

PARAMOUNT COLLECTIVE INTEREST: A SOLUTION TO CONSTITUTIONAL DILEMMAS

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Abstract

In a globalized area, new avenues have led to an upsurge in the claims of Human rights, formulating a battleground for causing clashes between the fundamental rights. The diversity of the Indian subcontinent is enumerated as a reason for the increasing tension between the fundamental rights enshrined in part III of the Constitution. The paper aims to provide a theoretical framework of the approaches of Common law and Indian Law in resolving the conflicts that may arise inter et intra fundamental rights. The paper firstly, discusses the common law approaches of resolving the conflicts between fundamental rights. Secondly, it discusses the viability of common law approaches in the Indian context emphasizing on the doctrine of Balancing of Rights. Lastly, it focuses on the development of a framework that is the principle of 'Paramount Collective Interest' which prioritizes public interest while upholding individual rights. Accordingly, it is argued that the principle of 'Paramount Collective Interest' is a successful strategy of the Indian judiciary for resolving constitutional dilemmas by following a principled approach that preserves the constitutional values enshrined in the legal framework.

Keywords: Constitutional Law, Common Law, Fundamental Rights, Constitutional Dilemma, Public Interest.

Introduction

A constitutional dilemma usually involves two elements- a choice between two evils protected by fundamental rights and a fundamental loss of a good which is protected by a fundamental right irrespective of the decision.¹ The conflict between the fundamental rights is inevitable owing to the competing claims that arise in a society. The continued efforts of democratic institutions in protecting the rights of individuals have resulted in various nuances to come forth. Human rights are not compartmentalized rules but rather are overflowing principles that overlap each other. Moreover, the extension of the applicability of fundamental rights, which

¹ Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in *Conflicts Between Fundamental Rights* 20 (Eva Brems ed., 2008).

were initially enforceable solely against the state to now non-state entities as well has also contributed to an increase in competing claims. The horizontal application of fundamental rights has unearthed the positive obligation that rests on the State to protect the fundamental rights of its citizens, leading to an assertion of fundamental rights claims.

In India, the complex diversity of the subcontinent has led to the widening of the horizons of the rights protected by the legal institutions. Competing claims are inevitable in a country with immense diversity. One of the reasons attributed to surging claims is the constant attempt of the legislators and the judiciary to protect Human dignity. Moreover, the courts have embodied its duty as that of a '*balancing wheel between the rights*'². Additionally, recent judgements like '*Vishaka v State of Rajasthan*'³ and '*Indian Young Lawyers Association and Ors. v The State of Kerala and Ors.*'⁴ which held that certain fundamental rights are enforceable against non-State entities has ultimately led to rising discord related to fundamental rights. Therefore, the Indian judiciary has sought various approaches in dealing with the conflict while also giving its due diligence to the public interest.

Common Law Approaches for Resolving Conflicts

A conflict between the fundamental rights in any jurisdiction is inevitable. In Common Law, the legal fraternity has carved out distinct approaches in dealing and resolving these conflicts. The first approach is ranking the fundamental rights to resolve the dilemma. Human rights instruments do not prescribe a strict hierarchy between the fundamental rights. In common law, other than division of rights into 'absolute' and 'relative' rights, there exists no hierarchy of rights. Absolute rights are given more priority over the relative rights as Absolute rights cannot be subjected to any limitation by the State whereas Relative rights can be subjected to limitations in the interest of the general public, this only creates a rudimentary hierarchy. However, it has been pointed out by various scholars that all human rights should be upheld with equal importance as all rights are considered to be inter-related and overflowing. Due to the dynamic nature of human rights, Deprivation of one group of rights also affect the other rights due to which giving equal respect to all human rights becomes imminent.

The Second approach stems from the utilitarian view which advocates for equal sacrifice from the conflicting fundamental rights. Under this school, the scholars believes that ideally one individual's rights should not be curtailed more than other individual's rights owing

² I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643 (India).

³ Vishaka v State of Rajasthan, (1997) 6 SCC 241 (India).

⁴ Indian Young Lawyers Association and Ors. v The State of Kerala and Ors., (2019) 11 SCC 1 (India).

to which equal forfeiture of interests in their rights by both parties is considered to be just and fair.⁵ The criticism faced by this approach rests on the argument that all fundamental rights cannot be treated equally as they have different weightage. So, sacrificing both equally would not essentially resolve the conflict.

The Third approach is imposing the liability on the State for failing to protect constitutional rights. This approach rests upon the assumption that fundamental rights were developed to protect people from the powers of the State. The State's liability can be calculated through the 'Principle of Proportionality' in which if the minimum protection guaranteed by a fundamental right is not enforced by the State, it has failed to fulfill its duty.⁶ However, this approach can only explain the existence of a conflict between the fundamental right which is due to the lack of sufficient measures taken up by the State, it does not explain how to resolve this discord.

The Fourth approach is to give precedence to Human dignity in all circumstances. Human dignity is the core of all the fundamental human rights. The historical overview postulates that as the aftermath of the second world war and the resolution adopted by the United Nations, all focussed on the preservation of human dignity, it becomes the utmost priority. As all fundamental rights are based on the common value of safeguarding human dignity, assessing the relation of human dignity to that of a fundamental right can be considered a legitimate way of resolving the conflict. Under this approach, a problem persists when it becomes ardent to resolve a conflict between fundamental rights, both of which are rooted in Human dignity. Moreover, using Human Dignity as an interpretative tool to resolve conflict leaves a legal lacuna for subjectivity and judicial discretion.

The most accepted and the fifth approach of resolving conflict is balancing the interests. It entails weighing the interests that need to be protected by the fundamental rights in conflict. Under this approach, both Factual circumstances and theoretical considerations are deliberated to reach a conclusion. This is termed as 'ad hoc' balancing which has two steps- Firstly, consideration of the essence of a fundamental right and secondly, consideration of the circumstances of the case.⁷ The Balancing method is regarded as a '*universal feature of the structure of constitutional rights throughout the contemporary world*'.⁸ Balancing plays a key

⁵ Derya Nur Kayacan, *How to resolve Conflicts Between Fundamental Constitutional Rights*, in Saar Blueprints (2016).

⁶ id at 5.

⁷ Derya Nur Kayacan, *How to resolve Conflicts Between Fundamental Constitutional Rights*, in Saar Blueprints (2016).

⁸ Stephen Gardbaum, *Limiting Constitutional Rights* 54 UCLA Law Review (2007).

role in the jurisprudence of constitutional courts and becomes the most apparent in adjudicating conflicting rights. The Proportionality principle under this approach implies that limitation is to be put on a fundamental right only when it is necessary to meet the objective of preserving the general interest and the right of others.⁹ It is considered better than trying to calculate which right is heavier than the other. Therefore, a balance is struck bearing in mind the purpose of Justice and upholding the values of fairness and equality.

Judicial Techniques for Resolving Conflicts in India

There exists no legal framework for resolving the disputes arising *inter et intra* fundamental rights enshrined in part III of the Constitution, Over the course of years, the Indian Judiciary has culled out possible solutions for the same. The Doctrine of Balancing of Rights has been one of the major approaches in resolving this discord by the judiciary. However, before proceeding towards the approaches of solving the conflict, it becomes important to understand the types of conflicts that arise before the institutions of the Indian judiciary.

There are two types of clashes that may ensue- firstly, between different fundamental rights of the constitution for instance in the case of *Indian Young Lawyers Association v the State of Kerala* (Sabrimala case)¹⁰, there was a tussle between freedom to manage religious affairs stated in Article 25 of the Constitution and the Dignity and liberty of women encompassed in Articles 15 and 21 of the Constitution.¹¹ Secondly, two claims under a single fundamental right like in the case of *Asha Ranjan v State of Bihar*, where the petitioner demanded the transfer of the accused from the Siwan jail to Tihar jail alleging a fair trial under Article 21 of the Constitution while the accused pleaded that his transfer would also violate his right to fair trial as he will be moved away from his family.¹²

The common law approach of demarcating a hierarchy among the fundamental rights is also evident in the Indian judicial precedents. An instance of the same is the case of honour killing in *Vikas Yadav v State of Uttar Pradesh*, where a woman's family sued her for marrying inter-caste to protect the 'class honour'.¹³ In a patriarchal society, a woman's choices are overlooked to give preference to family's honour and wishes which is often reflected in the legal framework where both the rights are considered equally important. Owing to this reason, it

⁹ Derya Nur Kayacan, *How to resolve Conflicts Between Fundamental Constitutional Rights*, in Saar Blueprints (2016).

¹⁰ *Indian Young Lawyers Association and Ors. v The State of Kerala and Ors.*, (2019) 11 SCC 1 (India).

¹¹ *Indian Young Lawyers Association & Ors. v. the State of Kerala & Ors.*, (2018) SCC OnLine SC 1690 (India).

¹² *Asha Ranjan v. State of Bihar*, AIR 2017 SC 1079 (India).

¹³ *Vikas Yadav v. State of Uttar Pradesh*, AIR 2016 SC 4614 (India).

becomes theoretically and practically ardent to give precedence to any of the competing claims. The Supreme court's court decision of giving precedence to the woman's choice over that of the family's interests showcases that there in fact exists some of hierarchy in fundamental rights which helps in resolving the conflict.

The judicial trend of adopting the Doctrine of balancing of rights is evident through the famous Dawoodi Bohra case¹⁴, which revolves around the question of religious excommunication. The issue pertaining to the case was the strife between an Individual's Right to freedom of religion encompassed in Article 25 of the Constitution¹⁵, and a community's right to manage religious affairs encompassed in Article 26 of the Constitution¹⁶. The honorable court compounded the 'anti exclusionary principle' which prescribes that if a particular practice has the effect of exclusion of an individual or treats them as second-class citizens, in turn, harming their dignity and other civil rights.¹⁷ The underlying principle behind it is that as the constitution guarantees rights to both individuals and groups, a balance is important. Therefore, as evident from the abovementioned case, the constitutional courts adopted the doctrine of balancing of rights in resolving the dispute.

The Indian Judiciary after adopting the Doctrine of Balancing of Rights as the most pertinent approach, expanded it. The honorable court in *Sahara India Corporation Vs SEBI* laid down a test to be applied before the balancing method is adopted as the *Sahara case* revolved around the conflict between Freedom of Press under Article 19 and the Right to a fair trial under Article 21.¹⁸ The prerequisite conditions are - first that operation of one right enshrined under part III of the constitution poses a 'real and substantial' risk to the operation of another. Secondly, a 'necessity test' needs to be applied in order to evaluate that there exists no other reasonable or less invasive alternative to resolve the conflict than the balancing method. Third, a 'proportionality test' which compares the benefits of balancing with the detriment caused to the operation of a right or freedom which will be restricted, the former should outweigh the latter.

The court suggested that after the prerequisite conditions have been met, a 'neutralizing device' must be employed. The neutralizing device has the following principles – (a) It should

¹⁴ Central Board of the Dawoodi Bohra Community and Ors. v. State of Maharashtra and Ors., AIR 2005 SC 752 (India).

¹⁵ India Const. art. 25.

¹⁶ India Const. art. 26.

¹⁷ Central Board of the Dawoodi Bohra Community and Ors. v. State of Maharashtra and Ors., AIR 2005 SC 752 (India).

¹⁸ Sahara India Corporation v. SEBI, (2012) 12 SCC 610 (India).

operate within the parameters of both the necessity and the proportionality test. (b) it should pass the reasonability test enshrined under Articles 14, 19(2), and 21 of the constitution and (c) it should have the capacity to ‘neutralize’ the discord between the fundamental rights.¹⁹ Therefore, the Supreme Court in the Sahara case held the use of postponement orders which are temporary in nature as a ‘neutralizing device’ against any publication may put the justice dispensation system at a ‘real or substantial’ risk.

A distinct shift in the approach of balancing of rights towards the public interest can be witnessed in the recent judgements. The initial strategy that the court adopted in the framework of the balancing test was one right against the other or rather a “clash” of rights, but subsequently shifted the paradigm towards the clash between rights and public interest. In the infamous Aadhaar judgement, the Supreme Court had to balance an individual’s right to freedom on one hand and on the other the right to food, health, shelter, etc.²⁰ As both the competing claims had their roots in Human dignity, the common law approach of giving precedence to human dignity becomes impractical. The court’s decision of mandatory Aadhaar enrolment for government welfare benefits leaned more towards the interest of the general public than towards balancing both claims. This hints at the blatant aim of the judiciary to balance fundamental rights by giving preference to only one of the competing claims.

The constitutional courts after various efforts have explicitly laid down a definite test to solve the friction that may erupt *inter et intra* fundamental rights. As evident from the case laws, balancing fundamental rights seems a common strategy as it is consistent with the interpretation and the jurisprudence of fundamental rights. A mandatory feature of balancing the fundamental rights devised by the Indian judiciary is to ensure that the ‘Paramount Collective Interest’ prevails in all circumstances.

Paramount Collective Interest – a Solution?

The foundation of the Principle of ‘Paramount Collective Interest’ can be attributed to the case of *Mazdoor Kisan Shakti Sanghatan v Union of India*.²¹ As competing claims can also arise under the aegis of a single fundamental right, the common law approach of ranking the fundamental rights or assessing the relationship of the fundamental right with human dignity becomes redundant in these situations. Even the doctrine of balancing the rights in a circumstance like this becomes more complicated as both the claims seems to have equal

¹⁹ Sahara India Corporation v. SEBI, (2012) 12 SCC 610 (India).

²⁰ Justice K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1 (India).

²¹ Mazdoor Kisan Shakti Sanghatan v. Union of India, AIR 2018 SC 3476 (India).

supremacy. The Supreme Court with the aim of solving the disagreement but also not compromising the fundamental right of any individual devised a unique principle in addition to the balancing of rights, that is the principle of 'Paramount Collective Interest'. So, the honorable Court laid down that the decision needed to be based on a balance that fosters public interest and aims to instill faith in the justice dispensation system.

The principle of 'Paramount Collective Interest' or 'sustenance of public confidence in the justice dispensation system',²² lies at the core of the balancing approach adopted by the Indian Judiciary. It basically advocates that the 'larger public interest' should prevail in all circumstances. The Indian judiciary has laid down a three-pronged test which has the following steps. Firstly, the facts and circumstances of the violation should be scrutinized. Secondly, the competing claims of the parties should be measured and thirdly, a balance is sought, so that none of the fundamental rights is completely ignored. The collective interest tends to serve the public cause which then has the legitimacy to assert a fundamental right. The rationale behind giving primacy to public interest in circumstances of conflict is to foster a spirit of the rule of law. A perfect balance has to be maintained so that an individual's freedom is not curtailed while also giving precedence to societal interests.

The Test of Primacy is also applied as part of the principle of the Paramount Collective Interest.²³ Under this test, Foremost, the public interest is considered in the facts of each case. Secondly, the competing claims are measured after factual scrutiny. Thirdly, a balance is established between the competing interest to give weightage to the public interest and the rule of law. The principle of Paramount Collective Interest attempts to resolve the conflicts that arise *inter et intra* fundamental rights.

Balancing broadly and vaguely defined principles leaves a lacune for judges to exercise their discretion and often prioritize their preferred constitutional values over others. Without an established standard to determine and adjudicate conflicts between fundamental rights based on over-generalized principles is difficult and leads to inconsistency in judicial reasoning. A standard of judicial reasoning ought to be one that is capable of providing pragmatic reasoning based on the factual and legal matrix. Arbitrary judgements based on personal preferences have a negative effect on legal certainty, the rule of law, and public faith in the judiciary. In this context, the principle of paramount collective interest continues to be a rock-solid formula that guides the judiciary in resolving this constitutional dilemma. Therefore, the Principle of

²² *Id.*

²³ *Asha Ranjan v. State of Bihar*, AIR 2017 SC 1079 (India).

Paramount Collective Interest can be termed as a possible solution that not only fosters the public interest but also preserves the constitutional values.

Conclusion

In order to resolve the constitutional dilemma that arises due to a tension between fundamental rights, the legal fraternity has devised certain approaches. In common law, the most accepted approach is the 'Doctrine of Balancing Rights' under which both factual circumstances as well as theoretical consideration is deliberated to reach a conclusion. This approach is also evident via the judicial decisions in India in resolving conflicts. This approach has also evolved, which is evident through the prerequisite conditions laid down in the *Sahara* case. A unique addition to the approach of balancing of rights in the Indian context has been the establishment of the principle of 'Paramount Collective Interest', under which a balance is sought that favors the interest of the general public. Therefore, the attempt of the Indian judiciary in resolving this constitutional dilemma via the principle of Paramount Collective Interest based on the doctrine of balancing of rights can be termed as triumphant.