



## STRIKING A BALANCE BETWEEN INDIVIDUAL RIGHTS AND COLLECTIVE RIGHTS – A PERPETUAL DILEMMA IN THE CONSTITUTIONAL JURISPRUDENCE OF INDIA

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### **ABSTRACT**

*Politically, the founding fathers of Indian constitution tended to privilege the individual even as they grappled with the notion of protecting the collective. A social revolution experiment was hardcoded in the Constitution, given that inequities had crept into the society. It visualised that the job of the state – an all-powerful yet benevolent entity – was to rescue the individual from the ills of the collective. At the same time, certain individual rights could be superseded for the collective good, for instance, to ensure 'law and order', 'public order' and 'state security'. However, several archaic laws, propounded earlier by the British, that still find a place in India's statutes, creating a dichotomy of sorts, need to be reviewed and addressed.*

*Keywords: Endeavour of the Higher Judiciary in India, Kesavananda Bharati ,Romila Thapar, K.S. Puttaswamy,etc*

### **INTRODUCTION:**

To what extent can a state legitimately restrict the liberties of its citizens in order to serve the common good? Furthermore, to what extent has the protection of the public's welfare been a pretext for governments to curtail or erode fundamental rights? These questions have formed the foundation of controversies and long-running debates about the balancing between the individual rights and the collective rights.

The gradual shift away from “primacy of the individual” to a world where surveillance and privacy infringement for the “collective good of the society” are becoming more acceptable. The turn away from individualism was largely caused by developments such as terror attacks that have necessitated the broadening of the state’s role aided by technology tools, which ironically had given wings to the netizens in the first place.

Historically, India’s traditional political and social organisations have centred on the notion of ‘village self-government’ or village republics. The society was characterised by interdependence and displayed mutual obligations. The ‘reflexive consciousness’ has been to think in terms of ‘we’ rather than ‘I’. The Western society, in contrast, shifted to individualism starting with the Enlightenment and believed in a rights-based view rather than a collective one. The constitutional courts of India have been endeavouring to strike a balance between individual and collective rights and the result has always been a mixed one. It is pertinent to shed some light on this endeavour of courts in India.

### **STRIKING A BALANCE, ENDEAVOUR OF THE HIGHER JUDICIARY IN INDIA – AN ANALYSIS:**

#### **KESAVANANDA BHARATI Vs STATE OF KERALA**

The landmark judgement was delivered on 24<sup>th</sup> April 1973 by a thin majority of 7:6 wherein the majority held that any provision of the Indian Constitution can be amended by the Parliament in order to fulfil its socio-economic obligations that were guaranteed to the citizens as given in the Preamble, provided that such amendment did not change the Constitution’s basic structure.

The minority, however, in their dissenting opinion, were wary of giving the Parliament unlimited amending power. Despite the ruling that Parliament cannot breach fundamental rights, the court upheld the amendment that removed the fundamental right to property.

No law can impinge on the basic structure. What the basic structure is, however, has been a continuing deliberation. Parliamentary democracy, fundamental rights, judicial review, secularism- are all held by courts as basic structure, the list is not exhaustive. It is the Judiciary that is responsible to decide what constitutes the basic structure. This case can be said to be a touch stone in balancing between individual rights and the collective rights.

#### **ROMILA THAPAR Vs UNION OF INDIA**

The State arrested five human rights activists and critics of the State – calling them ‘Urban Naxals’. These human rights activists had substantial experience working with marginalized and disadvantaged communities. Further, they had often been critical of the government in the past.

This sudden arrest by the Pune Police was seen as an attempt to freeze dissent by the heavy hand of state

machinery. In response, five eminent citizens filed a Public Interest Litigation (PIL) case in the Supreme Court, challenging the arrests and seeking a court-monitored probe into the investigation.

The Court in a 2:1 judgment rejected the plea for a Special Investigation Team (SIT) to probe into the investigation, on the ground that the State had adduced sufficient evidence for the possibility that they are members of a banned terrorist organization, CPI (M). The petitioners were not allowed to scrutinize this evidence, as it was submitted in sealed covers – only the judges viewed it. The lone dissenting judge, DY Chandrachud, called for a court-monitored probe as he recounted various procedural lapses in the arrest process, signalling States' selective targeting of critics.

This case forces one to re-examine the fragile nature of speech protection when it collides with state power. The standards of proof, required for successful conviction, need not be met to justify a call for a probe at initial stages. A *prima facie* case is sufficient to merit investigation. Further, should the power asymmetry between citizens and the State not be factored in, when such brazenness is shown in arresting dissenters and critics? Rather than legitimizing sealed cover jurisprudence, shouldn't the Court critically assess the government's account of the facts?

#### **K.S. PUTTASWAMY Vs UNION OF INDIA**

A nine-judge bench of the Supreme Court has ruled that Indians enjoy a fundamental right to privacy, that it is intrinsic to life and liberty and thus comes under Article 21 of the Indian constitution.

The Supreme Court has overruled verdicts given in the *M.P. Sharma* case in 1958 and the *Kharak Singh* case in 1961, both of which said that the right to privacy is not protected under the Indian constitution.

Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level, privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III.

Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament.

Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair,

just and reasonable.

The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

Justice AK Sikri writing the majority opinion, spoke of balancing two notions of the right to dignity – individual dignity, predicated on freedom of choice, and a communitarian approach to dignity, which accounts for the "community good."

#### **YOUNG INDIAN LAWYERS ASSOCIATION Vs. STATE OF KERALA**

In a 4:1 judgment, 5-membered constitution bench of Supreme Court has allowed women of all ages to worship in Sabarimala Temple. In its judgment, Supreme court stated that 'devotion cannot be subjected to gender discrimination'. Chief Justice Dipak Misra, Justice RF Nariman, Justice AM Khanwilkar and Justice DY Chandrachud constituted the majority, while the lone woman judge on the Bench, Justice Indu Malhotra dissented.

Supreme court has ruled that Rule 3(b) is *ultra-vires* the Constitution, Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 as well as Section 4 of the 1965 Act which says that the regulations/rules made under this act shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

It said that exclusion on grounds of biological and physiological features like menstruation was unconstitutional. It amounted to discrimination based on a biological factor exclusive to gender. It was violative of the right to equality and dignity of women. No customs or usages can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty, and equality and customs and personal law have a significant impact on the civil status of individuals.

Justice Indu Malhotra dissented from the majority opinion and held that notions of rationality cannot be invoked in matters of religion by courts. She held the determination of what constituted an essential practice in a religion should not be decided by judges on the basis of their personal viewpoints. Essentiality of a religious practice or custom had to be decided within the religion and it is a matter of personal faith.

Justice Malhotra observed that the freedom to practice their beliefs was enshrined in Article 25 of the Constitution. Harmonisation of fundamental rights with religion included providing freedom for diverse sects to practice their customs and beliefs.

#### **JOSEPH SHINE Vs. UNION OF INDIA**

The Supreme Court scrapped the pre-independence provision of adultery law under section 497 of Indian Penal Code (IPC). The apex court termed the law arbitrary and against the constitutional ideals of liberty, equality and freedom.

Adultery law (Section 497) read along with CrPC 198(2) had given the husband the right to get his wife's lover prosecuted. If found guilty, the adulterer faces up to five years behind bars.

The married woman was barred from getting her husband prosecuted for adultery under the law. It was only the 'outsider' the lover of the married woman who was supposed to be prosecuted. Therefore, it had become a tool for controlling the sexuality of woman by levelling her to a commodity owned and controlled by husband.

Criminalising adultery is "absolutely, manifestly arbitrary and unconstitutional". It would tantamount to punishing the people, who lived in an unhappy marriage. Attaching criminality to adultery is a retrograde step. Adultery can be a ground for a civil remedy i.e., dissolution of marriage. Justice Rohinton F. Nariman said that Section 497 was based on a chauvinistic notion. The provision, which is over 150 years old, is a relic of the past, brought in much before the Constitution which introduced the fundamental rights of equality, liberty and dignity. Women are treated as "chattel" of the husband.

Laws which were made more than 150 years ago under an alien rule if still prevalent, continue the legacy of colonial structure of the society. Women in independent India have been protected by special provisions in constitution (article 15(3)); provided right to vote, right to participate in the economic development of the country. All that would be meaningless if she would be subject to the will of their male partners under the fear of laws like adultery.

Partners in marriage should have respect for each other's sexual autonomy. Marriage does not mean ceding autonomy of one to the other. Ability to make sexual choices is essential to human liberty. Even within private zones, an individual should be allowed her choice.

Society imposes impossible virtues on a woman. It raises her to a pedestal, confines her to spaces. treats her as objects capable of being punished and says she should be pure, but has no qualms to rape her, assault her, commit female foeticide, discriminate against her within a home etc. The Supreme Court judgement will be a landmark judgement in providing women equal footing in social contracts like marriage.

#### NAVTEJ SINGH JOHAR Vs. UNION OF INDIA

The Supreme Court decriminalised homosexuality by striking off parts of Section 377 of the Indian Penal Code (IPC) which were held violative of Fundamental Rights of LGBTQ Community. It made it clear that Article 14 of the Constitution guarantees equality before law and this applies to all classes of citizens thereby restoring 'inclusiveness' of LGBTQ Community.

Supreme court upheld the pre-eminence of Constitutional morality in India by observing that equality before law cannot be denied by giving precedence to public or religious morality. It noted that modern psychiatric studies and legislations recognise that gay persons and transgender do not suffer from a mental disorder and therefore cannot be penalized.

Homosexuality is not unique to humans, which dispels the prejudice that it is against the order of nature. Supreme Court stated that the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' should be applied as a part of Indian law.

Section 377 of the Indian Penal Code 1860, a relic of British India, states that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished." This included private consensual sex between adults of same sex.

Those against legalising gay sex argue that it is against the moral values of the society. However, activists arguing for it say what is forbidden in religion need not be prohibited in law. This judgement will spur LGBTQ Community to demand more progressive laws like Gay marriage laws, right to form partnerships, inheritance, employment equality, protection from gender-identity-based discrimination among others.

#### CONCLUSION:

To conclude, any dichotomy between the individual rights of the people and the powers of the state has to be dealt with through a nuanced approach. Neither can have an absolute approach. The challenge is not so much about adopting a position on individualism versus the collective represented by the state. Instead, it is about righteously balancing both, depending on the context.

This delicate balance between the collective good and the individual good sits firmly on two seemingly opposed pillars – rational-prudent and abstract-ideal. The endeavour of the higher judiciary to strike a balance between these two is intrinsically linked to the welfare of the people as the collective rationality is concomitant with normativity. In a sense, then, the individual is part of a collective whose happiness is of prime importance to the running of a State.

#### REFERENCES:

- <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2267241/>
- <https://www.idsa.in/idsacomments/individual-rights-and-collective-good-290420>
- <https://blog-iacl-aids.org/2019-posts/2019/3/8/10-cases-that-shaped-india-in-2018>
- <https://thewire.in/law/supreme-court-aadhaar-right-to-privacy>
- <https://www.drishtiias.com/daily-updates/daily-news-analysis/basic-structure-doctrine-kesavananda-bharati-case>