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# OF MATERNAL STATE AND MINIMALIST JUDICIARY: THE INDIAN SUPREME COURT'S APPROACH TO TERROR- RELATED ADJUDICATION

—Mrinal Satish\* and Aparna Chandra\*\*

## I. INTRODUCTION

What is the role of a constitutional court in a democracy? This fundamental question of constitutional theory has consumed many forests but continues to haunt theorists and practitioners of constitutional law alike.<sup>1</sup> The question has deep implications for day-to-day decision-making by constitutional courts, not only in ascertaining the scope of the court's power of constitutional adjudication and review,<sup>2</sup> but also in determining judicial methodology, and also the substantive outcomes of Constitutional

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<sup>1</sup> See, Aharon Barak, *The Supreme Court 2001 Term, Foreword: Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 13 (2002-2003). See also, Frank Paddock, *American Democracy and the Supreme Court*, 14 TEMP. L. Q. 210 (1939-40); R. B. Stevens, *The Role of a Final Appeal Court in a Democracy: The House of Lords Today*, 28 MOD. L. REV. 509 (1965); Michael Allen Berch, *An Essay on the Role of the Supreme Court in the Adjudication of Constitutional Rights*, 1984 ARIZ. ST. L. J. 283 (1984); Pius N. Langa, *The Role of the Constitutional Court in the Enforcement and the Protection of Human Rights in South Africa*, 41 ST. LOUIS U. L. J. 1259 (1996-1997); Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFRICAN L. J. 134 (1997); Jutta L imbach, *The Role of the Federal Constitutional Court*, 53 S. M. U. L. REV. 429 (2000); Aharon Barak, *The Role of a Supreme Court in a Democracy and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125 (2003-2004).

<sup>2</sup> See, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986).

adjudication.<sup>3</sup> These issues form the crux of this article. We seek to explore the contours of one such approach - the minimalist approach to decision-making - with particular reference to the Indian Supreme Court's usage of this approach in constitutional adjudication of terror-related cases. We argue that the Supreme Court has been using minimalist strategies in dealing with such cases, and that the use of this approach is opportunistic and escapist rather than either the expression of a well-theorized understanding of the role of courts in the Indian polity, or a reflection of broader policy rationales for adopting such a strategy.

Part II of the paper will briefly outline the theory of minimalism as an approach to decision-making and will discuss the rationale for the approach as well as the facets of a minimalist strategy of decision-making. Part III will then examine how the Supreme Court's decisions on terror-related Constitutional law cases reflect the use of a minimalist strategy. Part IV will test this against the methodology of the Supreme Court in Constitutional adjudication in general, and will highlight the difference between the methodologies adopted in general Constitutional adjudication and terror-related adjudication. Part V, the concluding section, will make more general claims on the disparity in methodology in terror and non-terror-related constitutional adjudication by the Supreme Court.

Before we begin, we would like to clarify that in this article we do not make a normative claim about whether or not a minimalist strategy is justified (though in our reading of the role of courts in the Indian polity, we believe that it is not). The larger point we are making is that regardless of whether minimalism is justified, the usage of this strategy by Indian Courts is neither consistent across the genre of constitutional adjudication, nor is it informed by a clear understanding of the role of courts in a constitutional democracy.

## II. MINIMALISM DEFINED

Minimalism is a methodology for judicial decision-making<sup>4</sup> that essentially advocates that judicial decisions should be made on the

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<sup>3</sup> See, Owen Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

<sup>4</sup> Benjamin C. Zipursky, *Minimalism, Perfectionism, and Common Law Constitutionalism: Reflections on Sunstein's and Fleming's Efforts to Find the Sweet Spot in Constitutional Theory*, 75 FORDHAM L. REV. 2997, 3002 (2006-2007).

narrowest possible grounds sufficient to decide the dispute before the court, while leaving larger questions of principle for decision by the political branches, or deferring to their stance on such principles. Minimalism therefore deals with the issue of how the court should go about the decision-making exercise, and touches on both the approach of courts in constitutional adjudication, as well as the substantive outcome of such decisions.

Minimalism has had a long history in American constitutional scholarship, though the express use of the term has been recently popularized by Cass Sunstein. As far back as 1936, Justice Brandies stated in *Ashwander v. Tennessee Valley Authority* that “[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”<sup>5</sup> Writing in the 1960s, and examining the activism of the Warren Court, Alexander Bickel propounded the idea of “*passive virtues*”—a list of tools to postpone or avoid resolving disputes.<sup>6</sup> While Bickel’s focus was on when courts should and should not review decisions of the political branches, Cass Sunstein coined the phrase judicial minimalism to denote an approach that “*increase[s] the scope for continuing democratic deliberation on the problem at hand*” even in cases where the courts do decide to exercise review.<sup>7</sup> Therefore while Bickel focuses on *when* to review cases, Sunstein focuses on *how* to do so.<sup>8</sup> In recent times, minimalism has found proponents on the U.S. Supreme Court. Justice Sandra Day O’Connor is generally classified as a minimalist.<sup>9</sup> More recently still, Chief Justice John Roberts famously remarked, “[i]f it is not necessary to decide more to dispose of a case ... it is necessary not to decide more.”<sup>10</sup> Minimalism has also recently been gaining currency in American legal scholarship, both in response to the ideas put forward

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<sup>5</sup> *Ashwander v. Tennessee Valley Authority*, 297 US 288, 347 (1936).

<sup>6</sup> See, Bickel, *supra* note 3, at 111-198. See also, Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1967).

<sup>7</sup> CASS R. SUNSTEIN, ONE CASE AT A TIME, 39-40 (1999); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1778 (2004).

<sup>8</sup> Neil S. Seigel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1958 (2004-2005).

<sup>9</sup> See, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2005-2006) (discussing Justice O’Connor’s preference for minimalist rulings, and arguing that “[f]or the last generation, Justice O’Connor has been the [U.S. Supreme] Court’s leading minimalist”).

<sup>10</sup> Cass R. Sunstein, *The Minimalist*, L. A. Times, May 25, 2006 at B11, available at <http://www.law.uchicago.edu/sunstein-minimalism-roberts.html>.

in Cass Sunstein's writings on the issue, and as a liberal response to the perceived conservative bent of the current Supreme Court.<sup>11</sup>

In Cass Sunstein's conceptualization of minimalism, there are two facets to the strategy - narrowness and shallowness.<sup>12</sup> *Narrowness* refers to the approach of deciding cases on as narrow grounds as possible, so that the decision applies to as few cases that might arise in the future; and *shallowness* refers to avoidance of linking the reasoning to debates about more fundamental values.<sup>13</sup> The effort is to settle pending disputes rather than articulate deeper constitutional principles.<sup>14</sup> The focus of all scholarly writing in the minimalist tradition is to "*postpone resolution of deeper debates*";<sup>15</sup> so that political branches can engage with the issue, instead of judicial decisions occupying the field. The distinction between narrow and shallow decisions has also been referred to as procedural and substantive minimalism: *procedural* where the dispute is fully decided but on as narrow grounds as possible, so that its impact on future cases is as limited as possible; and *substantive* where the decision-making is either avoided, or substantial deference is afforded to the political branches.<sup>16</sup> Narrowness or procedural minimalism is therefore about the scope of the court's decision; and shallowness or substantive minimalism is about its content.<sup>17</sup>

To give an example of how a minimalist approach would work, let us examine the case of *Anuj Garg v. Hotel Assn. of India*.<sup>18</sup> The issue in this case was whether Section 30, Punjab Excise Act of 1914, which prohibited the employment of all women and of men under the age of twenty-five, in establishments serving liquor, was violative of Article 14 and Article 15 (1) of the Constitution of India. The argument of the State was that the provision was protected under Article 15(3) of the Constitution as it made special provisions for women. The narrow question before the Court was whether security concerns could justify the protection of Article 15(3) for the said provision. The Court however decided on

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<sup>11</sup> See, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1456 (2000).

<sup>12</sup> SUNSTEIN, *supra* note 8, at 10.

<sup>13</sup> Neil S. Seigel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1958 (2004-2005), at 1955.

<sup>14</sup> LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 31-32 (2001).

<sup>15</sup> Molot, *supra* note 8, at 1781.

<sup>16</sup> See, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1456 (2000), at 1459.

<sup>17</sup> *Id.*, at 1460.

<sup>18</sup> *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1 (Supreme Court of India).

two broader issues (1) what types of concerns are justified in limiting the exercise of Fundamental Rights (and held that in the hierarchy of norms, Fundamental Rights are of greater salience than social goals like providing security, which cannot be balanced against the former); and (2) the nature of review in cases that fall under Article 15(1) (holding that “*strict scrutiny*” applies to such cases). Had the case been decided on the narrow issue, it would have formed precedent for future cases that looked at the scope of Article 15(3). In deciding on the broader issues, the case now forms precedent not only for all equality review cases, but also for all cases in which rights are sought to be balanced against other social interests. The non-minimalism of the case along the shallowness continuum is also evident from the fact that the Court linked its decision to the deeply jurisprudential debate over the scope of Fundamental Rights vis-à-vis other social interests - a debate that has raged for centuries in jurisprudential scholarship without a clear winner.<sup>19</sup>

### A. Justifications for Minimalism

It is important to clarify that minimalism straddles both the normative and the descriptive realms. It is both a prescriptive theory as well as a description of judicial practice. As a normative theory, minimalism seeks to promote the values of certainty, consistency, adherence to legal rules, and promotion of democratic deliberations in adjudication.<sup>20</sup> It is broadly a response to concerns over the democratic legitimacy of judicial review; and realist concerns over the articulation of personal preferences rather than legal principles in judicial adjudication. These and other concerns are identified in this segment.

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<sup>19</sup> See, Francois Du Bois, *Rights Trumped? Balancing in Constitutional Adjudication*, ACTA JURIDICA 155 (2004); T. M. Scanlon, *Adjusting Rights and Balancing Values*, 72 FORDHAM L. REV. 1478 (2003-2004); Denise Meyerson, *Why Courts Should Not Balance Rights Against the Public Interest*, 31 MELB. U. L. REV. 873 (2007); Cristopher Supino, *The Police Power and “Public Use”: Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 712 (2007-2008); Donald L. Beschle, *Kant’s Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949 (2003-2004); Aileen Mc Harg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671 (1999); Franklin R. Liss, *A Mandate to Balance: Judicial Protection of Individual Rights under the Canadian Charter of Rights and Freedoms*, 41 EMORY L. J. 1281 (1992). See also, C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism while Preserving Civil Liberties*, 33 DENV. J. INT’L. L. & POL’Y 195 (2004-2005) (for a summary of the debates on this issue during the framing of India’s Constitution).

<sup>20</sup> Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 124 (2006).

**(a) Democratic Legitimacy of Judicial Review and the Counter-Majoritarian Difficulty**

The counter-majoritarian difficulty challenges the democratic legitimacy of judicial review and essentially asks: why should judges have the power of striking down laws made by democratically accountable branches of the state?<sup>21</sup> Minimalism is presented as a means of reconciling this judicial power with democratic values.<sup>22</sup> The minimalist strategy advocates that the judiciary should give all possible deference to the political branches,<sup>23</sup> but where this is not possible, the judicial role should be limited to deciding the narrow dispute between the parties, leaving larger questions open for democratic settlement.<sup>24</sup>

According to theories of minimalism, this is the best account of judicial review in a democratic polity as it gives space for political discourse on the issue, instead of taking matters away from the political arena.<sup>25</sup> Therefore, minimalism is the practice of “*saying no more than necessary to justify an outcome, and leaving as much as possible undecided [so as to] promote more democracy and more deliberation*”.<sup>26</sup> Sunstein refers to this approach as the democracy-protecting minimalist strategy. He also advocates the use of democracy-promoting minimalist strategies, arguing that the judiciary should not only refuse to interfere in democratic deliberations, but should also actively decide in a manner such that democratic deliberations are promoted. This democracy-promoting strategy deals with the content of judicial decisions, and favours those outcomes which enhance democratic deliberations. Therefore, Sunstein argues in favour of striking down those enactments and actions that do not conform to procedures meant for sustaining and enhancing democratic

<sup>21</sup> Molot, *supra* note 8, at 1754-55. *See also*, Bickel, *supra* note 3.

<sup>22</sup> *See contra*, Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQ. L. 643, 647-48, 658-59 (2008) (arguing that this form of reasoning reduces democracy to majoritarianism; and that judicial review does not close off democratic deliberation, but defines the scope of deliberation, thus giving it “a certain vitality”). *See also*, RONALD DWORKIN, JUSTICE IN ROBES 133-34 (2006) (stating that a majoritarian government is democratic only if it protects the fundamental values of the polity from the tyranny of the majority).

<sup>23</sup> This issue was debated as far back as 1893, when James Bradley Thayer advocated that the Court should give all possible deference to Congress’s interpretation of the Constitution. *See*, James B. Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>24</sup> SUNSTEIN, *supra* note 8, at 3-4. *See contra*, Seigel, *supra* note 14, at 2010. (arguing that in “leaving issues to the democratic process and promoting democratic deliberation, minimalist Justices often simply postpone the questions they do not decide for future litigation”).

<sup>25</sup> Fiss, *supra* note 23, at 647.

<sup>26</sup> SUNSTEIN, *supra* note 8, at 3-4.

deliberations, like on grounds of non-application of mind, vagueness, excessive delegation, mala fides, etc.<sup>27</sup>

***(b) Realist concerns over the constraining power of legal reasoning***

In the aftermath of the legal realism movement, scholars lost faith in the determinacy of law and the constraining power of legal reasoning.<sup>28</sup> As formalism stood discredited, the argument was that in the guise of legal reasoning, judges were advocating personal preferences. If this were the case, and if judges could not be trusted to decide cases based on legal principles, minimalist strategies were advocated as the means whereby courts could at least be made to confine the scope of their decisions, and decide as little as possible.<sup>29</sup>

***(c) To reduce costs of judicial decisions***<sup>30</sup>

Sunstein in particular sees two types of costs associated with non-minimalist decisions: decision costs and error costs.<sup>31</sup> Decision costs are the costs associated with arriving at a broad decision, and include the time and research required to make an accurate decision on broad issues with far-reaching impact. Further, decisions can be wrong, and the broader the decision, the higher the costs of a wrong decision.<sup>32</sup> Therefore, minimalism as an approach to decision-making advocates taking the narrow view to minimize the costs of a wrong decision. Minimalism is specifically advocated where judges are not confident that they have reached the correct decision.<sup>33</sup> Sunstein's broader claim is that minimalism will make

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<sup>27</sup> SUNSTEIN, *supra* note 8, at 3-4. See also, See, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1456 (2000), at 1463.

<sup>28</sup> Molot, *supra* note 8, at 1767.

<sup>29</sup> Molot, *supra* note 8, at 1757.

<sup>30</sup> Fiss, *supra* note 23, at 646. Fiss also argues that the minimalist strategy itself imposes severe costs through "the cycles of litigation ... and the resources consumed by the judicial and legislative branches". *Id.* at 658-59. See also, RONALD DWORKIN, *JUSTICE IN ROBES* 133-34 (2006) (stating that a majoritarian government is democratic only if it protects the fundamental values of the polity from the tyranny of the majority), at 657.

<sup>31</sup> Cass R. Sunstein, *Second - Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2874 (2006-2007).

<sup>32</sup> SUNSTEIN, *supra* note 8, at 4.

<sup>33</sup> Charles A. Kelbley, *Privacy, Minimalism, and Perfectionism*, 75 FORDHAM L. REV. 2951, 2955 (2006-2007).



the possibility of wrong decisions less frequent, and their effects less damaging.<sup>34</sup>

***(d) As a decision-making strategy***

Minimalism is seen as a tool for reaching a consensus among people with divergent views.<sup>35</sup> This is particularly emphasized where there is deep disagreement over the issue in question. Minimalism, as a decision-making strategy, advocates basing the decision on the narrowest possible grounds, while leaving the broader questions open, so as to reach a consensus on the issue.<sup>36</sup>

**B. Facets of minimalist decision-making**

Based on the concerns highlighted above, and both as a prescriptive strategy as well as descriptive theory, the following tools for decision-making are associated with minimalism:

1. As far as possible, declining substantive review of actions of political branches.<sup>37</sup>
2. Deciding on narrow technical grounds rather than on broad principles.
3. Deciding on statutory rather than constitutional grounds,<sup>38</sup> and engaging in statutory interpretation rather than constitutional adjudication.
4. Deciding on procedural issues rather than substantive grounds.<sup>39</sup>

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<sup>34</sup> SUNSTEIN, *supra* note 8, at 4 (minimalism is likely to make judicial errors less frequent and (above all) less damaging"). *See contra*, Seigel, *supra* note 14, at 2006 ("As a general matter, there seems to be little reason to suppose that overall costs in the legal and political system will be minimized by a Supreme Court that decides cases as narrowly and shallowly as reasonably possible").

<sup>35</sup> SUNSTEIN, *supra* note 8, at 10-11.

<sup>36</sup> Kelbley, *supra* note 34, at 2955.

<sup>37</sup> BICKEL, *supra* note 3.

<sup>38</sup> Fiss, *supra* note 23, at 646; Kelbley, *supra* note 34, at 2954.

<sup>39</sup> *See for e.g.*, SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 97 (2005). (arguing that privacy cases like *Griswold v. Connecticut* and *Lawrence v. Texas* should have been decided on the ground of desuetude rather than through an articulation of the right of privacy). *See also*, Kelbley, *supra* note 34, at 2960, arguing that Sunstein's reasoning reveals that minimalists should decide, as far as possible, on procedural rather than substantive grounds.

5. Providing strong deference to the views of the political branches on what is constitutional,<sup>40</sup> and/or leaving broader constitutional issues undecided.
6. Confining the decision as far as possible to the facts of the case.<sup>41</sup>
7. Giving advice rather than binding decisions, so that while the court engages in, it also defers to the political branches in, the resolution of a constitutional dispute.<sup>42</sup>
8. Review actions of the political branches to ensure compliance with procedures for democratic deliberation.

Minimalism is therefore an incremental, gradual, cautious, one-case-at-a-time approach to judicial decision-making. It sees the role of courts, not as giving meaning to and protecting constitutional values, but as a dispute resolver charged with the duty of deciding specific disputes without engaging in broader constitutional deliberations.<sup>43</sup>

### III. “COURTING TERROR”: CONSTITUTIONAL ADJUDICATION IN TERROR-RELATED CASES

Minimalism as an approach to decision-making appears to be very popular in times of national emergencies. Both Owen Fiss and Cass Sunstein have described the minimalist approach of the U.S. Supreme Court in such situations, Fiss decrying the practice and Sunstein celebrating it.<sup>44</sup> Sunstein in particular describes three broad categories of approaches in the face of national security concerns: National

<sup>40</sup> SUNSTEIN, *supra* note 8, at 26. Kelbley, *supra* note 34, at 2961 (referring to Justice Holmes’ “Puke Test” which states that a statute is unconstitutional only if it makes you want to throw up).

<sup>41</sup> Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 887 (2003). *See also*, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1456 (2000), at 1465.

<sup>42</sup> *See*, Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710 (1998).

<sup>43</sup> Fiss, *supra* note 23, at 647. *See also*, Seigel, *supra* note 14, at 2004.

<sup>44</sup> *See, contra*, Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQ. L. 643, 647-48, 658-59 (2008) (arguing that this form of reasoning reduces democracy to majoritarianism; and that judicial review does not close off democratic deliberation, but defines the scope of deliberation, thus giving it “a certain vitality”). *See also*, RONALD DWORCKIN, JUSTICE IN ROBES 133-34 (2006) (stating that a majoritarian government is democratic only if it protects the fundamental values of the polity from the tyranny of the majority), Cass R. Sunstein, *Minimalism at War*, Supreme Court Review (Forthcoming) available at <http://ssrn.com/abstract=629285>.

Security Maximalism, Liberty Maximalism and Minimalism.<sup>45</sup> The three approaches can be seen as part of a single continuum, national security maximalism and liberty maximalism forming polar opposites and minimalism occupying the intermediate space. National security maximalists see a highly deferential role for the judiciary in the face of national security threats, on the ground that the political branches have to do all they can to protect the country. Liberty maximalists on the other hand insist that just as in times of peace, in times of war too, the role of the judiciary is to protect constitutional rights and liberties- in fact more so in times of war, as they are more under threat.<sup>46</sup> Following an intermediate approach minimalists insist that their role is to ensure compliance of the state with “*Due Process Writ Large*” - which Sunstein defined in terms of an emphasis on clear legal standards, compliance with procedural rules and safeguards, and balancing national security concerns with protection of civil liberties in a manner that prevents over-reaching on either end.<sup>47</sup> Sunstein goes on to describe how a large part of American constitutional history in times of national security threats reflects a minimalist approach of courts to adjudication. Interestingly, we have found that as a matter of description, this applies to India as well.

We have looked at the prevalence of minimalist decision-making in terrorism-related cases in India. Our focus has been on cases where courts were called upon to adjudicate between the competing claims of national security on the one hand and civil liberties on the other.<sup>48</sup> Therefore, our analysis is confined to those cases where the constitutionality of a

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<sup>45</sup> See, contra, Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRY IN LAW 643, 647-48, 658-59 (2008) (arguing that this form of reasoning reduces democracy to majoritarianism; and that judicial review does not close off democratic deliberation, but defines the scope of deliberation, thus giving it “*a certain vitality*”). See also, RONALD DWORKIN, JUSTICE IN ROBES 133-34 (2006) (stating that a majoritarian government is democratic only if it protects the fundamental values of the polity from the tyranny of the majority), Cass R. Sunstein, *Minimalism at War*, Supreme Court Review (Forthcoming) available at <http://ssrn.com/abstract=629285>, at 3.

<sup>46</sup> Fiss, *supra* note 23, at 647-48, 658-59 (2008); Dworkin, *supra* note 23, at 133-34; Sunstein, *Minimalism at War*, Supreme Court Review (Forthcoming) available at <http://ssrn.com/abstract=629285>, at 3.

<sup>47</sup> Sunstein, *Minimalism at War*, at 4.

<sup>48</sup> On testing cases for features of minimalism, see Neil S. Seigel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1958 (2004-2005), at 1963 (arguing that a falsifiable and therefore operational definition of minimalism must have the following two components: “it must (a) result from the (apparently) international choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available”).

terror-related enactment or of an action under such enactment was in question. We have tested these judgments for features of minimalist decision-making outlined above. It is pertinent to note here that, as Cass Sunstein has himself acknowledged as a descriptive matter, the minimalist approach cannot be tested on absolute standards but on relative grounds.<sup>49</sup> Therefore as a description of judicial practice, minimalism is often a *tendency* to decide on narrower (rather than broader) and shallower (rather than deeper) grounds and might not in all cases reflect decision-making on the narrowest (rather than broadest) or shallowest (rather than deepest) grounds.<sup>50</sup> In our analysis therefore, we have looked for the prevalence of one or more facets of minimalist decision-making outlined above.

As elaborated below, we find that in terror-related constitutional adjudication the Supreme Court has tended towards identifying its role as a mediator between the competing claims of national security and Fundamental Rights; rather than as a guardian of Fundamental Rights. It broadly defers to legislative wisdom on where the line between the two should be drawn and does not engage in the larger debate on the extent of intrusion permissible into the protected realm of civil liberties. The Court also tends to check for procedural safeguards and compliance rather than substantive review of provisions. It prefers to engage in statutory interpretation rather than constitutional adjudication in deciding upon the *vires* of particular provisions. It exercises limited review of legislatively mandated principles but is open to reviewing executive action to ensure compliance with such principles. It thus prefers to resolve disputes between the citizen and the state in individual fact situations rather than make broader statements on rights and entitlements guaranteed by the polity.

In this segment, before reviewing the terror-related jurisprudence of the Supreme Court, we will first look at the approach of the Court more generally to the issue of national security vis-à-vis Fundamental Rights. Our attempt is to show the similarities in its approach to adjudication in national security related issues (of which terrorism forms one part) from 1950 onwards.

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<sup>49</sup> Sunstein, *Minimalism at War*, at 28.

<sup>50</sup> See, Sunstein, *Testing Minimalism*, at 125 (replying to Neil S. Seigel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1958 (2004-2005)).

## A. The Supreme Court's Approach to National Security vis-à-vis Fundamental Rights

The interface between national security and civil liberties initially came up before courts in matters pertaining to preventive detention. From 1950's to the mid 1980's various preventive detention legislations as well as executive actions under these legislations were challenged before the Supreme Court, and these formed the focal point of the debate between national security and civil liberties. With the enactment of specific anti-terror laws in the mid-1980's, the focus shifted from preventive detention to state action in the context of terrorism.<sup>51</sup>

In national security related adjudication, the Indian Supreme Court has seen a narrow role for itself, limited to negotiating between the competing claims of national security and civil liberties protection. A good example of this policy was evident in *S.P. Gupta v. Union of India*.<sup>52</sup> Here the Court quoted with approval, a passage from *State of Rajasthan v. Union of India*<sup>53</sup> wherein the Supreme Court had held that the role of the judiciary was to "uphold constitutional values and enforce constitutional limitations",<sup>54</sup> and for this purpose, it was precluded from declaring a "judicial hands-off" even in cases involving political questions. After articulating this broad principle however, the Court in *S.P. Gupta* carved out a limitation on judicial deliberation of certain issues, including national security.<sup>55</sup> In essence therefore, the Court saw a different and much narrower role for itself in cases involving national security.

The Supreme Court has fulfilled this narrow mediating role by granting broad deference to the political wings in dealing with national security concerns on the one hand; and focusing on ensuring procedural compliance and minimization of misuse, instead of engaging in a substantive rights review. The deferential approach to political wings was

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<sup>51</sup> See generally, Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L. L. 311 (2000-2001), Anil Kalhan et. al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006-2007) (on the continuity between preventive detention laws and anti-terror laws).

<sup>52</sup> *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 : AIR 1982 SC 149 (Supreme Court of India).

<sup>53</sup> *State of Rajasthan v. Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361, ¶ 154 (Supreme Court of India).

<sup>54</sup> *Id.*

<sup>55</sup> *S.P. Gupta v. President of India*, 1981 Supp SCC 87 : AIR 1982 SC 149, ¶ 982 (Supreme Court of India).

very much in evidence in the national security related preventive detention cases of the 1950's, 60's and 70's. In *A.K. Gopalan v. State of Madras*,<sup>56</sup> for example, the Court upheld the *vires* of the Preventive Detention Act, 1950, by rejecting a due process interpretation of the phrase 'procedure established by law' in Article 21.<sup>57</sup> The Court held that any procedure enacted by Parliament to deprive a person of his right to life or personal liberty, came within the purview of Article 21 and was constitutionally valid.<sup>58</sup> It felt that the substantive justness and reasonableness of the procedure was for the Parliament to consider.<sup>59</sup> The Court therefore provided broad deference to the legislative branch in enacting legislation depriving citizens of their life and liberty, and declined to replace legislative wisdom on the fairness of such legislation with its own understanding.<sup>60</sup>

This broad deference to the political wings was also evident in *Makhan Singh v. Punjab*,<sup>61</sup> and *Sadanandan v. State of Kerala*.<sup>62</sup> These cases related to preventive detention under the Defence of India Ordinance and arose during the subsistence of a Proclamation of Emergency, whereunder the enforcement of certain Fundamental Rights had been suspended. The Supreme Court emphasized that the determination of whether the conditions justifying the Emergency were still prevalent, how long the Emergency should be in force and what rights ought to be suspended during an Emergency should be left to the executive, and courts should not interfere in such determinations. It was held that effective safeguard against abuse of executive powers "*is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion*".<sup>63</sup> This was another example of deference to, and faith in the democratic forces as against judicial regulation.

Another facet of minimalism, that of declining substantive rights review but assessing procedural compliance, is also a theme that runs through both these cases. The petitioners in both cases challenged their preventive detention orders for violation of Fundamental Rights. Declining to decide

<sup>56</sup> *A.K. Gopalan v. Madras*, AIR 1950 SC 27 (Overruled) (Supreme Court of India) [Hereinafter 'Gopalan'].

<sup>57</sup> *Gopalan*, at ¶ 16.

<sup>58</sup> *Gopalan*, at ¶ 305.

<sup>59</sup> *Gopalan*, at ¶ 23.

<sup>60</sup> *Gopalan*, at ¶ 23.

<sup>61</sup> *Makhan Singh v. Punjab*, AIR 1964 SC 381 (Supreme Court of India).

<sup>62</sup> *Sadanandan v. State of Kerala*, AIR 1966 SC 1925 (Supreme Court of India).

<sup>63</sup> *Makhan Singh v. Punjab*, AIR 1964 SC 381, ¶ 49 (Supreme Court of India).

the merits of the claims on the ground that the petitioners were precluded from bringing a claim to enforce Fundamental Rights by virtue of orders under Article 359, the Supreme Court further ruled that the decision to pass a detention order was dependent on the subjective satisfaction of the detaining authority.<sup>64</sup> Nevertheless, the Court held that it could examine the detention order to ensure compliance with statutory safeguards,<sup>65</sup> and on grounds of *mala fide*, excessive delegation and non-application of mind.<sup>66</sup> The emphasis was therefore clearly on ensuring procedural compliance.<sup>67</sup>

The focus on procedural compliance was also present in the 1974 case of *Haradhan Saha v. State of W.B.*,<sup>68</sup> where the constitutionality of the next law to provide for preventive detention, the Maintenance of Internal Security Act [hereinafter "MISA"], was challenged. The petitioners claimed that the Act was unreasonable because it provided unguided power to the State to preventively detain a person, as the grounds for detention were very broad and had not been defined.<sup>69</sup> Further, there were no standards for the objective assessment of the grounds for such detention. Second, the petitioners contended that the Act violated Article 21 because the detenu was not given a proper right to be heard. Third, it was contended that Article 22 (5) was violated because the Act did not provide for the machinery or just procedure to give effect to this Article. Fourthly, the Act was said to violate Article 14 because it permitted discrimination in how the government chose to deal with the offence.

Rejecting these claims, the Court held that the grounds on which a person could be detained were not vague and that it was permissible to detain a person for an act which was not by itself an offence under any

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<sup>64</sup> *Sadanandan v. State of Kerala*, AIR 1966 SC 1925, ¶ 20 (Supreme Court of India) [Hereinafter 'Sadanandan'].

<sup>65</sup> *Sadanandan*, at ¶ 14.

<sup>66</sup> *Sadanandan*, at ¶¶ 13-14.

<sup>67</sup> This reasoning of the Court is also akin to Sunstein's understanding of democracy-promoting minimalism, where the court strikes down legislation on grounds that the other branches have not complied with norms of democratic deliberation. Sunstein had examined decisions in *Griswold v. Connecticut* and *Lawrence v. Texas* and argued that a minimalist approach to the cases would have decided the issues on grounds of desuetude rather than on the substantive right to privacy.

<sup>68</sup> *Haradhan Saha v. State of W.B.*, (1975) 3 SCC 198 (Supreme Court of India).

<sup>69</sup> Section 3, MISA provided for detention on grounds of preventing a person from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or the security of the State or the maintenance of public order, or the maintenance of supplies and services essential to the community.

penal statute.<sup>70</sup> The focus of the Court, in testing the reasonableness of the provisions, was on examining whether there were sufficient procedures for the detenu to make a representation. The Court stated that procedural reasonableness could not be tested against abstract notions but had to be “judged in the context of the urgency and the magnitude of the problem, the underlying purpose of the restrictions and the prevailing conditions”.<sup>71</sup> On this basis, the Court rejected the contention that principles of natural justice have to be complied with in all procedures, and held that “if a statutory provision excludes the application of any or all the principles of natural justice then the court does not completely ignore the mandate of the Legislature”.<sup>72</sup> Accordingly, it held that as long as the Government and the Advisory Board gave proper consideration to the detenu’s representation, and there was no abuse of discretion, the requirement of reasonableness<sup>73</sup> and fairness<sup>74</sup> was complied with, and thus there was no additional duty to disclose any evidence to the detenu,<sup>75</sup> or make a speaking order.<sup>76</sup> Executive action in individual cases could however be challenged on the grounds that the detenu had not been given the opportunity to make a representation or that the detaining authority had abused the power of detention.<sup>77</sup>

Therefore, in *Haradhan Saha*, the Court deferred to legislative wisdom in determining the reasonableness of procedures. It did not test the provisions of MISA for substantive reasonableness but limited its scrutiny to compliance with Article 22 restrictions. However, it left the window open for a detenu to challenge executive action in individual cases for non-compliance with MISA procedures.

At about the same time as *Haradhan Saha*, the Supreme Court decided another case under MISA, this one directly relating to terrorism. *Giani Bakshish Singh v. Govt. of India*,<sup>78</sup> decided by the Court in 1973, dealt with a British citizen of Indian origin, who had allegedly addressed secret

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<sup>70</sup> *Haradhan Saha v. State of W.B.*, (1975) 3 SCC 198, ¶ 22 (Supreme Court of India) [Hereinafter ‘Haradhan’].

<sup>71</sup> *Haradhan*, at ¶ 28.

<sup>72</sup> *Haradhan*, at ¶ 30.

<sup>73</sup> *Haradhan*, at ¶ 28.

<sup>74</sup> *Haradhan*, at ¶ 30.

<sup>75</sup> *Haradhan*, at ¶ 30.

<sup>76</sup> *Haradhan*, at ¶ 26.

<sup>77</sup> *Haradhan*, at ¶ 31.

<sup>78</sup> *Giani Bakshish Singh v. Govt. of India*, (1973) 2 SCC 688 : AIR 1973 SC 2667 (Supreme Court of India) [Hereinafter ‘Giani Bakshish’].



meetings for planning the use of force to effect Punjab's secession from India. He was preventively detained by the Government on these charges under the MISA, but was not charged for the commission of any crime. Before the Supreme Court, the Government argued that if released, the petitioner would return to England and indulge in prejudicial activities against India, which was why he had been detained. The Court refused to review the detention order on merits, stating that it would not review the truth or sufficiency of the grounds of detention,<sup>79</sup> and could not test compliance with Article 22 by virtue of the existence of a Proclamation of Emergency.<sup>80</sup> It therefore confined itself to interpreting clauses (a) and (b) of Section 3(1), MISA, and concluded that the state had the power under the said sections to detain a foreigner for purposes other than expelling him for the country.<sup>81</sup>

Another case of note in relation to MISA is *A.D.M., Jabalpur v. Shivkant Shukla*,<sup>82</sup> which exhibits in many ways, the vanishing point of minimalism. During the Emergency of 1975-77, the enforcement of Articles 14, 21 and 22 was suspended.<sup>83</sup>

However, relying on the precedent in *Makhan Singh*,<sup>84</sup> various High Courts in the country ruled that they had the right to issue the writ of *habeas corpus* in cases of preventive detention, if they found an order of detention to be *mala fide*, or passed by an authority not empowered to pass such an order, or passed in excess of the power delegated to the concerned authority.<sup>85</sup> On appeal, a five-judge bench of the Supreme Court ruled that courts did not have the power to review orders of detention, even if they were *ultra vires* the legislation under which they had been imposed or on grounds of *mala fide*, since exercising such a review, and granting the writ of *habeas corpus* would amount to the enforcement of Article 21 which was suspended during the Emergency. In coming to this conclusion, the Court upheld the contention of the State that Article 21 is the sole repository of the right to life and personal liberty, and that “[l]iberty is itself the gift of the law and may by the law be forfeited

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<sup>79</sup> *Giani Bakshish*, at ¶ 2.

<sup>80</sup> *Giani Bakshish*, at ¶ 6.

<sup>81</sup> *Giani Bakshish*, at ¶ 4.

<sup>82</sup> *A.D.M., Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207 (Supreme Court of India).

<sup>83</sup> IMTIAZ OMAR, EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN 99.

<sup>84</sup> *Makhan Singh v. Punjab*, AIR 1964 SC 381 (Supreme Court of India).

<sup>85</sup> Omar, *supra* note 84, at 100.

or abridged”.<sup>86</sup> On the same reasoning, it was also held that neither the Court, nor the detenu could ask for the grounds for detention.<sup>87</sup>

Defining the role of the Court as that of navigating between the competing interests of the individual and the government, the Court opined that though it was competent to undertake this exercise under normal circumstances,<sup>88</sup> “[i]n period[s] of public danger or apprehension the protective law which gives every man security and confidence in times of tranquility, has to give way to interests of the State”,<sup>89</sup> and the Court could not weigh the “competing claims of individuals and government” in such extraordinary situations because it was ill-equipped to determine whether a certain set of events constituted an “Emergency,” whether there was a genuine threat to national security, and the extent to which this required government control over individual liberty.<sup>90</sup> The extreme deference—some call it abdication<sup>91</sup> or surrender<sup>92</sup>—of the Court to the political branches is exemplified by the statement of Justice Beg, speaking for the majority, when he opined that “the care and concern bestowed by the State authorities upon the welfare of detainees who are well – housed, well – fed and well – treated, is almost maternal”.<sup>93</sup>

With the end of the Emergency in 1977, the hugely unpopular MISA was repealed in 1978.<sup>94</sup> In 1980 however, another law on preventive detention, the National Security Ordinance, was promulgated. It was subsequently replaced by the National Security Act, 1980. The *vires* of the Ordinance and certain provisions of the Act were challenged in *A.K. Roy v. Union of India*.<sup>95</sup> The Petitioners *inter alia* challenged the justness of the Act, impugned the vagueness of the grounds of detention and questioned the

<sup>86</sup> *Makhan Singh v. Punjab*, AIR 1964 SC 381, ¶ 35 (Supreme Court of India).

<sup>87</sup> *A.D.M., Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521, ¶ 138 (Supreme Court of India) [Hereinafter ‘A.D.M., Jabalpur’].

<sup>88</sup> *A.D.M., Jabalpur*, at ¶ 45.

<sup>89</sup> *A.D.M., Jabalpur*, at ¶ 44.

<sup>90</sup> *A.D.M., Jabalpur*, at ¶ 45.

<sup>91</sup> Justice Ruma Pal, *Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India*, (2008) 7 SCC J-9, J-18.

<sup>92</sup> See, S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL’Y 29 (2001).

<sup>93</sup> Beg J. (as he then was) in *A.D.M., Jabalpur*, at ¶ 324-A.

<sup>94</sup> See, generally, Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311 (2000-2001), Anil Kalhan et. al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006-2007) (on the continuity between preventive detention laws and anti-terror laws). (On the history of MISA and its repeal.).

<sup>95</sup> *A.K. Roy v. Union of India*, (1982) 1 SCC 271 (Supreme Court of India) [Hereinafter ‘A.K. Roy’].

reasonableness of the procedures prescribed under the Act. The Court refused to go into the “*justness*” of having a law on preventive detention, first on the ground that the Constitution itself provided for preventive detention, and secondly on the reasoning that its power of judicial review did not extend so far.<sup>96</sup> The Court also rejected the contention that the grounds for preventive detention under the Act were vague and imprecise. Arguing that the very nature of the harm sought to be prevented by the Act made it difficult to give a concrete meaning to the terms used, the Court felt that a certain amount of latitude had to be given to the Legislature in this matter. However, it held that when individual cases were brought before courts, they would construe the terms very narrowly.<sup>97</sup> Therefore the Court upheld the provision, on the understanding that there was always scope for judicial correction of executive error in individual cases.<sup>98</sup> It also upheld the reasonableness of the procedures, first by clarifying that both the reasonableness of procedures and the content of principles of natural justice were context specific and not immutable;<sup>99</sup> and secondly by reading in safeguards,<sup>100</sup> and engaging in statutory construction.<sup>101</sup> The Court therefore held that a detenu did not have the right to legal representation,<sup>102</sup> the right to cross-examination,<sup>103</sup> or the right to a public trial,<sup>104</sup> since the Constitution did not mandate it and the Act did not provide for it, and that the non-availability of these rights did not impinge upon the reasonableness of the procedures under the Act.

Preventive detention under the National Security Act, on grounds of engaging in terrorist activities was in question in *State of Punjab v. Sukhpal Singh*.<sup>105</sup> Declining to question the subjective satisfaction of the detaining authority on whether this was a fit case for detention, the Court limited its role to ascertaining compliance with procedural requirements under Article 22(5) of the Constitution of India.<sup>106</sup> This understanding of the Court’s role was reached based on the reasoning that “[t]hose who are responsible for the national security or for the maintenance of public

<sup>96</sup> *A.K. Roy v. Union of India*, (1982) 1 SCC 271, ¶¶ 34-38 (Supreme Court of India).

<sup>97</sup> *A.K. Roy*, at ¶ 63.

<sup>98</sup> *A.K. Roy*, at ¶ 63.

<sup>99</sup> *A.K. Roy*, at ¶¶ 84, 101.

<sup>100</sup> *A.K. Roy*, at ¶¶ 80, 93, 94, 108.

<sup>101</sup> *A.K. Roy*, at ¶ 86-88.

<sup>102</sup> *A.K. Roy*, at ¶ 93.

<sup>103</sup> *A.K. Roy*, at ¶ 99.

<sup>104</sup> *A.K. Roy*, at ¶ 106.

<sup>105</sup> *State of Punjab v. Sukhpal Singh*, (1990) 1 SCC 35 (Supreme Court of India).

<sup>106</sup> *Id.*, AIR 1990 SC 231, ¶ 9 (Supreme Court of India).

*order must be the judges of what the national security or public order requires” and therefore “the Court cannot examine the materials before it and find that the detaining authority should not have been satisfied on the materials before it and detain the detenu”.*<sup>107</sup>

Not all of these cases on prevention detention were directly on the issue of terrorism, but they do exhibit a tendency of taking a hands-off approach to national security, providing broad deference to the political branches on such matters, and focusing on ensuring procedural compliance rather than substantive review.

## **B. Judicial Review of Anti-Terror Legislations**

In 1985 Parliament enacted, and in 1987 extended, the Terrorism and Disruptive Activities (Prevention) Act [hereinafter “TADA”], to “*make special provisions for the prevention of, and for coping with, terrorist and disruptive activities*”.<sup>108</sup> The Act, *inter alia*, defined, and provided penalty for, terrorist and disruptive activities, created a special adjudicatory structure to deal with cases arising under the Act and defined powers of designated Courts under the Act, provided special investigative procedures and laid down special evidentiary rules. TADA lapsed in 1995. In 2000, the President promulgated the Prevention of Terrorism Ordinance. The Ordinance was enacted into legislation in 2002, in the form of the Prevention of Terrorism Act [hereinafter “POTA”]. After an existence of two years, POTA was repealed in 2004. The Constitutional validity of both Acts was challenged in *Kartar Singh v. State of Punjab*<sup>109</sup> [hereinafter “Kartar Singh”] and *Peoples’ Union for Civil Liberties v. Union of India*,<sup>110</sup> [hereinafter “P.U.C.L.”] respectively. There were two other legislations that have a bearing on terror-related issues, and whose constitutionality was challenged before the Supreme Court. One was the Armed Forces (Special Powers) Act, 1958, whose constitutional *vires* was challenged in *Naga People’s Movement of Human Rights v. Union of India* [hereinafter

<sup>107</sup> *State of Punjab v. Sukhpal Singh*, (1990) 1 SCC 35 : AIR 1990 SC 231, ¶ 9 (Supreme Court of India).

<sup>108</sup> See, Preamble to the Terrorist and Disruptive Activities (Prevention) Act, 1985.

<sup>109</sup> *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 (Supreme Court of India) [Hereinafter ‘*Kartar Singh*’].

<sup>110</sup> *Peoples’ Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580 (Supreme Court of India).

“Naga Peoples’ Movement”];<sup>111</sup> the other was the Maharashtra Control of Organised Crime Act, 1999 [hereinafter “MCOCA”], whose constitutional challenge was heard and decided by the Supreme Court in *State of Maharashtra v. Bharat Shanti Lal Shah* [hereinafter “Bharat Shah”].<sup>112</sup> The Armed Forces (Special Powers) Act was enacted to enable the armed forces to exercise certain special policing powers in “*disturbed areas*,” as defined by notification. Through Notification, it was *inter alia* extended to the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura.<sup>113</sup> MCOCA on the other hand was enacted to deal with organized crime, but is frequently used for prosecuting terror-related cases as well. Taken together, these four cases form the crux of the constitutionality review of anti-terror enactments. Interestingly all four cases show a remarkable degree of consistency in applying the minimalist approach, as will be examined below.

In both *Kartar Singh* as well as *P.U.C.L.*, instead of deciding on the broad issue of if, and to what extent, national interests and security concerns can trump civil liberties, and whether whittling down procedural and evidentiary safeguards was a constitutionally just means for combating terror, the Court deferred to the legislature on the need for the enactment,<sup>114</sup> and confined itself, as shall be seen below, to examining whether the provisions of the Act had enough procedural safeguards to ensure compliance with due process. Refusing to go into the need for enacting a special anti-terror law, the Court deferred to Parliament’s assessment that “*to face terrorism we need new approaches, techniques, weapons, expertise and of course new laws*”<sup>115</sup> and that “*a new anti-terrorism law is necessary for a better future*”.<sup>116</sup> The Court made it clear that it would not look into need for special terror legislations, or the potential for abuse, in deciding constitutionality.

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<sup>111</sup> *Naga People’s Movement of Human Rights v. Union of India*, (1998) 2 SCC 109 (Supreme Court of India).

<sup>112</sup> *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (Supreme Court of India).

<sup>113</sup> *Naga People’s Movement*, at ¶2.

<sup>114</sup> *PUCL v. Union of India*, (2004) 9 SCC 580, ¶ 22 (Supreme Court of India) (Another issue that the Petitioner has raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the ‘need’ of POT. It is a matter of policy).

<sup>115</sup> *PUCL*, at ¶ 9.

<sup>116</sup> *Id.*

These cases highlight again the Court's self-understanding of its role as that of performing a balancing act between national security concerns and the protection of Fundamental Rights. Therefore in *Kartar Singh*, the Court pointed out that while

[t]he liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice in cases like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution.<sup>117</sup>

Similarly, in *P.U.C.L.* the Court on the one hand acknowledged the need for the protection and promotion of human rights in the fight against terror; but on the other, viewed terrorism itself as “*an assault of basic rights*.”<sup>118</sup> In light of this, it felt that its own responsibility was to maintain a “*delicate balance*” between protecting “*core’ human rights*” and State action in fighting terrorism.<sup>119</sup> The Court also stated that it would judge the constitutionality of P.O.T.A. keeping these considerations in mind.<sup>120</sup>

In keeping with this understanding of its role, the Court took the following actions in *Kartar Singh*, *P.U.C.L.*, *Naga People’s Movement* and *Bharat Shah*, (apart from determining the legislative competence of the concerned legislatures to enact the laws (in all cases in favour of the respective legislatures)):

**(a) Upheld those provisions that had inbuilt procedural safeguards, and exhibited a nexus to the object of the Act**

Examples include Section 11, T.A.D.A., which gave the executive the power to transfer cases from one court to another without giving the accused a right of hearing. However, the concurrence of the Chief Justice of India was required for this purpose, and this was held to be an adequate safeguard, negating the requirement of *audi alteram partem*.

<sup>117</sup> *Kartar Singh*, at ¶ 351.

<sup>118</sup> *PUCCL*, at ¶ 15.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

Similarly, the Court upheld the constitutionality of Sections 3 and 4, T.A.D.A., which defined and punished terrorist and disruptive activities respectively, negating the contention that the two sections cover acts which constitute offences under ordinary laws and there was no guiding principle as to when the executive should proceed under TADA or the general laws. It was held that in cases of this nature, which provide for stringent punishment, sufficient materials linking the acts to the purpose for which the enactment was brought about, has to be produced. This was held to be sufficient guidance for distinguishing between T.A.D.A. crimes and ordinary ones.

In *P.U.C.L.*, section 14 P.O.T.A., which permitted a police officer to compel any person to furnish information was challenged as being violative of Articles 14, 19, 20(3), and 21. The Court however held that since the section required that such information could be asked only after obtaining a written approval from an officer not below the rank of Superintendent of Police, and since such a provision was necessary for the detection of terrorist activities, sufficient safeguards existed and hence the section was not unconstitutional.<sup>121</sup> Similarly, the Court upheld Sections 18 and 19, dealing with the notification and de-notification of terrorist organizations, on the grounds that *first*, such a provision was necessary to protect the unity and sovereignty of India and was therefore a reasonable restriction under Article 19(4). *Second*, that there might be occasions when the Government felt the need to declare an organization a terrorist organization without waiting to give them an opportunity to be heard; and *thirdly*, that even though there was no provision for pre-decisional hearings, the principle of *audi alteram partem* was not violated as there was provision for post-decisional hearings.<sup>122</sup> In the same vein, Section 27 (power to direct the accused to give bodily samples);<sup>123</sup> Section 30 (keeping identity of witnesses secret);<sup>124</sup> and Section 32 (admissibility of confessions made to police officers);<sup>125</sup> were upheld on the grounds that these provisions were needed to combat terror, and that there were enough procedural safeguards to ensure that they were not misused.

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<sup>121</sup> *PUCL*, at ¶¶ 36-38.

<sup>122</sup> *PUCL*, at ¶¶ 40-44.

<sup>123</sup> *PUCL*, at ¶¶ 50-53.

<sup>124</sup> *PUCL*, at ¶¶ 54-61.

<sup>125</sup> *PUCL*, at ¶¶ 62-64.

In *Naga People's Movement*, dealing with the constitutional challenge to Section 4(a) of the Armed Forces (Special Powers) Act,<sup>126</sup> the Court ruled that the conferment of wide powers to the armed forces is neither arbitrary nor unreasonable. It came to this conclusion based on the fact that the powers under the section could be exercised only on the satisfaction of all the conditions mentioned in the section.<sup>127</sup>

Taking a similar approach, in *Bharat Shah*, Sections 13-16 dealing with the interception of wire, electronic and oral communication was held as not violative of the right to privacy, because *first*, these provisions were intended to help in the prevention of organized crime and/or evidence collection; and *secondly*, there were sufficient safeguards built into the provisions.<sup>128</sup>

***(b) Upheld Constitutionality of provisions, but laid down procedural safeguards to prevent misuse***

In *Kartar Singh*, Section 8, TADA, relating to the forfeiture of certain types of property, was challenged on the ground that there were no guidelines on when this could be done, which rendered the provision arbitrary. It was also argued that forfeiture might hurt the interests of innocent third persons. The Court, while upholding the provision, laid down guidelines for exercise of the forfeiture power.<sup>129</sup> Similarly, in upholding the constitutionality of Section 15, which made confessions to a police officer admissible in court, the Supreme Court found that such a provision was required in light of national security concerns, but laid down detailed procedural guidelines to prevent misuse.<sup>130</sup>

In *Naga People's Movement*, dealing with the constitutionality of Section 4 of the impugned legislation, which gave the army wide powers

<sup>126</sup> The section reads: **Section 4: Special Powers of the armed forces** – Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area - (a) if he is of the opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed areas prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances.

<sup>127</sup> *Naga People's Movement*, at ¶ 46.

<sup>128</sup> *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (Supreme Court of India).

<sup>129</sup> *Kartar Singh*, at ¶ 156.

<sup>130</sup> *Kartar Singh*, at ¶ 263.



to open fire, arrest, search, as well as destroy structures where absconders or armed volunteers took shelter or were trained, the Court prescribed a list of “*Do’s and Don’t’s*” while acting under the legislation.<sup>131</sup> It agreed with the Attorney General that these instructions would provide an effective check against misuse or abuse of the provisions.<sup>132</sup>

**(c) Upheld constitutionality of provisions by engaging in statutory interpretation to read in clauses so as to meet constitutionality requirements**

In both *Kartar Singh* as well as *P.U.C.L.*, the Court read in the requirement of *mens rea* into the definition of abetment in T.A.D.A. and P.O.T.A. respectively.<sup>133</sup> *Kartar Singh* interpreted Section 5, which made the possession of specified arms and ammunition a substantive offence, to include only those instances where such possession was in connection with the use thereof in terrorist or disruptive activities.<sup>134</sup> Similarly, in *P.U.C.L.*, a knowledge requirement was read into Section 4, P.O.T.A. which dealt with the same issue of possession of arms.<sup>135</sup> *Mens rea* requirements were also read into Sections 20, 21, and 22, P.O.T.A. dealing with certain associative crimes.<sup>136</sup>

In *Bharat Shah*, intention and knowledge requirements were read into Sections 3(3) and 3(5), M.C.O.C.A., dealing with crimes of harbouring a member of an organized crime syndicate, and using proceeds of organized crime, respectively.<sup>137</sup> The Court also read in the phrase “*after coming into force of the Act*” after “*at any time*” into Section 4, M.C.O.C.A., to protect it from the vice of retroactivity.<sup>138</sup>

**(d) Upheld provisions, but made recommendations to the political branches to strengthen the legislative framework**

Where the Court felt that the provisions might be open to misuse or cause unwarranted hardship, instead of striking down such provisions, it

<sup>131</sup> *Naga People’s Movement*, at ¶ 54.

<sup>132</sup> *Naga People’s Movement*, at ¶ 55.

<sup>133</sup> *Kartar Singh*, at ¶ 133; PUCL, at ¶ 25.

<sup>134</sup> *Kartar Singh*, at ¶ 451 (Sahai, J. concurring).

<sup>135</sup> PUCL, at ¶ 23-27.

<sup>136</sup> PUCL, at ¶ 46-49.

<sup>137</sup> *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (Supreme Court of India).

<sup>138</sup> *Id.*

made recommendations to the political branches to look into the matter. Therefore, for example, in *Kartar Singh* the Court recommended the constitution of Review Committees to appraise individual cases under T.A.D.A., as well as the overall working of the legislation.<sup>139</sup> Similarly, it recognized the hardship likely to be caused due to provisions for direct appeal to the Supreme Court, particularly in terms of access to the Court and the expenditure likely to be incurred in obtaining such access. However, instead of invalidating the provision the Supreme Court asked Parliament to intervene in the matter.<sup>140</sup>

***(e) Struck down provisions on ground of vagueness and arbitrariness***

The Court struck down Section 22, T.A.D.A. dealing with the usage of photographs for basing identification;<sup>141</sup> and the part of Section 21(5), M.C.O.C.A., that dealt with the denial of bail under the Act if the accused was on bail under any other Act as well. In this latter case, the Court held that the provision denying bail to the accused on the ground that he was on bail under another Act, did not have any nexus with the object of M.C.O.C.A., which is to prevent organized crime. Hence to this extent, the section was struck down.<sup>142</sup>

Taken together these cases exemplify minimalist decision-making. The Court articulates its role in terms of balancing competing interests of national security and civil liberties; it provides broad deference to the legislature, not only to its policy, and its understanding of what is required and permissible to implement the policy, but also by engaging in a fair amount of legal gymnastics to uphold constitutionality of provisions. It evaluates legislative provisions not for their impact on Fundamental Rights of citizens, but to examine whether the provisions further the purpose of the Act on the one hand, and whether there are enough procedural safeguards to prevent misuse on the other. Where in spite of this curtailed review, a provision does not pass muster, the Court takes over the role of the legislative drafter and provides a procedural framework to prevent

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<sup>139</sup> *Kartar Singh*, at ¶ 265.

<sup>140</sup> *Kartar Singh*, at ¶ 297.

<sup>141</sup> *Kartar Singh*, at ¶ 361.

<sup>142</sup> *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5 (Supreme Court of India).

misuse, or recommends measures for the Parliament's consideration. Very rarely, if at all, does it invalidate a provision.

In terms of examining executive action, it has to be noted that the Court has moved from deferring to the subjective satisfaction of the official concerned, to abrogating for itself the power to review the sufficiency of the objective factors which lead to such action/decision. This is done principally to ensure compliance with procedures and to prevent misuse, and reflects changes in the jurisprudence on the scope of judicial review of administrative actions.<sup>143</sup> Broadly therefore, the Court has taken a hands-off approach when faced with issues of broader legislative policy and framework, but has sought to ensure that in individual cases, the executive does not go beyond the bounds of the legislative mandate. This approach to adjudication of terror-related cases exhibits both the narrow and shallow aspects of minimalism. It is narrow in that the focus is on procedural compliance in individual cases; and shallow because of the reluctance to engage with the broader issue of the permissible extent of state intrusion into civil liberties. Instead, the Court confines itself to reviewing whether the provision is in furtherance of the legislation concerned and has enough procedural safeguards.

One other feature of minimalist decision-making evident in the Supreme Court's jurisprudence on terror cases, is that of incrementalism. For example, in *Kartar Singh* the Court upheld Sections 3 and 4 of T.A.D.A., despite there being no clear guidance on how to differentiate between a T.A.D.A. offence and a normal I.P.C. offence made out on the same facts. The Court merely opined that since T.A.D.A. provided more stringent provisions, the designated court would have to be extra-vigilant to ensure that the ingredients of the offence were made out.<sup>144</sup> However, once it was brought to light in a later case that the complexity and substantial ambiguity of the issue was leading to misuse of the Act, the Court took up the matter in *Hitendra Vishnu Thakur v. State of*

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<sup>143</sup> For instance, the Court moved from refusing to look at subjective satisfaction of the detaining authority, but only examining orders on grounds of *mala fide* and excessive delegation (See, *Sadanandan*), to looking at the objective materials on which the executive authority arrived at its decision. (See, *PUCI*, at ¶ 45). See also, *Om Kumar v. Union of India*, (2001) 2 SCC 386 (Supreme Court of India) (discussing the move from testing administrative action using the *Wednesbury* principles to doing so on the touchstone of proportionality).

<sup>144</sup> See, *Kartar Singh*, ¶ 147, quoting *Ahmadi, J.* (as he then was) in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijaya*, (1990) 4 SCC 76, ¶ 8 (Supreme Court of India).

*Maharashtra*.<sup>145</sup> Here, the Supreme Court was again asked to clarify the exact scope of T.A.D.A. *vis-à-vis* provisions of other penal statutes. The Court then looked into the purpose of the enactment and the express words of the provisions to hold that for T.A.D.A. to be attracted the accused must have had the specific intention of spreading terror and must have undertaken the impugned activities for this motive. It held that the intention and not the consequence of the alleged terrorist act was the true test of deciding whether the legislation was attracted.<sup>146</sup>

Another illustration of incrementalist decision-making relates to the issue of Review Committees. In *Kartar Singh*, while upholding Section 15 of T.A.D.A., on the admissibility in court of confessions made to police officers, the Supreme Court recommended the setting up of executive Review Committees to provide a “higher level of scrutiny”<sup>147</sup> so as to evaluate the imposition of T.A.D.A. in individual cases and the working of the Act in general. This was an integral rationale for upholding what many viewed as a draconian measure.<sup>148</sup> This was enough to decide the core issue before the Court in *Kartar Singh*, which concerned the constitutional validity of Section 15. However, the Court did not look into the broader issues of, what effect a Review Committee finding on the use or abuse of T.A.D.A. should have in a matter pending before a court, or the even broader separation of powers issue of whether an executive committee could validly be asked to determine the innocence or guilt of a person whose trial was underway in a court of law.

The first issue came to be decided in *R. M. Tewari v. State*,<sup>149</sup> where the Court held that even where the Review Committee found in a given instance that T.A.D.A. had been wrongly applied, this finding could not lead to the automatic withdrawal of a case pending before a T.A.D.A. court. The public prosecutor had to first apply his mind to the opinion of the Review Committee and only if he was in agreement with the recommendation, could he approach the court for withdrawal of the case

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<sup>145</sup> *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 (Supreme Court of India).

<sup>146</sup> *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602, ¶ 6, 7, 15 (Supreme Court of India).

<sup>147</sup> *Kartar Singh*, at ¶ 265.

<sup>148</sup> See, *Kartar Singh*, at ¶ 193 and 194 (where the Court refers to Mr Ram Jethmalani's scathing attack on the provision).

<sup>149</sup> *R.M. Tewari v. State*, (1996) 2 SCC 610 (Supreme Court of India).

under Section 321, CrPC. The final decision to permit withdrawal would rest with the designated court.<sup>150</sup>

Issues relating to separation of powers and the impartiality of executive Review Committees came up before the Supreme Court on a few occasions. In *Shaheen Welfare Assn. v. Union of India*,<sup>151</sup> the Court itself raised questions over the impartiality of Review Committees as then constituted, and recommended that such committees be headed by retired Judges.<sup>152</sup> However, the Court did not re-open the issue of the validity of the stringent provisions of T.A.D.A. even though it found that on the one hand there was large scale abuse of T.A.D.A. provisions and on the other, Review Committees, which were meant to be essential safeguards, were not working impartially in all cases.<sup>153</sup>

The issue of the working of Review Committees, particularly the separation of powers concerns over the validity of executive review of pending court cases, as well as the exact impact of the Review Committee decision on a court case, came to be considered in the case of *Mahmadhusen Sheikh v. Union of India*.<sup>154</sup> This case came up in the context of the Prevention of Terrorism (Repeal) Act of 2004, which provided for executive review of P.O.T.A. cases, and automatic withdrawal of cases pending before courts where the Review Committee found that no *prima facie* case had been made out. Here the Court recognized that while ordinarily executive bodies cannot review court cases, in the instant case, since P.O.T.A. had already been repealed and the impugned provision was more in the nature of winding up of the Act, the intention was not to encroach upon the judicial sphere.<sup>155</sup> Further, it was held that a Review Committee decision in favour of the accused would have automatic effect and would not be governed by Section 321, Cr.P.C. in light of clear legislative mandate.<sup>156</sup>

This case brought the issue of Review Committees to a full circle. The Court began its journey by upholding the constitutionality of stringent

<sup>150</sup> R.M. Tewari v. State, (1996) 2 SCC 610 (Supreme Court of India), at ¶ 10.

<sup>151</sup> Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616 (Supreme Court of India) [Hereinafter 'Shaheen'].

<sup>152</sup> *Shaheen*, at ¶ 5.

<sup>153</sup> *Shaheen*, at ¶ 5.

<sup>154</sup> Mahmudhusen Abdulrahim Kalota Shaikh v. Union of India, (2009) 2 SCC 1 (Supreme Court of India) [Hereinafter 'Kalota Shaikh'].

<sup>155</sup> *Id.*

<sup>156</sup> *Kalota Shaikh*.

T.A.D.A. provisions by creating additional safeguards in the form of “*higher levels of scrutiny*” by Review Committees; then decided that this “*higher level of scrutiny*” would not automatically impact a pending court case; then found through the mechanism of the Review Committees that there was large scale abuse of T.A.D.A., as also that Review Committees themselves were not always working impartially, but did not re-open the issue of constitutionality of the initial T.A.D.A. provisions; and concluded by examining whether review by such executive committees of pending court cases, and their power to order withdrawal of cases was itself constitutional, or an unjustified encroachment into the judicial sphere.

It is also interesting to note that in *Shaheen Welfare Assn.*, the Court was made cognizant of the vast number of long-pending T.A.D.A. cases and the high number of detenus under the Act. While the Court recognized that T.A.D.A. was being misused, that the additional safeguard of Review Committees was not always impartial, and that the delay in adjudication of such cases was violating the Fundamental Right of the detenus under Article 21, in a classic minimalist move, the court made a one-off, fact-bound decision, to divide the pending cases into various categories according to the seriousness of offences, and provided guidelines on whether and how to grant bail to persons under various categories.<sup>157</sup> Declaring this to be a “*pragmatic*” approach,<sup>158</sup> the Court held that this was required to reconcile the conflicting claims of individual liberty and the right of the community and the nation to safety and protection from terrorism and disruptive activities.<sup>159</sup>

Our attempt in this section has been to highlight the institutional self-understanding of the Supreme Court of its role, approach and methodology in dealing with national security and terror-related cases. We have not made a normative claim about the validity or otherwise of this understanding. However, in the following segment, we will critique it with reference to the Court’s understanding of its role, approach and methods in general constitutional adjudication.

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<sup>157</sup> *Shaheen*, at ¶ 12-16.

<sup>158</sup> *Shaheen*, at ¶ 11 and 12.

<sup>159</sup> *Shaheen*, at ¶ 9 and 12.

#### IV. CONFUSION REIGNS SUPREME

In this segment we will argue that the Court's adoption of minimalist approaches to decision-making in terror-related cases is not a thought out or conscious decision-making strategy but an opportunistic role reversal, smacking of judicial escapism. This is because as a matter of general policy, Indian courts have not been minimalist; rather the opposite. We show by example that down the years the Court has shunned minimalist approaches for what Sunstein terms "*liberty maximalism*",<sup>160</sup> and that the Court has not justified why an exception should be carved out in the case of terror-adjudication.

##### A. Role Confusion

In the previous section we highlighted the Court's minimalist understanding of its role, in terms of mediating between the competing claims of national security and civil liberties. However, in non-terror cases, the Court has conceived of its role more broadly. It sees its role as that of the guardian of constitutional values,<sup>161</sup> and its duty as that of protecting Fundamental Rights.<sup>162</sup> As far back as 1952, the Court ruled that the Constitution has assigned it the role of being "*a sentinel on the qui vive*", with respect to Fundamental Rights.<sup>163</sup> Hence, while it respected legislative judgment, it could not "*desert its own duty to determine finally the Constitutionality of an impugned statute*".<sup>164</sup> Emphasizing that individual rights are superior to other social concerns,<sup>165</sup> the Court has held that its duty is to "*zealously and vigilantly*"<sup>166</sup> and in an "*activist manner*"<sup>167</sup> protect the civil rights and liberties of citizens against legislative and executive action.<sup>168</sup> Therefore in general Fundamental Rights adjudication, the Court sees a "*liberty maximizing*" role for itself.

<sup>160</sup> Sunstein, *Minimalism at War*, at 3.

<sup>161</sup> P.N. Dua v. P. Shiv Shanker, (1988) 3 SCC 167, ¶ 36 (Supreme Court of India); C.K. Daphthary v. O.P. Gupta, (1971) 1 SCC 626, ¶ 52 (Supreme Court of India); Ujjam Bai v. State of U.P., AIR 1962 SC 1621 : (1963) 1 SCR 778, ¶ 309 (Supreme Court of India).

<sup>162</sup> I.R. Coelho v. State of T.N., (2007) 2 SCC 1, ¶ 130 (Supreme Court of India).

<sup>163</sup> State of Madras v. V.G. Row, AIR 1952 SC 196 (Supreme Court of India).

<sup>164</sup> *Id.*, at ¶ 14.

<sup>165</sup> See, Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1, ¶ 278 (Supreme Court of India). See also, Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1 (Supreme Court of India).

<sup>166</sup> Raja Ram Pal v. Lok Sabha, (2007) 3 SCC 184, ¶ 651 (Thakker, J. concurring) (Supreme Court of India).

<sup>167</sup> Govt. of A.P. v. Laxmi Devi, (2008) 4 SCC 720, ¶ 88 (Supreme Court of India).

<sup>168</sup> *Id.*

The maximalist role that the Court sees for itself can be gauged from the manner in which it has approached constitutional adjudication as well. For example, in *Kesavananda Bharati v. State of Kerala*,<sup>169</sup> the Court was called upon to decide on whether *Golak Nath v. State of Punjab*,<sup>170</sup> was rightly decided. However, instead of limiting itself to that narrow question, the Court took the opportunity of examining the power of the Parliament to amend the Constitution.<sup>171</sup> In *Maneka Gandhi v. Union of India*,<sup>172</sup> the Court was called upon to decide whether Section 10(3)(c), Passport Act contravened Articles 14, 19 and 21.<sup>173</sup> It could have decided

<sup>169</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (Supreme Court of India). [Hereinafter 'Kesavananda Bharati']

<sup>170</sup> *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (Supreme Court of India).

<sup>171</sup> See, *Kesavananda Bharati*, at ¶ 10, where Sikri, C.J. says:

...However, as I see it, the question whether *Golak Nath's case* was rightly decided or not does not matter, because the real issue is different and of much greater importance, the issue being: what is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2), on Parliament?

See, *Kesavananda Bharati*, at ¶ 510, where Shelat and Grover, JJ. say:

The decision in *Golak Nath* has become academic, for even on the assumption that the majority decision in that case was not correct, the result on the questions now raised before us, in our opinion, would just be the same. The issues that have been raised travel far beyond that decision and the main question to be determined now is the scope, ambit and extent of the amending power conferred by Article 368. On that will depend largely the decision of the other matters arising out of the 25th and the 29th amendments.

See also, *Kesavananda Bharati*, at ¶ 790, where Ray, J. says:

The real question is whether there is any power to amend the Constitution and if so whether there is any limitation on the power. The answer to this question depends on these considerations. First, what is the correct ratio and effect of the decision in *I.C. Golak Nath v. State of Punjab* Second, should that ratio be upheld? Third, is there any limitation on the power to amend the Constitution? Fourth, was the 24th Amendment validly enacted? If it was, is there any inherent and implied limitation on that power under Article 368 as amended?

<sup>172</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (Supreme Court of India).

<sup>173</sup> *Id.*, at ¶ ¶ 49 and 50, where Bhagwati, J. says:

The Petitioner thereupon filed the present petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so...The principal challenge set out in the petition against the legality of the action of the Government was based mainly on the ground that Section 10(3)(c), in so far as it empowers the Passport Authority to impound a passport "in the interests of the general public" is violative of the equality clause contained in Article 14 of the Constitution, since the condition denoted by the words "in the interests of the general public" limiting the exercise of the power is vague and undefined and the power conferred by this provision is, therefore, excessive and suffers from the vice of "over-breath." The petition also contained a challenge that an order under Section 10(3)(c) impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and since in the present case, the passport was impounded by the Government without affording an opportunity of hearing to the petitioner, the order was null and void, and, in the alternative, if Section 10(3)(c) were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be



the case on statutory and procedural grounds, instead of reading in a due process requirement into Article 21, and linking Articles 14, 19 and 21; in *Jolly George Varghese v. Bank of Cochin*,<sup>174</sup> the Court could have confined itself to reading down Section 51, Code of Civil Procedure, instead of examining it on the anvil of Fundamental Rights and human dignity.<sup>175</sup> In *S.R. Bommai v. Union of India*,<sup>176</sup> the Supreme Court decided to rule on an academic question and established a major principle of accountability for executive action, which it need not have gone into at all.<sup>177</sup> In *Bodhisattwa*

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void as offending Article 14. These were the only grounds taken in the Petition as originally filed...The petitioner filed an application for urging additional grounds and by this application, two further grounds were sought to be urged by her. One ground was that Section 10(3)(c) is ultra vires Article 21 since it provides for impounding of passport without any procedure as required by that Article, or, in any event, even if it could be said that there is some procedure prescribed under the Passport Act, 1967, it is wholly arbitrary and unreasonable and, therefore, not in compliance with the requirement of that article. The other ground urged on behalf of the petitioner was that Section 10(3)(c) is violative of Articles 19(1)(a) and 19(1)(g) inasmuch as it authorises imposition of restrictions on freedom of speech and expression guaranteed under Article 19(1)(a) and freedom to practise any profession or to carry on any occupation, or business guaranteed under Article 19(1)(g) and these restrictions are impermissible under Article 19(2) and Article 19(6) respectively.

<sup>174</sup> *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 (Supreme Court of India).

<sup>175</sup> *Id* at ¶ 2-5 and 18, where the Court says:

From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights...An apercu of Article 21 of the Constitution suggests the question whether it is fair procedure to deprive a person of his personal liberty merely because he has not discharged his contractual liability in the face of the constitutional protection of life and liberty as expounded and expanded by a chain of rulings of this Court...A third, though humdrum, question is as to whether, in this case, Section 51 has been complied with in its enlightened signification. This turns on the humane meaning of the provision...we must candidly state that the Special Leave Petition is innocent of these two issues and the arguments at the bar have avoided virgin adventures. Even so, the points have been raised and counsel have helped with their submissions. We therefore, proceed to decide...The question may squarely arise some day as to whether the Proviso to Section 51 read with Order 21, Rule 37 is in excess of the Constitutional mandate in Article 21 and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the *vires*, which is why we are desisting from that essay.

<sup>176</sup> *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (Supreme Court of India).

<sup>177</sup> *Ramaswamy, J.* says:

Though the need to decide these questions practically became academic due to conducting elections to the State Assemblies and the new Legislative Assemblies were constituted in the States of U.P. , Rajasthan, Madhya Pradesh and Himachal Pradesh, all the counsel requested us to decide the questions regardless of the relief to be granted in this case. As stated earlier, since the decision on these questions is of paramount importance for successful working of the Constitution, we acceded to their prayer.

*S.R. Bommai v. Union of India*, (1994) 3 SCC 1, ¶ 154 (Supreme Court of India).

*Gautam v. Subhra Chakraborty*,<sup>178</sup> when called upon to decide whether the High Court was right in not quashing the complaint filed by the victim, the Court ruled that rape was a violation of the right to life and established the principle that a victim of rape can be awarded interim compensation during the pendency of the trial.

In terror related cases however, the Court tries to tread a fine line between upholding Fundamental Rights and protecting national security. As highlighted in the previous section, it does so by engaging in statutory interpretation and checking for procedural compliance, rather than expounding upon constitutional principles. Thus, it is evident that the Court perceives a different role for itself in general Fundamental Rights adjudication as opposed to the adjudication of Fundamental Rights claims in terror-related cases. This difference in role however has neither been explained nor justified by the Court and in the absence of such justification; this role reversal appears more ad-hoc than deliberate.

It is true that the rights guaranteed by Part III are not all absolute, and that Articles 19 and 21 in particular have inbuilt limitations, which makes it inevitable that the Court will have to decide on the scope of the right vis-à-vis its limitations. However, it has to be understood that these limitations are both *permissive* and *restrictive*: permissive because they allow the State to limit the rights and freedoms guaranteed by these Articles, and restrictive because they prescribe the limits and extent to which, and the purposes wherefore, these limitations might be placed.<sup>179</sup> In general Fundamental Rights adjudication, the Court has therefore taken the view that the right or the freedom enunciates the broad principle, and the limitations are in the nature of exceptions. The Court's approach has been to uphold the right unless the State can show that the restriction placed thereon is reasonable, and in the case of Article 19 rights, for a purpose mentioned in the limitation clauses.<sup>180</sup> Therefore, though the Court has been called upon to balance rights against limitations thereon, it has adopted a *weighted balancing approach*; where the scales are weighted in favour of upholding the right, and where a heavy burden is placed on the State to justify, on grounds of both reasonableness as well

<sup>178</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490 : AIR 1996 SC 922 (Supreme Court of India).

<sup>179</sup> M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1147 (2003).

<sup>180</sup> See, *Ichhu Devi Choraria v. Union of India*, (1980) 4 SCC 531 : AIR 1980 SC 1983, ¶ 3 (Supreme Court of India) ("The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind").

as purpose of the restriction, why the scales should be tipped in their favour.<sup>181</sup> However, in terror-related constitutional adjudication, we contend that the Court has flipped this approach, weighting the scales in favour of the limitation, and seeking to uphold the limitation rather than the right. As we will argue in the next two segments in this part, the Court does this by adopting an excessively deferential approach to the legislature; and by subjecting anti-terror legislations to limited scrutiny, restricting itself to examining the nexus of specific provisions with the broad purpose of the Act, and the presence of procedural safeguards.

## B. Ambiguities in Approach

It has been seen above that the Court has adopted a highly deferential approach towards the legislature in dealing with terror-related issues. It has refused to examine legislative policy,<sup>182</sup> and has deferred to the legislature's understanding of the types of actions required to meet the ends of this policy.<sup>183</sup> However, in general Fundamental Rights adjudication, the Court has time and again clarified that where the law encroaches upon civil liberties, it will not grant deference to the political branches, but will "*carefully scrutinize whether the legislation on these subjects is violative of the rights and liberties of the citizens, and its approach must be to uphold those rights and liberties, for which it may sometimes even have to declare a statute to be unconstitutional*".<sup>184</sup> This difference in approach is epitomized by some of the most famous and enduring judgments of the Court. *Keshvanand Bharati* and *Maneka Gandhi* are but two examples of the refusal of the Court to defer to legislative will, and of the testing of legislative and executive action against constitutional principles, be it those enshrined in the basic constitutional structure, or the golden thread of justness, fairness and reasonableness that runs through Part III of the Indian Constitution. This difference in the deference approach is also evident in the Court's review of "*political questions*", which were once thought to be beyond the pale of judicial

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<sup>181</sup> See, *Om Kumar v. Union of India*, (2001) 2 SCC 386, ¶ 30 (Supreme Court of India) ("The burden of proof to show that the restriction was reasonable lay on the State"); *Deena alias Deen Dayal v. Union of India*, AIR 1983 SC 1155 (Supreme Court of India); *Saghir Ahmed v. State of U.P.*, AIR 1954 SC 728, ¶ 27 (Supreme Court of India).

<sup>182</sup> *PUCJ*, at ¶ 22.

<sup>183</sup> *Kartar Singh*, at ¶ 145.

<sup>184</sup> *Govt. of A.P. v. Laxmi Devi*, (2008) 4 SCC 720, ¶ 78 (Supreme Court of India).

review.<sup>185</sup> In this respect, Justice Shah's observation in the *Privy Purse case* that the "[c]onstitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted courts"<sup>186</sup> reflects the approach of the Court in undertaking a Fundamental Rights review in general rights adjudication.

For purposes of protecting Fundamental Rights, the Court has gone to the extent of ruling that even legislative policy must conform to constitutional mandates, and if it does not, courts have the power to intervene. Therefore it has held that matters of policy are subject to judicial review.<sup>187</sup> Thus the Court's carving out of a more deferential role in terror-related issues as opposed to general Fundamental Rights adjudication is also starkly evident, but as emphatically unexplained.

The Court's terror-related jurisprudence has also confused legislative policy with *strategies* to achieve those policies.<sup>188</sup> Therefore in *PUCL* the Court refused to go into the need for an anti-terror legislation that provided for a different set of procedures to deal with the menace of terrorism on the ground that the normal procedures are inadequate to deal with the issue.<sup>189</sup> Here the policy of the legislature is to adopt a no-tolerance approach to terror. However, the strategy to implement this policy which is more closely aligned to the issue of the need for the legislation, is that of whittling down general procedural rights. Whether or not this strategy is constitutionally permissible, is clearly within the scope of judicial review, as held by the Court itself, *inter alia*, in *Delhi Science*

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<sup>185</sup> See, *S.P. Gupta v. President of India*, 1981 Supp. SCC 87 : AIR 1982 SC 149 (Supreme Court of India) (political questions are bound to assume judicial colour), *A.K. Jha v. Union of India*, (2005) 3 SCC 150 (Supreme Court of India); *Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group*, (2006) 3 SCC 434 : AIR 2006 SC 1489, ¶ 92 – 93 (Supreme Court of India).

<sup>186</sup> *Madhav Rao Scindia v. Union of India*, (1971) 1 SCC 85.

<sup>187</sup> *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77, ¶ 18 (Supreme Court of India). See also, *Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group*, (2006) 3 SCC 434, ¶ 88 and 89 (Supreme Court of India).

<sup>188</sup> Justice Ruma Pal, *Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India*, (2008) 7 SCC J-9, J-18, J-20. (But, say the critics, Judges are really indulging in policy making, which is the sole prerogative of the other two branches of government. Without a definition of the word 'policy' the charge lacks clarity. Does it mean the prioritization of social or economic goals, or does it mean the method by which the goals are to be achieved? Courts do not in fact interfere with the first but have subjected the second to judicial scrutiny under their powers of judicial review).

<sup>189</sup> *PUCL*, at ¶ 9 and 14.

*Forum v. Union of India*<sup>190</sup> and *Narmada Bachao Andolan v. Union of India*.<sup>191</sup>

Both policy and strategy have to be tested on the touchstone of the Constitution. In the words of the Supreme Court itself in *Anuj Garg*, the legislative act has to be justified in principle, and proportionate in measure.<sup>192</sup> Therefore in this case, while the Court agreed that the purpose behind the impugned provision, that of providing security to women, was within the power of the State, the strategy of doing so by restricting their autonomy was not permissible.<sup>193</sup> To take a hypothetical example, if the Legislature were to decide that it will adopt a no tolerance policy against religious conflict and violence, and for this purpose enacts a legislation prohibiting any public practice, profession or propagation of any religion on the ground that this right is anyway subject to public order, then merely because the broad policy is justified, the strategy to achieve the policy does not automatically become justified. It still has to be tested against constitutional provisions. The simple point here is that the ends do not justify the means. In terror-related adjudication however, the Court seems to think otherwise.

### C. Methodological Divergence

#### (a) *Limited scrutiny*

The Court's methodology in terror-related constitutional review is as follows: It takes the legislative policy and strategy as a given which it will not review; tests specific provisions to see if they are relatable to the purposes for which the legislation was enacted; if this nexus exists, it checks whether there are enough procedural safeguards to prevent misuse, and then upholds the legislation. If it finds that there are not enough safeguards, the Court either reads them in, or requests the Legislature to consider the matter. In exceptional cases, where the Court feels that the provisions are too harsh, it reads them down.<sup>194</sup>

<sup>190</sup> *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405, ¶ 7 (Supreme Court of India).

<sup>191</sup> *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, ¶229 (Supreme Court of India).

<sup>192</sup> *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1, ¶ ¶ 46, 51 (Supreme Court of India) [Hereinafter '*Anuj Garg*'].

<sup>193</sup> *Id* at ¶ 36.

<sup>194</sup> *See*, § III B above.

An example of this type of reasoning is evident in *P.U.C.L.*, in the context of the Court's appraisal of the provisions on bail.<sup>195</sup> Sections 49(6) and (7) were impugned *inter alia* on grounds of the long period of pre-trial detention and the virtual impossibility of getting bail due to harsh conditions. These were assailed as arbitrary. The Court however ruled that the long period of detention was needed in light of the purposes of the Act, and since there was judicial oversight, the provision had enough procedural safeguards.<sup>196</sup> On this basis the provision was held to be non-arbitrary. Similarly, in *Bharat Shah*, the Court held wiretapping provisions of the MCOCA as reasonable because such actions were for purposes of the Act; and in *Naga Peoples' Movement*, Section 4(a), Armed Forces (Special Powers) Act, which empowers officers to fire upon and even kill persons acting in contravention of certain orders was held to be not unreasonable or arbitrary because there were enough procedural safeguards.<sup>197</sup>

In terror-related adjudication therefore, the Supreme Court tests the reasonableness or arbitrariness of provisions based on the nexus of the provision with the purpose of the Act, and on the basis of procedural safeguards against misuse. Unlike, general Fundamental Rights review, a determination of whether the restriction is "*arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation*",<sup>198</sup> or the test of proportionality between "*legitimate aims*" of the legislation and the means used to achieve it, are not used in these cases.<sup>199</sup> In general Fundamental Rights review however, the Court has consistently taken a much deeper approach to understanding the concept of arbitrariness and reasonableness, going beyond nexus with purpose of

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<sup>195</sup> *PUCL*, at ¶ 65-70.

<sup>196</sup> *PUCL*, at ¶ 67 (arguing that since the offences under POTA are highly complex and may involve nationals as well as foreigners, investigation might require some time; hence, long periods of detention were justified and hence not unreasonable. In spite of this the grant of bail was not completely barred and if the court decided that the person was not guilty he could be released on bail).

<sup>197</sup> *Naga People's Movement*, at ¶ 46.

<sup>198</sup> *Om Kumar v. Union of India*, (2001) 2 SCC 386, ¶ 30 (Supreme Court of India), referring to the ratio in *Chintamanrao v. State of U.P.*, AIR 1951 SC 118 : 1950 SCR 759 (Supreme Court of India).

<sup>199</sup> *Anuj Garg*, at ¶ 51.

the Act,<sup>200</sup> and has substantively assessed whether an impugned provision is reasonable.<sup>201</sup>

The focus of the Court in terror-related adjudication is therefore on ensuring internal consistency between the purpose of the Act and its provisions, and on providing procedural safeguards against misuse, rather than substantively assessing whether an impugned provision violates Fundamental Rights. Therefore the Court does not appear to be testing impugned provisions for Constitutional validity, but to ensure that they are not misused, which is a different kind of enquiry - more a matter of cautious legislative drafting rather than judicial review. They seem to be missing the point that the proper use of a constitutionally invalid law can still infringe Fundamental Rights.

To return to our hypothetical example above, if in furtherance of the legislative policy of curbing religious violence, and its strategy of banning the practice of religion in public to meet this end, the Legislature enacts a provision criminalizing the act of publicly referring to God, the Court will hold the provision reasonable because it furthers the legislative purpose. The Court will only examine whether there are enough safeguards to ensure that no one is wrongly accused of publicly referring to God, for example, by looking at the kind of evidence required as proof. Therefore, in terror-related rights adjudication, the Court engages in a *limited scrutiny* of the impugned provisions.

The Court's discussion of the constitutionality of the bail provisions of P.O.T.A. also indicates that its approach to reviewing provisions of terror

<sup>200</sup> See generally, *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 (Supreme Court of India); *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (Supreme Court of India). See also, Justice Ruma Pal, *Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India*, (2008) 7 SCC J-9, J-18, J-14.

<sup>201</sup> See, *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75 ¶ 95 (Supreme Court of India)

I can conceive of cases, where there is the utmost good faith and where the classification is scientific and rational and yet which would offend this law. Let us take an imaginary cases in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub-standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely, simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that Judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I think, is inevitable when a Judge is called upon to crystallise a vague generality like Article 14 into a concrete concept.

enactments is that, if the provision is needed, it is reasonable. Taking such an interpretation would mean that the need for a particular State action decides the scope of a Fundamental Right, rather than Fundamental Rights placing limits on state action.<sup>202</sup> This view is exactly similar to the *Gopalan* doctrine that the legislative wisdom on the justness of a provision decides the scope of the right to life and personal liberty guaranteed to a person.

### **(b) Necessity Review v. Reasonableness Review**

In *P.U.C.L.*, Section 18, POTA, which provided that the Central Government can declare any organization a terrorist organization, without having the obligation of giving them the right to be heard before making such a declaration, was challenged *inter alia* on the ground that it violated the right to freedom of association under Article 19(1)(c). This provision was upheld on the ground that the right to association under Article 19(1)(c) could be limited in the interest of sovereignty and integrity of the country, and that since this was the purpose of the provision, the section was not unconstitutional. Similarly a challenge to the constitutionality of Section 14, POTA on the ground that it violated the right to privacy was disallowed because in the opinion of the Court “*right to privacy...is not an absolute right. Right to privacy is subservient to that of security of State*”,<sup>203</sup> and since the purpose of the section was relatable to state security, the provision was valid. In both these, and other instances, the Court held the provision to be reasonable because it was for a valid purpose.

The concept of reasonableness in Part III of the Constitution flows from Article 19.<sup>204</sup> This Article provides a list of enumerated rights

<sup>202</sup> It is interesting to note that in *P.U.C.L.*, the Court was itself of the view that the “fight against terrorism has to be circumscribed by human rights”. However, in its adjudication methodology, it seems to have lost sight of this principle. On the nature of Fundamental Rights, see *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, ¶ 17 (Supreme Court of India)

It is a fallacy to regard Fundamental Rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of basic fact that they are members of the human race. These Fundamental Rights are important as they possess intrinsic value. Part III of the Constitution does not confer Fundamental Rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts ... Fundamental right is a limitation on the power of the State.

<sup>203</sup> *PUCL*, at ¶ 37.

<sup>204</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (Supreme Court of India).



and the permissible limitations thereon. The limitation clauses allow “reasonable restrictions” for certain enumerated purposes. Therefore, the Article provides a two step scrutiny: whether the restriction is for a purpose mentioned in the limitation clause, and whether the restriction is reasonable.<sup>205</sup>

However, as the examples above illustrate, in terror-related adjudication, where the Court finds that the purpose of a provision is relatable to a constitutionally mandated ground for limitation, this is sufficient to uphold the provision. The Court seems to be missing the point that not everything done in furtherance of a valid purpose is necessarily constitutionally valid, for the simple reason that ends do not necessarily justify the means. It also seems to be confusing necessity for reasonableness. As the Court has itself recognized in *Krishna Chandra v. State of M.P.*,<sup>206</sup> when asked to rule on the constitutionality of a statute, the core issue for the Court to determine is whether the law enacted to achieve a certain objective imposes *unreasonable restrictions* on guaranteed rights.<sup>207</sup> The Court also seems to be going back on the principle enunciated in a line of cases like *State of W.B. v. Anwar Ali Sarkar*,<sup>208</sup> and *Bennett Coleman v. Union of India*<sup>209</sup> that it is the consequence of the Act, and not its purpose, that is determinative of whether it infringes a Fundamental Right.

## V. CONCLUSION

The Supreme Court's jurisprudence in terror-related adjudication, and in cases involving national security concerns more broadly, shows a consistent narrow conceptualization of its role, an approach of broad deference to the legislature, and a methodology of undertaking a limited scrutiny of provisions in testing them against Fundamental Rights. The Court prefers decision-making on statutory rather than constitutional grounds; and focuses on procedural compliance rather than substantive review. It is concerned with ensuring that there are adequate procedural safeguards to prevent misuse of provisions, and is open to examining individual instances of executive action under terror-related legislation to

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<sup>205</sup> See generally, M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1147 (2003).

<sup>206</sup> *Krishna Chandra v. State of M.P.*, AIR 1965 SC 307 (Supreme Court of India).

<sup>207</sup> *Id.*, at ¶ 14.

<sup>208</sup> *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75, ¶ 48 (Supreme Court of India).

<sup>209</sup> *Bennett Coleman v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106 (Supreme Court of India).

check for compliance with legislative and constitutional principles, rather than striking down the legislative principles themselves. Taken together, there is remarkable consistency in this approach, not only with the theory of minimalism, but also in terms of uniformity in decision-making. From *A.K. Gopalan*, decided in 1950, through *A.D.M., Jabalpur*, decided during the midst of the Emergency, to *Bharat Shah*, decided in late 2008, the Court's approach to terror/national security related constitutional adjudication remains constant.

This minimalist conception of the Court's role, and its corresponding approach and method of adjudication are however at odds with the general adjudicatory practices of the Court with respect to Fundamental Rights review. We have argued that in general Fundamental Rights adjudication, the Court conceives its role more broadly, takes a less deferential approach to adjudication and adopts a deeper review of restrictions on Fundamental Rights. In this article, we have not argued that one is better than the other. We have merely sought to describe the difference and point out that this dichotomy in approach has neither been explained nor justified either with respect to the normative bases of minimalism or in relation to other policy concerns. In the absence of such justification, and in light of different approaches adopted by judiciaries of other countries, most notably the U.K.,<sup>210</sup> the Indian Supreme Court's minimalism in terror-related adjudication appears more like diffidence, abdication and opportunistic escapism rather than a well-deliberated and jurisprudentially sound understanding of its place in the Indian polity.

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<sup>210</sup> See generally, Lord Phillips, Impact of Terrorism on the Rule of Law, available at [http://www.judiciary.gov.uk/docs/speeches/lcj\\_american\\_bar\\_assoc\\_031007.pdf](http://www.judiciary.gov.uk/docs/speeches/lcj_american_bar_assoc_031007.pdf).