since, there is a direct conflict between two rights which means that the court has to resort to the balancing test.

7. **Anuradha Bhasin v. Union of India and Others**<sup>23</sup> and **Foundation for Media Professionals v. Union Territory of Jammu and Kashmir and Another**<sup>24</sup>

Again, I have brought two cases together not only because the subject-matter is similar but the latter case formulates the recourse to the former one. Both the cases came as a result of the promulgation of Presidential order in Jammu and Kashmir (J&K) which led to the suspension of internet and telecom services. The petitioner contended that it is a violation of Article

<sup>22</sup> (1996) 5 SCC 216

<sup>23</sup> (2020) 3 SCC 637

<sup>24</sup> (2020) SCC 453



19(1)(a) as well as 19(1)(g) as she was not able to run her newspaper press. The court directed the concerned authorities to balance the security of the State and the freedom of speech and expression of the people by imposing reasonable restrictions and not a complete ban on the aforesaid services.

Since a restraint has been imposed on the fundamental right, it becomes necessary to apply the necessity test. As I have also mentioned in the Internet and Mobile Association of India case that the security of a country or a State cannot be compromised at any cost but in the present case, there does not seem to be a serious threat as in the wake of pandemic, very less number of people were moving out of their homes and it is not correct to impose a complete ban on internet and mobile services in anticipation of terrorist activities to take place.

Now, the sufficiency test has to be applied in order to see that whether a complete ban is more than sufficient or not. Yes, as it is not

required to ban the services in the entire J&K but to impose such ban to those areas where there is manifest threat of riots or terrorist activities to take place. There are no such activities taking place in many parts of J&K and thus, the ban could be relaxed in such areas. The same would be *sufficient* to uphold the security of the State and the freedom of people.

Also, the court needs to look further that are there any *alternatives* to ban on communication services. This question was answered in a much better manner in the case of *Foundation for Media Professionals*, where the court directed to consider the option of switching to 2G internet services and steadily allowing the 3G services in areas of tension, with 4G services in those areas where there is no possible threat of violence. Also, a review as well as a special committee was directed to be set up in order to review the condition in the whole of J&K and seeking to



such condition, the communication services shall be regulated.

Lastly, adopting any of the aforesaid means would certainly increase *burden* on the State but at the same time, it is also important to respond to the needs of the society and resorting to such means would also help in constant vigilance of the State's condition in terms of threat activities, which ultimately promotes the idea of ensuring the security of the State. Again, since there is a conflict between two rights, balancing stage needs to be looked upon.

**8. Hanuman Laxman Aroskar v. Union of India<sup>25</sup>**

This case was based upon the contemporary theory of balancing the ecosystem as well as the development of the country. In this case, an International Airport was allowed to be constructed in Goa and received the Environmental

Clearance (EC). Surprisingly, all this happened in spite of the lack of adherence to minimum conditions required to be followed before such construction is proposed. There was no collection of the baseline data relating to the Airport operations and the duty of the project proponent to disclose all the material information of the surroundings or the environment of such place of project was not discharged. The court suspended the construction of the Airport until the appropriate guidelines are followed as required by the Expert Appraisal Committee (EAC) so constituted in this case.

Certainly, it is the duty of the State to improve the nation's standards under Article 51(a)(j)<sup>26</sup> of the Indian Constitution but at the same time, it also bears a duty under Article 48A<sup>27</sup> to protect and improve the environment. Applying the necessity test in this regard, what is

<sup>25</sup> (2019) 15 SCC 401

<sup>26</sup> A. 51(a)(j)- to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;

<sup>27</sup> A. 48A- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.



sufficient here is that the impugned project shall seek the required clearance on satisfying the prescribed directions and the guidelines and at the same time, ensuring the least amount of harm to the environment will *suffice* for the construction of the Airport. The only *alternative* available in this case is not to build the Airport but before thinking of that, one must know that the economy and environment are equally important and both can only be ensured if the economy is allowed to grow but at the same time, projects like such shall strictly follow the prescribed environmental laws and the directions of the bodies so constituted in that behalf.

Although, there will be *burden* on the State to ensure the compliance of such mandatory requirements before the project is actually initiated for the same reasons noted above but it would also ensure the maintainability of the natural environment which is equally

important as economy in order to sustain our future lives.

#### **B. CASE LAW DEFECTING ON THE NECESSITY TEST**

##### **1. K.S. Puttaswamy and Another v. Union of India and Another (Aadhaar Case)<sup>28</sup>**

This case did recognize the proportionality test and the necessity test in particular but did not applied them substantively. Here, the case involved a challenge to the Aadhaar Act, particularly sections 7 and 8 of the Act and the Prevention of Money Laundering Rules amended in 2017. Both the sections required and mandated the Aadhaar card in order to receive subsidies or other benefits from the State or private entities. But the petitioners contended that the impugned law is in violation Article 21 of the Indian Constitution.

Now, was the law unduly filled with provisions to achieve the purpose or does it suffice to comprise such provisions. In order to know the *sufficiency* of the Aadhaar law, we can look onto the *alternatives*

<sup>28</sup> (2019) 1 SCC 1



available. The Public Distribution System (PDS) could have been enhanced by arranging food coupons, managing the records or by providing doorstep delivery, etc. On the other hand, the Money Laundering activities could have also been combated by only freezing those accounts which are skeptical of tax evasion, through KYC or other identifications methods. However, the court showed favour towards section 7 and 8 of the Act but did not confirm to the reasoning given for the Money Laundering purpose.<sup>29</sup>

Since it is clear from the above discussion that the law was excessive or overburdened in nature and the State could have switched to the above alternatives or any other feasible options, thereby making the law more sufficient than excessive. The present law is nothing but unnecessarily burdening people with the requirement of procuring an Aadhaar Card. Also, the last element

of the necessity test is to assess the *burden* on either of the parties by switching to alternatives. Since, in the first place, the burden was imposed on the petitioners to prove the viability of such alternatives which was not possible for them to do as it required empirical research. Then, if the State would have complied with such alternatives, the burden would have shifted onto the State to prove the same which could have turned the alternative meaningless. However, I refute to confirm with the preceding statement as the State is still bearing a huge burden of ensuring that every individual shall have an Aadhaar Card which is certainly high than that of conducting an empirical research and resorting to any feasible alternative. Also, the State has all means to conduct such research and come up with something more effective and less burdening. Therefore, the Aadhaar law needs to be revised in the light of the necessity

<sup>29</sup> Aparna Chandra, "Proportionality in India: A Bridge to Nowhere?" 3(2) *University of Oxford Human Rights Hub Journal* 73-74 (2020)



test which was not much relied upon by the court initially.

**2. K.S. Puttaswamy and Another v. Union of India and Others (Privacy Case)<sup>30</sup>**

This case revolved around the question that whether right to privacy is a part of Article 21 of the Indian Constitution. The court affirmed to the protection of right to privacy as a fundamental right. Though, the necessity test did not gain much significance in order to know the validity of a limitation on such right. If I reiterate the example given in the Subramanian Swamy case, it will become clear that it was Y's right to privacy getting infringed when it comes to the disclosure of his venereal disease to his to be spouse, Z. Now, such would not be the case if Y is actually suffering from such disease and the disclosure was made for the well-being of Z as it is sufficient to disclose such information for saving the other person's life, but if the disclosure would have had been made with respect to any of his habits which

has nothing to do with Z's life; it is certainly an infringement of his right to privacy. Thus, one can entrench into the privacy of the other person until it *suffices* such intrusion to protect an equally important right.

The *alternatives* in cases of privacy matters depend on the circumstances as in the case of Y, X could have had a word with Y first in order to convince him to talk to Z and this might have led X to save his relationship. Lastly, the question of proving the *burden* in such cases can be on either of the parties which the court has to look upon, depending on the alternative so chosen.

**3. Binoy Viswam v. Union of India and Others<sup>31</sup>**

In this case, the court was to judge the validity of linking PAN Card with Aadhaar and the same was upheld by the court. The court did not adopt the necessity test in this case and it becomes necessary to do the same. Firstly, the purpose of such linkage was to prohibit individuals from having multiple PAN Cards and

<sup>30</sup> (2017) 10 SCC 1

<sup>31</sup> (2017) 7 SCC 59



thereby indulging in activities such as tax evasion or money laundering, etc. However, the same purpose could have been fulfilled by individually scrutinizing the personal details of a person, skeptical of involved in such illicit activities. Thus, resorting to the above *alternative* or any other would have been *sufficient* to achieve the purpose of de-duplication of PAN rather than linking Aadhaar with PAN.

Also, individual scrutinization of PAN might be *burdening* for the State as it has to establish more agencies which can perform such function but at the same time, ensuring the linkage of Aadhaar with PAN is no less *burdening*.

## V. CONCLUSION

One clear idea which can be drawn from this research paper is that if a law-infringing measure is not imbued with more than what is sufficient to secure the purpose of such law, there would hardly be any case where the alternative could achieve the same purpose with imposing less burden. Also, if

an alternative is less burdening, it is implicit that it does not limit the right to a greater extent as the impugned right infringing-measure does.

If we take a close look at the annexure attached below, one can conclude that there are certainly some reasons because of which the applicability of the necessity test varies. Now, the two manifest factors affecting the application of the necessity test are, the judges presiding before a case and the nature of law involved in a particular case. For instance, Justice A.K. Sikri presided over the Bid-Rigging case, the PAN Card case and the Private Educational Institutions case, whereby the approach towards the necessity test was different altogether in the PAN Card case than in the Bid-Rigging and Private Educational Institutions case. Where the judgment delivered in the PAN Card case was not supportive of the necessity test, in the other two cases, the necessity test was heavily relied upon and thereby, the judgment was delivered accordingly. After a close observation of the case law mentioned in the appendix, nature of law has not much affected the application of necessity test as every time the court used the necessity prong to uphold the ‘public interest’, whether in



the J&K Internet Services case, Abkari Workers case or the Right to Information case. However, it is not necessary that public interest will hold water every time as in the Aadhaar case or the PAN Card case, the court did not pay much regard to the majoritarian view. Also, in the Right to Information case, the application regarding the declaration of assets held by the judges was rejected for being personal in nature and had nothing to do with the public interest. Thus, the facts and circumstances of a case also play a major role, along with other relevant considerations of some specified above.

**Annexure**

S. No	Case Name	Area of Law	Citation	Judges Involved	Constitutional Challenge to a Legislation/Administrative Order	Application of Proportionality Review	Application of Necessity Stage in Parti

								cu lar
1	Anuradha Bhaskar v. Union of India	India Constitution, Information Technology, Telecommunications, Criminal Procedure Code and Administrative Law	(2017) 3 SCC 67	N.V. Ramana, R. Subhash Reddy and B. R. Gavai	Orders, Notifications, Directions and Circulars	All four progs applied	Applied effectively	
2	Kerala State Beverage S (M &	Service and Administrative Law	(2019) 3 SCC 7	L. Nageswara Rao and Hemant	Order	All four progs applied	Applied effectively	





				ar Sap re, Dr. DY Ch and rac hud , San jay Kis han Ka ul and S. Ab dul Na zee r					an d An ot he r (A ad ha ar Ca se)		DY Ch and rac hud and As hok Bh ush an			
5	K. S. Pu tta sw am y an d An ot he r v. Un io n of In dia	India n Cons tituti on, Aad haar Act and Prev entio n of Mon ey Laun derin g Rule s	( 2 0 1 9 ) 1 S C 1	Dip ak Mi sra , C.J ., Dr. A. K. Sik ri, A. M. Kh an wil kar , Dr.	Both	All fou r pro vis ions app lie d	Ap pli ed							

