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**COGNITIVE DISSONANCE AMONG FUNDAMENTAL RIGHTS – IN THE LIGHT  
OF RECENT P. GOPALKRISHNA V. STATE OF KERALA**

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**ABSTRACT**

The expansive interpretation of the Constitution enabled us to look beyond the stated ideals of the makers of this comprehensive document. It took us thirty more years from independence to realize that a life that is guaranteed by article 21 cannot be enjoyed in its totality if the requisite elements corroborating it are not present. Post-1975, article 21<sup>1</sup> became an inflowing source of assertions for the decent existence of human life in society by incorporating certain rights under its ambit. It is now that we are witnessing an inter conflict among these asserted rights, which makes proportional balancing between them significant, to maintain their benefits to the subjects. This paper talks about the rising strife among part III of the constitution and one such disagreement was seen between the right to a fair trial of an accused and the right to privacy of the Victim, where the court was deciding on an application as to whether the accused is entitled to that piece of evidence that may compromise the victim's privacy<sup>2</sup>. The paper also critically analyses the issues involved and tries to bridge the resonating discord between the two prominent rights in the light of the aforementioned case.

Keywords: Fundamental Rights, Intra-Conflict, Right to fair trial, Right to privacy, Judicial Interpretation

**APPREHENDING FUNDAMENTAL RIGHTS: NEED AND OBJECTIVE**

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<sup>1</sup> INDIA CONST. art 21

<sup>2</sup> P Gopalkrishna V. State of Kerala And Ors, (2020) 9 SCC 161

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The world was bleeding and so were the colonies of the protagonists of World War II. The holocaust, atomic mishap and enough dead bodies to exhaust the burial grounds, screamed the grounding effects of deadliest bloodshed human history has ever seen, sounds much like extinction of humanity. But India, a country that is probably 250,000 years old and had been struggling with 200 years of British colonialism wanted to talk about Freedom. It wanted to talk about rights and fair disposition in the society, so it did. On November 26<sup>th</sup> 1949 the most comprehensive Document reassuring the dignity and equality of individuals and a fair regulation of Indian political system was adopted by the constituent assembly.

The Concept of fundamental rights traces its origin from United States Constitution, where the motive of the framers was to secure the basic human rights to the citizens and discourage any impediments hindering social justice. In Indian Paradigm the basic idea behind consolidating them was to deter away the shackles of inhumane violations during the colonialism. The demand first occurred in 1895, when BalGangadharTilak announced, “FREEDOM IS MY BIRTH RIGHT, AND I SHALL HAVE IT”<sup>3</sup>. It was after 53 more years, B.R. Ambedkar’s draft of constitution upheld what tilak demanded back in 1895. However, during the discourse where majority of members supported the draft some were unable to comprehend the exclusive incorporation of part III. Mr. Shri Krishna Sinha, who later became the first Chief Minister of state of Bihar anchored an interesting discourse on the exclusive assimilation of fundamental rights under the constitution. He said, “India shall have her place, her rightful place among the world”. He further elaborated that, India shall one day lead the Asiatic Countries and will establish a hefty democratic republic with a decentralised concentration of powers. He pronounced that, when the western imperialism will retreat the land then this independent country has to find out its way to solve their own problems. He said that the Fundamental Rights have the power to lead our country by protecting the rights of every citizen and groups and at the same time safeguarding the fundamental rights of the minorities. He postulated that, “It is necessary to do so to set an example for the rest of Asiatic countries, so that like the Balkans these Asiatic lands may not also become battle grounds of the imperialisms of the west.”<sup>4</sup>

#### FUNDAMENTAL RIGHTS AND INTERPRETATIVE TRENDS

Every other right under Part III of the constitution are bare pronouncements of the basic rights

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<sup>3</sup>VijayashriSripati, *Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AMER J. INT’L L. 415, 427-428, 1998

<sup>4</sup>CONSTITUENT ASSEMBLY DEBATE,

[https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/1/1946-12-17](https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-17), (last visited on Apr. 15, 2021)

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that a person and in some cases, citizens exclusively can avail, whereas, article 32<sup>5</sup> provides for an effective machinery for enforcement. The judicial Establishments of the country have been a constructive means to reach the ends conceived by the forefathers. They have been entrusted with their capacity to scrutinize laws and protect the rights of the individuals. Moreover, the courts were also entrusted with the task of interpreting the Constitution, which later ignited the flames of transformative constitutionalism.

The interpretational journey of Part III has been a remarkable. Indian constitutionalism has seen contemporary departure from procedure established by law towards due process of law, which is an American concept imbibed under clause 39 of Magna Carta. Before *Maneka Gandhi v. Union of India*<sup>6</sup> case the judicial approach tenaciously upheld the proposition of procedure Established by law through its narrow exposition of provisions of Part III. However, after late 70s a germane departure towards the American concept of due process of law was seen.

The newly adopted trend enabled the courts of law to study the entropy of rights in consonance with the personal liberty, procedural fairness and substantive rights fairness. In *A.K Gopalan*<sup>7</sup>, the Supreme Court interpreted the 'law' as "the state made law". Apex Court eluded the provision of article 21 from the definition of law and defined them as *jus naturale*, principles of Natural Justice. It was the inability to look beyond the closed doors of legislature made laws that braced the stumbled ambit of Part III. The apex Court while deciding the validity of domiciliary visits under M.P. Police regulation 855<sup>8</sup> and 856<sup>9</sup>, upheld privacy does not fall within the ambit of fundamental right. Petitioner's contention of violation of "right to privacy" was rejected. Moreover, the court said that depending upon the character and the antecedents of the person subject to surveillance, limitation is made<sup>10</sup>. It was after the famous *Habeas Corpus* case<sup>11</sup>, that the idea of shift in approach was conceived. The verdict in the afore-mentioned case bluntly acknowledged the dead ends after one's right to movement is suspended. Although one can approach Court but with suspended right of movement, its purpose seems to frustrate. The court in this case, stuck adamantly to the procedure established by law and held that, 'if the right to move was suspended by the presidential order under article 359, then the detenu has no *locus standi* to file a writ petition for challenging the legality of the detention'.

The contemporary change in judicial trend owes much to the socio-political conditions at the

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<sup>5</sup> INDIA CONST. art 32

<sup>6</sup>*Maneka Gandhi v. Union of India*, AIR 1978 SC597

<sup>7</sup> *A.K Gopalan V. Union of India*, AIR 1950 SC 27

<sup>8</sup> *Madhya Pradesh police regulations s. 46(2)(e) of Police Act 1861*

<sup>9</sup> *Madhya Pradesh*, supra 8

<sup>10</sup> *Govind v. State of M.P.*, AIR 1963 SC 1295

<sup>11</sup> *A.D.M. Jabalpur v. ShivakantShukla*, AIR 1976 SC 1207

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time. The cumulative effect of emergency and blatant violations of basic human rights, brought forth the question of what is the correct interpretation of the phrase procedure established by law? *Maneka Gandhi v. Union of India*<sup>12</sup>, The court said that the provision relating to Fundamental Rights should be interpreted in its totality. Bhagwati J., said: “The future of the court should be to expand the reach and the ambit of the Fundamental Rights rather than to attenuate their meaning and -content by the process of judicial construction”. Thereafter, a new trend emerged, whereby a fundamental right cannot be observed in isolation. It has to be read in consonance with its enabling effect. The apex court went a step forward, to pronounce that speedy trials are a part of Fundamental Rights and it is the duty of the courts to speed up the process in order to decide the cases in reasonable time<sup>13</sup>. It is noteworthy, where according to prior trend article 21 did not fall within the definition of law, post *Maneka Gandhi* became the stepping stone of wider exposition. Later in the case of *In Sunil Batra v. Delhi Administration*<sup>14</sup>, the court issued directions to the jail authority to abstain from procuring inhumane treatment to the petitioner who was confined with imprisonment of life. The approach advocating wider interpretation also brought forth the dilemmas of constitutional morality, although barely enforceable but one among the various ideals of propounding fathers of the constitution. It is pertinent to mention that in *Olga Tellis v. Bombay Municipal Corporation*<sup>15</sup>, the Supreme Court’s decision declaring municipal corporation’s act of removing the encroachment caused by pavement dwellers unconstitutional was in furtherance of the spirit of constitution and deeply rooted values of morality. The Apex court in the said case articulated article 21 as the anchor of the constitutional machinery, that talks about right to life and liberty which necessarily includes all the elements of basic life as a matter of fundamental right.

#### REPERCUSSIONS OF EXPANSIVE INTERPRETATION OF THE FUNDAMENTAL RIGHTS

They say, the road to change is the hardest to walk on. The alterations in socio political structure of the country in late 70s demanded a shift in Judicial approach. Whereas, courts were stretching the ambit of fundamental rights for one person’s liberty, such interpretation concurrently violated adverse party’s right as well. This created a paradoxical conflict between rights emanated from same source. Hence, enforceability of one’s right was on the cost of

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<sup>12</sup>Maneka, supra note 6

<sup>13</sup>HussainaraKhatoon v. Home Secretary of Bihar, AIR 1979 SC 1360

<sup>14</sup> Sunil Batra v. Delhi Administration, AIR 1980 SC 1579

<sup>15</sup> Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180

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violation of others.

In *P. Rathinam v. Union of India*.<sup>16</sup>, The wider approach of the court could be termed as revolutionary but the repercussions of the judgment on the society could have been far worse than the benefit it was supposed to confer. The judgment was later struck down by a constitutional bench of 5 judges in *Gian Kaur v. State of Punjab*<sup>17</sup>, but setting such precedents can cause severe consequences.

- Inter Conflict Among the Fundamental Rights

Newly adopted approach led to plethora of intra-conflicts among the articles. One's remedy eclipsed other's entitlement. The conflicts brought forth the need of proportional balancing where the rights of two individuals have been struck by paradoxical expansion. The shift in approach was to suffice the need of changing socio-political changes prevalent that time. However, current trend shows society's self-awareness on matters of right and liabilities.

#### Strife between Article 21 and Article 19

In the case of *M.C Mehta v. Union of India*<sup>18</sup>, the Supreme Court ordered the closure of factories and work place in to improve the habitable condition of that locality. Whilst furthering the same, an incidental encroachment on the rights of the labor was observed under article 19(1)(g) to enforce the furtherance of wider exposition a subsidized effect was laid upon article 19(1)(g) and the right to safe and habitable environment was preferred over labor and factory owners right to occupation. In a different case where the dilemma before court was to whether media's right to speech and expression which falls well within the meaning of article 19 should be allowed to vitiate the right to fair trial of an accused. The court observed that an accused's right to fair trial should not be tampered although, the court might acknowledge the evidences produced by media establishment but shall not construct an opinion on mere perception-based reporting<sup>19</sup>

#### Strife between Article 14 and Article 15 & 16

The nature of article 15 when perceived in isolation is itself in breach of the basic ideal of the constitution, that is equality. However, the constitution also embarks the principle of equity and

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<sup>16</sup> *P. Rathinam v. Union of India*, (1994) 3 SCC 394

<sup>17</sup> *GianKaur v. State of Punjab*, (1996) 2 SCC648

<sup>18</sup> *M.C. Mehta Union of India*, 1987 SCR (1) 819

<sup>19</sup> *State of Maharashtra vsJalgaon Municipal Council*, Appeal (civil) 1296-1297 of 2003

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therefore, it is equity that validates the laws made to further the object of article 15.

In *State of Uttar Pradesh v. Pradeep Tondon*<sup>20</sup> the state government allowed reservation for the people belonging from Uttarakhand. After a petition was moved to the apex court that the said provision blatantly violated the right to equality of other residents of Uttar Pradesh, the Court asserted the constitutionality of the said provision valid and interpreted the stature of article 15 above article 14. In the landmark case of *M. Nagraj*<sup>21</sup> the court again faced the same dilemma concerning the equality of the subjects of state. Validity of Article 16(4) was at stake, that provided for reservation in promotions. The Court Ruled in favor of the government thereby, setting article 16(4) at greater par value with article 14.

#### Conflict between Article 21 and Article 29

In *D. Velluswamy v. D. Patchaiammal*<sup>22</sup>, the question before the apex court was to resolve the discord between right to life and the manner in which one wants to fulfill it. The court again expressed their fondness for article 21 and ruled in favor of validity of live-in relationships.

#### Conflict between Article 21 and Article 25

Allahabad High Court in a major decision banned use of loudspeaker for azan and allowed only human voice for azan. The PIL was filed for violating the right to life. The disagreement in this case was between article 21 and Article 25, clearly article 21 won the tussle<sup>23</sup>. In *Sabrimala case*<sup>24</sup>, women of a certain age group were not allowed to worship in the temple. The classification according to the court was unreasonable in nature. However, this was one among those cases where the judicial approach should have been careful. The judgment might be progressive but lacks compliance. Moreover, the Sabrimala verdict has depicted the importance of proportional balancing with sensitive approach is important to maintain status quo.

- Intra-Conflict Among the Fundamental Rights emanating from Article 21 in the reference to *P Gopal Krishna v. State of Kerala*.

The jurisprudence of article 21 is wide and ever evolving. It encompasses every other right which has not been defined expressly but are incidental in furnishing a decent life. Since the

<sup>20</sup> *State of Uttar Pradesh v. Pradeeptondon*, AIR 1975 SC 563

<sup>21</sup> *M. Nagraj v. Union of India*, 2006 8 SCC 212.

<sup>22</sup> *D. Velluswamy v. D. Patchaiammal*, (2010) 10 S.C.C. 469

<sup>23</sup> *Afzal Ansari vs State of U.P. Writ Petition (PIL) No. 570 OF 2020*

<sup>24</sup> *Indian Young Lawyers Association & Ors vs. The State of Kerala & Ors.*, 2018 SCC OnLine SC 1690

purview of Article 21 is an art of heavy framework, dissonance among them is likely to take place. The judicial proposition when two fundamental rights conflict remains to be collective balancing of interest, but the issue becomes vulnerable when both the rights in conflict are inherent part of the same enigma, that is article 21.

In a recent case of P. Gopalkrishna vs State of Kerala<sup>25</sup>, the court has tried to carefully weigh the exertion of both the rights. However, the judgment lacks the usage of any uniform guidelines.

The conflict between the right to privacy and right to a Fair trial of Accused arose when the Apex Court was hearing Dilip, a Malayalam Movie actor's Petition, who is also the 8th Accused in the case for providing access to the Visuals of the recorded alleged sexual crime against the victim who is a famous Malayalam Actress, in February 2017. The main contention of the appellant, Dilip was that the fundamental evidence on which the prosecutrix relied was not supplied to him, that is a memory card which held recorded visuals of the alleged crime.

The Public prosecutor before the court of law asserted that the memory card does not constitute a document under the ambit of Cr. P.C.<sup>26</sup> rather amounts to a 'material object'. Whereas, the Senior Counsel for appellant contended that the memory card constitutes 'Document' under section 3 of Evidence Act and therefore, liable to be furnished to Accused for a fair trial. Assertions from both the adversaries brought forth a significant issue inter alia involved in the case;

Whether the Supplementation of evidence that can compromise the dignity and privacy of the victim violates her right under article 21, and if it does then whether non-procurement of the copy of such evidence to Accused violates his right of Fair trial under the same ambit or not?

The apex court in the above case ruled out the possibility of withholding an evidence from accused which is of voluminous nature and also sensitive. The court weighs Right of a fair trial of an accused at a greater value than the privacy of a victim. Court in the above case allowed Accused by his pleader to inspect the contents of memory card that constitutes a document, to develop a fair defense against such evidence. The Court during the course of hearing referred various cases to settle the intra conflict between both the rights flowing from article 21. The court relied on, Superintendent and remembrancer of Legal affairs, West Bengal v. SatyenBhowmick and ors<sup>27</sup>, the apex court while appreciating the twin bar applied by section

<sup>25</sup> P. Gopalkrishna, supra note 2

<sup>26</sup> Criminal Procedure Code, 1973, No. 2, Acts of Parliament, 1974

<sup>27</sup> Superintendent and remembrancer of Legal affairs, West Bengal v. SatyenBhowmick and Ors, 1981 SCR (2)

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14 of official secrets Act that bans publication of documents or evidence that public should be excluded from, held that section 14 does not override the provisions of Cr. P.C. and that its non-observance can cause prejudice to the accused. The court concluded in its judgment that a very important right was given to accused under section 162(1) of Cr. P.C and it can be effectively exercised only when the accused is furnished every statement and evidence recorded in the course of investigation<sup>28</sup>.

### **ANALYZING THE FRICTION AND ITS CRITICAL APPRAISAL**

It is only after the Puttuswamy Judgment<sup>29</sup>, we recognized the right to privacy is a member of the inner sanctum of article 21 and that its existence is fundamental. It is true that a right is violated when someone escapes their liability, but how often do we witness two fundamental rights conflicting each other in spite of emanating from the same source. In the case of P. Gopalkrishna v. State of Kerala the court witnessed a tussle between the Right to privacy and the Right to fair Trial of an accused. Though the court ruled in the favor of the accused upholding his right to fair trial at a greater par but did not establish it as a fundamental rule, thereby indirectly subjecting it to facts of the case.

The right to fair trial is not limited to a diligent representation in the court of law but also an Impartial atmosphere for facilitating smooth dispensation of justice with zero discrepancy<sup>30</sup>. Parties to the case should be secured that the court of law is to enforce complete neutrality towards both the parties and that no prejudice is caused to either side. Here, in this case the apex court has completely overridden the Right of fair trial of the Accused over the contentions of privacy.

Considering the duty of the courts to protect the fundamental rights of the subjects of state it is also pertinent to bring forth, that unearthing of truth is also a sine qua non for a justice-based society. The apex Court's order, not furnishing the accused with the piece of evidence on which the prosecutor relied is a screaming ordeal to the accused's right to fair trial. In the case of R.M. Malkani v. State of Maharashtra<sup>31</sup>, the Apex court spelt out three condition for admissibility of tape recording as Evidence that is Relevance, Voice Identification, and proof of accuracy all three being technical grounds. The court in the same case said that even if the evidence is procured illegally, it will be admissible in the court of Law.

A closer view to the accused right to fair trial can be understood by the case of Deepti Kapur v.

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661

<sup>28</sup> S.J. Chowdhary v. The State, (1984 Cr.L.J.854)

<sup>29</sup> Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

<sup>30</sup> ZahiraHabibullah Sheikh &AnrVs State of Gujrat, (2004) 4 SCC 158

<sup>31</sup> R.M. Malkani v. State of Maharashtra, 1973 SCR (2) 417

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Kunal Jhulka<sup>32</sup>, wherein, a CD was produced before court that recorded the wife talking ill about her husband and in-laws to her friend. The court rejected Wife's contention that admissibility of such Evidence shall lead to breach of privacy of an individual which is guaranteed by Article 21. The court said that in a tussle between the right of fair trial and right to privacy, the latter will yield to the former and an evidence even in the breach of an individual's privacy is admissible. The Apex court harmoniously constructed these two rights and also upheld that No fundamental right is absolute in nature, therefore mere examination of evidence in the case of P. Gopalkrishna is administering rights to both the adversaries in bits and pieces. Non Furnishment of a significant evidence to the accused is upholding him to develop a better defense against the prosecution that restricts him to improper representation. When observed in totality no one can actually say, what precedes what, maybe there is a more expanse to the understanding of these rights. There is still a thin line between it that keeps swaying with the changing circumstances. The case of P. Gopalkrishna has made it imperative that there is need for a legislative or judicial directive as to the nature of approach towards this ongoing tussle. A guideline for recognizing the existence of both the rights harmoniously and dominantly as the case may be. Anything done should be in furtherance of justice.

### **SUGGESTIONS AND RECOMMENDATIONS**

The paradoxical void created by variance in interpreting the par value of different fundamental rights needs to be resolved to forbid any constitutional dilemma casting. The Judicial establishments need to revamp their methodology to cast out any inter conflict between rights of same stature. Growing conflicts may be revolutionary for transformative constitutionalism but also weakens public spirit in the constitution. Here are some recommendations that can be employed to resolve the growing conflicts in Indian constitutionalism;

- If either by legislative process or through judicial activism an order of fundamental rights is established and a sequence of precedence is set, proportional balancing shall become comparatively easier. Theoretical hierarchy among the fundamental rights may be helpful in resolving any inter conflict.

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<sup>32</sup>DeeptiKapur v. KunalJhulka, 2020 SCC Online Del 672.

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- An equal amount of sacrifice from both the parties is necessary to obtain an unoffensive middle ground where both the parties does not have to bear the burden of each other's right<sup>33</sup>.
- Relative weight of a right is more important than actual weight of the right. To calculate it, the contextual relation is to be kept in mind. Moreover, the influential elements of that respective legal becomes significant as well.
- Human rights are the stepping stone of fundamental rights on which all the constitutional rights are based<sup>34</sup>. Considering India's position on human rights index and current trends, the active acknowledgement of same can be helpful in resolving any conflict among fundamental rights.

## CONCLUSION

The discords among the rights enshrined in part III, is part of the evolution and forms an essential element in increasing constitutionalism. However, offensive disregard to one's right and its substitution with another's might deform the constitutional structure and weaken public trust in it. To conclude, it is only the logical approach that can be applied to resolve growing conflicts and then proportional balancing can be achieved. A comprehensive study and a fundamental guideline are needed to carefully weight the relative burden of the rights. It is important to leave a room for judicial discretion in such directives so as to attain the clarity subjective to facts of the case. The art of interpretation is a powerful instrument; hence

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<sup>33</sup>Thlimmenos v Greece, (2001) 31 EHRR 411

<sup>34</sup>Jakab, *Breaching Constitutional Law on Moral Grounds in the Fight against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on 'The Rule of Law vs. Terrorism,'* 9 INT'L J. of CONST. L., p. 68, 2011

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