



The pressing need to adjudicate, not mediate

Right to protest

The recent judgment of the Supreme Court that refused to review its earlier verdict on the Shaheen Bagh protest is inseparable from its political context. The verdict of October 7, 2020, declared that there is no absolute right to protest, and it could be subjected to the orders of the authority regarding the place and time. Apart from thinking about the legal and constitutional issues, it can also lead to a discourse on the moral authority of the top court in dealing with such fundamental questions related to freedom.

Protests, a political challenge

1. Both the judgments came out at the time of ongoing street agitations. Protest “at any time and anywhere” has not been as simple as conceived in the judgments.
2. The agitations against the Citizenship (Amendment) Act (CAA) and the farm laws also brought out the immense agony and hardship that the protesters had to face.
3. In the anti-farm laws struggle, they experienced suffering over almost the entire winter for a cause which they believe as one that concerns the whole nation.
4. They had to pay a heavy price for their convictions. Many were subjected to malicious prosecution by the state on serious charges of sedition and terrorist activities.
5. Not only the protesters but also their supporters, including comedians and journalists, were not spared. All freedoms under Article 19 of the Constitution, from freedom of expression to that of peaceful association, were seriously impaired.
6. Such arrests continue because the protests are a political challenge to the existing regime, a theme which the Court did not even address with contextual details.

A problematic ‘balancing’

1. There is a more significant question that a citizen could pose against the Court’s pronouncements on the Shaheen Bagh protest. The agitations on the street became imperative because the issues were not subjected to a timely judicial examination.
2. The subject matter of almost all the major protests which have happened recently in India, be it over ‘economic reservation’, the CAA or the farm’s

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laws, involved legal and constitutional issues requiring immediate and effective adjudication in terms of their constitutional validity.

3. The top court could not exercise its constitutional role and ensure judicial scrutiny on an aggrandising executive and an equally imposing Parliament by exercising its counter-majoritarian function.
4. Having failed to do so, the kind of 'balancing' which the Court now tries to attain by way of the Shaheen Bagh orders will pose more questions than it answers.

Adjudicate not mediate

The Court's duty during the testing times is to adjudicate, and not to mediate. A reconciliatory approach is not a substitute for the juridical assertion. Constitutional morality is a philosophy that should primarily apply to the constitutional courts. Dr B.R. Ambedkar used this idea in terms of institutions and not of individuals. Had there been a timely adjudication of the validity of the laws which was questioned by the process recognised by the law, the torment on the street could have been probably reduced.