ISSN 2319-3719

ILS LAW REVIEW

Volume IV March 2011

Articles

PART I: GENERAL JURISPRUDENCE OF UNENUMERATED RIGHTS

Conceptual Analysis Of Unenumerated Rights: Some Reflections — M.P. Singh

Rights, Judicial Process And Unenumerated Interests: Some Reflections — Shirish Deshpande

Unenumerated Fundamental Rights Under The Constitution Of India — Parag P. Tripathi

Fundamental Rights In Constitution Of India In Flux: Critical Reflections On Doctrine Of Unenumerated Rights — Sanjay Jain

Unenumerated Fundamental Rights : A Myth — Amit A. Pai

Conceptual Analysis Of Unenumerated Fundamental Rights — Nikhil Kumar Singhal

PART II: COMPARATIVE CONSTITUTIONAL LAW AND UNENUMERATED RIGHTS

A Question Of Interpretation: A Comparative Study Of 'Unenumerated' Rights Recognition In India And South Africa — Avinash Govindjee and Rosaan Kruger

Enumerating The Unenumerated : Unenumerated Rights Under The U.S. Constitution — Kalyani Tulankar

Unenumerated Fundamental Rights In The Irish Constitution — Sharath Chandran

PART III: SPECIFIC UNENUMERATED RIGHTS

Supreme Court Of India Conjuring Up New Rights! — Sathya Narayan

Right To Privacy: An Unenumerated Fundamental Right? A Journey From Kharak Singh Till Today — Rajalaxmi Joshi

Right to Property, Now State's Right to Confiscate: A Case for the Inclusion of the Right to Property as an Un-enumerated Fundamental Right under the Right to Life — Pallav Shukla

FOURTH SATHE MEMORIAL PUBLIC LAW LECTURE

Judicial Accountability In India: Some Reflections — Prashant Bhushan

ILS LAW COLLEGE, PUNE

2011

ILS LAW REVIEW

Volume IV March 2011

Chief Patron

Mr. Raosaheb Shinde, Advocate
President, Indian Law Society

Patron

Mrs. Vaijayanti Joshi
Principal, ILS Law College

Editorial Committee

Editor:

Sanjay Jain

Mode of Citation: (2011) IV ILS. L. R

© Principal, ILS Law College, Pune, 2011.

Disclaimer: The views expressed by the contributors are personal and do not in any way represent opinions of the institution.

ILS LAW COLLEGE
Chiplunkar Road (Law College Road), Pune - 411004
Tel.: 020-25656775, Fax: 020-25658665
Email : ilslaw@vsnl.com, Website : www.ilslaw.edu

ILS Law Review

Number 4 March 2011

Contents

Principal's Page iii

Editorial iv

Acknowledgements viii

About The Contributors ix

PART I: GENERAL JURISPRUDENCE OF UNENUMERATED RIGHTS

Conceptual Analysis Of Unenumerated Rights: Some Reflections — M.P. Singh — 2

Rights, Judicial Process And Unenumerated Interests: Some Reflections — Shirish Deshpande — 12

Unenumerated Fundamental Rights Under The Constitution Of India — Parag P. Tripathi — 25

Fundamental Rights In Constitution Of India In Flux: Critical Reflections On Doctrine Of Unenumerated Rights — Sanjay Jain — 42

Unenumerated Fundamental Rights : A Myth — Amit A. Pai — 99

Conceptual Analysis Of Unenumerated Fundamental Rights — Nikhil Kumar Singhal — 110

PART II: COMPARATIVE CONSTITUTIONAL LAW AND UNENUMERATED RIGHTS

A Question Of Interpretation: A Comparative Study Of 'Unenumerated' Rights Recognition In India And South Africa — Avinash Govindjee and Rosaan Kruger — 126

Enumerating The Unenumerated : Unenumerated Rights Under The U.S. Constitution — Kalyani Tulankar — 151

Unenumerated Fundamental Rights In The Irish Constitution — Sharath Chandran — 160

PART III: SPECIFIC UNENUMERATED RIGHTS

Supreme Court Of India Conjuring Up New Rights! — Sathya Narayan — 170

Right To Privacy: An Unenumerated Fundamental Right? A Journey From Kharak Singh Till Today — Rajalaxmi Joshi — 184

Right to Property, Now State's Right to Confiscate: A Case for the Inclusion of the Right to Property as an Un-enumerated Fundamental Right under the Right to Life — Pallav Shukla — 193

FOURTH SATHE MEMORIAL PUBLIC LAW LECTURE

Judicial Accountability In India : Some Reflections — Prashant Bhushan — 204

PRINCIPAL'S PAGE

I am indeed very glad to present the forth volume of our annual publication-ILS Law Review to all of you. This volume has followed the pattern of last three volumes, by focusing on a legal issue of contemporary importance.

Volume four contains the public lecture delivered by Shri Prashant Bhushan, Advocate Supreme Court of India, on the theme of 'Judicial Accountability' and contributions by scholars and students during "Forth Remembering S.P. Sathe event" held in 2010 on the theme of 'Unenumerated Rights in India'. In addition, contribution by Smt. Sathya Narayan, one of the senior faculty members of ILS Law College and Director, Institute of Advance Legal Studies, Pune has also been included in this volume.

ILS Law Review is a platform available to our students to articulate and express their thoughts on various legal issues and facilitates them to have candid and stimulating deliberations on the contemporary legal themes with Judges, Jurists and academicians. I am sure that our students will take maximum advantage of this opportunity.

I am thankful to all scholars and students for their rich contributions to the law review. I thank Dr. Sanjay Jain and his team for their hard work and patience while bringing out this volume. I am sure that this volume of the journal being one of very few contributions on the theme of 'Unenumerated rights' will be received very well by both academia and students.

Mrs. Vaijayanti Joshi

EDITORIAL

A careful look into the literature on the theme of 'Unenumerated Rights' demonstrates that it assumed prominence in the United States Constitutional jurisprudence. The textual foundation of Unenumerated Rights is reflected in IXth Amendment of Constitution of USA. Speaking in jurisprudential terms, one may contend that Unenumerated Rights are 'rights' either flowing or derived from numerated rights. For the sake of simplicity, it may be said that the former are accessory rights and the later are principal rights; viewed this way, it may be possible to argue that Accessory rights are subordinate to Principal rights. Thus, in the context of Constitutional law, any peripheral right or a right integrally connected with any of the express fundamental right mentioned in Part III, is bound to be subordinate to it and its recognition and enforcement is squarely based on the explicit language of the expressed parent right. On the other hand, if it is assumed that, both, provisions of Constitution in general and Bill of rights in particular have a level of generality and the same being in the process of constant transformation with the tide of the time, then it is possible to argue that, Constitutional rights are not static; rather they go through the dynamic processes and keep on assuming different incarnations in form of Unenumerated Rights. E.g. in 1950 'right to freedom of expression' covered freedom of press. In 2010, the same right does also cover freedom of surfing internet. In other words, the process of finding an accurate level of generalization to define the scope of previously recognized right and to determine the reach of newly claimed right is a very intricate dimension of constitutional adjudication and judicial process.

Viewed this way, in almost every jurisdiction, where written Constitution prevails, the notion of Unenumerated Rights is bound to assume immense significance. In fact, in India also Unenumerated Rights are evolved by the Courts from day in and day out. Albeit, if we have a serious look on the literature of Constitutional law of India, lack of interest on part of academia to generate literature on this issue is amazingly striking. However, as always, Professor S. P. Sathe also made rich contribution on this issue by writing a consultation paper '*Enlarging the Fundamental Rights*' for the 'National Commission to review the working of the Constitution' published in Volume II Book I of its report.

We at ILS Law College, Pune decided to pay rich tribute to Dr. S. P. Sathe by organizing an International Conference on the above rather neglected theme, as a part of '*4th Remembering S. P. Sathe*' event. During this one-day conference, we extensively deliberated on different dimensions of the conception of 'Unenumerated Fundamental Rights'. In the conference, a number of presentations were made by invited senior faculties, lawyers, and students from India and abroad.

Dr. M.P. Singh, the then Vice Chancellor of 'National University of Juridical Sciences', Kolkata, presently chairperson, Delhi Judicial Academy, Delhi during his presentation focused on jurisprudential angle of Unenumerated Rights and enlightened the audience about evolution of the same in USA and India. I acknowledge the assistance of Shrimati Swati Kulkarni for converting his audio presentation into printable version.

Dr. Parag Tripathi, Additional Solicitor General of India, in his immensely interesting paper reflected on landmark judgments delivered by the Supreme Court and High Courts of India on the theme of Unenumerated Rights and critically analyzed them.

Dr. Avinash Govindjee, Associate Professor, Dr. Nelson Mandela Metropolitan University, South Africa and Dr. Rosaan Kruger, Senior Lecturer Rhodes University, South Africa generated interesting debate by comparing and contrasting the impact of Unenumerated Rights on the Constitutional canvas of South Africa and India in their illuminating paper.

Dr. Shirish Deshpande, Head, Dept of Law, RSTM University Nagpur, specially focused the vital issue of level of generality of interpretation of Constitutional rights in his thought provoking paper.

Ms. Sathya Narayan Director, Advanced Institute of Legal studies, ILS Law College, Pune engaged with critical analysis of right to sleep by focusing on Ramlila Maidan case in her erudite piece, which she agreed to write for this volume on special request of the Principal Vaijayanti Joshi and Editor Dr. Sanjay Jain.

In my review essay, apart from comparing and contrasting Bill of rights in the Constitutions of US, Canada, South Africa, Kenya, ICCPR and ICESCR with Part III of Constitution of India assessing the impact of unenumerated rights from the perspective of Comparative Constitutional law,

and dealing with the views of prominent scholars of India and US, I have also critically analyzed some of the landmark judgments handed down by Supreme Court of India from the stand point of 'level of generality of Interpretation of Constitution'.

Besides, student presenters also made impressive presentations. Ms. Rajalaxmi Joshi and Mr. Pallav Shukla, delved into the right to privacy and right to property respectively. Rajalaxmi challenged the analytical foundation of the right to privacy and demonstrated how Supreme Court of India in judgments after judgments has erroneously interpreted *Kharak Singh v. State of UP;* Whereas, Pallav made out a strong case for recognizing right to property as one of Unenumerated Fundamental Rights.

Ms. Kalayani Tulankar, in her presentation deliberated on foundations of Unenumerated Rights in IXth and XIVth amendments of USA Constitution.

Mr. Sharath Chandran, , compared and contrasted the position of Unenumerated Rights in the Constitutions of Ireland vis-à-vis India.

Mr. Amit Pai and Mr. Nikhil Singhal, delved into the general jurisprudence of the notion of Unenumerated Rights. Amit viewed the unenumerated rights as merely an adjudicatory myth whereas Nikhil emphasized on the conceptualization of the same by referring to the jurists like Dworkin.

All the presentations made during the conference have been substantially revised till 2010 and I am happy to present them in the Fourth volume of ILS law Review. The Papers are divided into three themes.

One – General Jurisprudence of Unenumerated Rights; containing papers of Prof. M.P. Singh, Dr. S.L. Deshpande, Dr. Parag Tripathi, Dr. Sanjay Jain, Mr. Amit Pai and Mr. Nikhil Singhal.

Two - Comparative Constitutional law and Unenumerated Rights; containing papers of Dr. Avinash Govindjee and Dr Rosan Kruger, Ms. Kalayani Tulankar and Mr. Sharath Chandran.

Three - Specific Unenumerated Rights; containing papers of Ms. Sathya Narayan, Ms. Rajalaxmi Joshi and Mr. Pallav Shukla.

Besides, the 'Fourth Remembering S. P. Sathe Memorial Public Law lecture,' on 'Judicial Accountability-Some Reflections' delivered by Shri Prashant Bhushan has also been included in this volume.

I would like to thank Principal, ILS Law College, Shrimati Vaijayanti Joshi, for giving me the privilege to be the editor of this volume of ILS Law review. Without her moral support, it would not have been possible for me to accomplish this task of such a magnitude.

I am quite confident that this volume which is one of the few publications on the theme of 'Unenumerated Rights in India' is bound to generate intellectually stimulating discussion and would pave way for further research in this arena. As an editor of this volume, I have tried my level best to eliminate all the errors, nevertheless, there are bound to be certain pit falls, for which I solely and candidly own the responsibility.

Place- Pune
Date – 28th May 2012

Dr. Sanjay Jain
Faculty, ILS Law College Pune

ACKNOWLEGEMENTS

I would like to thank Shri Prashnt Bhushan, Advocate and social activist for accepting our invitation to deliver forth Remembering S.P.Sathe Memorial Public Law lecture.

My heartfelt thanks are also go to all the contributors to this 'Forth Volume' of ILS Law Review. I would like to thank all the authors for their co-operation in responding to our reminders, suggestions, and clarifications and timely submission of the papers.

I would also like to acknowledge assistance provided by Shrimati Swati Kulkarni, faculty ILS Law College who transcribed the recorded audio speeches of forth public law lecture of Shri Prashant Bhushan and the presentation of Dr. M.P. Singh during forth Remembering S.P. Sathe memorial International conference on Unenumerated Rights with great accuracy.

I would specially like to thank my wife Sakshi Jain for rendering much required cooperation and research assistance during every stage of the editing of this volume.

I would also like to acknowledge the assistance of Ms. Maithili Sane, Alumini ILS Law College in the formatting of the texts of papers in this volume.

Last but not the least; I would like to thank Shree J Printers Pvt. Ltd. For publication of this volume within the short span of period.

ABOUT THE CONTRIBUTORS

Dr. M.P. Singh, Chairperson Delhi Judicial Academy, New Delhi,

Dr. Parag Tripathi, Additional Solicitor General of India

Mr. Prashant Bhushan, Advocate, (Supreme Court and High Court) and social activist, New Delhi.

Dr. Shirish Deshpande, Head, Dept of Law, RSTM University Nagpur

Ms. Sathya Narayan Hon. Director, Advanced Institute of Legal studies, ILS Law College, Pune

Dr. Avinash Govindjee Associate Professor, Dr. Nelson Mandela Metropolitan University, South Africa

Dr. Rosaan Kruger Senior Lecturer Rhodes University, South Africa

Dr. Sanjay Jain, Faculty ILS Law College, Pune

Ms. Rajalaxmi Joshi, Student of LL.M. Final Year ILS Law College, Pune

Ms. Kalayani Tulankar, Student of LL.M.- I, Bombay University

Mr. Sharath Chandran, Student of B.CL. University of Oxford

Mr. Amit Pai Advocate,

Mr. Pallav Shukla Associate TRI legal, New Delhi

Mr. Nikhil Singhal, Senior Associate - Taxation and Corporate Law', LakshmiKumaran & Sridharan, Attorneys

PART I: GENERAL JURISPRUDENCE OF UNENUMERATED RIGHTS

Conceptual Analysis Of Unenumerated Rights: Some Reflections*

M.P. Singh**

Preliminary Remarks

Principal Joshi, Prof. Deshpande, Amit and Nikhil, members of the audience and students, I am grateful to Principal Joshi for inviting me on this occasion to share my views with fellow students and legal luminaries. Normally my administrative responsibilities do not easily let me participate in important academic discourses primarily because of my inability to prepare something worthwhile for such a discourse. But Dr. Sanjay Jain told me that today's event is being organized in and dedicated to the memory of Professor S.P. Sathe. Therefore, I made it a point to be part of this discourse, whatever my limitations in contributing anything worthwhile to it. Professor Sathe was a senior colleague with whom I never had the opportunity of working or interacting much, but I knew him from my LL.M. days in 1961-63 when he was doing a project for the Indian Law Institute on 'delegated legislation' with Prof. V.N. Shukla at Lucknow University. I met him in person only sporadically but had the opportunity of meeting him frequently through his writings which appeared in the form of books, articles, reports and endowment lectures. It is our misfortune that such a sound scholar and prolific writer was snatched from our midst when he was giving his best to us.

To keep alive at least a part of his tradition let us meet and discuss as often as possible on some of the issues which Professor Sathe would have discussed with greater authority. Let us try to carry on that tradition as far as possible.

Evolution of the Concept of Rights

When I was asked to speak on 'unenumerated rights' in the memory of Professor Sathe, I was reminded of his writings on the right to know and the

* Transcript of Lecture delivered by M.P. Singh, in the Forth Remembering S.P. Sathe Memorial International Conference 2010, it was prepared by Smt. Swati Kulkarni and with the Approval of the author is being published.

** Former Vice Chancellor, National University of Juridical Sciences, Kolkata & presently Chairperson, Delhi Judicial Academy, Delhi.

right to privacy, which could be the starting points for a discussion on unenumerated rights. I doubt if unenumerated rights constitute a jurisprudential concept. The jurisprudential concept is of rights which extends to marking a distinction between rights and the fundamental rights. If we look back at the process of evolution of rights, we find that the modern concept of 'rights' started taking shape in the West from 16th century onwards. Prior to that there was hardly any discussion of rights. Some of the earliest proponents of the idea of rights that we know were contractarian scholars such as Hobbs, Locke and Russo. But they propounded two different kinds of approaches to rights. For Hobbs State was the guarantor of all rights and only through strong State individuals could realize their rights. Therefore, he argued that the people should ask the State to give them rights or they should create a State which will ensure their rights. It is this line of approach which later Bentham, who was critical of rights except those which the State gave to the people, supported. Therefore, Bentham was also opposed to the idea of natural rights.

Locke and Russo took a different approach according to which individuals have rights that they are entitled to claim against the State also. Therefore, the State also should be bound by those rights. This led to the idea of inherent or natural rights of individual according to which every human being is born with certain rights which cannot be taken away by anyone including the State. Such rights were named as fundamental or natural rights.

These two approaches continued to work side by side. But in course of time the latter of the two became dominant which led to the introduction of a bill of rights in the Constitution of the United States and declaration of rights of men in the French Revolution which continues to guide the French law and French constitutionalism until today.

Developments in UK

But the other approach also did not disappear from the scene. Hobbsian and Benthamite idea acquired its roots in England. Therefore, in England an individual had has only those rights which the State granted to him/her, whether under the *Magna Carta*, Bill of Rights, Act of Settlement or the Human Rights Act 1998. All the rights the individual has are the gift of the State and not of nature which the State is incapable of taking away from or denying to the individual. Dicey, and to some extent also John Stuart Mill,

however, gave a modified version of rights in England, which had a great impact on the idea of rights in that country. According to them, in England, everybody was free to do whatever one liked, so long as one did not interfere with similar freedom of others. Therefore, unless and until the State makes a law which restricts this freedom of the individual, the individual is free to do whatever the individual likes. Under this view though the sovereignty of parliament over and above the freedom of the individual remains unaffected so long as parliament does not exercise that sovereignty to restrict that freedom. This view led to the birth of the idea that the rights cannot be confined to a listed category but extend to immense possibilities which an individual can explore so long as those possibilities are not denied by a democratically elected parliament. This led to the birth of the idea of unenumerated rights in England. It is this idea which became part of law in the British colonies other than the United States which became separated from the British Empire much before this idea acquired its clear shape.

Rights in Constitutions: The United States

Now the question is: How far the idea of rights has influenced the constitution and constitution making in the modern world? I have already mentioned that the United States was the first country to write a bill of rights in its constitution. The bill of rights, as we all know, originally bound only the federal government and not the State governments. It was by subsequent amendments in the constitution, i.e. the 13th, 14th, 15th or any other amendments that certain fundamental rights were made binding on the States. Among the initial amendments binding only on the federal government the 9th amendment provides: "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." This provision assumes that the makers of the Constitution were aware of the rights of the people other than those they were providing in the Constitution. They did not want to deprive people of those rights by enumerating certain rights in the Constitution. Therefore, in course of time under the Constitution of the United States a concept of implied rather than unenumerated rights developed according to which right written in the Constitution imply unwritten rights too.

The concept of implied rights or rights by implication in the Constitution of the United States seems natural in the overall frame of that

Constitution. It is not confined only to rights or fundamental rights. It extends to other aspects of the constitution also.

There is also a theory of implied powers. Implied powers of the congress i.e. the unenumerated powers of congress in Art.1 sec. 8 also include those powers which are essential and necessary for the purpose of execution of expressed powers. Thus there are powers implied within the powers expressed or enumerated in the Constitution. Similarly there is also a theory of implied prohibitions according to which the federal structure of the constitution implies that the Central government cannot interfere with the matters concerning State government and vice versa. By implication, therefore, certain limitations on government powers such as immunity of instrumentalities i.e. immunity from tax powers of one government of the property of the other also exist. Accordingly both implied powers as well as implied prohibitions are recognized in the US Constitution because, as we all know, the constitution of the United States is the shortest constitution among constitutions of different countries about which it is often said that it implies more than what it expresses or hides more than it exposes. It also does not provide for easy process of amendment of the Constitution. In order to ensure functionality and success of such a constitution in an indefinite and fast changing future life of a country which has moved from horse cart to space craft it was absolutely necessary to read into the Constitution what was not expressed in so many words but without which it would not work. It is because of such an approach that the Constitution of the United States has already survived for two and a quarter of a century without many amendments.

The idea of implied rights in that Constitution could also be attributed to this nature of the Constitution even though the bill of rights in the Constitution is well expressed through amendments. Though the bill of rights was added to the Constitution soon after its initial adoption, the idea of rights in the Constitution did not acquire prominence until the beginning of the first quarter of the twentieth century and more prominently until after the World War II. In the evolution of rights in the Constitution of the United States we find that they were included in the Constitution primarily for the protection of the privileged class as is apparent from the *Dread Scott*[1], *Civil*

---

[1] 60 U.S. 393 (1857)

Rights[2] and *Plessey* v. *Ferguson*[3] cases. In *Dread Scott* a slave was considered property of the slave owner and the latter could not be deprived of the ownership of the former without due compensation as required by the 5th amendment to the Constitution. Accordingly a Congressional law that made a slave free man if he moved from a slave owning to non-slave owning State was invalidated by the Supreme Court in the absence of provision for compensation to the slave owner. And when after the civil war for the enforcement of the 14th amendment Congress enacted the Civil Rights Act, the Supreme Court invalidated these Acts too on the ground that the Congress in the name of enforcing equal protection of laws, could not violate the rights of the States. Again in *Plessey* v. *Fergusson* the Supreme Court laid down that equal but separate facilities did not violate the equal protection clause of the 14th amendment of the constitution. Even in the early part of the 20th century, the Court continued to support the privileged class under the bill of rights. For example, though nowhere in the bill of rights freedom of contract is mentioned the Court found it implicit in the due process clause of the 5th amendment in *Lochner*. The same position continued until the 1930s that led to the political process of packing the Court.

Post New-Deal Era

To illustrate, the right to the liberty of contract was recognized in *Lochner* v. *New York*[4], and a few other cases much before the new era. Later, during the new era the Court started the process of incorporation. As we all know, the 5th and 14th amendments of the US Constitution speak of due process. Out of the two former applies only to Federal Government while the latter applies only to States. 14th amendment also contains equal protection clause. Through its interpretation of the two amendments, the Court has incorporated several of the important rights in the first nine amendments in the 14th amendment due process clause and has applied the equal protection clause of the 14th amendment to Federal Government. This has been done through the so called process of incorporation in the course of time without an end. Perhaps the earliest case in that process was *Palco* v. *Connecticut*[5] in

---

[2] 109 U.S. 3 (1883)
[3] 163 U.S. 537 (1896)
[4] 198 U.S. 45 (1905)
[5] 302 U.S. 319 (1937)

which the right to double jeopardy was claimed in the proceedings in the State court while the State constitution did not provide for such a right. The Supreme Court initially rejected incorporation of that right into the due process clause of the 14th amendment because in its view it was not so fundamental that it should be considered as part of the ordered liberty, but later it changed its views and included that right in the 14th amendment. The Court has also created such rights which it considered part of history and tradition of the American people any violation of which would amount to the violation of unenumerated rights of the people. This is illustrated by *Skinner* v. *Oklahoma*[6] in which the validity of the State law which provided for compulsory sterilization of persons guilty of having committed certain kinds of felonies for three or more times was challenged. The Supreme Court invalidated the law on the ground that it violated the equal protection clause. The basis of the decision was that marriage and child bearing have always been regarded as fundamental by the people of the United States and therefore they could not be considered to be absent or excluded from the constitutional rights of the people. Similarly in *Rochin* v. *California*[7], where the police forcefully pumped the stomach of the accused for compelling him to vomit or pass out a narcotic which he had swallowed to destroy any evidence of its possession, the Supreme Court declined to take that evidence in account on the ground that the tactics used by the police was against the fundamental rights of the accused because the police action amounted to a behavior that shocked the conscience of the people of United States. There are many more cases to support my point that the US Supreme Court has recognized several rights which are not enumerated in the Constitution. Therefore, the idea of unenumerated rights finds full support in that Constitution.

Position in India

Let us now examine the position in our Constitution. Inclusion of the fundamental rights in our Constitution is considered an aspect of the Western tradition of such rights. As such we trace their reach only in terms of the

---

[6] 316 U.S. 535 (1942)
[7] (342 U.S. 165 (1952)

Western traditions and not ours. No serious effort has ever been made to relate them to any Indian tradition. That is one point to be taken into account while examining if there are any unenumerated rights of the people in the Constitution or otherwise. I am, however, of the view that the Constitution produced by the people of India includes those traditions somewhere in some form, at least impliedly if not expressly.[8] Let us also, however, admit that the idea of the rights in India came to forefront only during the British period because perhaps only it is that government, which started violating the rights of the people. Therefore the need of demanding rights arose only against that government. Soon after the creation of the Indian National Congress in 1885, we started demanding our Bill of rights against the British and the first constitutional demand which we presented to them in 1895, we asked for certain fundamental rights. But the difference which I am trying to point out is that from the very beginning the constitution makers were demanding rights different from those demanded in the United States or the other Western countries. One of those rights was the right to education. And, therefore, we were conscious of different kind of rights than the kind of rights which were being demanded in the Western world, whatever may be the reasons for that.

But the question is: whether in the Constitution of India and its makers included all those rights in the form of fundamental rights or otherwise which the people of India could have, or have they enumerated only some of those rights and left some others to be unenumerated? If we accept that individuals are born free or have rights by birth, then definitely all the rights of the individual cannot be enumerated in a constitution. If we compare the bill of rights in different constitutions we find some difference in each one of them in some respect or the other. It suggests that there is no fixed or set list of fundamental rights. Every constitution provides those which its makers consider the most important at the time of making the constitution. Others, one may presume, are either left out or remain unmentioned. Can we say so or has it been ever said about rights in our Constitution? If we look at the constitutional interpretation, starting from the *Gopalan's*[9] *case*, which was the first case before the Supreme Court on constitutional interpretation

---

8 M.P. Singh, Human Rights in the Indian Tradition – Search for an Alternative Model, in Singh et al (eds), Human Rights and Basic Needs, 3ff (Universal, Delhi, 2008).

9 1950 SCR 88

involving fundamental rights, it recognized that personal liberty is a very wide term and it includes number of things which cannot be exhaustively enumerated such as the right to sleep, right to eat, right to work or not to work etc. Therefore, from the very beginning it was recognized that within or along with the enumerated rights there are unenumerated rights among the fundamental rights. This also reminds me of Panikkar's theory of human rights in India who argues that Indians do not have rights because they never demanded them.[10] He argues that only those people demand rights whose rights have been taken away. As far as India is concerned, people always had rights; therefore, the question of demanding them never arose. It is only the British who for the first time started violating their rights and, therefore they started demanding them from or against the British. Before the British came to India there was no occasion for the people of India to demand their rights from anyone. Thus, it must be presumed that people in India possess all the rights and any government that does anything against those rights must justify its action. The individual need not establish his right but rather the government must justify its action either by establishing that its action does not violate any rights of the individual or the violation is permitted.

In this connection, however, the difference between rights and fundamental rights is relevant. All rights are not fundamental rights even though all fundamental rights are also not expressly and specifically provided in the Constitution. Reference to *Gopalan* establishes the latter proposition. Again, soon after *Gopalan* in *Ramesh Thapar*[11], the Supreme Court recognized that the right to freedom of expression also includes the right to press and since then many activities that could be covered under the term 'expression' have been brought within the freedom of speech and expression. Then in *Kharak Singh*[12] and again in *Govind*[13], the privacy right was recognized. Also in *Satwant Singh Sahani's*[14] *case*, in the right to personal liberty the Court recognized the right to travel abroad. Thus from the very beginning from time to time the Court has been recognizing fundamental rights that are not specifically enumerated or expressed in the Constitution.

---

10 R. Panikkar, '*Is the Notion of Human Rights a Western Concept*?' 120 Diogenes 75 (1982).

11 1950 SCR 594

12 (1964) 1 SCR 332

13 (1975) 2 SCC 148

14 1967 SCR (2) 525

The recognition of un-enumerated rights became much more visible and pronounced after *ADM Jabalpur*[15] case in which the Court by a majority of 4 to 1 decided that fundamental rights including the right to personal liberty, are conferred by the Constitution. Any pre-constitutional rights which could be brought within enumerated rights such as personal liberty in Article 21, the Court held, ceased to exist outside that right. The Court went on to hold that Article 21 right was not a common law right and there existed no common law remedy of habeas corpus. It went on to add that no common law right corresponding to fundamental rights did exist as a distinct right parallel to the fundamental rights. The Court even exempted the executive from the requirement of law for taking life or liberty of any person. This approach of the Court was not consistent with the earlier precedents though one could argue that the decision was given in an unprecedented situation in the country. However, soon after the Emergency was over, came the famous *Maneka Gandhi*[16] case which paved a stronger and smoother path for the expansion of rights. In *Maneka Gandhi* the Court recognized and emphasized upon the core and penumbra of rights in detail. Core of rights is expressly mentioned in the Constitution and is easily understandable. Penumbra of rights comprises rights read out of or implied in those rights which are enumerated in the Constitution. In that case one of the issues on the point was whether under Article 19 (1) (a) a journalist also has the right to travel abroad? The court did not accept the claim of the journalist, namely, Maneka Gandhi but recognized the existence of such a right which could be claimed and granted in an appropriate case. From there onwards, as we all know, the Court has read into the fundamental rights, particularly in Article 21, many rights which were not known such as right to clean water, right to clean environment, right to health care, right to livelihood and the claim for right to food, right to education, etc. All these rights have been created under the right to life as explained in *Coralie Mulin*[17] case. Hardly any right has been created under the concept of liberty except the earlier recognized rights to travel abroad or the right to privacy recently relied upon by the Delhi High

[15] 1976 AIR 1207
[16] 1978 SCR (2) 621
[17] 1981 SCR (2) 516

Court in *Naz Foundation*[18] case recognizing the right to homosexual relationship between the consenting adults.

I am not trying to list all the unenumerated rights in the Indian law or Constitution because they cannot all be listed. I have mentioned them illustratively to explain my point that there are un-enumerated rights along with the enumerated rights in our law and the Constitution. I hope they are enough to substantiate my point.

Conclusion

Let me end up by saying that these developments are not confined to India or the United States. They are universal. Pick up any constitution and you will find expansion of rights under it. As the constitutions are written at a particular moment of time in the life of a country and have to operate indefinitely through new developments in that country and the rest of the world they need to be interpreted and reinterpreted in line with those developments. One of the major developments which all societies are going through is the immense expansion of human rights. The national courts must take into account this development and bring the national constitutions in line with them. Otherwise the constitution will break down unless it is amended too frequently at the risk of losing its sanctity. In my view, by discovering unenumerated rights along with the enumerated ones in the constitutions, the courts and the lawyers are performing their rightful and desired job. ■

[18] 2009 (160) DLT 277

Rights, Judicial Process And Unenumerated Interest: Some Reflections*

Shirish Deshpande **

The legal rights are ***conferred/enumerated***[1] by legal rules, is a proposition of a breathtaking banality. However the ambiguity stems from the fact that legal rights are conferred by legal rules. This proposition owes its origin to the positivistic conception of rights i.e. rights cannot exist independent of and apart from legal rules. Admitting this proposition could mean that rights must always be grounded in the text of law or constitutional provisions. By way of a sharp contrast natural lawyers believe that natural rights exists independent of and prior to any positivist legal rule. Legal rights are not conferred by legal rules but they are confirmed by the legal rules. This debate has a direct relationship with the question of how to ascertain the existence and contents of a legal right. Constitutions of liberal democratic countries contain constitutional rules of different degrees of specificity, accuracy or generality.[2] For example; the minimum age for becoming a president is 35 years and/or the state shall not deny to any person equal protection of laws or deprive any person of right to life and personal liberty except according to due process of law. It is against this background the issue of un-enumerated rights is to be analyzed.

Section I

This section explores the process of reasoning of the courts through the language of the constitution. It is submitted that the doctrine of un-enumerated rights is a part of the overall theory of implied meaning of the provisions of the constitution.

---

* This Paper is prepared for the ILS Law Review Volume IV 2011. The first draft of this paper was presented in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010

** *Associate Professor and Head, P.G.T.D law, RTM, Nagpur University, Nagpur.* The author wishes to place on record his deep sense of appreciation and gratitude to Dr. Sanjay Jain, Asst. Professor, ILS, Pune, Mrs. Varsha Deshpande, Asst. Prof. Department of Law, Dr. Ambedkar College, Nagpur and Sachin Tripathi, Visiting Faculty, PGTD of Law, RTM, Nagpur University, Nagpur for discussing the subject from time to time and rendering invaluable assistance in the preparation of this script.

1 These two expressions share two common qualities. First, they refer to explicitness and specificity and second they exclude things which do not fall within their coverage. Furthermore their meaning is to be gathered from the language used for the purpose of International conference or enumeration.

2 Laurence H. Tribe and Michael C. Dorf , *Levels of Generality in the Definition of Rights*, 57 U. Chi. Rev. 1057, See also Richard A. Posner, *The concept of un-enumerated rights,* 59 U. Chi. L. Rev. 433

If the rights are required to be expressly conferred, the question arises how to ascertain the degree of express-ness or textual explicitness necessary and sufficient for grounding the rights in the text of a constitutional provision or a legal rule.

The doctrine of un-enumerated rights as evolved by the Supreme Court of India raises similar questions of the degree of explicitness or specificity, requisite for an un-enumerated interest to be counted as the part of an enumerated right.

It involves a question of interpretation of the text of the constitution. As Justice Venkatchalliah rightly pointed out that, there is a difference between interpretations of text of the constitution on the one hand and interpretation of the concepts embodied in the text of the constitution on the other. The meaning and scope of the concept is to be ascertained by inquiring into the evolution of the concept within a particular timeframe. The language of the constitution plays a very little role in the process of reasoning of the court. By way of sharp contrast, the original intent approach that is to confine court to the meaning that is attributed by the founding father of the constitution to the words used by them. There is a third approach, which seeks to interpret the words of the constitution in the light of changing social economic or cultural situations in which the word or phrase occurring in the text of the constitution come to be applied. In other words, the meaning determination process is dependent upon the situation prevailing at the time of the decision of the case. It is important to bear in mind that constitution has been described as a living document. Therefore determining the meaning of the language would necessarily involve references to socioeconomic political and cultural conditions. For example in *Plesy* v. *Ferguson*[3] , the supreme Court of United States held that, the doctrine of equal protection of laws is means that the blacks are to be regarded as separate but equal. Whereas in 1954 in *Brown* v. *Board of Education,*[4] the Supreme Court held that, the doctrine of separate but equal is inherently discriminatory and therefore violative of equal protection of laws.

---

3 163 US 527.
4 347 US 483.

Furthermore until very recently, homosexuality was regarded as offence of sodomy whereas in some countries now homosexuality amongst adults in privacy is legalized or decriminalized.

The original intent approach has been applied by the Supreme Court in *A. K. Gopalan* v. *State of Madaras* [5] where the expression personal liberty was interpreted by the Supreme Court to mean "freedom" form bodily restraint and also the expression "procedure established by law" was interpreted to mean an enacted law (*lex*) and not *jus*.

In *R.C.Poudyal* [6] the Supreme Court considered the challenge to the validity of the 36th Amendment Act admitting the state of Sikkim in the Indian Union with special provisions for reservation of seats in the Sikkim legislative assembly for Buddhist Sangh. Among other things, the amendment was challenged on the grounds that reservation of seats in a legislative assembly for religious institution was violative of secularism which is held to be an essential feature of the basic structure of the Indian Constitution in *S.R.Bommai's case*[7]. Rejecting this argument, Justice Venkatchalliah observed that the concept of secularism as is understood in the Constitution cannot be applied to the newly admitted state. The meaning of the concept secularism must be gleaned from the evolution of social and political institution of the state of Sikkim. After surveying the evolution of these institutions Justice Venkatchalliah held that religious institution have always been the part of the political structure of Sikkim and therefore the special provisions do not violate secularism as an essential feature of the basic structure of the constitution.

The above examples clearly demonstrate that what model of interpretation of the constitution is to be applied cannot be a matter of the positivist command to the judges. Whether original intent approach is to be adopted or the textual model should be adopted or the conceptual model of interpretation is to be adopted, is a matter in the ultimate analysis of the judge's discretion.

It is therefore submitted that, whether a particular un-enumerated interest asserted by the petitioner before the court is a part of an enumerated

[5] AIR 1950 Supreme Court 27, 1950 SCR 88.
[6] R.C. *Poudyal* v. *Union of India*, AIR SC 1804: 1994 Supp (1) SCC 324.
[7] *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918; (1994) 3 SCC 1.

right and/or concepts, is a question of the model of interpretation to be applied by the judges.

Section II: Different Methods for Recognizing Un-enumerated Rights

Supreme Court's reasoning with respect to Constitution has taken on new forms. It involves;

(a) Interpreting the words and phrases in the constitution

(b) Reading two or more provisions within part III of the constitution together known as integrated reading of the constitution.

(c) Reading Part III and Part IV of the constitution together

(d) Constructing a doctrine or principle reading the constitution as a whole for example doctrine of basic structure or doctrine of secularism and so on.

Each of these forms of interpretation lies at the foundation of un-enumerated rights and powers. An attempt is made in this section to survey the relevant methods by which un-enumerated rights or interests are elevated to the status of enumerated rights.

There are several ways in which un-enumerated rights may be recognized and protected by the Court.

a) ***Incorporating Directive Principles into Fundamental Right***

With a view to strengthen the protection of Fundamental Right, the Court reads a Directive Principle of State Policy into a fundamental right thereby overcoming the bar of enforcement under Article 37 of the Indian Constitution. For example:

(i) The Directive Principle of State Policy proving for the legal aid was read into Article 21 of the constitution. In *Hussainara's case*[8], the Court invoked Article 39-A which provides for free legal aid and has interpreted Article 21 in the light of Article 39-A has emphasized that legal assistance to poor or indigent accused. The Court further observed that "... *providing free legal service to the poor and the*

[8] *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1369

needy is an essential element of any reasonable, fair and just procedure." [9]

(ii) The Supreme Court has deduced the principle of "equal pay for equal work" from Articles 14, 16 and 39 (d) and the preamble of the Constitution. Although no such principle is expressly embodied in the Constitution but the principle has now matured into a fundamental right.

In *Randhir Singh*[10], the Supreme Court, by referring to Article 39(d) has emphasized that the doctrine of equal pay for equal work is not an abstract doctrine but one of substance. Though the principle is not expressly declared by the Constitution to be a fundamental right yet it may be deduced by construing Article 14 and 16 in the light of Article 39(d).

In *Grih Kalyan Kendra* [11], the Supreme Court observed : *"equal pay for equal work is not expressly declared by the Constitution as a fundamental right but in view of the Directive Principles of State Policy as contained in Article 39(d) of the Constitution "equal pay for equal work" has assumed the status of Fundamental Right in service jurisprudence having regard to the constitutional mandate of equality in Articles 14 and 16 of the Constitution."* [12]

b) ***Integrated approach to the interpretation of the constitution.***

The standard understanding of *Gopalan's* case is that every fundamental right is an island into itself therefore the validity of laws infringing the fundamental right must be interpreted by employing the Doctrine of Pith and Substance. Since the preventive detention law which was an issue in *Gopalan's* case must be tested by reference to Article 22 of the constitution which constitutes a self contained code for determining the validity of preventive detention laws.

However this method of reading constitution was rejected by the Supreme Court in *Maneka Gandhi's case*[13] in favor of an integrated approach to interpretation of the provisions of constitution. The court has now held that

9 Ibid at page 1373.
10 *Randhir Singh* v. *Union of India*, AIR 1982 SC 1473: (1982) 1 SCC 618.
11 AIR 1991 SC 1173 : (1991) 1 SCC 619
12 Ibid at page 1176.
13 AIR 1978 SC 597.

while determining the validity of any law for its alleged infringement of fundamental right the Court must look into the direct and inevitable consequences of the legislation on one or more fundamental rights.

This integrated method of reading the provisions of the constitution has led to the doctrine of Non-arbitrariness. A very fascinating aspect of Article 14 which the courts in India have developed over time is that Article 14 embodies "a guarantee against arbitrariness" on the part of the administration. In *Royappa* [14] the Supreme Court has observed: "from a positivistic point of view, equality is antithetic to arbitrariness." Any action that is arbitrary must necessarily involve negation of equality.

A conjoint reading of Article 14 and Article 21 of the Constitution has led to the recognition of the Fundamental right to just, fair and reasonable procedure. It has paved the way for judicial review of the legislative and administrative action, both on substantive and procedural grounds.[15]

c) ***Reading fundamental right in the light of international Conventions.***

This is a relatively recent method of recognizing and protecting un-enumerated rights.

For example:- In *Vishakha's case*[16] the Supreme Court recognized the freedom from sexual harassment by reference to the definition of sexual harassment contained in CEDAW committee comments and on the basis of this the court formulated certain guidelines for protecting women at workplaces. As a result of this decision freedom from sexual harassment is not confined to workplaces only, but extend to industries, educational institutions, hospitals and so on. The court perceives freedom from sexual harassment as a part of right to human dignity and also right to equality in the matter of public employment. Prior to the decision in Vishakha's case it was held that the international conventions are not enforceable in the courts unless they are incorporated within the domestic legal system by the parliament in exercise of the powers conferred by Article 253 of the Constitution. It was held in *Jolly George Verghese – v. - Bank of Cochin*[17] that no enforceable right can be founded on treaties unless they are incorporated in the national legal system. In other words, it was for the parliament to decide to what

14 *E.P.Royappa* v. *State of Tamil Nadu*, AIR 1974 SC 555: (1974) 3 SCC 3.
15 *See Tata Press Ltd.* v. *Mahanagar Telephone Nigam*, AIR 1995 SC 2438, recognizing the right to commercial speech by reading of Article 19 and Article 21 together.
16 *Vishakha* v. *State of Rajasthan*, AIR 1997 SC 3011; (1997) 6 SCC 241.
17 AIR 1980 SC 470; (1980) 2 SCC 360.

extent international conventions should be incorporated in the national legal system. However with the decision in Vishaka's case the Supreme Court has now held that a provision of an international convention which is not inconsistent with the Constitution could be enforced by the courts for the purpose of protecting fundamental rights. It appears that the court has seized the initiative from the parliament in the matter of enforcement of the provisions of the treaties and conventions, although for a limited purpose of protecting fundamental rights of Indian citizens.

Section III: Un-enumerated Rights and Separation of Powers

This section seeks to explore the implication of the un-enumerated rights for Doctrine of Separation of Powers. It is trite learning that conference of rights, powers, privileges and immunities and imposition of duties, liabilities and disabilities is a function of legislature. It is also equally trite learning that in the process of interpretation of the provisions of Fundamental Rights, the Supreme Court adds or deletes something from the rights; thereby the court also ascertains the scope of legislative and executive powers. That is because fundamental rights constitute a limitation upon legislative and executive power.

However in the context of judicially recognized and protected un-enumerated rights fall into a different class in view of the fact that un-enumerated rights do not figure in the provisions of the Constitution and thus lack legitimacy. It is submitted that, the doctrine of un-enumerated rights is inseparable from the doctrine of implied powers or implied limitations. The doctrine of un-enumerated rights however may implicate deeper questions of separation of powers and also of judges exercising political powers without any democratic accountability.

In the case of implied powers, either in the case of legislatures or executes, create no difficult questions since implied increase in the power of executives is accompanied by the doctrine of collective responsibility of the cabinet to the Lok Sabha and similarly implied powers in the context of legislature is equally non problematic. However, the exercise of power by the judiciary in recognizing and protecting un-enumerated rights of citizens and non-citizens raises deeper questions about the exercise of political powers by the judges without any accountability.

It is pertinent to mention her that, the court takes great care to specify the intimate connection between the un-enumerated interests and the named fundamental rights. Attention may be drawn to some of the criteria to be applied in deciding whether an un-enumerated interest is a part of an enumerated right. Justice Bhagwati in *Maneka Gandhi's case* [18] held that:

"It would thus be seen that even if a right is not specifically named in Art. 19 (1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Art. 19 (1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the right to go abroad cannot in all circumstances be regarded as in freedom of speech and expression." [19]

Thus it will be seen that in order to qualify for an un-enumerated interest to be a part of enumerated right, it must be a direct instance of exercise of an enumerated right. For example right to sing, right to dance, right to paint are direct instances of right to freedom of speech and expression, which is an expressed enumerated right under article 19(1)(a) of the Indian Constitution. It may be observed that, the court was interpreting an amorphous concept like speech and expression which has the potential of

---

[18] *Maneka Gandhi* v. *Union of India*, AIR 1978 597
[19] Ibid at page 640-641

capturing any activity of the life as forming part of the concept of speech and expression. How do I project myself to the external world is a form of relational expression, thereby giving rise to right to relational expression. One's sense of dressing may also be considered to be form of expression therefore falling within the concept of freedom of speech and expression. Similarly Article 21 refers to the right to life and personal liberty. Both the concepts are vulnerable to be interpreted at a higher or lower level of abstraction or generality.[20] By asking such questions as; how could there be a life without clear air or water? How could there be a right to life without education? The examples can be multiplied but the point to be made is that judges do not derive any assistance from the text of the constitution.

The Supreme Court judgment in *Unnikrishnan's Case* [21] makes a striking departure from the strangle hold of abstract concepts by reference to the Directive Principles of State Policy. For example *Mohini Jain's case* [22] recognized the Right to Education as a part and parcel of Right to Life. Unlike Mohini Jain, which recognize general right to education including higher education, the Supreme Court in *Unnikrishnan's Case* interpreting article 21 in the light of un-amended article 45 held that the right to education is a fundamental right only up to primary level. The Supreme Court came to this conclusion on the reasoning that the recognition of the interest in higher education is subject to limits of economic capacity of the state whereas Article 45 provided for free and compulsory education made available between the age group of 6-14 years within ten years from the commencement of the constitution. Since this period has expired, it is mandatory on the state to provide free and compulsory primary education. The Supreme Court further observed that after the expiry of 10 years period of the commencement of the Constitution, to make provisions for free and compulsory education as contemplated under Article 45 becomes mandatory and hence by reading free and compulsory education into right to life, the court has not encroached into the domain of the political branches.

20 See *Richard A. Posner*, supra note 2
21 *Unni Krishnan v. State Of Andhra Pradesh*, AIR 1993 SC 2178 : (1993) 1 SCC 645.
22 *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 : (1992) 3 SCC 666.

This reasoning clearly lays down the path for recognizing and delimiting the un-enumerated interests as part of enumerated fundamental rights.

To a limited extent the doctrine of un-enumerated rights made the courts to exercise the legislative powers. Recognizing un-enumerated interest as worthy of protection through enumerated rights may not create any difficulty if the un-enumerated interest could be protected within the existing machinery and the resources. However the problem arises where the recognition of un-enumerated interests and its protection through enumerated rights involves appropriation and allocation of scarce resources, then it may involve the Court in the direct violation of doctrine of separation of powers. There have been instances where the Courts have recognized un-enumerated rights but found itself helpless in granting the remedies.

For example : A PIL[23] was filed in the Himachal Pradesh High Court seeking declaration that the practice of ragging prevailing in Shimla Medical College was violative of right to life under Article 21 of the Indian Constitution. It was urged on the part of the petitioners that mandamus be issued to enact a law declaring ragging as a criminal offence. Upholding both the contentions, the High Court directed the government of Himachal Pradesh to introduce the necessary legislation within 6 months time. On appeal by the state, the Supreme Court by way of special leave petition set aside the order of the Himachal Pradesh High Court. The Apex Court held that it is not open to the High Court to direct the legislature of the states to enact a particular law within a particular time frame. The Supreme Court has cautioned that Public Interest Litigation is a weapon which has to be used with great care and circumspection and that judiciary has to be very careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executives and the legislature. [24]

In *State of Himachal Pradesh* v. *Umed Ram*[25], the Supreme Court emphasized upon the importance of roads in the hilly areas for enjoyment of life. The entire Himachal Pradesh is in hills, and without workable roads, no

23 *State of Himachal Pradesh* v. *Student's Parent, Medical College, Shimla*, AIR 1985 SC 910 ; (1985) 3 SCC 169.
24 Ibid
25 AIR 1986 SC 847; (1986) 2 SCC 68.

communication is possible. The access of people in such area to the life outside is obstructed by the absence of roads. Reading Article 21 with Article 19(1)(d) in the background of the directive principle contained in Article 38(2) every person has right under Article 19(1)(d) to move freely throughout the territory of India. He has under Article 21 right to life which right "embraces not only physical existence of life but the quality of life and for residents of hilly areas access to road is access to life itself". The Court has observed, *"We accept the proposition that there should be road for communication in reasonable conditions in view of our constitutional imperatives and denial of that right would be denial of life as understood in its richness and fullness by the ambit of the Constitution. To the residents of Hilly areas as far as possible and feasible society has constitutional obligation to provide roads for communication."* [26]

It may be recalled that, in the instant case, the construction of road connecting planes with the hills could not be completed for want of necessary funds. Although the Court recognized the right to road, it expressed its inability to give the necessary remedy because appropriation of funds is a matter falling within the jurisdiction of legislature.

Recognition of the right to information as an aspect of freedom of speech and expression would necessarily mean that an adequate machinery for its enforcement is to be established and the necessary economic resources including the human resources are to be allocated. Absent any such machinery and resources, an un-enumerated right to information would remain a dead letter. That is why after the recognition of right to information in *S.P.Gupta's* case,[27] no headway was made in the direction of enforcement of this un-enumerated right beyond the litigational setting in the court. It was not until the enactment of a comprehensive legislation recognizing and protecting the right to information, that the goal of transparency and accountability of the administration could be achieved.

Finally it is not in every instance of recognition of an un-enumerated right by the courts, gives rise to the situation of judiciary encroaching upon the domain of the legislature. For example in *D.C.Wadwa's* case[28], challenge

[26] Ibid at 851
[27] *S.P.Gupta* v. *Union of India*, AIR 1982 SC 149 : 1981 Supp. SCC 87.
[28] *D.C.Wadhwa* v. *State of Bihar*, AIR 1987 SC 579 : (1989) 1 SCC 378.

was made to the practice in the state of Bihar to repromulgate ordinances with a view to bypass the requirement of laying the ordinances before the legislature. The Supreme Court held that after India became democratic republic, the ordinance raj has been abolished. Every citizen of India has a right to be governed by a law enacted by the representatives of the people and the practice of the re-promulgation of the ordinances is a fraud on the Constitution.

Thus it will be seen that, the Court has recognized an un-enumerated right of the citizen to be governed by a law enacted by their representatives. It has not violated the doctrine of separation of powers. Par from it, it has restored the constitutional space for the Bihar State Legislature, which space was usurped by Bihar State Government.

These cases demonstrates that, the doctrine of un-enumerated rights is not a fishing expedition but a calculated value judgment on the part of the Court regarding the importance and priority of un-enumerated interest working well within the framework of democratic accountability.

Further these examples clearly show the right path to the constitutionally permissible extent to which an un-enumerated right is to be elevated to the status of a named fundamental right.

Conclusion

The most gifted draftsman of the Constitutional document cannot imagine the context and the circumstances in which the language of the Constitution would be interpreted and applied. Furthermore the language itself is incapable of apprehending the infinite variety of situations in which the language will be applied. The inevitable consequence of these can't helps is judges or judicial discretion. In order to regulate judicial discretion, the judges have evolved rules of interpretation. However no command of the positive law dictates to a judge which rules of interpretation are to be applied. Therefore, while dealing with situations where an asserted interest which is not enumerated, the judges engage in value judgments in regard to significance and the importance of an un-enumerated interest.

The court has shown a good deal of concern for the doctrine of separation of powers by limiting its holdings on/or by denying a remedy although recognizing an interest as worthy of legal protection. In all those

cases, where the Court has recognized the right without granting a remedy, the court has led the path for NGO's to take up the matter with competent authority armed by a judicial decision in their favour. The rigidity observance of the doctrine of separation of powers is impracticable. There should be reciprocity and interdependence, autonomy and co-operation amongst the three organs of the state. That is to say there should not be separation of powers in the strict sense but association of powers in order to realize the ideals of social economic and political justice through the employment and conjoint acceptance of un-enumerated rights and interest thereby confirming to contemporary understanding of the Constitution as a living document.

■

Unenumerated Fundamental Rights Under The Constitution Of India

Parag P. Tripathi*

I. Introduction

In every written Constitution of the world, the interpretation of what are called "Constitutional Silences" has always been a teasing issue of jurisprudential interpretation. As aptly said by Tom Paine, "... Constitution is to liberty, what grammar is to language".[1] However, the problem is, and has been to etch out the details of this grammar and to reach out and enumerate the liberties; those explicitly written and those which are unenumerated.

There is a lot to be said for the view enunciated by the American Supreme Court that while interpreting the Constitution, one cannot be unmindful of the fact that it is a living document[2] that is being expounded. Accordingly, courts in America are not inclined to adopt such a technical or strained construction as will unduly impair the efficiency of the legislature to meet responsibilities occasioned by changing conditions of society[3]. It was presumably in this vein that the Court in *Flaska vs. State*[4] held that "a constitution should not receive too narrow or literal an interpretation, but its meaning should be applied in such a manner as to meet new or changed conditions as they arise".

The aim of this paper is to discuss the interpretative processes that have been used by the Courts to identify the unenumerated fundamental rights in the Constitution of India.

II. Interpreting Unenumerated Fundamental Rights

For ease of reference, as a purely conceptual construct, unenumerated fundamental rights i.e. silences in the specified fundamental rights can be identified by at least three different interpretative processes. The first among these processes is the 'Necessary Concomitant / Integrality Principle', i.e. that the unenumerated part of the fundamental right is a necessary

* Additional Solicitor General of India, January 2010

1 Jagdish Swarup, Constitution of India, 2nd Edn., Vol. 1 at P. 149.; Laird Wilcox, ed, The Writer's Rights (2002) p. 31

2 Warwick vs. State (Alaska) 548 P2d 384

3 State vs. Canon (Sup) 55 Del 587, 190 A2d 514

4 51 NM 13, 177 P2d 174

concomitant of the express fundamental right and is so integrally intertwined with it as to form a necessary part and parcel of the fundamental right itself.

The second is to read into the fundamental right, an unenumerated right as a vested right, routed through the instrumentality of the Directive Principles of State Policy in Part IV of the Constitution[5]. For easy identification we can refer to this process as the 'Directive Principle Route'.

A third tributary which feeds into and enlarges the scope and content of express fundamental rights is, a right or an element of a fundamental right which is to be read into the fundamental right based on the concept of the basic structure of the Constitution. Allow me to call this the 'Basic Structure Route'.

1) Necessary Concomitant / Integrality Principle

Over the last almost six decades the Indian Constitutional history has shown examples of each one of these three different processes of enlarging the scope and content of fundamental rights. As early as in 1962, a Constitution Bench of the Supreme Court of India *in All India Bank Employees Association (AIBEA) v. National Industrial Tribunal*[6] while dealing with the rights of a Trade Union in the context of freedom of association, examined whether it would extend to the unenumerated right "to effective collective bargaining or to strike". The Constitution Bench, speaking through Justice Ayyangar, firmly rejected the contention and in the process laid down a litmus test for determining what is permissive and what is impermissible while interpreting constitutional silences in the field of unenumerated fundamental rights. The Court observed:

> *"It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights for that construction would by a series of ever expanding concentric circles in the shape of*

[5] Articles 36 to 51
[6] AIR 1962 SC 171

> *rights concomitant to concomitant rights and so on, lead to an almost grotesque result."*[7].

The Court further observed:

> *"There is no doubt that in the context of the principles underlying the Constitution and the manner in which its Part III has been framed the guarantees embodied in it are to be interpreted in a liberal way so as to sub-serve the purpose for which the constitution-makers intended them and not in any pedantic or narrow sense, but this, however, does not imply that the Court is at liberty to give an unnatural and artificial meaning to the expressions used based on ideological considerations."*[8]

This enunciation of the law has successfully stood the test of time and was recently reiterated by the Supreme Court of India in *Dharam Datt v. Union of India*[9] . *Dharam Datt's case* arose in the context of a challenge to the constitutional validity of the Indian Council of World Affairs Act, 2001, by which the Society of the same name and the assets of the said Society including the valuable property of Sapru House came to be vested in the new statutory entity, viz; The Indian Council of World Affairs.

Incidentally, in 1978, an extraordinary enunciation of law, particularly of Article 21 of the Constitution of India[10], came about in *Maneka Gandhi v. Union of India*[11] . In a technical sense the observations set forth in this judgment were entirely obiter for the simple reason that during the pendency of the matter, the *lis* between the parties had come to an end inasmuch as not only did the Union of India concede to grant a hearing to the Petitioner Ms. Maneka Gandhi, but also issued her a passport. The Supreme Court had the occasion in this case to examine the entirety of this limitation in reading unenumerated fundamental rights in the Indian Constitutional framework and

[7] Supra, para 20 at pg.180
[8] Supra, para 21 at pg.180
[9] (2004) 1 SCC 712 at pr. 24 & 28 at page 733-735
[10] Article 21: **Protection of life and personal liberty** – No person shall be deprived of his life or personal liberty except according to the procedure established by law.
[11] (1978) 1 SCC 248
[incidentally an extraordinary enunciation of law which is in a technical sense entirely obiter for the simple reason that during the pendency of the matter, the lis between the parties had come to an end (as not only did the Union of India concede the grant hearing to the Petitioner Maneka Gandhi, but also issued her a passport]

expressly reiterated the dire consequences of an unbridled expansion of fundamental rights which was made memorable by Justice Ayyangar's use of the expression of achieving "...an almost grotesque result".

The Court expressly rejected the concept of peripheral or concomitant right which facilitates the exercise of a named fundamental right following a binding Constitution Bench judgment of Justice Ayyangar and held that:

> *"We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right. This much is clear as a matter of plain construction, but apart from that, there is a decision of this Court which clearly and in so many terms supports this conclusion. That is the decision in All India Bank Employees Association (AIBEA) v. National Industrial Tribunal...."*[12]

Applying this principle, the Court held that the right to go abroad could not therefore, "... be regarded as included in the freedom of speech and expression guaranteed under Article 19(1)(a) on the theory of peripheral or concomitant right..."[13].

The Court then went on to observe:

> *"But that does not mean that an order made under Section 10(3)(c) [of the Passport Act] may not violate Article 19(1)(a) or (g). While discussing the constitutional validity of the impugned order impounding the passport of the petitioner, we shall have occasion to point out that even where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may be void. Therefore, even though Section 10(3)(c) is valid, the question would always remain whether an order made under it is invalid as contravening a fundamental right..."*[14]

[12] Para 33 at P. 310
[13] para 34 at P. 311

With due respect to the Court's view, this may not be the correct approach. Once a statutory provision is held to be compliant with the Constitution, then the only inquiry is or should be whether any action taken under that provision is *intra vires* the statutory provision. Surely, an action taken under a constitutionally valid provision cannot be *intra vires* the statute and yet non-compliant with the Constitution.

Perhaps, a simpler answer to the various hypothetical queries raised by the Court in para 35 of its judgment, namely impounding of a passport of a pilot or evangelist, who visits various parts of the world to spread good religious word or of a singer, dancer, a visiting professor or scholar of international repute seeking to go abroad would simply be invalid on the ground that it is *ultra vires* section 10(3)(c) of the Passport Act. In fairness, one must point out that in the last sentence of para 35, the judgment mentions that such an order would not only be violative of Article 19(1)(a) but also be *ultra vires* section 10(3)(c) of the Passport Act.

The interesting point to note however is that while dealing with limitation on reading unenumerated fundamental rights peripheral to the enjoyment of the named fundamental right, the judgment in *Maneka Gandhi* does not seek to apply the same principle while reading in the requirement of "due process" in Article 21. This requirement of "due process" which is brought in on account of the dictum in *Maneka Gandhi* that a procedure must be "fair, just and reasonable" is nothing but a classic case of not only interpreting a constitutional silence but really incorporating the "due process" principle that was expressly considered by Sir B.N. Rau after his visit to the United States of America and discussions, amongst others with Judge Felix Frankfurter of the American Supreme Court.

Thus, in *Maneka Gandhi* a larger Bench of 7 Judges which had the option of overruling the limitation theory propounded by Justice Ayyangar in the *AIBEA case*, instead of reaffirming and applying it, incorporated in Article 21 an unenumerated right which was not only contrary to the express intention of the framers of the Constitution but directly in conflict with the

[14] Para 35 at P. 312

jurisprudential principle in the *AIBEA case.* That is not to say that the development of the law enunciated in *Maneka Gandhi*, as it eventually turned out, has not been for the benefit and for the furtherance of democratic principles. Indeed, it has been. However, the point being raised is that in many ways, *Maneka Gandhi* is India's *Marbury v. Madison*[15] , where, by eschewed judicial craftsmanship or, depending on your assessment, a clever judicial sleight of hand, while affirming the limitation theory of unenumerated fundamental rights, exactly the opposite result was achieved.

I say that *Maneka Gandhi's case* is India's *Marbury v. Madison* not without reason. In *Marbury v. Madison* also Chief Justice Marshall of the American Supreme Court, while proceeding to decide the validity of his own action as Secretary of the State proceeded to deny relief to midnight judicial appointments and while so denying the relief, held that in an appropriate case, the Supreme Court can strike down a Congressional law. A great principle was laid down without causing undue consternation either on the Legislature or the Government, a principle which later endured (notwithstanding subsequent Chief Justice Tenny's now forgotten contrary view) and indeed flowered to the benefit of democratic principle.

If one examines the mainstream interpretation of fundamental rights by the Constitutional Courts in India and particularly by the Supreme Court of India over a period of time, we are left to wonder whether this allegorical reference to "grotesque result" has really been kept in mind and followed or has only been enshrined as an ideal which is referred to on and off but has really never been followed.

As far as the Necessary Concomitant / Integrality Principle line of cases is concerned, a classic example is reading freedom of the Press as part of Article 19(1)(a), viz. freedom of speech. In India, unlike in the U.S.A., reference to Freedom of Press is not explicit and therefore, in a sense, has been left unenumerated. However, on a deeper reflection, this may really be a case of unenumerated fundamental right as afacet of Freedom of Speech itself, just that the stakeholder is the Press[16].

Perhaps, a most interesting example and an example which would truly fall within the concept of unenumerated fundamental rights is the issue

[15] 5 U.S. (1 Cranch) 137 (1803)
[16] Express Newspaper [AIR 1958 SC 578]

as to whether commercial speech is a part of freedom of speech and expression. This important unenumerated fundamental right was accepted as a part of freedom of Press by the Supreme Court in *Tata Press Ltd. v. M.T.N.L.*[17] . Incidentally, I was one of the lawyers who participated during the arguments in this case before Court. This seminal issue was barely touched upon in passing during the arguments but was included in the Written Submissions in the Petitioner's brief, and on apparent later reflection accepted and incorporated as the law. The important question as to whether this is an enumerated or unenumerated right and if so whether it can be read as part of Article 19(1)(a) was dealt with by the Supreme Court of India in paras 23 to 25, which make an interesting reading:

> "23. *Advertising as a "commercial speech" has two facets. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech". In relation to the publication and circulation of newspapers, this Court in Indian Express Newspaper case [AIR 1958 SC 578], Sakal Paper case [AIR 1962 SC 305] and Bennett Coleman case [(1972) 2 SCC 788] has authoritatively held that any restraint or curtailment of advertisements would affect the fundamental right under Article 19(1)(a) on the aspects of propagation, publication and circulation.*
>
> 24. *Examined from another angle, the public at large has a right to receive the "commercial speech". Article 19(1)(a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to*

[17] (1995) 5 SCC 139

listen, read and receive the said speech. So far as the economic needs of a citizen are concerned, their fulfillment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of "commercial speech" may be having much deeper interest in the advertisement giving information regarding a life-saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration.

25. *We, therefore, hold that "commercial speech" is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution."*

It would be seen that the controversy in the three cases referred to in para 23 of the *Tata Press* judgment was in the context of the right of the State to impose restraint or curtailment on advertisements not because advertisements per se represent a constitutionally protected Article 19(1)(a) right, but because curtailment on advertisements affect the core Article 19(1)(a) value of the right of a newspaper to publish the newspaper which basically meant the non advertisement content of the newspaper.

The second proposition which found acceptance from the Bench was that the Court accepted the truism that the public at large has a right to receive commercial speech and that fulfillment of economic needs of a citizen has to be guided "by information disseminated through advertisement". The judgment does not indicate that the Court was alive to the question as to whether commercial speech was a necessary concomitant of Article 19(1)(a) or whether it fell within the conundrum of ever expanding concentric circles. The famous "grotesque result" issue prophesized by Justice Ayyangar is not noted. It was in this background that after setting out the reasons in paragraphs 23 and 24 of the judgment, the Court felt compelled to "...Therefore, hold that commercial speech is a part of speech and expression guaranteed under Article 19(1)(a)"[18].

[18] para 25 at P. 156

A third interesting example of a right which fulfils the test of integrality is the right to privacy. The development of this unenumerated fundamental right of privacy owes its origin to the judgment of *Kharak Singh v. State of U.P.*[19] which, curiously, had a Bench of six Judges, but where the majority, speaking once again through Justice Ayyangar, expressed the more conservative view. The issue arose in the context of the validity of Regulation 236 of the U.P. Police Regulations in regard to the right of surveillance by the Superintendents of Police of any person released on parole, including authorizing domiciliary visits at nights, i.e. visits by police officers at night to the residence of the person released on parole. The majority speaking through Justice Ayyangar rejected the contention that the provision for surveillance violated Article 19(1)(d) and brushed aside the argument that Article 21 had any relevance in the context. It was held as follows:

"Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Art. 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."[20]

The Court, therefore, by majority only struck down the provision permitting domiciliary visits by the police. In a stirring dissent Justice Subba Rao, (speaking for himself) and Justice Shah, expressly accepted the right of privacy, as an unenumerated fundamental right on the ground that it "...is an essential ingredient of personal liberty." Justice Subba Rao held:

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential

[19] AIR 1963 SC 1295
[20] para 20 at P. 1303

ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in (1948) 338 US 25 pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution[21]."

One can appreciate that even though the concentric circle proposition of Justice Ayyangar, in the *All India Bank Employees Association case* was not expressly mentioned, the contention was, in substance, answered by holding "the right to personal liberty as taking in the right to privacy".

Eight years later, the issue would resurface again in *Govind v. State of Madhya Pradesh*[22] , where a Bench of three Judges, speaking through Justice K.K. Mathew, after noting the judgment in *Kharak Singh*, decided similar provisions of domiciliary supervision under the Madhya Pradesh Police Regulations. The Court dealt with the matter 'assuming' that the right of privacy was an unenumerated right which arose as an emanation from Article 19(1)(d). Interestingly, this issue was not "decided". The Court seems to have noted with approval the European Convention on Human Rights which refers to right to respect for "a person's private and family life, home and his

[21] Para 31 at Pg. 1306
[22] AIR 1975 SC 1378

correspondence[23]". The Court, further notes that even if this right is treated as emanating from Article 19(1)(a), 19(1)(d) and 21 "we do not think that the right is absolute". The Court observed as follows:

"28. *The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.*

29. *Having reached this conclusion, we are satisfied that drastic inroads directly into the privacy and indirectly into the fundamental rights of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalization of the powers vested in the police by the two Regulations earlier read becomes necessary, if they are to be saved at all....*"

30. *Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest... Even if we hold that Article 19(1)(d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether regulation 856 is a law imposing reasonable restriction in public interest on the freedom*

[23] Article 8 of the European Convention on Human Rights

of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing restriction upon it for compelling interest of state must be upheld as valid."

The turning point as far as this particular right is concerned, arose in the case of *R. Rajagopal v. State of Tamil Nadu*[24] where a 2 Judge Bench of the Supreme Court, speaking through Justice B.P.Jeevan Reddy, after dealing with *Kharak Singh*, *Govind* and the American cases, summarized that the right to privacy is:

"...implicit in the right to live and liberty guaranteed to the citizens of this country by Art. 21". The judgment of R. Rajagopal makes an interesting reading as the Court in R. Rajagopal, while referring to the case of Govind mentions that in Govind, Kharak Singh was followed even while at the same time elaborating the right to privacy[25].

In *Kharak Singh*, the right to privacy was expressly negatived.In *Govind*, a judgment of a smaller Bench of 3 Judges, (which therefore could not have overruled a larger Bench of 6 Judges' judgment in *Kharak Singh*) the Court approved the *Kharak Singh* dictum. Justice Mathew additionally tested the validity of the Madhya Pradesh Police Regulations assuming that there was a right to privacy. After noting these two judgments, Justice B.P. Jeevan Reddy in *R. Rajagopal*, (speaking on behalf of a two member bench), while summarizing, what his Lordship called "a broad principle flowing from the above discussion", held the right to privacy as implicit in Article 21[26].

By the time, the matter came up for further consideration in *PUCL v. UOI*[27], the Bench of 2 Judges, speaking through Justice Kuldip Singh proceeded on the basis that "...7 learned Judges in *Kharak Singh case* (majority and minority opinions) included the right to privacy as part of Art. 21[28]". This assertion seems to be contrary to the extracts of the majority and minority opinions of the 6 (and not seven) Judge Bench which constituted

[24] (1994) 6 SCC 632
[25] para 13 at P. 643 also para 26, at P. 649
[26] AIR 1995 SC 264 para 28 at Pg. 276
[27] (1997) 1 SCC 301
[28] Para 14 at P. 310

Kharak Singh Bench. The aspect that *Kharak Singh* specifically negatived the right to privacy in Article 21 seems to have escaped the attention of the Bench in the *PUCL case*. The Bench, however, rightly noted that in *R. Rajagopal*, Justice B.P. Jeevan Reddy, observed that a right to privacy had acquired a constitutional status and proceeded thereafter to state that the Court had "no hesitation in holding that right to privacy is a part of the right to live and personal liberty" in Article 21[29]. Therefore, as far as privacy is concerned, its journey as a recognized unenumerated right seems to have proceeded with somewhat *sub silentio* without any specific clarity as to whether it is an integral part of Article 21 or has any other entitlement to its accepted constitutional status. However, the observations of Justice B.P. Jeevan Reddy J in *R. Rajagopal case* do suggest that the right to privacy was an integral part of Article 21.

Another interesting facet was presented in *Surjit Singh v. State of Punjab*[30], where a question arose as to whether under the Medical Reimbursement Regulations, an employee who got himself operated in England could ask for reimbursement on the basis of the equivalent expenses which he would have incurred in an approved and authorized hospital in India. While dealing with this issue in the context of the applicable medical expenses and reimbursement regulations, the Court proceeded to chisel out a right of "self preservation of one's life" as a necessary concomitant to Article 21 and described it further as "fundamental in nature, sacred, precious and inviolable"[31]. It then went on to link up this right with the right of self defence in criminal law.

2) The Directive Principle Route

The second area, where unenumerated fundamental rights have been enumerated is the Directive Principle Route. A classic example in this realm is the judgment of a 2 judges Bench of the Supreme Court in *Mohini Jain v. State of Karnataka*[32], where while dealing with the issue of commercialization of education, particularly in private medical colleges and of capitation fees, the Supreme Court held:

[29] para 17 at P. 311
[30] (1996) 2 SCC 336
[31] para 11 at P. 342
[32] (1992) 3 SCC 666

"9. The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.

14. *The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide education institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments. The Karnataka State has permitted the opening of several new medical colleges under various private bodies and organizations. These institutions are charging capitation fee as a consideration for admission. Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage...".*

The Court was mindful of the fact that the right to education (and not primary education alone) was referred to in the Directive Principles contained in Article 41 of the Constitution. The Court did not seem to have noticed the Directive Principles contained in Article 45 which dealt with "education for all children until they complete the age of 6 years". The judgment while reading the right to education into Article 21 does not examine the very important and basic issue of the relationship between Directive Principles and Fundamental Rights. As an interesting parallel jurisprudential narrative, I may point out that the initial view of the Supreme Court was the one in *State of Madras* v. *Champakam Dorairajan*[33], where the Supreme Court proceeded on the basis that the Directive Principles have to conform to and run as subsidiary to the Chapter of Fundamental Rights. Interestingly, this view met with serious criticism from the Academia[34].

Later on, there was a change in the view and in *Golak Nath* v. *State of Punjab*[35], the Supreme Court dropped the subordination paradigm of Directive Principles and placed its imprimatur on the paradigm of "harmonious construction". Subsequently, *Golak Nath,* on a different point was overruled by *Keshavananda Bharti*[36]. In *State of Kerala* v. *N.M. Thomas*[37], the Supreme Court developed the "harmonious construction" paradigm and held that Directive Principles formed the fundamental feature and the social conscience of the Constitution and provided the policy guidelines and the goal of socio economic freedom. Still later in *Minerva Mills Ltd. v. Union of India*[38], the Supreme Court further enumerated the status and role of Directive Principles as providing the goals which have to be achieved without the abrogation of the means provided for by Part III (Fundamental Rights).

It is true that *Mohini Jain* was partly overruled in the case of *J.P. Unnikrishnan*[39] which limited the right to education under Article 21 to the right of primary education. The noteworthy point, however, is that incorporation in Article 21 of the right to education whether up to the primary level or otherwise, via the Directive Principles contained in Article 41 in *Mohini Jain* case was done without the examination of the concept of unenumerated fundamental rights and their selective incorporation. The question, naturally arises as to whether the harmonious construction paradigm includes all or some of the Directive Principles as part of unenumerated fundamental rights, whether at all such incorporation is a part of the constitutional scheme, particularly when the founding fathers being fully aware of these aspects, chose to place them not in Part III but in Part IV of the Constitution.

---

[33] 1951 SCR 525
[34] Kindly see Directive Principles of State Policy: The Lawyer's Approach to Them, Hitherto Parochial, Injurious and Unconstitutional
[35] AIR 1967 SC 1643
[36] (1973) 4 SCC 225
[37] (1976) 2 SCC 310
[38] (1980) 3 SCC 625
[39] AIR 1993 SC 2178

Interestingly, in *JP Unnikrishnan*, the Constitution Bench, speaking through Justice B.P. Jeevan Reddy notes in para 43[40] that the goal of universal primary education would be dependent on the financial and other conditions in the country and that no one can ask for primary education as right today (circa 1950). However, the Court took a view that the ground position of today (circa 1993, the date of the judgment), the position is different and after noting that the law stated in *Mohini Jain* case had been "somewhat broadly stated" proceeded to confine the emanating right to the one referred to in the Directive Principles contained in Article 45 and therefore held that free education up to the age of 14 years is a fundamental right[41]. Thus, in purely contextual interpretation based on the Courts' assessment of the reality prevailing at the time of the judgment and departing from the written context of the Constitution, the Court chiseled and embellished an emanating fundamental right in terms of an existing Directive Principle.

3) The Basic Structure Doctrine

The last limb of incorporation is through the basic structure doctrine whichwas, for the first time, noted in *Golak Nath's case* but rejected. It finally found favor in the *Keshvanand Bharti* judgment. A contemporary interpretation of incorporating an emanatory right through the basic structure is to be found in the judgment of the Constitution Bench (speaking unanimously through Justice Kapadia) in the case of *M. Nagaraj v. Union of India*[42] . Here the Supreme Court was dealing with the question *inter alia* of the expansion of the principle of reservation in promotions in the context of Articles 16(4), 16(4)(a), 16(4)(b) and 335 of the Constitution. The judgment echoes the American principle of constitutional interpretation in the nature of expounding a living document by noting that the Constitution is "not an ephemeral legal document" but sets out principle for expanding future and is intended to endure for ages to come" and recognized the adoption of a purposive, rather than a strict liberal interpretation". It further enunciates that this liberal interpretation approach is most apposite "to the interpretation of fundamental rights". It reiterates that fundamental rights are not a gift from the State to its citizens but rights which inhere because of the "foundational values of the right". It notes that it is the foundational value which is put in

[40] P. 676-678
[41] para 54 at P. 684
[42] (2006) 8 SCC 212

Part III and proceeds to hold that the content of a right is to be defined by the Courts[43]. It appears that in this judgment, the Supreme Court has provided the jurisprudential parameters for appropriate incorporation from within and outside the Constitution all principles which are in sync with the "foundational values" of Part III and therefore entitled to be incorporated, if necessary, as emanational rights. It would be interesting to see how this doctrine is developed in the subsequent judgments.

III. Conclusion

To conclude, therefore, we find that when dealing with emānational rights the approach of the Supreme Court of India has been varied. However, in its recent judgment in the *Nagaraj case*, certain emanational rights have been read as part of fundamental rights as necessary concomitant of enumerated fundamental rights. Certain other emanational rights have been read in by suitably re-reading earlier judgments and by bringing them in from the route of Directive Principles on the basis of changed circumstances.

Lastly, the Supreme Court has now accepted the principle of foundational value of a fundamental right and therefore opened up an interesting and constitutionally challenging area of reading appropriate emanatory rights based on the foundational value, rather than the strict interpretation of the exact words used while enumerating the fundamental rights.

■

[43] paras 19 to 21 at P. 240-242

Fundamental Rights In Constitution Of India In Flux: Critical Reflections On Doctrine Of Unenumerated Rights *

Sanjay Jain**

Prologue

While discussing the issue of influence of 'Doctrine of unenumerated rights' on Constitution of India , two diametrically opposite approaches may be adopted; Firstly, the very notion of "unenumerated rights' can be questioned[1]. Thus, it is possible to argue that a judicially created right is nothing more than a standard or a doctrine and its sustenance, stability and placement as a part of particular fundamental right is always bound to be doubtful in the light of changing judicial attitudes, and it is therefore not plausible to characterize the interpretative praxis of the Courts as evolving 'unenumerated rights' as such. The second approach on the other hand, would not only acknowledge the existence of 'unenumerated rights' but it would also require us to examine how far there adoption and enforcement is viable within the four corners of Constitution of India.[2]

However, this Paper does not wish to engage in debate about efficacy of either of the above approaches, rather the author would focus on, the role, of 'unenumerated rights' doctrine in the interpretation of Part III of Indian Constitution. The author would make an attempt to briefly describe myriad judicial patterns evolved by Judges of the Apex Court in India in favour of and against incorporation of doctrine of unenumerated rights as a tool of Constitutional interpretation.

* This Paper is prepared for the ILS Law Review Volume IV 2012. The first draft of this paper was presented in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010

** Assistant Professor ILS Law college, Pune.

1 See generally *Ronald Dworkin, 'Unenumerated Rights: Whether and how Roe should be overruled.' (1992)59 U. Chi. L. Rev. 381*

2 See generally *Richard Posner 'Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights.' (1992) 59 U. Chi. L. Rev. 433.*

Conceptualization of 'Unenumerated right'-

For the purposes of this paper, I would use the notion of Unenumeration/ unenumerated rights in following two senses- Firstly, I would characterize all those fundamental rights, which are evolved by the courts through the case laws and which are not explicitly mentioned in Part III as unenumerated fundamental rights. In my opinion, this is a technical conception of unenumerated rights. But there may be yet another sense in which one can construe notion of unenumeration/ unenumerated rights. It is possible to argue that with the lapse of the time, meaning and content of a given right as enshrined in either Constitution or Statute, undergoes through transformation, thereby requiring the court to select/ unravel the appropriate and abstract level of generality of such right. Cleary, the selection of the same is bound to lead to either broadening or narrowing of interpretation of such a right. Court has to engage in such a rather complex enterprise to constantly sustain and revitalize the dynamism of Bill of Rights. In following pages, the notion of unenumerated rights as deployed by me at relevant places would embrace either of these two notions depending upon the context.

Seminal Questions

It would be appropriate to kick start the discussion by flagging following seminal questions (substantive and procedural) such as-

- Whether the notion of unenumerated rights militates against Supremacy of written Constitution?
- Whether courts deploy constituent power while recognizing and protecting unenumerated rights as guarantees under part III of our Constitution?
- Whether this technique is legitimate within the framework of our Constitution?
- Whether interpreting text of Constitution alongside abstract principles evolved by conflicting political theories would not introduce uncertainty and relativity in the scope of part III?
- Whether it is appropriate on part of judiciary to withdraw a particular unenumerated right, earlier recognized and protected by it as a fundamental right from the purview of Part III in a subsequent case?

- Whether legislature can abrogate judicially created unenumerated rights?
- Whether it is legitimate on part of the courts to relocate Directive Principles in Part IV into Part III and then transform them as fundamental rights? Are such rights are unenumerated or relocated numerated rights?
- Whether entirely new rights not even recognized and protected by Constitutional Common law of India or our customs, traditions and cultural ethos, can be recognized and protected by Courts as unenumerated fundamental rights?
- Should both Supreme Court as well as High Courts stipulate Bench strength, if either of them proposes to create unenumerated rights?
- Whether such a bench should be specially constituted by CJ of India or Chief Justices of High Courts? and Whether the courts must issue notices to concerned parties and to National and State human rights commissions and other appropriate bodies so as to enable such a bench to give anxious considerations to every possible aspect before evolving a new unenumerated fundamental right?
- Whether there should be Parliamentary committee which should annually review the Unenumerated/ Juristocratic rights, and should its report not be tabled in the house for a critical discussion, whether the courts must not be kept inform about the same by the Speaker of the Parliament and whether the same would tantamount to invasion into the independence of Judiciary?
- Emphasizing on the haziness and abstraction in the theory of unenumeration, Can it not be argued that rights created by Common law are unenumerated rights? However, looking at the issue differently, can it not be contended that method of Common law is 'a technique of interpretation and its adoption by a legal system' would implant the notion of 'unenumeration' as a part of enumeration?.
- Thus, on the strength of Article 372 read with Article 13, can it not be contended that all unenumerated rights evolved by placing reliance on common law are as a matter of fact enumerated rights, because the aforesaid provisions explicitly incorporate common law as a part of

Constitution of India except so far as it is in derogation with the letter and spirit of our Constitution?

- At fortiori, can it not be claimed that by expressed incorporation of the notion of unenumerated rights through Ninth amendment, Constitution of US has provided textual foundation for the technique of unenumeration, which is absent in text of Indian Constitution.?

Having demonstrated the breadth and the length of the subject, let me present the structure of this Paper. Section one briefly examines the structure of Part III of Constitution of India (hereinafter our Constitution) and compares and contrasts it with it's US, South Africa, Canada and newly adopted Constitution of Kenya counterparts. It would be demonstrated that Constitutional design of Bill of rights in India has some novel and distinct features. It would be also shown that unlike Constitution of India, Constitution of US explicitly incorporates the notion of 'unenumerated rights' via Ninth amendment.

In Section two, I would identify various judicial approaches for and against the incorporation of principle of Unenumeration in the interpretation of Part III. It would also be demonstrated that courts have by and large been wanting in guarding these approaches in articulated principles and theories. It would be also emphasized that Courts by unduly expanding the compass of Article 21 particularly by way of expansive interpretation of the term personal liberty, have at times left the other fundamental rights redundant. In order to substantiate this claim, a brief allusion is made to the Constituent history of Article 21 and Common law conception of Personal liberty. Similarly, some light is shed on the views of eminent jurists on the notion of unenumerated rights.

Section three then goes into the intricacies of the reasoning processes of the Courts and suggests a roadmap for evolution of Unenumerated rights. In my view, any constitutional enterprise has to be legitimate and therefore I would suggest a constitutional mechanism based on principles of constitutional commuity and deliberative democracy. It would be also argued that after the lapse of a reasonable time, a so called Juristocratic right should not be allowed to remain in the state of 'unenumeration', because the same could lead to uncertainty and has potential to give rise to the plurality of

interpretations and would seriously damage the structure of fundamental rights so vigorously guaranteed by Part III.

Section One - Structure of part III

Part III of our Constitution contains 24 Articles; however, all these articles do not confer or guarantee fundamental rights.[3] Similarly, all fundamental rights are not equally available to citizens as well as persons (non-citizens).[4] Again, fundamental rights guaranteed by part III are neither absolute nor fully unrestricted.[5] Moreover, although most of the fundamental rights in part III are influenced by the western notion of civil and political rights, there are few entirely new fundamental rights[6]. It would be also seen that most of the fundamental rights are articulated by deploying rolled up and open textured expressions[7]. A careful scrutiny would suggest that Part III reflects principles of verticality,[8] horizontality,[9] and intersectionality[10].

---

3 See Articles,15(3),(4).,16 (4) (4A), (4B), 17 and 22 (4-7). These articles should be characterized as power conferring/enabling provisions rather than right conferring provisions. But for a contrary view see M.P.Singh *"Are Articles 15(4) and 16(4) fundamental rights?' (1994) 3 SCC (Jour) 33.* By comparing and contrasting the language of Articles 15(4) and 16 (4) vis-à-vis Article 21, he takes the view that if the Courts can provide activist magnitude despite the negative obligation on the State in Article 21, by inferring positive duties and numerous unenumerated rights than at fortiori there should not be any hurdle in using the language of Articles 15(4) and 16(4) casting positive obligations on the State to infer fundamental rights to reservation for SCs, STs and OBCs from these provisions. He also insists to interpret these Articles alongside Directive Principles enshrined in Articles 38,41 and 46. For the criticism of this view see Dr Parmanand Singh *"Fundamental Right to Reservation: A Rejoinder"* (1995) 3 SCC (Jour) 6. Invoking analytical jurisprudence and relying on Sawhney's case 1993, he argues that articles 15 (4) and 16(4) are not exceptions. He appears to be also influenced by the position taken by an eminent jurist and Constitutional lawyer Late Shri H. M. Seervai in his treatise on Constitutional law.

4 E.G. Articles 15, 16,19 are available only to citizens whereas articles 14 and 21 is available to every person residing on the territory of India.

5 Assumption underlying Article 14 is broadly based on doctrine of reasonable classification. CF. Article 19 (1) a-g with article 19 (2) – (6). See generally M.P. Singh, *"The Constitutional Principle of Reasonableness", (1987) 3 SCC (Jour) 31;*

6 See Article 17, which enjoins the pernicious social Practice of untouchability and safeguard and upholds the right to human dignity of citizens belonging to SCs and STs. Similarly Articles 23 and 24 abolish bonded labour and child labour.

7 E.g. 'equality before law', 'equal protection of law', 'discrimination', life and personal liberty' See *R.C. Poudyal v Union of India AIR 1993 SC 1804,* per Venktachaliah J "In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth." Id at Para 64.

8 E.g. Article 14 illustrates the application of Principle of verticality because it creates negative rights against denial of equality before law and equal protection of law against the State. See generally Ashish Chugh 'Fundamental rights – vertical or Horizontal? (2005) 7 SCC (J) 9

9 E.g. Article 15 (2) illustrates the application of principle of horizontality, in that it guards against discriminatory treatment by a citizen or group of citizens against other fellow citizen or group of citizens in sphere of public life. See Sudhir Krishnaswamy 'Horizontal application of fundamental

Although, enforcement of fundamental rights is facilitated through High courts and Supreme Court, at least fundamental rights relating to life, Liberty, equality and dignity can also be enforced through special human rights courts envisaged by Protection of Human rights Act 1993[11]. It is to be also noted that courts have the powers to declare laws enacted by Parliament and subordinate/delegated legislation enacted by local and other authorities as void, if the same contravenes any of the fundamental rights in Part III.[12] Again, amendments of the Constitution contravening certain fundamental rights, which are identified by the apex court, as the 'features of the basic structure of the Constitution' from time to time, will be declared void by the judiciary.[13]

---

rights and state action in India' Rajkumar C, K Chokolingam and Krishna Iyer edited- *"Human rights, Justice and Constitutional empowerment' Oxford University Press 2010*

10 The principle of intersectionality illustrates itself in Articles 15 (1), (2) and 16 (2) through the phrase ' or any of them'. A noted activist, Kalpana kannabiran aptly observed, "..it is necessary to re-examine this article and explore the possibility that the phrase "or any of them" has a meaning distinct from "only". While in legal usage the word "only" in this context denotes "solely" (Garner 1987: 390), and this is the way it has been interpreted by courts in India, there has been no discussion either in the Constituent Assembly or in case law on the concluding phrase of this clause, "or any of them" (Rao 1968: 182-92). The word "or" in legal usage means both "and" and "or" (Garner 1987: 394). Opening this clause out and re-examining its import points us in a different direction. Namely, the state shall not discriminate solely on the listed grounds, and on any of the listed grounds, in the singular or the plural, and on grounds of any of the listed indices with factors that do not figure in this list – factors that allude to the larger context. The specific conjunction of sex with any other factors or listed grounds that are alleged to result in discrimination based on sex must then be examined by the court.." See Kalpana Kannabiran *'Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India' October 31/ 2009, Economic and Political weekly, Vol Xliv no.44, Pp 88 etseq.* See also See generally, Williams, Kimberlé Crenshaw. *"Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color".* In: Martha Albertson Fineman, Rixanne Mykitiuk, Eds. *The Public Nature of Private Violence. (New York: Routledge, 1994), p. 93-118.* Kantola, Johanna and Nousiainen, Kevät(2009) 'Institutionalizing *Intersectionality in Europe', International Feminist Journal of Politics, 11: 4, 459 — 477.*

11 See also Article 32 (3) empowering the Parliament to make law for conferment of all or any of the powers exercisable by Supreme Court under Article 32 (2) on any other court within its local limits of jurisdiction. I venture to submit that at fortiori a conjoint reading of sections 2 (d) and 30 of protection of Human rights Act 1993 may be characterized as exercise of legislative power by parliament under article 32(3) thereby equipping these Human rights Courts with all or any of the powers necessary for vindication of human rights of the oppressed. See also Article 359 (1) which imposes fetters on emergency powers of the Parliament in guarding against suspension of Articles 20 and 21 of the Constitution. It would be interesting to examine the dynamics and metrics of conjoint effect of section 2(d) read with section 30 and Article 359 (1) particularly on interpretation of Article 21

12 See Article 13. In Kesavananda Bharati case, Mathew J very aptly observed "However, I think that Article 13(2) was necessary for a different purpose, namely, to indicate the extent of the invasion of the fundamental right which would make the impugned law void..... Every limitation upon a fundamental right would not be an abridgment of it" See generally Dr. Sanjay Jain and Sharath Chandran "Justice K K Mathew' pp 84. in Sanjay Jain and Sathya Narayan Eds. *"Basic Structure Constitutionalism: Revisiting Kesavananda Bharati"* 2011 Eastern Book Company

13 See *His Holiness Kesavananda Bharti V. State of Kerala (1973) 4 SCC 225. Indira Gandhi Nehru Vs. Raj Narain1975 Supp SCC 1, I.R. Coelho (Dead) by LRS v. State of Tamil Nadu. 2007 (2) SCC 1.* Presently, insertion of a fundamental rights violating law as declared void by the Court by way of an amendment in IX th schedule would not enjoy immunity from judicial review when challenged on the

Although, text of part III is silent on the issue whether fundamental rights can be enforced against judiciary; by reading in between the lines, judiciary has almost settled this point by enforcing fundamental rights against itself[14]. It is also noteworthy that alongside some of the most empowering rights, Part III also contains certain draconian provisions with a potential to almost destroy all these cherished fundamental rights.[15]

Let us now briefly compare and contrast our bill of rights with that of international covenant on civil and Political rights and relevant provisions in US, Canadian, south African and newly adopted Kenyan Constitution.

ICCPR and Fundamental Rights-

A close look on ICCPR[16] would show that although most of the rights guaranteed by it are also echoed in Part III of our Constitution, there are some rights, which are conspicuously absent, form Part III.[17] Similarly, Part III

---

ground of violation of Basic structure of Constitution. See generally Kamla sankaran *'From brooding omnipresence to concrete textual provisions: I R Coelho judgment and basic structure doctrine' JILI 2007, Vol 49 pp 240.* Et seq.

14 See *Naresh Mirajkar v State of Maharashtra,* 1967 AIR SC 1. And *A. R. Antulay v R.S. Nayak* AIR (1988) SC 1531

15 See Article 22 (4-7). Safeguards introduced in clauses 4 and 7 by 44th amendment to the Constitution in 1978 have not yet been brought into the force and therefore these clauses are merely paper tigers.

16 International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976.

17 Right to self determination (Article 1), right to marry and to form family (Article 23)and right to vote (Article 25, in India it is only statutory rights. See *Mohinder singh gill v Union of India)* (AIR 1991 SC 1745) But some other rights though not explicitly provided in text of Part III are nonetheless recognized and protected by the Courts in India as Unenumerated rights e.g. right to privacy Article 17, Kharak Singh V. State of U.P. AIR 1963 SC 1295, Gobind v State of MP AIR 1975 SC 1378, *Malak Singh* v. *State of P&H,* (1981) 1 SCC 420, *Sheela Barse* v. *State of Maharashtra 1987*) 4 SCC 373, *Prabha Dutt* v. *Union of India* (1982) 1 SCC 1, *State through Supdt., Central Jail, N.D.* v. *Charulata Joshi* (1999) 4 SCC 65 *R. Rajagopal* v. *State of T.N. Kaleidoscope* (*India*)(*P*) *Ltd.* v. *Phoolan Devi* AIR 1995 Del 316, *People's Union for Civil Liberties* v. *Union of India,* (1997) 1 SCC 301, *Dinesh versus state of Rajasthan,* right to travel abroad- *Satwant Singh V. Assistant Passport Officer New Delhi, (AIR 1967, SC 1836), Maneka Gandhi V. Union of India (AIR 1975 SC 1378)* , Right of Prisoners to be treated with Humanity *Charles Shobraj v. Superintendent Central Jail, Tihar and New Delhi, (AIR 1978 SC 514), Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (AIR 1981 SC 746), Joginder Kumar v. State of U.P. and others (AIR 1994 SC, 1349), Sunil Batra v. Delhi Administration (No. 1) (AIR 1978 SC 1675) Prem Shankar Shukla v. Delhi Administrator (AIR 1980 SC 1535), Sunil Batra versus Delhi administration, (no. 2) [AIR 1980 SC 1579, D.K. Basu v. State of West Bengal, (AIR 1997 SC 610),* Right of compensation- Article 9(5). *Hari kisan versus sukhbir singh AIR 1988 SC 2127), Guruswamy versus state of T.N. 1979, 3 SC, 797), Saheli vs. Commissioner of Police, Delhi, Neelabati Behera vs. State of Orissa, Chairman Railway board Vs. Mrs. Chandrima Das (AIR 2000 SC 988) Dinesh @ Buddha Vs. State of Rajasthan decided On: 28.02.2006, State of Maharashtra Vs. Ravikant Patil1991 2 SSC 373), Pramodkumar padhi Vs. goleka, 1986 Criminal LJ 1634 SC, Rudul sah Vs State of Bihar AIR 1983 SC 1086 & Arvinder singh Bagga Vs State of UP 1994 6SCC 478, State of Madhya Pradesh v. Shamsunder Trivedi and Ors,(1995) 4 SCC 262.* It is important to note that India has entered reservation on Article 9. therefore it is more appropriate to characterize it as discretionary remedy rather than right.

recognizes certain new rights, which are not mentioned in ICCPR[18]. Unlike Constitution of India, ICCPR confer all the rights enshrined therein on 'Individuals within the territory of its State Parties and who are subject to their jurisdiction', and thereby does not differentiate between status of Citizens and Aliens.[19] Rather it imposes obligation on State Parties to ensure conferment of equal civil and political rights on men and women[20]. Again, treatment of principle of non-discrimination differs markedly in both. Unlike Articles 15 and 16 of Indian Constitution, which exhaustively identifies number of protected characteristics viz. religion, race, caste, sex, place of birth or any of them [Article 15 (1) and (2) and in addition to the same Article 16 (2) adds two more grounds i.e. descent and residence, Article 29 (2) adds 'Language' and Article 23(2) adds 'class'] in favour of citizens alone,[21] against vertical and horizontal actions;. On the other hand, ICCPR identifies the protected characteristics only by way of illustration by using the terms like 'such as' and 'other status', and even its illustrative list is considerably broader (colour, political or other opinion, national or social origin, property) than the Articles 15 and 16 . Moreover, ICCPR imposes obligation on State parties to practice non-discrimination equally in favor of citizens and non-citizens. On the other hand, principle of non-discrimination in our constitution is relative to nature of certain fundamental rights and its scope is also specific to the text of those articles.[22]

Again, unlike Constitution of India, empowering the State[23] to derogate from all fundamental rights but from Articles 20[24] and 21[25] during the

---

18 Article 17-Right against Untouchability, Article 21A- right to education See *unnikrishanan v State of AP* AIR 1993 SC 2178, *Mohini Jain v State of Karnataka* AIR 1992 SC 1858, [Non discrimination on the ground of Sexual orientation (Naz foundation v Govt of NCT MANU/DE/0869/2009, Freedom against the Sexual harassment of women at work place] rights mentioned in square bracket are judicially created unenumerated rights. (*Vishaka v State of Rajasthan* AIR 1997 SC 3011). Madras High Court rightly pointed out in *Srimati Champkan Doirajan v State of Madras* AIR1951Mad120 that Provisions in *parimateria* with Articles 15 and 16 of Constitution of India are not to be found in any of the well known constitutions of the world. (see Para 6)

19 See Article 2 (1) of ICCPR.

20 See Article 3

21 Article 14 affords protection equally on all persons but its scope is limited in the sense that it does not identify any protected characteristics.

22 Compare Articles 15 (1 and 2) and 17 with Article 16 (2), and Article 29 (2).

23 See Article 358, state action acquires immunity from the right to freedoms guaranteed by Article 19 viz freedom to Speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout territory of India, to reside and settle in any part of India, to practice any profession or to carry on any occupation, trade or business during the operation of proclamation of emergency on the grounds either of threat of war to the security of India as a whole or any of its parts or external aggression. (See Article 352) Article359 empowers the President to suspend enforcement of all fundamental rights in Part III of Constitution of India except Articles 20 and 21

operation of state of emergency, the obligations imposed by ICCPR on State parties during the same envisages a far greater non-derogation from civil and political rights enshrined therein. Thus, apart from excluding right to life and personal liberty and certain safeguards against the operation of criminal laws envisaged by articles 21 and 20 of constitution of India,[26] it also implicates non-derogation from other important Human rights like right against torture; cruel, inhuman and degrading treatment; coerced subjection to medical or scientific experimentation[27]; slavery or compulsory labor;[28] safeguards against imprisonment on the ground of inability to fulfill a contractual obligation[29]; right to recognition everywhere as a person before the law[30]; and right to freedom of religion[31].

Besides, Article 31(B) also starkly conflicts with the mandate of non-derogability as even during the peace time Parliament can acquire immunity for 'fundamental rights violating laws' by incorporating them in the Ninth schedule of Constitution.[32] In sharp contrast with part III which also recognizes and protects certain rights of second and third generations[33], ICCPR focuses only on Civil and political rights. It is also possible to contend that there is an adequate scope in the language of Part III to inform it with Socio-economic contents in stark contrast with the language of ICCPR, which is mostly leaned towards individualism. Again, courts in India have been able to interpret Part III alongside provisions of ICCPR in such a

during the proclamation of emergency without explicitly mentioning its specific grounds unlike the article 358. It is submitted that there is nothing in article 359 which can prevent the parliament from incorporating a law in derogation of Articles 20 and 21 by way of a constitutional amendment in Ninth schedule in accordance with Article 31 (B) lest the court declares the same as violative of Basic structure of constitution of India. Similarly, it needs to be seen whether article 359 would prevent the State from indemnifying any person in the services of union or states or otherwise for acts done by him in connection with the maintenance or restoration of order in any area within the territory of India or validate any sentence passed, punishment inflicted, forfeiture ordered or [o]ther act done during the force of Martial law, is a very critical question and assumes utmost significance due to disturbances in North East and Jammu and Kashmir. In my submission constitution must explicitly recognize that Article 33 and 34 are subject to Article 359.

24 Protection in respect of a) self incrimination, b) double jeopardy and c) retrospective operation of criminal laws

25 Right to life and personal liberty.

26 Articles 7 and 15 of ICCPR approximately correspond with these Articles.

27 See article 7 of ICCPR

28 Article 8 ICCPR

29 Article 11

30 See article 16

31 Article 18

32 The moot question is, whether Article 31(B) is incompatible with the letter and spirit of ICCPR in the light of its vast potential to demean rights guaranteed by Part III?

33 See Articles 17, 21-A, 23, 24, 30

manner so as to incorporate into Part III a number of rights guaranteed therein as 'Unenumerated Fundamental rights'.[34] Last but not the least, in the light of section 2 of Protection of Human rights Act 1993, which while defining Human rights explicitly incorporates along with two international covenants (ICCPR and ICESCR) other international Human rights instruments, the question of the issue of compatibility of part III with other International human rights law standards has assumed utmost pertinence and deserves an earnest academic reflection from scholars.

Comparison of Part III of Indian Constitution with Bill of Rights in other Jurisdictions –

South Africa

Unlike Constitution of India, which has classified rights into Justiciable (part III) and non-justiciable (part IV), Constitution of South Africa has one of the most detailed Bill of rights from articles 7-39 and it deviates from Constitution of India in not recognizing the aforementioned classification. Of course, this does not mean that under South African Constitution all rights enshrined in its Bill of rights enjoy equal or similar level of enforceability[35]. So far as scope of rights is concerned, both constitutions recognize that all rights and freedoms are not absolute and are subject to 'reasonable restrictions'. However, unlike constitution of India, restrictions imposed on various rights and freedoms in Bill of Rights of South Africa would reveal two forms of restrictions a) restriction specific to a particular right[36] and b) general restrictions on all rights[37]. It is also noteworthy that the number of restrictions on some of the rights in South Africa are far lesser than its Indian

34 See *R. Rajagopal* v. *State of T.N.* AIR 1995 SC 264, (recognizing Right to Privacy), *Satwant Singh V. Assistant Passport Officer New Delhi, (AIR 1967, SC 1836)* [right to travel abroad], *Jolly George Verghese v. Bank of Cochin AIR 1980 SC 470)* [Right of not to be Imprisoned for Inability to Fulfill a Contractual Obligation], *Neelabati Behera vs. State of Orissa* AIR 1993 SC 1960 , [Right to receive compensation as a part of public law remedy under article 32, despite explicit reservation on part of Union of India]

35 See section 25 (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. see section 26 (2) (right to housing) section 27 (Health care, food, water and social security) section 29 (right to education), section 32 (right to access to information)

36 See Section 9 (5) [Right to Equality], section 15(2) [freedom of religion, Belief and opinion], section 16(2) [freedom of expression], section 22- [Freedom of Trade, occupation and profession], section 23 (5) labour relations, Section 24 Right to environment, section 25 (2-9) freedom of property, Section 26 (2) Housing, Section 27 (2) Health care, food, water and social security, Section 29(3) right to Education, Section 30 Right to culture and language, section 31 (2) Cultural, religious and linguistic communities, section 32 – right to just administration, Section 39 –Interpretation of Bill of Rights

37 See section 36 of Constitution of Republic of South Africa 1996

counterpart.[38] Similarly, Bill of rights of South Africa is fully compatible with provisions of ICCPR, in respect of non-derogability of rights and freedoms during the state of emergency[39] unlike the Indian Constitution.

In sharp contrast with Article 12 of Indian Constitution, Section 8 of South-African constitution is unambiguous and provides that the Bill of rights applies to all laws and binds all the organs of the State[40] including natural or juristic persons in relevant cases[41]. The requirement to develop the common law in section 8(3) arises when it is decided that a right is applicable in a particular private relation and situation and that existing law does not afford sufficient protection of that right in that situation. Thus, section 8(3) somewhat resembles with Article 142 (1) of Indian constitution. Clearly, there is obvious advantage in conferring certain fundamental rights on even juristic persons. Viz Right to freedom of Press can realistically be exercised only by incorporated media houses and in India they have to resort to a rather circuitous route to avail protection of article 19 (1) (a).

Unlike, constitution of India, South African constitution attaches less significance to 'citizen-person dichotomy' with regard to conferment of fundamental rights. Thus, only four fundamental rights are confined to citizens under the Bill of Rights [Political rights, Citizenship, Freedom of Residence in any part of Republic, right to passport and freedom of trade, occupation and Profession].[42] Similarly, principle of due process of law is articulately runs through the various provisions of South African Constitution unlike Indian constitution, where, the same is judicially incorporated rather ambiguously. Last but not the least, there is bound to be a less scope for evolution of unenumerated rights under constitution of South Africa than that of India, because in the former the rights are articulated rather elastically and inclusively, viz. Compare Article 19 (1) (a) of Indian constitution [right to freedom of Speech and expression] with section 16 of South African constitution, which provides, 'Everyone has the right to freedom of

38 Cf. Article 19 (2) of Indian Constitution and section 16 (2) of South African Constitution 1996.
39 See Section 37 of Constitution of republic of South Africa 1996.
40 See section 8(1) of South African constitution. Section 33 expressly recognizes interalia fundamental right of everyone to administrative action that is lawful, reasonable and procedurally fai. r In India constitution is not explicit on the issue whether Judiciary is the 'State'.
41 See section 8 (2) see also clause (4). Under constitution of India Juristic person does not enjoy any fundamental rights.
42 See sections 19.20.21.22 respectively.

expression, which includes - freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research'.

Canada

Unlike Bill of rights under Constitution of South Africa, Canadian Charter of rights and Freedoms 1982 is somewhat closer to Part III of Indian Constitution. Particularly in respect of provisions, which allow derogation from freedoms expressed therein. Similarly, both the constitutions deploy a relatively general language for articulation of rights and freedoms compare to that of South Africa. There is a textual route in Canadian charter for recognizing all those rights and freedoms which exist in Canada. Thus section 26 of Canadian Constitution provides that 'the guarantee in this charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

USA

Constitution of USA has explicitly recognized 'Unenumerated rights' by its Ninth Amendment,[43] which provides, " The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". Although in many respects Bill of rights under Constitution of USA is markedly different from that of Part III of our Constitution[44], Judiciary in India has been extremely influenced by the exegesis of Bill of rights and on numerous occasions has extrapolated the principles, doctrines and standards from the decisions of USA Supreme Court to expand the scope of fundamental rights and even to create number of unenumerated rights in Part III[45]. Thus, be it right to privacy or right against

43 Adopted in 1791.Courts also deploy Vth and XIVth amendments for this purpose in their relevant parts, they provide, '... Nor shall any person be deprived of life, liberty or property without Due process of law...'(V th amendment adopted in 1791) '..nor shall any State deprive any person of life, liberty without Due process of law;'(XIV th amendment adopted in 1868) See generally Stephen kanter: 'The Griswold Diagrams: Towards a Unified theory of Constitutional Rights' 28 Cardozo Law review 623 (2006); See Symposium on 'the Future of Unenumerated rights' 9 U. Pa. J. Const. L January 2007.
44 E.g. The bill of rights under USA Constitution follows Individualistic model of Human rights and has not provided for any restrictions on various rights guaranteed by it. In sharp contrast with Indian Constitution, it recognizes certain rights like right to bear arms (see II amendment adopted in 1791) and interpretation of Bill of rights therein is not influenced by communitarian values in absence of analogous provision to Part IV of Constitution of India.
45 See *Gobind v State of MP AIR 1975 SC 1378*, wherein Mathew J. (Para 17) cited with approval the famous observations of Douglas J of US Supreme Court while delivering Majority opinion in

arbitrariness or right to fair procedure, principle of due process of law has pervaded numerous pronouncements of our courts.

Kenya

It would also be interesting to compare part III of our constitution with a recently enacted Constitution of Kenya. To begin with, chapter four of Constitution of Kenya, Bill of rights explicitly incorporates human rights discourse and notion of unenumerated rights by providing

- 'The rights and fundamental freedoms in the Bill of Rights— (a) belong to each individual and are not granted by the State;'[46]
- Do not exclude other rights and fundamental freedoms not in the Bill of Rights...[47]

To a large extent Socio-economic rights have the status analogous to part IV of our Constitution. Space constrain prevents me from a detail exploration into the provisions of Kenyan Constitution, but suffice it to say that its bill of rights is predominantly influenced by the Constitution of South Africa and provides an ample scope for judiciary to interpret all rights so as to ensure their fullest realization.

Thus, having compared and contrasted human rights mechanisms in major jurisdictions and modern Constitutions, I have established the influence of notion of unenumerated rights on Constitutional Jurisprudence. In the following section, I would explore in detail the judicial enterprise of Unenumerated fundamental rights in India by critically analyzing comparing and contrasting various approaches evolved by the court.

Section Two Unenumerated Rights under Constitution of India

This section is a brief excursus on judicial meanderings on evolution of unenumerated fundamental rights in India. In order to fully comprehend the

Griswold v Connecticut 381 US 479, 85 S.Ct.1678 (1965), "In Griswold v. Connecticut... the right of freedom of speech press includes not only the right to utter or to print but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific right would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion "of the sanctity of a man's home and the privacies of life" was fundamental.."

46 See Section 19 (3-a) of Constitution of Kenya

47 See Section 19 (3-b)

influence of notion of 'Unenumerated rights' on expressed fundamental rights, it would be imperative to commence the discussion right from 1950 with *A.K. Gopalan's case*[48], and go as far as the decision of Supreme Court of India in Selvi's Case[49] of 2010. If I were to describe the journey in only one sentence, I may say that '*it is a journey from procedure established by law to the unenumerated right of due process of law*'. Evolution of unenumerated rights by the court may be traced mainly in three phases-

A) Kharak Singh to Gobind [50]

B) Maneka Gandhi's Case

C) Post Maneka Phase

However, before engaging with the same, it is important to critically analyze the conception of 'Personal liberty and life' because most of the unenumerated rights are evolved through the expansive interpretation of these concepts. It is quite logical therefore, to examine whether Common Law conception of right to personal liberty underwent any change with the advent of Constitution of India and with the enactment of Article 21 in Part III of our Constitution. Some light also needs to be shed on the Constituent history of Article 21 and Views of eminent jurists.

2.1 Common Law conception of Right to life and personal liberty –

During the British Raj, Indians merely enjoyed common law rights under the Diceyan notion of Rule of Law viz. the subject may say or do what he pleases provided a) he does not transgress the substantive law or b) infringe the legal rights of others. A close scrutiny would demonstrate that although these common law rights were effective against the unauthorized executive invasion, they were ineffective and inefficacious against legislative encroachments. Obviously, the common law right to personal liberty was not an exception to the above legal position.[51] Yet another point, which seeks attention, is that British India common law attached a similar degree of protection to all common law rights and therefore right to personal liberty

48 *A. K. Gopalan v. State of Madras* AIR 1950 SUPREME COURT 27.

49 *Smt. Selvi &Amp; Ors vs State Of Karnataka* 2010, 7 SCC 263.

50 See supra FN 17

51 See B. Errabbi ' *the right to personal liberty in India: Gopalan revisited with a Difference*" In M.P.Singh Ed. *'comparative constitutional Law' Eastern Law book* Co, 1989. Id at P294. See generally Halsbury's Laws of England, Vol 7, Id at p 195-97

assumed a central role and had an upper edge over other common law rights because of its broad and open textured nature and therefore, enjoyment of all other common law rights was contingent upon whether or not one possessed the right to personal liberty.[52] Thus, prominence of common law right to personal liberty coupled with minimal protection accorded to the other common law rights made ascription of any particular meaning to the former common law rights made ascription of any particular meaning to the former totally inconsequential to the enjoyment of later.

However, this position changed dramatically with the advent of the Constitution as framers took a conscious decision to attach protection to different fundamental rights in varying degrees. Thus, in the post Constitutional scenario, not only the issue of scope of right to life and personal liberty assumed critical significance but its exact determination by the courts also became vital so as to accurately comprehend its relationship with other fundamental rights. In other words, answer to the question whether the notion of right to life and personal liberty must be construed narrowly or very broadly would have a lot of significance for the determination of scope of most of the fundamental rights in general and particularly Article 19. It therefore became most important for the jurists as well as judges to take a definite position on impact of common law rights on post Constitutional fundamental rights guaranteed by Part III and on the question of inter-relationship of these rights with one-another. Without going into an in-depth debate, I may venture to summarized the legal position-

- With the adoption of written Constitution and in absence of any contrary provisions thereto, it is plausible to assume that the common law that was in operation in British India became a part of the Constitution of India and it ceased to have any independent or extra Constitutional existence.[53]
- In the wake of explicit abandonment of 'West-Minstrel' notion of Parliamentary sovereignty, fundamental rights entrenched not only the legislative[54], judicial[55] and executive powers[56] but to an extent even the

[52] Ibid

[53] See Articles 13 and 372 of Constitution of India which saves pre-constitutional laws including common law rights to the extent of their conformity with the text of Constitution, moreover there is no entrenchment clause in favor of any common law rights in these articles. See also *A.D.M. v shivkant Shukla* (1976) 2 SCC 521,579; *Director of rationing v corporation of Calcutta* AIR 1960 SC 1335, 1360.

[54] See Article 13, Article 359 (1)

Constituent power[57] under Article 368 of the Constitution. [Part III also prescribes the grounds of permissible legislative encroachments, which are relative to different fundamental rights.]

- The specific enumeration of various fundamental rights make it incumbent not to collapse them into one another, an interpretation contrary to the aforesaid would render the specific enumeration unnecessary and redundant.
- Equally, interconnectedness, interdependence and open texture character of the fundamental rights should not be lost sight off.[58]
- Resultantly, any law, which abrogates more than one fundamental right, has to satisfy the requirements of all those rights.

Linking the aforesaid discussion, to the specific context of Article 21,

- The expression 'right to life and personal liberty', which is also characterized as one of the foundational values of our constitution,[59] must be assigned a meaning which would not disrupt or adversely affect a) independent existence of other fundamental rights, b) facilitate its interaction with other fundamental rights and c) would emphasize its interdependence on other fundamental rights.
- Interpretation of expression 'right to life and personal liberty' has potential to embrace numerous freedoms not contemplated either explicitly or implicitly by Article 19, so long as the same is in tune with Constitutional common law[60] and Constitutionalism of India.

I want to hypothesize that by overlooking the aforesaid aspects during the judicial evolution of unenumerated rights, interpretation of Article 21 has

[55] See *Naresh Mirajkar v State of Maharashtra* 1967 AIR SC 1. And *A. R. Antulay v R.S. Nayak* AIR (1988) SC 1531

[56] *Rai Sahib Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549.

[57] See *His Holiness Kesavananda Bharti V. State of Kerala (1973) 4 SCC 225. I.R. Cohelo (Dead) by LRS v. State of Tamil Nadu. 2007 (2) SCC 1*

[58] "The fundamental rights are deeply interconnected. Each supports and strengthens the work of others" see *I.R. Cohelo V State of TN* 2007 (2 SCC) 1

[59] See *M.Nagraj and Ors. v. Union of India, 2006 (8) SCC 212*, "it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated." Id Para 20

[60] See generally David A. Strauss *'Common Law Constitutional Interpretation'* 63 U. Chi. L. Rev. 877. See also *I.R. Cohelo V State of TN 2007* (2 SCC) 1 Para 44-47

collapsed constitutionally guaranteed right to life and personal liberty into its earlier pre-constitutional common law conception thereby disturbing the Constitutional schema of fundamental rights. However, before turning to judicial pronouncements to establish the same, it would be beneficial to have a peep into the Constituent history of Article 21.

2.2 The Constituent history of Article 21.

According to H. M. Seervai, answers to following three seminal questions provide key to identify precise scope of Article 21 and to place the correct interpretation on the same – a) what is meaning of expression 'Personal liberty' used in Article 21? b) Does personal liberty include all or any of the freedoms conferred on citizens by Article 19 (1) (a) to (e) and (g)? c) How is a fundamental right related to an ordinary legal right?

In order to seek answers to above questions, Mr. Seervai went into its constituent history. He demonstrated that the initial draft of Article 21 (Draft Art 15) was very broad and elastic. It provided,

> *"No person shall be deprived of his life or liberty without due process of law..."*

However, after a great deal of discussion and in the light of consultation of Dr. B.N. Rau with Frankfurter J. of US SC, the Article was overhauled by effecting two major changes. 1) the term Liberty was prefixed by word 'Personal' and 2) the expression ' due process of Law' was dispensed with and gave way to the expression 'except procedure established by Law' (deployed in Article XXXI of Japanese Constitution 1946). Dr. B.N.Rau and his protagonists vigorously defended both these changes on following grounds.

i) In absence of the prefix 'personal', Liberty might be construed expansively and could embrace even the freedoms already dealt with in Article 19 (draft Article 13). H. M. Seervai further strengthened the aforesaid ground by pointing out that since freedoms guaranteed under Article 19 were conferred only on citizens, whereas, Article 21 was applicable to every person including foreigners, it was necessary to explicitly eliminate doubts that the word 'liberty' under Article 21 embraced 'freedoms guaranteed by Article 19'.

ii) Similarly, the substituted expression was said to be more specific.[61] According to Seervai, this reason was correct only in terms of semantics. Going by the views of Mr. Seervai the substituted expression did not altogether transplants the American concept of 'Due process'. Whether or not judiciary accepted this proposition is a matter of debate.

He also showed how the constituent assembly was not very happy with the above changes. Thus there was a heated debate on the same on 6th [62] and 13the Dec 1948[63] and although the changes were ultimately accepted by Constituent Assembly, the dissatisfaction did not die down and eventually Dr. Ambedkar tried to assuage the feelings of critics by introducing Draft Art 15A (now Article 22 of Constitution). He stated that, "we are therefore, now, by introducing Article 15 A, making, if I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the *law of 'due process'* by the introduction of Article 15 A. .."[64] Obviously, Dr. Ambedkar was referring to first two clauses of the present Article 22.

Shri Seervai very aptly submitted that the constituent history of Article 21 was only partially brought forth before the Supreme Court in Gopalan's case and particularly the omission of mentioning the reintroduction of 'due process' via sub clauses 1 and 2 of Article 22 proved fatal. Had the court appreciated the same in its proper perspective, it would have been easier for the court to engage cohesively interalia with the question of Procedural due process and its relationship with Article 21.

In my humble submission Dr. Ambedkar by conceding the partial incorporation of 'due process' via Article 15 A (Present Article 22) seriously watered down the semantic shift effected by Dr. Rau to then Article 15 (now Article 21) and paved way for activist magnitude in the interpretation of Article 21. The aforesaid view also clearly, shows that Dr. Ambedkar favored an integrated approach for the interpretation of fundamental rights. It is therefore plausible to argue that Dr. Ambedkar sow the seeds for implanting

---

[61] See note of drafting committee in the draft Constitution Forwarded by Dr. Ambedkar to the President of Constituent Assembly on 21st Feb 1948.

[62] See C.A.D. Vol VII PP 842-857.

[63] Id at PP.999-1001.

[64] C.A.D. Vol IX P. 1497

the notion of 'Unenumerated rights' into Article 21 read with Article 22 Part III, while enchanting the Mantra of 'Due process'. However, I am doubtful whether Judiciary can use this debate to deduce a general proposition that different fundamental rights may be merged to infer new 'unenumerated rights' radical and alien to our culture.

2.3 Incorporation of Unenumerated fundamental Rights into Numerated-

I) Views of Jurists

It would be profitable to begin the discussion by alluding to some pertinent observations on the notion of unenumerated fundamental rights by Dr. D.D. Basu[65].

Dr. Basu-

He states that, whenever an appeal is made by a litigant to a right which is not printed in bold letters in the several provisions of Part III, litigant may still contend that the right relied upon by him follows from any of those rights which are in the text of the Constitution and it will be duty of court to determine whether the right alleged may be derived by a proper interpretation, from any of the enumerated rights.

Dr. Basu contends that courts are under obligation to give anxious consideration to following two factors before rejecting the above argument.

i) To inquire whether the said right is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions or which are basic to a free society or the very concept of civilization. [66]

ii) To further inquire, whether there is anything in the text of the relevant provisions of the Constitution, which would preclude the liberal interpretation that the court is called upon to make?

It is submited that a scrutiny of these two factors which may also be characterized, as twin tests would demonstrate obvious complexity. Thus, at

[65] *"Commentary on Constitutional law of India' vol.1,* Lexis Nexis India 2007 7th Ed. Id at PP 614

[66] Ibid. This proposition evolved by Dr. Basu is based on the two decisions of US Supreme Court. *Powell v Al bame* (1932) US 45 , *Savder v Massachusetts* (1934) US 97

one hand, Dr. Basu is emphasizing on the judicial duty to determine whether denial of any unenumerated rights claimed by the litigant would violate the principles of 'fundamental liberty and justice lying at the basis of all civil and political institutions, free society and civilization', on the other hand, he also wants the courts to ensure that such rights must not only have proximity with the text of the Part III of the Constitution, but their interpretation must also accord with Part III. It therefore, follows that although the court should not wash off their hands altogether from envisaging new situations owing to lapse of time and changing circumstances and reading them into Part III. The approach of the court while recognizing new unenumerated rights must be interstitial and it would enjoy legitimacy as long as its interpretation is in line with the text of the Constitution. In other words, the ultimate authority to recognize totally new rights not in tune with Part III would naturally be beyond the institution of judicial review and would legitimately belong to the amending body/ legislature.[67]

Prof T.K.Tope-

On the other hand, Prof. Tope resorts to a rather interesting approach for the evolution of unenumerated rights. By going beyond Bilaterality thesis and modifying correlativity thesis as propounded by Hohfeld[68], he insists that as fundamental duties are cast on every citizen of India, if a particular citizen fails to perform any one of the duties, the same would result in violation of some rights of his fellow citizens or himself, which corresponds to these duties. What those rights are? is not mentioned, but there must be corresponding rights. Though those rights are not specifically enumerated, non-enumeration of these rights should not make any difference. On the contrary, by the inclusion of a chapter on 'fundamental duties', the Constitution has accepted the concept of "unenumerated rights'. However, these rights are not fundamental rights and as they are not specifically stated, they may be considered as 'implied rights'. It would be the duty of the judiciary to enforce these 'implied rights' like other Constitutional rights.[69] A close look on these observations would suggest that Prof Tope has taken the view that Fundamental duties may themselves be the sources of Rights and

[67] Ibid

[68] See generally W.N. Hohfeld, Edited by Wheeler Cook, *"fundamental legal conceptions as applied in judicial reasoning: and other legal essays'* Yale University Press 1923.

[69] See Tope T K *"fundamental duties and Justiciability'* (1982) 2SCC (Jour) 9

accordingly, he is able to argue that citizen or citizens being under observance of duties as also holders or bearers of certain rights, thereby transcending the Hohfeldian analysis of rights. Of course, it is also possible to argue that Fundamental duties being very vaguely and generally worded, defy the creation of the jural relationship.

Prof. Upendra Baxi-

According to Professor Upendra Baxi,

> *"Discovery(or shall we say 'invention'?) of a new right is one aspect of creativity; articulation of a broad formulation of its scope and of legitimate constraints is another aspect .In both the supreme court is clearly exercising 'constituent power', that is the power of creating new facets of the constitution".*

He makes the above observation with lot of skepticism and adds footnote to them by observing,

> *"One would think that this is a wise exercise of constituent power. That the claim of privacy (autonomy/dignity) should be protected against state authority is easily accepted. However, the question arises at a more general level whether 'privacy' is a value of human relations in India. Everyday experience in Indian settings suggests otherwise...a question may arise whether privacy is not after all a value somewhat alien to Indian culture if so, can we expect Gobind to indigenize privacy values with a massive social spill over from its constitutional zones?"*[70]

The above observations fully justifies and strengthen my concern about legitimacy and competence of judiciary, a least politically accountable

[70] See Prof Upendra baxi ' *'Introduction- Creativity, Craftsmanship and communication'* in 'K.K. Mathew *'Democracy, Equality and freedom'* Eastern Law Book Company 1978 Id at PP I- LXXXVI

branch to indulge in creation of what may be appropriately characterized as Juristocratic Rights.[71]

Prof. S.P.Sathe-

How can I conclude the discussion on views of Jurists without referring to intellectual insights of Prof S P Sathe[72], writ large in the nook and cranny of public law discourse. Invoking the 'Interstitial legislature model',[73] he observed,

> *"Fundamental Rights contained in Part III of the Constitution have been the most litigated part of the Constitution. No Constitution can be interpreted in static manner because it does not contain mere rules for the passing hour but contains principles for an expanding future.*[74] *This is nowhere as manifest as in the judicial interpretation of various provisions of the fundamental rights. The text of a constitution is often brief and skeletal and this helps the courts to find space for emerging rights within the existing provisions. This is how the Constitution of the United States has grown....Under the common law system; the constitutional text finds space for emerging rights within the abstract guarantees of the bill of rights. The words such as "liberty" of "due process of law" are pregnant with meanings, which become articulate through judicial interpretation. Although the Constitution of India is much more detailed and specific as compared to the Constitution of the United States, the Indian Supreme Court has interpreted the*

[71] So far as decision in Gobind is concerned Mathews J although discussed at length the scope of right to privacy he did not rely on the same while delivering the judgment. As a matter of fact, he left the issue whether the right to privacy is an un-enumerated right quite open.

[72] See S.P. Sathe *'Enlarging the Fundamental Rights'* in 'FESTSCHRIFT - *Constitutional Jurisprudence and Environmental Justice - Essays in Honour of Prof. A. Lakshmi Nath,'* Ed.Dr. D.S.Prakasa Rao, Pratyusha Publishing Ltd.,Visakhapatnam,2003

[73] See J Bell *"Three Models of Judicial function'* Pp 61, in Rajeev Dhavan, R Sudarshan and Salman Khurshid Ed. *'Judges and the judicial power- essays in honor of Justice Krishna Iyer'* Sweet and Maxwell publication 1985.

[74] See generally Cardozo, *The Nature of the Judicial Process*, p.83, (Yale University Press, New Haven, 33rd Printing 1974.

words "life" and "personal liberty" or "procedure established by law" in Article 21 of the Constitution liberally to bring in various aspects of human rights.."[75]

Based on the aforesaid observation, he suggested to the National commission of Constitutional Review that those rights which the Supreme Court has already recognized do not need to be added to the Constitution because according to him,

"Recognition of the rights through cases is empirical and allows the Constitution to evolve."

He therefore interalia made suggestions for the enlargement of the fundamental rights on the following lines- (A) whether the existing provisions need to be supplemented with greater emphasis and clarity in order to make those rights which the Court has already recognised more vocal and audible; (B) what new rights need to be added to part III of the Constitution and whether the provisions which are manifestly inconsistent with the concept of rule of law such as preventive detention or the IX Schedule need to be deleted?;I respectfully differ from his view that Supreme Court of India has been empirical while evolving unenumerated rights, this view might have been correct during his days but at present, the approach of judiciary is topsi turvy and full of inconsistency[76]; I would rather go along with the views of Prof. Baxi and Prof. Richard Posner.

Prof. Ronald Dworkin-

Prof Dworkin is categorical in his position that notion of unenumerated rights is bogus he observes,

"So the distinction between enumerated and unenumerated rights is widely understood to pose an important constitutional issue: the question whether and

[75] The reflections of Prof. Sathe are echoed by the consultation Paper *'Enlarging the Fundamental Rights'* in National Commission to review the working of the Constitution Vol II Book I.

[76] I would like to place on record the fact that there are very few scholars at present in India who can match the courage, candor and craftsmanship of Dr. Sathe in respecting and safeguarding the rights of his critics to disagree with his views. I personally experienced the same during Seminars and conferences.

when courts have authority to enforce rights not actually enumerated in the Constitution as genuine constitutional rights. I find the question unintelligible, however, as I said at the outset, because the presumed distinction makes no sense. The distinction between what is on some list and what is not is of course genuine and often very important. An ordinance might declare, for example, that it is forbidden to take guns, knives, or explosives in hand luggage on an airplane. Suppose airport officials interpreted that ordinance to exclude canisters of tear gas as well, on the ground that the general structure of the ordinance, and the obvious intention behind it, prohibits all weapons that might be taken aboard and used in hijacks or terrorism. We would be right to say that gas was not on the list of what was banned, and that it is a legitimate question, whether officials are entitled to add "unenumerated" weapons to the list. But the distinction between officials excluding pistols, switch-blades and hand-grenades on the one hand, and tear gas on the other, depends upon a semantic assumption: that tear gas falls within what philosophers call the reference of neither "guns" nor "knives" nor "explosives. No comparable assumption can explain the supposed distinction between enumerated and unenumerated constitutional rights."

He further adds,

"The Bill of Rights, as I said, consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right. The key issue in applying these abstract principles to

particular political controversies is not one of reference but of interpretation, which is very different[77]."

Richard Posner

Richard Posner has identified two methods of reasoning- 'reasoning from the top down' and reasoning from the bottom up'. In the former the judge and legal analyst formulates or adopts a theory about an area of law or probably about all laws and employs it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and produce an outcome consistent with the same. Such a theory is neither drawn from existing law nor be articulated through lawyers jargons.

On the other hand, the later brings into play such familiar lawyers' techniques as "plain meaning" and "reasoning by analogy," one begins with the words of a statute or other enactment, or with a case or a mass of cases, and proceeds from there - but doesn't move very far from the same. The learned author states that these theories never meet. Along with exhibiting the limitations of bottom-up theory, he has also emphasized on its established place in legal tradition.

He has demonstrated the relation of unenumerated Constitutional rights with the above theories. The notion of Unenumerated rights would appear quite different if one inspects it from bottom up than the top down. If we adopt *top-down* approach to the Constitution like Prof. Dworkin, Ely etc, the theory may use the text as one of its jumping-off points (one of, not the), but it goes beyond and eventually submerges textual distinctions because specific constitutional rights such as the right to burn flags or to use contraceptives come out of the theory rather than (directly) out of the text.

On the other hand, the situation is different if we follow a bottom-up approach. For then interpretation commences by paging through the Constitution. such an approach would not reveal anything that seems related to contraception, sex, reproduction, flag or the family in Constitution of USA, however, we would find a reference to freedom of speech, and than probably one can move with ease analogically from 'literal speech to flag burning'.

[77] See Ronald Dworkin *'Unenumerated rights: whether and how Roe should be overruled.'* Id at PP 388, 59 U. Chi. L. Rev. 381

This method of reasoning may be objected as spurious. Although, it shows that there is a sense of "speech" embracing flag burning, yet it doesn't supply a reason for adopting that sense rather than a narrower one. For that, one must range wider and consider the differences, not just the similarities, between burning a flag and engaging in the other forms of communication that the courts have held to be constitutionally protected. One must, in fact, develop or adopt a theory of free speech and then apply it to the case at hand.

However, the problem does not end here too because even if it is conceded that Bottom up reasoning is no reasoning at all and at the most it only be preparatory to the reasoning; and that worthy legal reasoning does involve creation of theories to guide decisions, yet the vital question as to determination of exact scope of such theory haunts us. In fact, the same has the bearing on the important question as to what level of generality of the Framers' intentions should guide judges in interpreting the Constitution?[78] He has preferred an approach, which transcend both top-down and bottom –up theories. For him, former lacks coherence because of its high level of abstraction and relativity, whereas, the later is no reasoning at all. Thus, according to him, ninth amendment though may at first blush said to have foundation for unenumerated right, upon closure analysis, it would become evident that both jurists and judges have played down its significance because it simply like a blank chaque. He advocates the approach followed by Holmes J. by insisting judges to stretch provisions of the Constitution including contentious candidates like due process clause, when there is a compelling practical case for intervention. He stresses that in hard cases, it is possible to locate , "judicial action in instinct rather than in analysis." This approach may seem analytically weak, subjective, foundationless etc but it works as a better alternative because it is pragmatic.[79] Posner observes,

"In an area such as freedom of speech, where we have a text and a history and a long case experience, the materials are at hand for the creation of a theory, albeit clause-bound, that will guide future decisions; and so, perhaps, with such questions as whether and what types of sex discrimination fall under the ban of the Equal

[78] See Posner Richard Supra Note 2, PP 434 et seq

[79] See Page 448.

> *Protection Clause. In areas to which the constitutional text and history and a long decisional tradition cannot fairly be made to speak, such as that of sexual rights, we must either renounce a judicial role or suffer the judges to fall back on their personal values enlightened so far as they may be by a careful study of the pertinent social phenomena. Neither top-down nor bottom-up legal reasoning can finesse this painful choice."*[80]

In my opinion, approach evolved by Prof Posner is to be preferred over the grand theorizing and textualism, because at one hand, it provides room for a creative judicial role and on the other hand, it does not also completely break the link from the intent of the framers.

II) Judicial meanderings on unenumerated Rights-

On this background, it would be interesting to examine some of the landmark judgments of Supreme Court and High courts to see whether they have adhered to the aforementioned views or they have evolved some innovative approaches. The discussion would focus on following aspects,- a) Whether the Supreme Court has evolved any techniques for selection of appropriate level of generality of rights, so as to incorporate new rights into the named fundamental rights? b) Whether such techniques are effective? c) Whether judicially incorporated rights are confined to only those rights, which can be said to be integrally relatable to the named fundamental rights?

i) Pre Maneka Discourse vis-a-vis selection of Appropriate level of Generality of rights

Although, Kharaksingh[81] is said to be the first case, in which an attempt was made to apply the Principle of Unenumerated rights, at least in two earlier judgments the apex court engaged with unenumerated rights discourse. In other words, the court began to engage in the process of evolving standards, principles and doctrines for the selection of 'appropriate level of generality of fundamental rights', so as not only to keep them in space with the changing times but also to ensure that their articulation by way of interpretation do not go radically beyond the text of the Constitution.

---

80 Id at P 451.
81 *Kharak Singh v. State of U. P.* (AIR 1963 SC 1295).)

Gopalan Discourse –

A.K. Gopalan V State of Kerala[82], was the first case, which articulated the conception of "right to life and Personal liberty'. Although this judgment has been held to be an authority for the proposition that Articles 19 and 21 are mutually exclusive, I would proceed with the assumption that such a view is erroneous. If *Gopalan* is confined to its peculiar facts, then it is possible to argue that observations of judges on interaction of these Articles are squarely confined to the context of preventive detention and therefore the same should not be over-generalized. On the other hand, there are some remarkable observations in the opinions of some judges on the positive and negative dimensions of Right to life and personal liberty and the same may be characterized as a solid foundation for evolution of Doctrine of Unenumerated rights in India.

Kania CJ took the view that Personal Liberty guaranteed by Article 21 is anterior to an independent of Freedoms guaranteed by Article 19. He observed,

> *"If Art. 19 is considered to be the only Article safeguarding personal liberty several well-recognized rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think, that is the intention. It seems to me improper to read Art. 19 as dealing with the same subject as Art. 21"*[83]

Thus, emphasizing on the substantive contents of Personal Liberty, and by locating the residue of the same in Article 21, the learned CJ unraveled the rolled up expression therein, inferred number of dimensions of Personal Liberty, and resorted to interpretativism as suggested by Ronald Dworkin. According to Das J.,

> *"I cannot accept that our Constitution intended to give no protection to the bundle of rights which, together with the rights mentioned in sub-clauses (a) to (e) and*

---

82 *AIR 1950 SC 27*
83 See Para 12.

> *(g) make up personal liberty. Indeed, I regard it as merit of our Constitution that it does not attempt to enumerate exhaustively all the personal rights but use the compendious expression "personal liberty" in Art. 21, and protects all of them."*[84]

However, the approach of Mahajan J. is most exemplary because he actually evolved an unenumerated right in clause (5) of Article 22, by implication. In order to save it from being unconstitutional, he took the view that clause 5 of Article 22 categorically and independently guarantees right to obtain information about the grounds, on which the person is to be detained and to make a representation protesting against an order of preventive detention and since there is absence of explicit mention of any machinery for vindicating these rights, it is possible to assume its existence by way of an implication because...

> *"When a constitutional right has been conferred, as a necessary consequence, a constitutional remedy for obtaining redress in case of infringement of the right must be presumed to have been contemplated and it could not have been intended that the right was merely illusory ..."*[85]

A close analysis of the above views reveals a divergence in the approaches of all the three judges. In sharp contrast with Kania CJ, the observations of Das J. are far more broader and productive in respect of the substantive contents and instrumental functions of the idea of personal liberty as enshrined in Article 21 and have paved the way for evolution of theory of 'Unenumerated fundamental rights' as an integral part of Constitutional jurisprudence of India. [To highlight this point I would like to attract the

---

[84] See Para 218. He cited with approval the observations of Harries C. J. of Calcutta in his unreported judgment in (*Kshitindra v. The Chief Secretary of West Bengal*) Mic. case No. 166 of 1950 (Full Bench Ref. No. I of 1950) :
"It must be remembered that a free man has far more and wider rights than those stated in Art. 19 (1) of the Constitution. For example, a free man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things, which are not included in Art. 19. If freedom of person was the result of Art. 19, then a free man would only have the seven rights mentioned in that Article. But obviously the free man in India has far greater rights." For detail reasoning, see Para 217-225.

[85] Id at Para 136.

attention of the readers towards italicized words in the above observations of Das J.]

It is equally plausible to argue that deployment of the phrases like 'Bundle of rights' by Das J have posed before the subsequent Courts, the fundamental question of Constitutional importance, "*at what level of generality should the Court describe the right previously protected and the right currently claimed?*[86] In other words, it is far from easier to select level of generality while interpreting the open textured fundamental rights in a value neutral manner.[87] On the other hand, approach adopted by Mahajan J. seems to be pragmatic in the sense that, resort to technique of deduction of rights by implication is neither fully abstract nor totally radical. In fact, technique adopted by him is highly context specific.

The problem of selection of appropriate level of generality of rights was yet again squarely confronted by the Supreme Court very soon, in one of its landmark decisions in *All India Bank Employees Association (AIBEA) v. National Industrial Tribunal*.[88] In this case, the petitioner called upon the court to recognize, protect and institute unenumerated rights "to effective collective bargaining or to strike". While grappling with the interpretation of Article 19 (1) (c) , he framed following fundamental question, "When sub-clause (c) of clause (1) of Article 19 guarantees the right to form associations, is a guarantee also implied that the fulfillment of every object of an association so formed is also a protected right, with the result that there is a constitutional guarantee that every association shall effectively achieve the purpose for which it was formed without interference by law except on grounds relevant to the preservation of public order or morality set out in clause (4) of Article 19 ?[89] Obviously, the answer to the above question required the selection of appropriate level of generality of right to form association guaranteed under Article 19 (1) (c) to engage with the claims of petitioners. Ayyangar, J. proceeded to deal with this issue by emphasizing

---

[86] See Lawrence Tribe *'Levels of Generality in the Definition of Rights'*. 57 U. Chi. L. Rev. 1057. He rightly points out, the more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection. Id at pp 1059.

[87] See generally Bruce Ackerman *'Levels of Generality in Constitutional interpretation- Liberating abstraction'* 57 U. Chi. L. Rev 317, Frank Easterbrook *'Abstraction and Authority'* 57 U. Chi. L. Rev 349

[88] MANU/SC/0240/1961, AIR 1962 SC 171

[89] See Para 20.

more on the text and schema of Part III rather than on issue of the level of generality. He observed,

> *"..Article 19 - as contrasted with certain other Articles like Arts. 26,29 and 30 - grants rights to the citizen as such, and associations can lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregation of citizens, i. e. in right of the citizens composing the body....., associations of citizens cannot lay claim to rights not open to citizens, or claim freedom from restrictions to which the citizens composing it are subject."*[90]

In the same vein the learned judge also brushed aside the theory of *'Concomitant rights'* by pointing out,

> *"It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to under lie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result"*[91]

Clearly, there is a resemblance between the approaches of Ayyangar J and Mahajan J. because the former while countenancing the liberal interpretation of fundamental rights was equally forthright about attaching due significance to the context of each fundamental right.

Kharaksingh and Gobind Discourse on Right to Privacy-

Ayyangar J was yet again faced with the challenge of expounding the width of expression 'personal liberty' vis-à-vis right to privacy' which is not obviously enumerated right in Part III of Indian Constitution and this time he

---

[90] Ibid
[91] See Para 22

found it difficult to capture the controversy in textual matrix of Part III. He had two alternatives- 1. To select appropriate level of generality of 'Right to Life and Personal Liberty' so as to absorb in it "sanctity of a man's home, personal security and his right to sleep" or 2. To evolve a broad constitutional proposition that right to Privacy is an unenumerated fundamental right alongside named rights in Part III. The learned judge decided to opt the former. He observed,

> *"Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the 'part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal?"*

He answered this question in negative, by referring to the words of Preamble and underlying objectives like Human dignity.[92] He also invoked the famous common law maxim, "'every man's house is his castle" to strengthen the above observation. He clarified the same by holding,

> *"We are referring, to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notion or doctrinaire constitutional theories"*[93]

Accordingly, while upholding the Constitutionality of all the clauses of the Regulation 236 U. P. police Regulations but sub clause (b) and declared the latter to be violative of right to life and personal Liberty of the petitioner. He reasoned that the right of privacy not being guaranteed right under our Constitution , the attempt to ascertain the movements of an individual which

---

[92] See Para 17 *Kharak Singh*
[93] Ibid

is merely a manner in which privacy is invaded is not an infringement of fundamental right guaranteed by part III.[94]

Although Subba Rao J wrote a dissenting opinion for himself and Shah J in this case, his reasoning did not give any indication of recognition of elevation right to privacy as a fundamental right. Rather under the influence of American Constitutional law and Liberal theory of Human Rights he selected a more abstract level of generality of Right to life and personal liberty than that of his Majority Brethren and reached an opposite conclusion. He observed,

> *"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, bu,t the said right is an essential ingredient of personal liberty Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security ... The pregnant words of that famous Judge, Frankfurter J., in (1948) 338 US 25 pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one.... We would, therefore, define the right of personal liberty in. Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions to encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution"*[95]

In my submission, both Majority and Minority did not characterize right to Privacy as an unenumerated fundamental right because it was realized by them that it would be beyond the institutional competence of the judiciary to capture the *multidimensional and polymorphous structure* of this rather illusive right in a single judgment. The same point was further

94 See Para 20 *Kharaksingh*
95 Id at Para 31

developed by Mathew J. in his own characteristic way in *Gobind v State of MP*[96] while examining the Constitutional validity of M.P. Police regulations. On the issue of Unenumerated rights in general and right to Privacy in particular, the learned judge was skeptical, according to him ,

> *" ...The question whether right to Privacy is itself a fundamental right flowing from the other fundamental rights guaranteed to a citizen under Part III is not easy of solution"*[97].

As a matter of fact, he was not in favor of "the hazy shadowy analogy preferring,"[98] rather he advocated an empirical approach for elevating this important right as a fundamental right. He observed,

> *"The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute... As regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it: .."*[99]

The approach of Mathew J is very appropriately articulated by Professor Charles Black as

> *"we build "a corpus juris of human rights" by the method of the common law. And when choosing constitutional tools with which to build, we must resist*

96 MANU/SC/0119/1975, AIR1975SC1378
97 See Para 16 of *Gobind*
98 See Abhinav Chandrachud *'The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution'*(2006) 3 SCC (Jour) 31. In my submission, although, Mathew J cited the observations of Douglas J in *Griswold v. Connecticut* 381 U.S. 479, he was quick to point out, ".Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest See Para 31 Gobind
99 See Para 28 and 31.*Gobind*

the invitations of both conservatives and liberals to shy away from the Due Process Clauses."[100]

However, in my opinion, Supreme Court in its subsequent judgments instead of appreciating the same has rather anachronistically perpetuated the myth that right to privacy was characterized as unenumerated fundamental right in Kharaksingh and Gobind.[101]

Maneka Gandhi Discourse-

Although, the observations of Ayyangar J in *All India Bank Employees Association (AIBEA) v. National Industrial Tribunal* case were cited with approval by Bhagwati J in Maneka Gandhi,[102] while grappling with the issue of selection of *level of generality* for the interpretation of Article 19(1)(a), the learned judge evolved what may be characterized as '*Integrality doctrine*', for inferring new unenumerated fundamental rights from named fundamental rights. The issue which confronted the court was whether freedom of Speech and expression of a journalist would guarantee him/her by implication the right to go abroad under Article 19 (1)(a)? He observed,

> "*...It would thus be seen that even if a right is not specifically named in Art. 19 (1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective.*
>
> *Every activity, which facilitates the exercise of a named fundamental right, is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Art. 19 (1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the right to go abroad cannot in all circumstances be regarded as in freedom of speech and expression.*"[103]

[100] Cited from Lawrence Tribe Supra note 86, PP 1108
[101] See Supra FN 17
[102] *Maneka Gandhi v. Union of India* AIR 1978 SC 597

However, he located right to go abroad in Article 21 by placing reliance on Satwant Singh's case,[104] he observed that the right to go abroad, and in particular to a specified country, is clearly a right to personal liberty exercisable outside India and thereby its enjoyment does transcend the geographical boundaries of India . He opined that the State couldn't deprive a person of his choice to visit a particular country without following the procedure established by law enshrined in Article 21 in Constitution. [105] He then examined the issue whether section 10(3) (c) of Passport Act is intra vires Art 21? [106]He read application of principles of Natural justice by implication[107] in section 10(3) (c) and confined their exclusion to only few extraordinary circumstances and held the same to be valid. So far as order under this section was concerned, he took the view that although central govt. has the discretion to impound the Passport, the reasons underlying impoundment order must have nexus with the purposes laid down therein and it would be open for the court to examine whether the reasons are influenced

[103] Id at Para 77 for detail reasoning see Para 78-81B. CF the reasoning of Verma CJ (Supreme Court) in *Vishaka v state of Rajasthan* 1997 SC holding that Freedom against Sexual harassment is a logical consequence of fundamental right to carry on freedom of profession as enshrined in Article 19 (1) (g).
[104] (AIR 1967 SC 1836)
[105] See Para 73 *Maneka Gandhi case.*
[106] See Para 82-85
[107] See Para 57-64.

by extraneous consideration to the Act. He opined that since the govt. ultimately disclosed the reasons, promised a hearing though post decisional to the petitioner, and limited the impoundment of the passport if required for the specified period, the unconstitutionality if any was cured.

The above analysis shows that at one hand, Bhagwati J. insulated right to go abroad from Article 19 (1) (a), but on the other hand, on the strength of a precedent, he located the same in Article 21 and also purported to select the level of generality for the interpretation of right to personal liberty. It is interesting to note that, in sharp contrast with Mahajan j, Bhagwati J merely resorted to judicial fiat to select a highly abstract level of generality of right to life and read right to go abroad as part of right to personal liberty of course his reasoning resembled with Mahajan J in respect of interpretation of section 10(3) (c).

However, in my submission, the test laid down by the learned judge may not even work to cover every aspect pertaining to the rights guaranteed by Article 19 leave alone open ended rights viz. right to life and personal liberty. Thus, rights to paint or to sing which are integrally and directly relatable to Freedom of expression and Courts may not have difficulties in countenancing them as unenumerated Fundamental rights guaranteed by Art. 19 (1) (a), but, what about right to go abroad? Does it constitute integral part of Article 19 (1) (a)? Upon an earnest reflection, we would realize that proximity of freedom of speech and expression with right to go abroad is conditional, indirect and was not in tune with the then contemporary level of generality of the named right. On the other hand, proximity of freedom of Speech and Expression with freedom of Press was far greater, direct, unconditional and in tune with contemporary Constitutional discourse, and the same is evident in the reasoning of Bhagwati J. However, in my opinion, this test may break down even in cases of rights integral to the named fundamental rights, when such rights are approximate to open textured concepts like right to life and personal liberty in contradistinction with specific freedoms laid down in Article 19. Thus, right to one's sexuality must certainly be integral to right to life and personal liberty and freedom of expression and yet when it comes to legal recognition of freedom of Homosexuality, most of judges would have a Jaundice eye look while dealing with the issue. Similarly, Rights like right to burn flag, right to hunger strike, right to euthanasia, right to form family as single mother etc may involve the

same fate. I therefore, argue that the so-called test propounded by Bhagwati J is merely an *heuristic device* to limit the reach of judicial process. It lacks rigor because it does not sustained itself on either bottom up theory or sound judicial role as advocated by Prof Posner. The learned judge has also not been able to shed sufficient light as to why and when a particular interest deserves to be elevated as fundamental right? Equally, a lot of blame is also to be shared by legal analysts and jurists in India because we have not been able to produce legal acumen at par with American jurists like Dworkin , John Hart, Posner, Jeremy Waldron etc. In fact, judicial craftsmanship only thrive in the company of an alive academia.

In sharp contrast with this approach, Chandrachud J decided to follow the reasoning of Ayyangar J, he observed,

> *"It is possible to predicate of many a right that its exercise would be more meaningful if the right is extended to comprehend an extraneous facility. But such extensions do not form part of the right conferred by the Constitution. The analogy of the freedom of press being included in the right of free speech and expression is wholly misplaced because the right of free expression incontrovertibly includes the right of freedom of the press. The right to go abroad on one hand and the right of free speech and expression on the other are made up of basically different constituents, so different indeed that one cannot be comprehended in the other."*[108]

Again, Chandrachud J. appears to have resorted to merely intuitive logic when he found right to go abroad and freedom of speech poles apart and of different properties. Going by the approach of Dworkin, the distinction

---

[108] See Para 46. He cautioned against the overuse of American Constitutional jurisprudence emphasizing the differences between Indian and US Constitutional law. Interestingly *Krishna Iyer J* did not find it appropriate to lay down any test but in order to select the appropriate *level of generality* of right to life and personal liberty, he deployed History of India, the cultural ethos, Constituent assembly debate, International Human rights jurisprudence, and comparative constitutional law. Probably, he was not keen to have his indulgence on distinction between enumerated and Unenumerated fundamental right. CF the approach of *Beg J* who resorted to analogical deduction by pointing out, " the right to travel and to go outside the country, which orders regulating issue, suspension or impounding, and cancellation of passports directly affect, must be included in rights to "personal liberty" on the strength of decisions of this Court giving a very wide ambit to the right to personal liberty" See Para 3. Maneka Gandhi

suggested by learned judge breaks down. After all underlying right to freedom of expression is a meta-principle and whether or not such a meta-principle approximate with a particular unenumerated right is a matter of interpretation.

To conclude the discussion on Maneka, there appears to be an asymmetry in the approach of Bhagwati J, who while at one hand, provided activist magnitude to the open textured language of Articles 19 and 21 to the extent of incorporating the American Constitutional jurisprudence on Due process of law, at the same time, he also tried to go along with Ayyangar J by purporting to reject the Peripheral theory of rights.

Post Maneka Discourse

The post Maneka discourse on unenumerated fundamental rights is almost a fairy tale and I find it breathtaking to read in judgments after judgments incarnations of named fundamental rights and particularly that of right to Life and Personal Liberty viz.

- Right to Privacy[109]
- Right against Solitary confinement[110]
- Right against use of bar fetters [111]
- Right to speedy trial[112]
- Right to free legal aid[113]
- Right against handcuffing[114]

---

[109] *Amar Singh v union of India* MANU/SC/0596/2011. "Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution.." Id at Para 38. See also *Malak Singh v State of Punjab* (1981) 1 SCC 420, *People's Union for Civil Liberties v Union of India* (1997) 1 SCC 301, *District Registrar and Collector v. Canara Bank*(2005) 1 SCC 496, *Sharda v. Dharmpal*(2003) 4 SCC 493, *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632, *Mr 'X' v. Hospital 'Z*(1998) 8 SCC 296, Mr 'X' v. Hospital 'Z'(2003) 1 SCC 500, See generally Jeffery Sham in *"Equality and Liberty in golden Age'* 2008 chapter " The right to Privacy'

[110] *Sunil Batra v Delhi Administration* AIR 1978SC 1675 See Para 53,54,200-202, 225

[111] *Charles Sobraj v Central jail,* AIR 1978 SC 1514 See Para 9,12, 16

[112] *P. Ramachandra Rao v. State of Karnataka*,(AIR 2002 SC 1856) See Para 30(2), 35,41 *Hussainara Khatoon (III) v State of Bihar* AIR 1979 SC 1360

[113] *M.H. Hoskot v State of Maharashtra* AIR1978 SC 1548 See Para 15-25

[114] *Prem Shankar Shukla Delhi Administration* AIR 1980 SC 1535 See Para 22, 30.

- A limited right against delayed execution[115]
- Right against custodial violence[116]
- Right to better working conditions[117]
- Right to livelihood[118]
- Right against public hanging[119]
- Right to clean environment[120]
- Right to the assistance of Doctors in Medical emergency[121]
- Right to food (including right against Malnutrition)[122]
- Right to clothing and shelter[123]
- Right to education[124]
- Right against arbitrary arrest[125]
- Right against sexual harassment at workplace[126]
- Right to better police administration[127]
- Right to human dignity[128]
- Right to inter-caste marriage.[129]
- Right against govt. lawlessness[130]
- Right to maternity leave for non-roaster female workers.[131]

---

[115] *T.V. Vatheeswaran v State of T N* AIR (1983) 2 SCC 68 See Para 21

[116] *Sheela Barse v State of Maharashtra* AIR 1983 SC 378 See Para 4 and 5

[117] *Bandhua Mukti Morcha v Union of India* AIR 1984 Sc 802 See Para 28,71,84

[118] *Olega Telis v Bombay Muncipal corporation* AIR 1986 SC 180 see 32-37

[119] *Attorney General of India v Lachma Devi* AIR 1986 SC 467 See Para 1

[120] *M.C. Mehta v Union of India* AIR 1986 SC 965 see Para 1

[121] *Paramananda Katara v Union of India* AIR (1995)3 SCC 248 See Para 8

[122] *People's Union for Civil liberties v union of India* (2007) 1SCC 719 and *Ekta Shakti foundation v govt. Of NCT Delhi* (2006) 10 SCC 337, see also Bombay HC Suo motu Writ Petition no. 5629 of 2004. See also generally Yamini Jaishankar and Jean Drèze *'Supreme Court orders on Right to Food-A tool for action'* 2005 available at **www.righttofoodindia.org**

[123] *Chameli Singh State of UP* AIR 1996 SC 1051See Para 8

[124] *Unni Krishnan v State of AP* MANU/ SC/0558/1993, See Para 30-31,150, AIR 1993 SC 2178

[125] *D.K.Basu v State of WB* AIR (1997) SC 610

[126] *Vishaka v State of Rajasthan* AIR 1997 SC 3011, MANU/SC/0786/1997 See Para 16 (

[127] *Prakash Singh v Union of India* (2006) 8 SCC 1. See Abhinav Chandrachud *'Due Process of Law'* Id at PP 207-208 EBC Publication 2011

[128] *Vikram Deo Singh Tomar vs. State of Bihar* AIR 1988 SC1782, See Para 2

[129] *Lata Singh v State of UP* AIR 2006 SC 2522 See Para 17

[130] *Veent Narayan v Union of India* AIR 1998 SC 889. See Para 15-16

- Right to non-discrimination on the ground of disability[132]
- Right to passive euthanasia[133]
- Right of close down the business[134]
- Right against rape[135]
- Right to remain silence[136]
- Right to receive information[137]
- Right of Woman to make reproductive choices, privacy, dignity and bodily integrity[138]
- Right against arbitrariness[139]
- Right to locus standi[140]
- Right to Sleep[141]

The list is merely illustrative. Space constrain prevent me from analyzing the panoply of undernoted cases. I would therefore high light some illustrations to evaluate if there is any new trends in judicial approaches while recognizing and protecting unenumerated fundamental rights.

Doctrine of Constitutional Silence-

Recently Supreme Court approved this doctrine in *Bhanumati v State of UP*[142] through Asok Kumar Ganguly J for himself and Singhvi J, while

[131] *Municipal Corporation of Delhi v. Female Workers,* AIR 2000 SC 1274 See Para 24
[132] *National Federation of Blind v Union Public service commission* AIR 1993 SC 1916, MANU/SC/0299/1993. See Para 11-12
[133] *See Aruna Shanbaug v Union of India,* AIR2011SC1290.
[134] *Excel Wear v union of India* AIR 1979 SC 25 See Para 21
[135] *Delhi Domestic working women's forum v Union of India* (1995) SCC 14 See Para 14-15
[136] *Bijoi Emmanaual v state of Kerala* AIR 1987 SC 748 , MANU/SC/0061/1986 See Para 16
[137] *Union of India v Association for democratic Reforms* AIR 2002 SUPREME COURT 2112, See Para 56(5)
[138] *Suchita Srivastav v Chandigarh Administration* MANU/SC/1580/2009 See Para 11 and 31
[139] *E. P.Royappa v State of TN* AIR 1974 SC 555 See Para 87-89
[140] *S.P.Gupta v Union of India* AIR 1982 SC 149.MANU/SC/0088/1981 See Para 84,399,408
[141] *In re ramlila Maidan incident v Home secretary of India and others* SC 2012 available at www.supremecourtofindia.nic.in see Para 19-29 of Chauhan J. see also directions and findings of Swatantrakumar J , where he observed, "..The decision to forcibly evict the innocent public sleeping at the Ramlila grounds in the midnight of 4th/5th June, 2011, whether taken by the police independently or in consultation with the Ministry of Home Affairs is amiss and suffers from the element of arbitrariness and abuse of power to some extent.... It was an invasion of the liberties and exercise of fundamental freedoms."
[142] MANU/SC/ 0515/2010 , [2010(7)SCALE398]

recognizing and protecting 'right to have no-confidence motion'. The learned judge observed,

> *"In a constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content and substance of their structures."*

(Page 10) The learned author elaborated this concept further by saying

> "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and intermediate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components"[143].

Applying this doctrine to the facts of the case the court evolved a new right by observing,

> *"Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by 73rd Constitutional amendment by making detailed provision for democratic decentralization and self Government on the principle of grass root democracy cannot be interpreted to exclude the provision of no-confidence motion in the respect of the office of the Chairperson of the Panchayat, just because of its silence on that aspect."*[144]

[143] See Para 67. For these observations court cited with approval Michael Folley in his treaties on '*The Silence of Constitutions*' (Routledge, London and New York)
[144] Id at Para 68-69

It is submitted that silence in the Constitution is either 'context generated' or 'context bound' and it would always accompany the text. Thus, silence in a given context of the text of the Provision of Constitution may be used to infer a right, to negate a right or even to pose it or indicate a right. The same happened in the instant case.

However, in my opinion, it is hazardous to invoke this doctrine out of context. Thus, if one conceives a new right and then on the basis of its absence in the text of the Constitution, i.e. particularly in Part III, implies Constitutional silence and incorporates this newly created right as one of the unenumerated rights, can the same be analytically justified? There may be two answers to this question; firstly, if one goes by the assumption that unenumerated rights must have at least some proximity with numerated/ named rights, then it would not amount to evolution of unenumerated right. Rather, it would tantamount to creation of entirely new right. Secondly, if one takes the position that unenumerated rights are evolved by the Courts to sustain dynamism of Bill of rights and to keep it in pace with changing time, then one may perhaps justify even creation of brand new unenumerated rights, totally incongruence with the Constitutional ethos. I would prefer the first approach in the light of Constitutional axiom of 'separation of powers'.

However, Katju J chose to follow the second course by creating unenumerated right to 'Passive Euthanasia'[145]. It is interesting to note that, he decided to evolve this right, despite a categorical finding on his part that, the court

> *"could have dismissed this petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and it has been held by the Constitution Bench decision of this Court in Gian Kaur vs. State of Punjab,[146] that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. Hence, the petitioner has not shown violation of*

[145] See Aruna Shanbaug supra note 133. See generally John Finnis Chapters *'Euthanasia and justice' and ' Euthanasia and Law'* in *'Human Rights and common good'* 2011.; Chapter *Organic Unity, Brain life and our beginning'* and Chapter *'Brian death and Peter singer"* in *'Intention and Identity"*; See Elizabeth Wicks *"Right to life and conflicting Interests'* 2010

[146] **1996(2) SCC 648 (vide paragraphs 22 and 23)**

> *any of her fundamental rights. However, in view of the importance of the issues involved we decided to go deeper into the merits of the case."*[147]

In my submission, the approach adopted by the judge is asymmetrical and he is not even able to justify the so called right under the rubric of public interest. He is also not able to furnish any cohesive reasoning to countenance locus standi of the petitioners. Moreover, there is not even semblance of hint in the Constituent assembly debate about right to Passive euthanasia. Public opinion in India is deeply divided on the issue, nonetheless, instead of taking judicial cognizance of the aforesaid, Katju J inferred this right from the so called Constitutional Silence and therefore apart from recognizing and protecting this right by way of articulation, he also created machinery for the enforcement of this right by using writ jurisdiction under Article 32 by invoking doctrine of *Parens patria*[148] and by conferring extra ordinary powers on High Courts.[149] Since, he did not have any Indian precedents to analogize this right in Constitutionalism of India, he took the extra ordinary step of resorting to the 'comparative Constitutional law method' and by placing reliance on 'Constitutional Common law of Western countries' rather tentatively justified his findings.[150] In my submission, the strategy adopted by Katju J is fraught with immense and insurmountable difficulties. Analytically, the whole procedure is unsound, because it is anachronistic to imply the Constitutional Silence and create a right to passive euthanasia by disregarding the legal proposition propounded by a larger Bench. As a matter of fact, quite contrary to the approach of Katju J, it is easier to infer negation of such a right in the Constitution, if one takes the judicial precedent in particular and overall Constitutional discourse in general in its earnestness. Sociologically also, reasoning of Katju J is fatally flawed because he indulged in Dynamic law making[151] without any support from judiciary as

[147] Id at Para 4 , *Aruna Shanbaug*

[148] See Para 128-132, *Aruna Shanbaug*

[149] See Para 138-142, *Aruna Shanbaug*

[150] See Para 49-96, *Aruna Shanbaug.* See *Union of India v. Raghubirsing,* AIR 1989 SC 1933; for critical analysis see Michael Gerhardt *'the power of Precedent'* Oxford university press 2008.

[151] Lord Devlin observes, "In dynamic law making the idea is created outside the consensus and before it is formulated, it has propagated…it means taking sides and if a judge takes sides on such issues as Homosexuality and capital punishment, he loses the appearance of impartiality and quite possibly impartiality itself." See Lord Devlin, *"Judges and Lawmakers"* (1976) 39 MLR 1.Cited in Bell John *"Three Models of Judicial Function'* Ed. Rajeev Dhavan, Sudarshan and Salman Khurshid, *"Judges*

well as from the other branches of the government including public opinion. Such a general use of this theory would not only turn the whole schema of Part III up side down but would also pose a serious challenge to the legitimacy of judiciary.[152]

Invocation of Human rights Jurisprudence –

It is important to highlight enactment of Protection of Human rights Act in general and Definition of Human rights-["human rights" means the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.][153] and international covenants ["International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify[154]] in particular, because the same is implicitly at play to evolve Unenumerated Fundamental rights in the exegesis of Constitution by Supreme Court in numerous cases; the most glaring example of that being *Vishaka V State of Rajasthan.* Both these definitions repay a careful analysis. In my contention, Parliament of India by defining Human rights in such broad terms has also provided some guidance to the judiciary for the selection of appropriate level of generality of important rights like Life, Liberty, equality, and dignity. In this connection, the word relating as appearing in section 2 (d) requires special attention. This term clearly enables the courts in India to recognize, protect and enforce all human rights having a bearing on

and judicial power- Essays in honour of Justice V.R. Krishna Iyer' Sweet and Maxwell publication. 1985

152 Reasoning of Katju J. is reminiscent of the approach adopted by K. Suba rao CJ. in *Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, New Delhi* AIR 1967 SC 1836. Hidayatullah J. in his dissenting opinion (for himself and Bachwat J) very candidly exposed the pit falls in the reasoning of Suba Rao CJ. Hidayatullah J demonstrated how the conclusion of Suba Rao CJ, ""a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U. S. Constitution and the expression "personal liberty" in Art. 21 only, excludes the ingredients of "liberty" enshrined in Art. 19 of the Constitution..", virtually turned the interpretation of Kharak Singh up- side down. The learned judge rightly pointed out, "In our judgment, these remarks, with due respects, involve a misreading of *Kharak Singh's case,* 1964-1SCR 332 = (AIR 1963 SC 1295). They are rather the minority view expressed in the same case by the learned Chief Justice. They are not the views of the majority." Id at Para 59, see also Para 60. and 61

153 Section 2(d)

154 Sec 2 (f) (Amendment 2005.)

or integral to or partaking of features of rights to life, liberty, equality, and dignity of individuals, provided that a) such rights are guaranteed by the Constitution or b) embodied in International covenants as defined by clause (f) and c) capable of being enforced by the Courts in India.

The definition of Human rights as seen above categorically incorporates the theory of 'Penumbra of rights'. As a matter of fact, post the enactment of Protection of Human rights Act 1993, the distinction between Unenumerated and Enumerated rights has become blurred because courts by using this definition can virtually incorporate a variety of human rights, which are not explicitly enshrined in Part III of Indian Constitution, as unenumerated fundamental rights. Thus, in Visakha's case, Supreme Court by referring to Protection of Human rights Act, recognized, protected, and enforced[155] the freedom against Sexual harassment of human at workplace. However, apart from visakha, both Supreme Court and High Courts have not been able to fully capitalize on Protection of Human rights Act so as to evolve the principles for selection of level of generality of fundamental rights.

Uncertainty

Fair amount of uncertainty is likely to generate if an unenumerated right remains in flux for a long time, there is a likelihood of its being interpreted in an inconsistent manner. There may also be problem in spelling out its scope accurately by way of judicial interpretation, if one appreciates the limitations of judicial process.[156] The same is very vividly illustrated by diametrically opposite interpretations of Supreme Court in the context of right to die[157] and that of High Courts in respect of right to Homosexuality.[158] I therefore contend that after a lapse of specified period, say of 4-5 years, Parliament of India must step in either by way of a Constitutional amendment or by way of legislation or executive declaration to provide finality to a given

155 See Para 16 *Vishaka v state of Rajasthan* 1997

156 One can easily see the hazy state of some of the unenumerated fundamental rights like right to food, right to shelter, right o livelihood etc.

157 See *Aruna shanbaug* ,Supra note 133, and 145-151 and accompanying text. See also *Maruti Dubal v State of Maharashtra* 1987 Cri LJ 743, (Bom),*P Ratinam and others v union of India* AIR1994SC1844; (recognizing right to die as unenumerated fundamental right), *Gian kaur v State of Punjab* AIR1996SC1257 (overruling the P Ratinam)

158 See *Naz foundation* supra note 18.

unenumerated fundamental right[159]. The same would apart from nurturing a sustained dialogue between Judiciary and legislature, would also bring in much needed certainty in the domain of fundamental rights.

Section Three Towards a Road Map

In this section, I would make a modest attempt to suggest a road map to the judiciary for evolving/ discovering new unenumerated fundamental rights. For the same I would place reliance on an illuminating article written by Prof. Stephen Kantar[160]. Assume that all legal and administrative remedies are unavailing short of Writ jurisdiction of Supreme Court/High Courts under Articles 32/226 of Constitution of India and the aggrieved citizen/individual moves the Supreme Court under article 32 to vindicate his fundamental right. Imagine further that the claimed right is substantive in character, has not previously been recognized by the courts and is not explicitly enshrined in Part III of our Constitution. In such a situation, how the court ought to response?

According to Professor Kantar, the first step which the court should take is

> *"to adopt and evince the proper "judicial" cast of mind"*[161] *viz "careful attention to the facts and circumstances of the claim; a sensitive contextual "situation sense;" conscientious application of the best craft available; and humble institutional self awareness," and the aforesaid elements must be at play in the judicial process along side "an open-minded and responsive approach to the task of determining, whether the putative substantive fundamental claim of right is legitimate, and if it is, how it should be enforced"*[162].

The same would enable the court to carefully examine the *pros and cons* of an erroneous decision in each direction. The same would also facilitate the court to take a judicious decision as to how much deference it

[159] See generally Erhard Denninger, *'Government assistance in the exercise of basic rights (procedure and organization*) German Law journal 2011, vol. 12 No.1 P 430-450.
[160] See Supra note 43.
[161] Id at Page 707
[162] Ibid

must attach to the suspect governmental action. While dealing with such extraordinary circumstances, Court might also proceed with the presumption of liberty or pursuit of happiness thereby leading to a rebuttable presumption that the government's particular action adverse to the individual in the instant case is unconstitutional.[163]

Secondly, the court must then evaluate the explicitly enshrined Fundamental rights in Part III provisions of the Constitution to discern, whether the putative claimed right is protected by one of these specific rights, or by their implied or penumbral zone. Court may also examine/enquire, whether the claimed right (although previously unrecognized) is actually just a composite of rights or parts of rights already protected by several express core rights and their penumbras. Besides, some other valid sources which should merit earnest reflection on part of the Court are Cultural ethos of India, Constituent history of fundamental rights-direct and inferential, comparative Constitutionalism, Precedents, sound principles of Constitutional construction, International Human rights law standards, contemporary trends in Moral philosophy, the specific types of examples against which the framers crafted each textual rights protection, and the functions and purposes underlying each provision in part III and part IV.

Despite having accomplished the same, if court is unable to find its way, should it discard the claim? In my opinion, the answer must be in negative. Rather the court must take the next decisive step i.e. acknowledgement of important structural, textual and Constitutional theoretical triggers justifying the pursuit of deserving judicial protection of claimed right. Some of these structural triggers are, a) Open textured language of Articles 14,19 and 21, b) theory of Implied rights to offset the principle of implied powers, c) the consensus moral philosophical position on rights as reflected in the history of our freedom struggle, Constituent Assembly Debates and the Preamble to the Constitution, d) recognition and invocation of fundamental constitutional Axioms/Principles and their interaction with one-another and with the textual matrix of Part III in particular and Part IV and Preamble in general, e) Judicial indulgence for microscopic observance of dynamics of interaction of Parts III and IV and f) counter-majoritarianism.

[163] See *State of west Bengal v Anwar Ali Sarkar* AIR 1952 SC 75

It is also important for the court to borne in mind that with the efflux of time, almost every right and particularly abstract civil and political rights like 'right against non-discrimination' or right to equality or freedom of expression undergo a metamorphosis i.e. they go beyond an accepted or known level of generality. For the same, even the technical and socio-economic change is also responsible. If the court develop the knack of grasping the same, it would be easier for it to unravel the new level of generality of rights, thereby introducing the much-needed element of dynamism in the judicial process.

It is also important for the courts to invoke Meta principles and foundational values[164] expressly and impliedly reflected in our Constitution.[165] In other words, the Court must approach the aforementioned tasks with an sharp awareness of the requirement for a generous, careful, and nuanced consideration of the complexity of Constitutional interpretation, evident in the Jurisprudence of the courts for provisions articulating fundamental Rights, i.e. Part III of Constitution.

If I were to exemplify the glimpses of the aforesaid strategy, then I may seek the attention of the readers to only two landmark pronouncements of Supreme Court of India, owing to space constrains.

Illustrating the roadmap :

UnniKrishnan v State of A.P.

In this case, [166] the court proceeded on the assumption that right to education flows from or is part of right to life guaranteed by Article 21 of our constitution. The court observed,

> *"The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then that the second question arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right to education is not included within the right to life. The content of the right*

[164] See Para 20-21 of *M Nagraj*
[165] See 22-26 *M Nagraj*
[166] MANU/SC/0568/1993

> *is not determined by perception of threat. The content of right to life is not be to determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law"*[167]

Articulating the level of generality of this right, the Court opined,

> *"the question is what the content of this right is? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs? Mohini Jain seems to say, yes. With respect, we cannot agree with such a broad proposition. The right to education which Is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it."* [168]

Thus, Right to education, understood in the context of Articles 45 and 41, means : (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.

The court than expounded the nature of obligation on State flowing from this right,

[167] See Para 144
[168] See Para 145

> *"Is it not noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does ..Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavor to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years, -- convert the obligation created by the article into an enforceable right?"*[169]

Grappling with the above questions, the court observed,

> *"we must say that at least now the State should honour the command of Article 45. It must be made a reality -- at least now. Indeed, the 'National Education Policy -- 1986' says that the promise of Article 45 will be redeemed before the end of this century. ...., we hold that a child (citizen) has a fundamental right to free education up to the age of 14 years."*

The Court expressed its opinion about the allocation of resources for the implementation of this important right by observing,

> *"In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which inter alia speaks of right to education. What has actually happened is --more money is spent and more attention is directed to higher education than to -- and at the cost of -- primary*

[169] Ibid

> *education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age). Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the government -- we are only emphasizing the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question."*[170] *"All we are saying is that while allocating the available resources, due regard should be had to the wise words of Founding Fathers in Articles 45 and 46. Not that we are not aware of the importance and significance of higher education. What may perhaps be required is a proper balancing of the various sectors of education."*

The Court also shed light on public-private participation for the effective implementation of this important right by observing this obligation cannot be performed only through the State schools,

> *"It can also be done by permitting, recognizing and aiding voluntary non-governmental organizations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, they too have a role to play. They meet the demand of that segment of population who may not wish to have their children educated in State-run schools. They have necessarily to charge fees from the students"* [171]

Cautioning against the over generalization of this decision, the court opined

> *"We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in Article*

[170] Ibid
[171] See Para 146

21, it does not follow automatically that each and every' obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right."[172]

A cursory look on the this judgment is bound to attract criticism from those critics who want to observe watertight compartmentalization of Part III and IV and indeed, they have argued that relocation of obligations enshrined in Part IV to Part III would upset the Constitutional balance. However, a close look on the aforesaid reasoning would suggest otherwise. It is possible to argue that court evolved an unenumerated fundamental right to education as part of right to life and personal liberty guaranteed by Article 21 and it merely referred to some of the provisions of Part IV, to determine, a) to select appropriate level of generality of right to life and b) the nature of obligation of the State incurred by this right. The decision repays study because court very carefully charted all dimensions of this important rights including allocation of resources and participation of all the stakeholders. The court also deployed Constitutional triggers by resorting to a nuanced interpretation of Article 21 and by complementing the same with creative reading of Part IV. On the other hand, in *M Nagraj*[173] SC rejected the arguments of the petitioners that 'catch up rule' and rule of 'consequential seniority' being implicit in Article 16(1) and (4) are part of Fundamental rights guaranteed therein. Taking the view that only Constitutional principles may be equated with features of basic structure or part of fundamental rights the court observed,

"..the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot

172 See Para 150
173 See supra note 59.

be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the "catch-up" rule nor the concept of "consequential seniority" is implicit in clauses (1) and (4) of Article 16.."[174]

The court also made seminal observations to articulate the notion of Constitutional Principles and foundational values underlying Part III. Kapadia J. speaking on behalf of unanimous bench of five judges observed,

"Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value".[175]

Similarly, he also emphasized on the need to juxtapose the text of the Constitution with certain principles. He observed;

"The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. ....This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings..... it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These

174 Id at Para 79.
175 Id at Para 20,

principles are part of Constitutional law even if they are not expressly stated in the form of rules"[176]

In my opinion though these judgments do not fully reflect strategy/ model suggested by me, it is a good starting point to grasp accurately the techniques and methods for the evolution and incorporation of judicially deduced unenumerated fundamental rights.

Epilogue

Thus to epitomize, instead of over focusing on or attaching extraordinary activist magnitude to the interpretation of Article 21, the efforts must be made by the courts to adopt a nuanced interpretation of Part III and to take into account interaction of various named fundamental rights. Apart from placing reliance on tests suggested by Bhagwati, Chandrachud, Venkatachalliha[177] and Mathew JJ, it would be also appropriate to have resort to model suggested by me in this paper. It is also to be noted that Courts have to master the art of selecting appropriate *level of generality of rights* in the light of established precedents. Apart from focusing on the text of the Constitution, they will have to also take into account Constitutional Silence generated by the Context or accompanying the text along with fundamental Constitutional Axioms, foundational values, interpretative tools, International Human Rights law and trends in contemporary moral philosophy. Lest, the same is accomplished with precision, Supreme Court of India is bound to produce outlandish and extra- Constitutional pronouncements like Aruna Shanbaugh.

The above discussion can be reduced to following broad propositions.

1) Judiciary has not been able to develop any cohesive technique to evolve unenumerated fundamental rights. Particularly in Post Maneka Era, judges have gone by their intuitions and at times, have either erroneously interpreted the earlier precedent or ignored them.

2) The cohesive approaches adopted by Mathew J and Ayyangar J have been more or less abundant.

3) Contemporary judicial tone and tenor on unenumerated rights thrives mainly on the observations of Bhagwati J in Maneka Gandhi's case.

[176] Id at para 23 .
[177] See supra note 7.

4) There is tension between reasoning and result of Bhagwati J and Chnadrachud J in Maneka Gandhi.

5) Despite fundamental differences in structure of Bill of rights between USA and Indian Constitution. There is a growing tendency to rely on unenumerated rights jurisprudence of US Supreme Court.

6) Some of the unenumerated rights evolved by Judiciary in India are radically alien to the cultural ethos and Constitutionalism of India. E.G. Right to die/ Euthanasia and right to homosexuality.

7) Neither Judiciary nor the Bar has effectively deployed the relevant provisions of protection of Human rights Act to rationalize the evolution of unenumerated rights.

8) There is hardly any attempt in both Supreme Court and High Courts to delve into the issue of selection of appropriate level of generality of rights. Neither it be based on purely text of the Constitution nor on extra-constitutional sources. In this connection, two diametrically opposite approaches evolved by Scalia J in a concurring opinion for himself and Rehnquist CJ in *Michael H. v Gerald D* [178] and Harlan J in *Poe v Ullman*[179] may be usefully referred. In his famous Footnote 6 in *Michael,* which is possibly at par with famous footnote 4 of Stone J[180], Scalia J takes the view that he had discovered a value-neutral method of selecting the appropriate level of generality. That method, he writes, is to examine "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[181] He articulated the above observations by criticizing the approach of Brennan J in yet another footnote i.e. footnote 4 by pointing out that it is a strange procedure to first examine whether the liberty is a part of fundamental right in isolation and then to inquire into the question whether a government practice limiting that liberty can be justified?[182]

On the other hand Harlan J in his dissenting opinion in *Poe* observed,

"..the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere

[178] 109 S Ct 2333 (1989)
[179] 367 US 497, 522 (1961)
[180] See *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938)
[181] Id at P 2344 supra note 179 .
[182] Id at PP 2342.

provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.. and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[183]

Without going into the in depth analysis of both these approaches, I may say that they do not have any parallels in India, though to some extent judgment of Mahajan J and Ayyangar J. approximate the approach of Scalia J. whereas, the approach of Mathew J somewhat resembles with that of Harlan J. Unfortunately, neither the approach of Ayyangar J nor the approach of Mathew J has undergone any reasoned elaboration[184] in subsequent judgments of either Supreme Court or High Courts.

I would like to conclude this paper by citing axiomatic observations of Professor Lawrence tribe,

"The basic choice -- and neither the Constitution's text nor its structure nor its history can make it for us -- is between emphasizing the "conservative" functions of both the liberty and equality clauses (as well as others), and emphasizing their potential as generators of critique and change. We must justify the choice extra-textually, but we may and should then implement it in ways that draw as much guidance as possible from the text itself."[185]

---

183 Id at P 543 supra note **180**.

184 See for the enunciation of this concept A.R. Blackshield 'fundamental rights and Economic viability of the Indian Nation-Part one Precedents and Progress' Id at PP 8, volume 10, January-March 1968 no.1

185 See Lawrence Tribe Supra note 86 id at PP 20.

Unenumerated Fundamental Rights : A Myth

Amit A. Pai*

I. Fundamental Rights under the Indian Constitution

During the British rule in India, the basic human rights of the people were left unprotected at the mercy of the rulers. To do away with this ill, the framers of the Indian Constitution ensured the inclusion of defined Bill of Rights within the Indian Constitution.[1] The most basic of these human rights, were included in Part III, i.e. fundamental rights, and the other rights were included in the form of principles that the State ideally ought to follow when it formed its policy in Part IV, i.e. directive principles of state policy. In other words, *"the entire human rights jurisprudence of India is founded on these two chapters."*[2]

Part III of the Indian Constitution deals with the fundamental rights that are guaranteed to the people, and the protection from their violation by State action. This Part broadly provides for the Right to Equality[3], Right to Freedom[4], Right against Exploitation[5], Rights to Freedom of Religion[6], Cultural and Educational Rights[7] and the Right to Constitutional Remedies[8]. The fundamental rights provided for by this chapter are protected against State action.[9] What is interesting to note is that Part III of the Indian Constitution contains specific fundamental rights, like the prohibition of discrimination[10], equal opportunity in public employment[11], abolition of untouchability[12], abolition of titles[13], protection in respect of conviction of

---

* Author was student of V B.S.L., LL.B., ILS Law College, Pune at the time of presentation of this paper in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010. .

1 N.A. Palkhivala, *Our Constitution Defaced and Defiled*, The Mac Millan Company of India Ltd., New Delhi, 1974, at pp. 25–27

2 *Sujata* v. *Manohar, The Indian Judiciary and Human Rights*, in Venkat Iyer Ed., *Democracy, Human Rights and the Rule of Law – Essays in Honour of Nani Palkhivala*, Buttersworth India, New Delhi, 2000, at p. 138

3 Articles 14 to 18

4 Articles 19 to 22

5 Articles 23 and 24

6 Articles 25 to 28

7 Articles 29 and 30

8 Article 32

9 Articles 12 and 13 read with Article 32

10 Article 15

11 Article 16

12 Article 17

13 Article 18

offence[14], protection against arrest and detention in certain cases[15], prohibition of human trafficking and bonded labour[16], prohibition of employment of children[17], freedom to practice any religion or belief[18], freedom to manage religious affairs[19], freedom from payment of taxes for the promotion of a particular religion[20], freedom from attendance of religious instructions[21], protection of interests of minorities[22] and rights of minorities to establish and administer educational institutes[23]. The nature of each of these fundamental rights is such that it may be included in a more general human rights, like the right to equality or the right to freedom to practice and protect any religion or the right to life and personal liberty, but it is interesting to find them specifically enumerated in Part III of the Constitution.

With regard to Part III, D.D. Basu takes the view:

> *"This Part of our Constitution relating to Fundamental Rights is more elaborate than the Bill of Rights contained in any other existing Constitution of importance and covers a wide range of topics...Instead of drafting the rights in general terms and leaving them to be interpreted and applied by the courts...the Indian Constitution makes the declaration of the rights more specific and detailed and also embodies the limitations or the conditions subject to which the rights may operate, thus narrowing down the scope for judicial review."*[24]

However, the author wants to point out that this finding of D.D. Basu is generally correct with regard to the fundamental rights; however, there are some fundamental rights which are open ended, and it is required of the Court to interpret the same.

---

[14] Article 20
[15] Article 22
[16] Article 23
[17] Article 24
[18] Article 25
[19] Article 26
[20] Article 27
[21] Article 28
[22] Article 29
[23] Article 30
[24] Durga Das Basu, *Confouary on the Constitution of India*, Wadhwa Nagpur, 2007, 8th Ed., p. 605

Part III of the Indian Constitution provides for a mechanism, by which certain basic human rights of the people are protected from State action. In other words, any action of the State, i.e. laws passed, ordinance, rule, regulations, etc., will be void, if they contravene any fundamental right that is enumerated in Part III of the Constitution. However, it was clarified by the Court from *Maneka Gandhi*[25] that the negative language of the fundamental rights was no bar to put a positive responsibility on the State to protect some of the fundamental rights of the people, as the fundamental rights were a mere enumeration of natural rights.

II. Interpretation Of Fundamental Rights By The Supreme Court – Judicial Activism

As has already been discussed, the some fundamental rights, like Article 21, merely provide the concept. It is left to the Court to interpret these values and apply them in a given situation. Justice Mathew, while discussing the nature of fundamental rights in Part III of the Constitution, opined:

> *"The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience."*[26]

The author submits that the Apex Court has wholeheartedly expanded the scope of these fundamental rights in various situations. Some of these unenumerated rights are: right to go abroad[27], right to privacy[28], right against solitary confinement[29], right against bar fetters[30], right to legal aid[31], right to speedy trial[32], right against hand-cuffing[33], right against delayed execution[34], right against public hanging[35], right to doctor's assistance[36], right to shelter[37], right to clean and healthy environment[38], right against custodial violence[39],

---

[25] *Maneka Gandhi v. Union of India,* AIR 1978 SC 597
[26] *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225, Para 1712
[27] *Satwant Singh v. D. Ramanathan, A.P.O.,* AIR 1967 SC 1836
[28] *Kharak Singh v. State of U.P.,* AIR 1963 SC 1295; also see *Gobind v. State of M.P.,* (1975) 2 SCC 148
[29] *Sunil Batra v. Delhi Administration,* (1978) 4 SCC 494
[30] *Charles Sobraj v. Supt., Central Jail,* (1978) 4 SCC 104
[31] *M.H. Hoskot v. State of Maharashtra,* (1978) 3 SCC 544
[32] *Hussainara Khatoon v. Home Secretary, State of Bihar,* (1980) 1 SCC 81
[33] *Prem Shankar Shukla v. Delhi Administration,* (1980) 3 SCC 526
[34] *T.V. Vatheeswaran v. State of Tamil Nadu,* (1983) 2 SCC 68
[35] *Attorney General of India v. Lacchma Devi,* (1989) Supp I SCC 264
[36] *Paramananda Katra v. Union of India,* (1989) 4 SCC 286
[37] *Shantistar Builders v. N.K. Totame,* (1990) 1 SCC 520
[38] *M.C. Mehta v. Union of India,* (1987) 1 SCC 395
[39] *Sheela Barse v. State of Maharashtra,* (1983) 2 SCC 96

right to reputation[40], right to access to clean air and clean water[41], right to live with dignity[42], right to protection against hazardous industries[43], right to timely medical treatment in Government hospitals[44], right to health[45], right to livelihood[46], right to primary education[47], freedom of press[48], right to remain silent[49], etc. Some of these rights that are recognised by the Courts have been so construed in light of the directive principles that are listed in Part IV of the Constitution, as the Court has recognised that Part III and Part IV of the Constitution complement each other.[50]

The rights that have arisen as a result of the expansion of Article 21 have been referred to as unenumerated rights which fall within the ambit of Article 21 of the Constitution.[51] In other words, the Court has recognised the aforementioned to be vital for the full and total enjoyment of Article 21 of the Constitution. These situations have gradually been accepted as unenumerated fundamental rights within the scope of the Indian Constitution. It was held by the Court that there is no difference between those fundamental rights that are enumerated in the Constitution and those that have been read into Part III by judicial creativity, in terms of enforcement.[52] Let us examine whether these situations are rightly given the status of fundamental rights.

III. The Myth of Unenumerated Fundamental Rights

The author believes that these unenumerated rights that have been recognised by the Courts to be within those rights that are enumerated in Part III. The author submits that these unenumerated rights cannot be equated with fundamental rights, and the reasons for same are enlisted below:

---

40 *State of Bihar v. L.K. Advani*, (2003) 8 SCC 361
41 *B.L. Wadhera v. Union of India*, (1996) 2 SCC 594
42 *Francis Coralie Mullin v. Delhi Administration*, (1981) 1 SCC 608
43 *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647
44 *Paschim Bangal Khet Mazdoor Society v. State of West Bengal*, (1996) 4 SCC 37
45 *State of Punjab v. Mahinder Singh Chawla*, (1997) 2 SCC 83
46 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545
47 *Unni Krishnan v. State of A.P.*, (1993) 1 SCC 645
48 *Express Newspapers v. Union of India*, AIR 1958 SC 578; Also see *Sakal Papers v. Union of India*, AIR 1962 SC 305 and *Bennett Coleman v. Union of India*, (1972) 2 SCC 788
49 *Bijoe Emanuel v. State of Kerala*, (1986) 3 SCC 615
50 Gopal Subramanium, *Contributions of the Indian Judiciary to Social Justice Principles underlying the Universal Declaration of Human Rights*, 50 JILI (2008) 593, at p. 595
51 See *Unni Krishnan v. State of A.P.*, (1993) 1 SCC 645, Para 29, (per Justice Mohan), supra note 47
52 *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399

1) Only the Legislature has the power to create fundamental rights, not the Court

The theory of separation of powers states that the legislature is the body that makes the law and the judiciary merely interprets it. The Originalists believe that the judiciary finds the law, which already exists. In other words, the inclusion of any new fundamental rights in Part III of the Constitution can be done only by an amendment to the Constitution under Article 368. An amendment to the Constitution can be brought about only by Parliament under Article 368 of the Constitution, and not by the Court. In the scheme of our Constitution, the Court does not have the power to create any fundamental rights. When these unenumerated situations are considered within the fundamental rights in Part III of the Constitution, the Court has always been cautious to state that these unenumerated situations are within the right that has been enumerated in the Constitution. In other words, if such situations do not arise, for the violation of the fundamental rights enumerated in the Constitution, then the Court does not get the opportunity to declare that these situations are a part of the said fundamental right.

For example, the right to live with dignity is a part of the right to life and personal liberty guaranteed by Article 21. In other words, these unenumerated fundamental rights are not independent fundamental rights on their own, and are always to be construed within those fundamental rights that are enumerated in Part III. This is to say that the court merely interprets the situations as to be within or without the fundamental rights given in Part III of the Constitution.

Let us examine the Right to Education as a fundamental right to better understand this aspect. In the case of *Mohini Jain*[53], the Court after a combined reading of Article 21, 38, 39, 41 and 45, concluded that the right to education was a fundamental right within Article 21 of the Constitution. However, it was soon realised that up to what level education was a fundamental right was a question that was left unanswered, as once recognised a fundamental right, there was positive obligation on the State to enforce the same. The Court, subsequently, in *Unnikrishnan* held that only the right to free and compulsory primary education, i.e. education to the age

---

53 *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666

of 14 years, was a fundamental right under Article 21. However, the same was not given the status of an independent fundamental right. Neither the Parliament nor the State Legislature took heed of this decision of the Court to provide for free and compulsory education to all up to the age of 14 years.[54] In 2002, by the 86th amendment to the Constitution, Article 21A was added to the Constitution, which made the right to education a fundamental right separate from the right to life. It is only recently that the State has acted on making the right to education an effective fundamental right.[55]

It is submitted that the Court merely declared that the right to education was a fundamental right within the scope of Article 21, it never created a new fundamental right, like that done by Parliament vide the 86th amendment to the Constitution. It is submitted that the Court does not have the power of the purse to create fundamental rights. In this context, Prof. S.P. Sathe takes the view:

> *"A court is not equipped with the skills and competence to discharge functions that essentially belong to the other co-ordinate organs of government. Its institutional equipment is not adequate for undertaking legislative or administrative functions. It cannot create positive rights such as the right to work, the right to education, or the right to shelter...It cannot entirely stop environmental degradation or governmental lawlessness. Its actions in these areas are bound to be symbolic."*[56]

Once a fundamental right is created, there is a positive responsibility on the State to ensure that the same is enforced. The scheme of the Constitution is such that some basic human rights have been enlisted in the Directive Principles of State Policy, as the State does not possess the financial power to provide for all that is enlisted in Part IV. Prof. Sathe rightly says:

---

54 P.P. Rao, *Fundamental Right to Education*, 50 JILI (2008) 585, at p. 587

55 See The Right of Children to Free and Compulsory Education Act, 2009, which came into effect on the 1st of April, 2010.

56 S.P. Sathe, *Judicial Activism in India – Transgressing Borders and Enforcing Limits*, 2nd Ed., New Delhi. 2006, Oxford University Press, p. 251

> *"It is not for the Court to convert a directive principle of state policy into a fundamental right. Moreover, even if it does, it will merely amount to conversion of a non-enforceable directive principle into a non-enforceable fundamental right."*[57]

It is submitted that when the Court does interpret the fundamental rights in consonance with the directive principles, it is merely in light with the duty cast up on the Court by the Constitution.[58] Hence, it is submitted that the Court does not create any fundamental rights; it merely interprets Part III depending upon the situation that is before it.

2) Considering these expansions equivalent to fundamental rights will lead to confusion

As has already been stated, the Court does not have the machinery to enforce the rights it creates. But sometimes, recognition of these expansions as fundamental right may create a confusion. Some illustration of such confusion has been stated below.

For example, the right to shelter as recognised by the Court in *Olga Tellis*[59]. The Court held that every person had a right to shelter; however, the Court admitted that the State cannot be cast with the duty to provide shelter to every person in the country. So, did the Court declare the right to shelter to be a fundamental right? If so, then as the principles of rule of law would demand, each and every person would have to be given the same type of shelter. What shelter provided by the State would be sufficiently satisfactory for each and every person in India that it would qualify the right to shelter as a fundamental right?

Now consider the right to education. *Mohini Jain* simply said that the right to education was a fundamental right. The question that comes up is education up to what level? Primary, graduate, Post-graduate, doctorate, etc.? This flaw was realised, and the Court subsequently clarified that the right to free and compulsory education was limited to primary education in *Unnikrishnan*. However, as already discussed, the same was to no avail.

---

57 Id at, p. 119

58 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, Para 1704 (Per Justice Mathew), *supra note 26*

59 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, *supra note 46*

In *P. Rathinam*[60], the Court held that the right to die was included within the right to life. Does it mean that the right to die was an unenumerated fundamental right? Does it mean that any person in India had the right to die? Prof. B.B. Pande has rightly asked whether there is a correlative duty on the state to ensure that a person realised his right to die.[61] In such a case, he asks, whether the state has the power to regulate *"self-effacing activities such as smoking, alcoholism and drug-taking?"*[62]

Another example of the misunderstanding of the expansion of the fundamental right to life was in the case of *Bijaylaxmi Tripathi.*[63] In that case, the Orissa High Court held that the right to live in a working women's hostel was a part of the right to livelihood, and the same was a part of the right to life under Article 21. Can we consider the right to live in a hostel a fundamental right?[64]

Sometimes, we have seen that the Court is forced to create more and more unenumerated rights, in order to do away with the application of the older ones in certain circumstances. In the case of *X v. Hospital Z*[65], the Court admitted that there existed a right to privacy and right to marry, but stated that these rights were subject to the right to health of the spouse. The author submits that the Court could have merely stated that though the aforementioned right existed, it was not absolute, and had no application in the matter at hand.

In the environmental law jurisprudence, the Court has consistently held that the right to clean air and water are a fundamental right. It is true that every person should have the right to be entitled to clean water and air, but in case the same is not available, how is the Court equipped to create these rights, especially when the water and air in the country are so highly polluted?[66]

---

60 *P. Rathinam v. Union of India*, (1994) 3 SCC 394; The view of the Court was subsequently changed in the case of *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648

61 B.B. Pande, *Right to Life or Death?: For Bharat both Cannot be Right,* 1994 4 SCC (J) 19, at p. 24

62 Id. at p. 25

63 *Bijaylaxmi Tripathi v. Managing Committee,* AIR 1992 Ori 242

64 See for detailed criticism and analysis, S.P. Sathe, *Judicial Activism in India – Transgressing Borders and Enforcing Limits*, 2nd Ed., New Delhi, 2006, Oxford University Press, p. 116 etseq, *supra note 56*

65 (1998) 8 SCC 296

66 See S.P. Sathe, *supra note 56,* p. 118

As mentioned above, the Court has held that the fundamental rights are a mere enumeration of the natural rights or basic human rights. If these situations are unenumerated fundamental rights, as claimed, then these situations must be like fundamental rights, natural rights. Are they? The author submits that all these situations do not fall within the ambit of natural rights, though some may.

3) The expansion of the enumerated fundamental rights is based on situations

The Court is tempted to create these so-called unenumerated fundamental rights only when there is a situation before it. In other words, when some person's privacy was infringed, he went to the Court and asked for a remedy, as his privacy was being infringed. The Court held that he had a right to privacy within his right to life and personal liberty. Would the Court have the power to state that the right to privacy was enjoyed by a person as a part of the fundamental right, if nobody's approached the Court? The answer is no. Even when the Court did state so, it said that every person had the right to privacy as a part of his right to life and personal liberty; which means, the right that was enjoyed by every person was that of life and personal liberty, and privacy was included within the concepts of life and personal liberty. The same is true for many of the other so-called unenumerated fundamental rights. The author submits the Court merely states that a certain situation falls within a fundamental right that has been enumerated in the Constitution or not. If it does, then it is held by the Court to be a part of the enumerated fundamental rights; not, as commonly misunderstood, an independent fundamental right on its own. It is possible that in one set of facts, the said situation may be infringing a fundamental right, but the same may not be true for another situation. This brings about the difference between those fundamental rights that are enumerated and the situations that are recognised within these fundamental rights.

As has already been stated, the fundamental rights given in the Constitution are a mere enumeration of natural rights or basic human rights. But is the same true for all those situations that are recognised as fundamental rights? Consider the freedom to make films. If a person wishes to make a film, he has the fundamental right to make a film, so long as he is not restricted within the restrictions that are enumerated in Article 19(2). Is the

freedom to make a film a natural right or a basic human right? But the making a film is a situation that is covered in right to freedom of speech and expression, not just a fundamental right that is enumerated in Part III, but also a natural right or basic human right. A similar analogy can be drawn for say the freedom to use mobile phones. The freedom to use mobile phones may not be considered a fundamental right let alone a natural right or a basic human right, but certainly is a part of the right to freedom of speech and expression.

How then does the Court determine which situation is to be considered within the enumerated fundamental rights and which situation without? These are what Ronald Dworkin terms as "Hard Cases".[67] The Court looks into our constitutional scheme and the values that are enshrined in our Constitution to find whether a particular situation falls within the fundamental rights enumerated in Part III or not. In other words, a situation defines whether a person is realising his fundamental right or not. If it does, the Court holds the same to fall within the ambit of the said fundamental right. In fact, the same is clear from the language of the judgments of the Court, which clearly specify that the situation is a part of a certain fundamental right, say for example the right to clean air is a part of the right to life; the same cannot be considered a separate fundamental right on its own. Ronald Dworkin says that the distinction between enumerated rights and these so called unenumerated rights is bogus.[68] He takes the view the so called unenumerated fundamental rights are merely interpretation offered by the Court, at the appropriate situation, and not independent rights on their own.[69]

The author does not deny the existence of unenumerated rights, but these unenumerated rights are nothing but situations that make enumerated fundamental rights wholesome. These situations just add flesh to the bare bones of the fundamental rights that are enumerated in Part III. The author submits that it is a confused notion to identify these situations as unenumerated fundamental rights on their own. The Courts have an obligation to interpret the fundamental right very liberally, as a Bill of Rights

[67] See Ronald Dworkin, *Taking Rights Seriously*, 4th Ed., 2008, Universal Law Publishing Co. Pvt. Ltd., New Delhi, p. 81 etseq.

[68] See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. Ch. L. Rev. 381

[69] Ibid.

only confirms the existence of basic human rights, which are accorded to each human being, so that the same are not left unprotected against the excesses of the authorities.[70] This liberal interpretation has led to the recognition of many situations to be within the fundamental rights guaranteed in Part III.

The author submits that the only fundamental rights that exist in the Indian Constitution are those that are enumerated in Part III; the others are mere situations which may or may not fall within the enumerated fundamental rights. The author submits that it is fallacious to regard these unenumerated rights equal to those rights in Part III in terms of enforcement.

■

[70] See generally, Soli J. Sorabjee, *Bill of Rights: Judicial Approach, Principles of Interpretation and Remedies – The Indian Experience*, in Soli J. Sorabjee Ed., *Law & Justice: An Anthology*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2003, at p. 266 etseq.

Conceptual Analysis Of Unenumerated Fundamental Rights

Nikhil Kumar Singhal*

"Law must be stable and yet it cannot stand still".[1] Such is the premise upon which law is said to be expansive. The stability to law is provided through codified text, and the flexibility through judicial creativity, activism and interpretation. The Indian Constitution is also regarded as a living document[2], the interpretation of which changes as time and circumstances change.

A purposive rather than a strictly literal approach to the interpretation of the Constitution should be adopted.[3] As for rights, it is in much dispute, ofcourse, what *particular* rights citizens have.[4] Does it only consist of those derived from the text of the Bill of Rights? Or are certain rights inherent in the very nature of a human being which exists even in the absence of a Constitution.

Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. A Bill of Rights does not 'confer' fundamental human rights. It confirms their existence and accords them protection.[5] But does the Constitution, even after its codification, provide or guarantee unarticulated rights to its subjects within the ambit of the legal rights already articulated?

The purpose of this paper is to understand the emergence, existence and recognition of unenumerated fundamental rights as a concept and their acceptance in the Indian and the world Constitutions. Also, the existence of natural rights, converted into legal rights with the codification of the Constitution, and the significance of those unenumerated natural rights which fall either ancillary or within the confines of legal rights, is also analyzed.

---

* Author was student of V B.S.L. LL.B, I.L.S Law College, Pune at the time of presentation of this paper in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010.

1 Roscoe Pound, '*Interpretation of legal history*', 1 (1923)

2 *Indira Nehru Gandhi* v. *Raj Narayan*, AIR 1975 SC 2299; *I.R. Coehlo* v. *State of Tamil Nadu*, AIR 2007 SC 861

3 Soli J. Sorabjee, *Bill of rights: Judicial approach, Principles of interpretation and remedies – The Indian experience,* as published in 'Law and Justice – An Anthology' (Universal Law Publishing, 2003) at pg. 266

4 Ronald Dworkin, '*Taking rights seriously*' (Second Indian Reprint, Universal Law Publishing, 1999) at pg. 184

5 *West Virginia State Board of Education* v. *Barnette*, 87 L.Ed. 1628, 1638; *I.R. Coehlo* v. *State of Tamil Nadu*, AIR 2007 SC 861; *M. Nagaraj* v. *Union of India*, AIR 2007 SC 71

I. Laws Of Nature And Laws Of Man

Natural Law, as conceived by medieval scholars, was derived partly from the Aristotelian distinction of natural and conventional justice, partly from the Latin exposition, led by Cicero, of the same idea in its later Greek forms, and party from the still later special adaption of it by the classical Roman jurists.[6] Justice, as a necessary element of state, is divided into natural and conventional. Rules of natural justice are those which are universally recognized among civilized men. Rules of conventional justice deal with matters which are indifferent or indeterminate until a *definite* rule is laid down by some specific authority.[7] The natural is contrasted with the legal or conventional; the universal which had its basis in nature, with the legal or conventional.[8] As the importance of conventional justice is highlighted by a written Constitution, there is consensus through ages that natural law consists of principles and axioms which are entitled to recognition regardless of whether or not they have found formal expression in the positive law of the state of other community.[9]

To underline a pattern of development, the sphere of natural law has always been demarcated from legal or conventional. With this demarcation, it cannot be presumed that natural law is dead in the modern sense and can be concluded that it has only transformed into a shape more available for making conquests in the modern world.[10] With this agreement on the existence of natural law even in the modern world, we can now establish a synthesis between conventional law and natural law. But to understand the synthesis we must analyze the elements of Law.

Law as a body of authoritative grounds of or guides to decision and administrative action under a legal order is made up of three elements: A percept element, a body of authoritative norms, *i.e.,* models or patterns of decision in adjusting relations and ordering conduct, a technique element, an authoritative technique of developing, interpreting and applying the precepts, and an ideal element, a body of received and traditionally authoritative or taught ideals with respect to which the precepts are developed, interpreted,

---

6 Sir Frederick Pollock, Jurisprudence And Legal Essays (Macmillan & Co., 1963) at pg. 125

7 *Ibid*

8 Roscoe Pound, The Ideal Element Of Law (Liberty Fund Inc, 2002) at pg.38

9 Edgar Bodenheimer, Jurisprudence (3rd Ed., Universal Law Publishing, 2001) at pg. 216

10 Sir Frederick Pollock, Jurisprudence And Legal Essays (Macmillan & Co., 1963) *supra note 10,*at pg. 143

and applied.[11] By laws we can, more or less, make men believe in particular ways; the constraints of express enactment or customary rules are sufficient to some extent, but not altogether, to determine the acts and forbearances.[12] Here comes the necessity of a natural or moral element. As J. B.N. Cardozo explained, 'natural law' has imprinted in us elements of reason, certain principles of which are application to the articles of a code.[13]

Within the above-mentioned analysis of the elements of law, one can understand the existence of authoritative norms (percept and technique) which operates in the form of fixed models representative of the modern day legislations and the ideal element representing natural law. In the modern time, no one element can operate without the existence of the other. Hence, the legal and the natural elements have to act in tandem to provide for of the entire portrait of law.

The theory of natural law may be made the basis for the deduction of natural rights which inhere in every human being by virtue of his personality and are inalienable and imprescriptable. From all these the term *legal* rights must be distinguished, of which the test is simple; is the right recognized and protected by the legal system itself?[14]

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by a rule of morality – an interest, the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognized and protected by a rule of law – an interest, the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty.[15]

Constitutional law is, as its name implies, the body of those legal rules which determine the Constitution of a state.[16] The Constitution of any state, as of India's, is considered a sacrosanct document. The will and consensus of the 'People', expressed by the Preambles of various Constitutions, reflects the guarantee and the protection of the State, which the People have accepted.

11 Roscoe Pound, The Ideal Element Of Law (Liberty Fund Inc, 2002), *supra note 8*, at pg. 32
12 Sir Frederick Pollock, Jurisprudence And Legal Essays (Macmillan & Co., 1963) *supra note 10*, at pg. 157
13 B. N. Cardozo, The Nature Of Judicial Process (Yale University Press, 33rd Printing) at pg.122
14 G.W. Paton, A Textbook Of Jurisprudence (4th Ed., Oxford University Press) at pg. 284
15 P.J. Fitzgerald, Salmond On Jurisprudence (12th Ed., N.M. Tripathi Pvt. Ltd.) at pg. 218
16 *Ibid* at pg. 83

The Bill of Rights contained therein reflect a popular consensus of the State and the people to protect that which is sacrosanct within the Constitution; the rights of the people. But from where has this Constitution and the rights emerged? Most parts of the Indian Constitution have been borrowed from other Constitutions. But as for the origins of Constitutions from which the Indian Constitution has been borrowed, it is submitted that it may be traced to pre-existing natural law.

Salmond ponders upon the same point and questions; 'Does this mean that the state and its Constitution are necessarily prior to the law, and that what passes as Constitutional law is in reality not law but a mater of fact and practice?' 'By what legal authority was the Bill of Rights passed?'[17] Yet the Bill of Rights is now a good law. So can it be presumed that the authority passed on from the Charter of Liberties, the *Magna Carta*, the English Bill of Rights, the Virginia Declaration of Rights, French Revolution's Declaration of the Rights of Man and of the Citizens etc.? But all these Charters proclaim nothing but the natural rights of men. In reply to all these questions, he concludes that the existence of a Constitution and Bill of Rights may be determined by pre-existing law and extra-legal origin.[18] This clearly implies the existence of the natural law element in legal rights.

Hence my argument; the codification of legal rights does not preclude the existence of natural rights *within* the ambit of legal rights. One cannot argue that the State undertook to formalize every right which ever existed in the pre-State era. Even the drafters of the finest Constitution cannot guarantee a Bill or Rights without unenumerated rights emerging from the text or the interpretation of the Constitution.

II. The Content Of Rights

It has come to be well understood that there is no more ambiguous word in legal and juristic literature than the word "right".[19] The noun *right* is one that has many meanings. A common dictionary definition of it is that it means the standard of permitted action with a certain sphere.[20] This definition

17 *Ibid* at pg. 85
18 *Ibid* at pg. 84-86
19 Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923); Pound, 26 International Journal of Ethics, 92 (1915); 1 Beale, *Conflict of Laws* (1935) 62-70, 79-86, as quoted in Roscoe Pound, The Ideal Element Of Law (Liberty Fund Inc, 2002) at pg. 110
20 *Shorter Oxford English Dictionary*

may be argued against. Though rights may have a certain sphere, the interpretation of that sphere is a task of the jurists.

To agree with an expansive interpretation of rights we must understand that a right is a juristic concept. Such concepts are to be distinguished from legal concepts. Legal concepts are legally defined categories into which facts may be put, whereupon a series of rules, principles and standards become legally applicable.[21] Juristic concepts are *not* prescribed and defined by law as legal concepts are. They are worked out by jurists in order to systemize and expound the phenomena of the legal order, the body of authoritative grounds of or guides to decision, and the operation of the judicial process.[22]

J. Mathew in *Keshvananda Bharti*[23] opined that "Fundamental Rights themselves have no fixed context; most of them are mere empty vessels into which each generation must pour its content in the light of its experience." This falls in consonance with the proposition that the Constitution is a living document.[24] It is well to remember that the Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out the "principles for an expanding future" and is "intended to endure for ages to come and consequently be adapted to the various crises of human affairs."[25] Thus the Constitution and the Fundamental Rights enshrined therein have always existed with expansive spheres, to be filled and interpreted by the Courts with the progression of time.

III. Bentham, Keshvananda and A.D.M. Jabalpur

It may be perceived as a rather odd combination, but indeed they all share the same philosophy. They belong to a school of thought which negates the existence of natural rights. The only difference lies in the degree of the philosophy negated. Bentham set the fashion still followed by many of completely denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law.[26]

---

21 Roscoe Pound, The Ideal Element Of Law (Liberty Fund Inc, 2002), *supra note 8* at pg. 109
22 *Ibid*
23 *Keshvananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461
24 *Supra* nt. 2
25 Benjamin N. Cardozo, The Nature of Judicial Process (Yale University Press, 33rd Printing); *M'Culloh* v. *Maryland*, 4 L.Ed. 579, 603; *supra* note. 13.
26 P.J. Fitzgerald, Salmond On Jurisprudence (12th Ed., N.M. Tripathi Pvt. Ltd.) at, *supra note 15* at pg. 218

The reasoning of the minority in *Keshvananda Bharti*[27] depicts a position of partial negation of natural rights. The Court opined that though natural rights exist, in the course of time have lost their utility with the becoming of the modern Constitution and it is a fallacy to regard that fundamental rights have been adopted from natural rights. Fundamental rights are those which have been expressly 'conferred' by people upon themselves and that a good many of them are not natural rights like the abolition of untouchability, titles, protection against double jeopardy etc. *ADM Jabalpur*[28] went to the extent of substantiating the minority view of *Keshvananda Bharti*[29] saying that the Courts cannot either increase of curtail the freedom of individuals contrary to the provisions of the Constitution. To some extent, the existence of all rights apart from codified fundamental rights have been denied by J. M.H. Beg by saying that 'neither rights supposed to be recognized by some natural law nor those assumed to exist in some part of Common Law could serve as substitutes for those conferred in Part III of the Constitution.'

This position nevertheless does not vitiate my argument. I do not contend that all natural rights have transformed into fundamental rights. Neither do I contend that natural rights should serve as a substitute of fundamental rights. I contend that the protection given by fundamental rights may further be expanded for the benefit of its subjects using natural rights which are not dead.

From *Golak Nath*[30] to *Maneka Gandhi*[31] to *I.R. Coelho*[32] the Hon'ble Apex Court has opined time and again that the evolution of fundamental rights depended on natural rights and that the Constitution doesn't 'confer' these rights, it merely 'confirms' them. Even J. H.R. Khanna confirms this position speaking for the majority in *Keshvananda Bharti*[33]; 'it is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it...the basic dignity of a man does not

---

27 *Keshvananda Bharti* v. *State of Kerala*, AIR 1974 SC 1461; *supra note 23.* JJ. A.N. Ray, D.G. Palekar, K.K. Mathew etc.
28 *A.D.M., Jabalpur* v. *Shivakant Shukla*, AIR 1976SC 1207
29 *Supra* nt. 27
30 *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643
31 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597
32 *I.R. Coehlo* v. *State of Tamil Nadu*, AIR 2007 SC 861
33 *Keshvananda Bharti* v. *State of Kerala*, AIR 1974 SC 1461; *supra note 23,* C.J. S.M. Sikri also talks of a similar position of natural rights in his judgment

depend upon the codification of fundamental rights nor is such codification a pre-requisite for a dignified way of living.'

It is true that the Courts look to the provisions of the Constitution and the statutory law to determine to determine the rights of the individuals. But this does not preclude that in determining these rights, rights which have not been enumerated under the Constitution cannot be interpreted by accepting the existence of natural rights. The idea of defining and declaring the Rights of Man and of Citizen is not a very recent contribution to political theory.[34] Until, however, these rights came to be defined and made an integral part of a country's Constitution, they were in the nature of pious wishes of progressive thinkers and liberal Government, rather than accepted obligations of the State towards the Citizens, and of civilized Society towards all mankind.[35]

As earlier mentioned, Salmond is of the opinion that rights are concerned with interests. They are either moral or legal, wherein, a moral or natural right is an interest recognized and protected by a rule of morality and a legal right is an interest recognized by a rule of law. It is amply clear that the protection given to an interest by a rule of law is adequately protected by the Constitution. But those interests protected by a rule of morality need not necessarily be negated. They still exist, either independent of the legal right or *within* the ambit of the legal right. Hence my argument; to protect these unenumerated rights, their existence has been included within the ambit of the legal rights. Natural rights, which have been brought within the ambit of these legal rights, serve as a further expanding factor to the sphere of legal rights from where unenumerated rights emerge.

Salmond agrees that in order that an interest should become the subject of a legal right, it must obtain not merely *legal protection*, but also *legal recognition*.[36] The Constitution of India provides for both these by enumerating Fundamental Rights and providing a remedy against any violation, so much so that the remedy is also a right under Article 32 of the Constitution of India. Nonetheless, the fact that such natural and moral rights and duties are not prescribed in black and white like legal counterparts points *only* to a distinction between law and morals; it does not entail the complete

[34] A Note On Fundamental Rights By K.T. Shah, Dec. 23, 1946, as stated in B. Shiva Rao, The Framing Of India's Constitution (Universal Law Publishing, 2004 Reprint) in Vol 2 at pg. 36

[35] *Ibid*

[36] P.J. Fitzgerald, Salmond On Jurisprudence (12th Ed., N.M. Tripathi Pvt. Ltd.) *supra note 23* at pg. 219

non-existence of moral rights and duties.[37] Hence the existence of these moral/natural rights guarantees those rights which have not been enumerated, but their enforceability can only be made possible when they are regarded to subsist within the sphere of legal rights.

One author substantiates my argument taking the view that the State is a combination of the Sovereign and the subject. Being declarations of the Sovereign, the fundamental rights are extensions, combinations or permutations of the three natural rights of life, liberty and equality, which are inherent to the people. The three natural rights are the essence of the Sovereign power.[38] Such is the importance of natural rights in the theory of unenumerated rights. If Bentham had known what the Law of Nature was really like in the Middle Ages, he would have had to speak of it with more respect.[39]

IV. Theories Of Enumeration

After understanding the existence of unenumerated rights, at this juncture, two questions come to the mind of the reader. How are unenumerated rights discovered within the ambit of legal rights and who decides the confines of these legal rights? 'Judicial creativity' may be a very vague term used to answer the question. But what are the limits of this judicial creativity? Some authors have contributed to the field of enumeration by proposing various theories useful in enumerating unenumerated rights. They are neither exhaustive nor can they befit every situation of enumeration in different Constitutions. They merely serve as guidelines for the researcher to help understand the concept of unenumerated rights.

1) The 'Vague' Constitution Theory:

Ronald Dworkin proposes a theory which may be pondered upon.[40] Though he does not propose this theory from the standpoint of enumeration of unenumerated rights, but nevertheless we may consider the same. He says that the Constitution and the Bill of Rights are designed so as to protect individuals and groups by incorporating various rules. These take the form of

[37] *Ibid*

[38] R.G. Chaturvedi, State And The Rights Of Men (Metropolitin Book Co. Pvt. Ltd, 1971) at pg. 185

[39] Sir Frederick Pollock, Jurisprudence And Legal Essays (Macmillan & Co., 1963), *supra note 10* at pg. 135

[40] Ronald Dworkin, Taking Rights Seriously (Second Indian Reprint, Universal Law Publishing, 1999). *Supra note 4* at pg. 133

either fairly precise rules or 'vague' standards. He emphasizes, that these 'vague' standards were chosen deliberately by the men who drafted and adopted them and that these could be justified by appeal to *moral rights* which individuals possess against the majority, and which the Constitutional provisions, both 'vague' and precise, might be said to recognize and protect. The program of judicial activism, he mentions, holds that Courts should accept directions of the so-called 'vague' Constitutional provisions in the spirit. Hence, to analyze this theory, we can assume the existence of legal rights with a fixed structure but with a 'vague' confine. For fixing the limits, as Dworkin mentions, we can resort to moral rights.[41]

2) Constitutional Skeleton theory:

In another theory proposed by Dworkin[42], he says that it is sometimes said that the Constitution does not 'mention' a right and are usually classified as unenumerated. Such rights are supported by the best interpretation of a more general or abstract right that is 'mentioned'. On its most natural reading, then, the Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction. Taken together, these principles define a political ideal: they construct the 'Constitutional skeleton' of a society of citizens both equal and free. He says that the distinction between enumerated rights and unenumerated rights is bogus and that the Bill of Rights consists of broad and abstract principles of political morality.

In turn, this theory of Constitutional Skeleton raises a very important Constitutional question; whether and when do the Courts have the authority to enforce rights not actually enumerated in the Constitution as genuine Constitutional rights? That becomes a question of later determination, but to analyze this theory from the standpoint of a bare skeleton, the rights discovered and enumerated under the skeleton act as an expansion of the bare skeleton; recognizing unenumerated rights under the codified enumerated ones. The adding flesh to the skeleton does not preclude that the enumerated right, that is the bare skeleton, loses its identity. Infact the flesh acts as the expansion of the skeleton, thus giving rise to unenumerated rights. Indeed,

41 In his theory of judicial *deference*, Dworkin points out that citizens do have moral rights against the state beyond what the law expressly grants them, but it points out that the character and strength of these rights are debatable.

42 Ronald Dworkin, Unenumerated Rights; Whether And How Roe Should Be Overruled, 59 U. Chi. L. Rev. 381. 1992

the responsibility on the judges is great. They undoubtedly have to adhere to limits of judicial activism and restraint where they cannot have unlimited power to expand the skeleton. Dworkin rightly mentions that such judges call themselves 'activists' or champions of 'unenumerated rights', who wish to go 'outside' the 'four corners' of the Constitution to decide cases on 'natural law' basis.

3) Other Theories:

There are other theories which have been given by different authors, though upon analysis, it can be seen that all theories broadly cover the premise of unenumerated rights as mentioned in the first two theories and the theory proposed by the researcher. They may be summarized as follows:

a) Textual and Originalist approach:

One author proposes various theories for enumeration of rights.[43] Although most of these theories are in context to the American Constitution, one can draw a general inference by the methodologies of recognition. The 'textual' theory envisages the approach to recognize only those rights that arise out of necessary implication from the text of the Bill of Rights. This 'textual' interpretation requires an interpretation of the Due Process and the Equal Protection clauses as well along with an observation that a given interpretation of one provision is the only reasonable way to make another provision make sense.

This approach was also adopted by the Indian Supreme Court in Maneka Gandhi's[44] case where J. Bhagwati referred to the measure of directness and the test of 'inevitable' consequence. "The action may have a direct effect on a fundamental right although its direct subject matter may be different", the Court mentioned while determining the scope of Article 19(1)(a) to include within its ambit passport impounding and matters of defamation.

An opposing view, however, would advance a jurisprudence of original intent. This is known as the 'Originalist Intentionalism' where the original intentions can be adapted to current problems by inferring how the purposes of the Founders best would apply to modern conditions. This theory rests on

43 David Crump, 'How do courts really discover fundamental rights? Cataloguing the methods of Judicial Alchemy', 19 Harv. J.L. & Pub. Pol'y 795, 1996

44 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597, *supra note 31.*

the premise that the Constitution is a living document and the present generation ought to interpret the original intention of the founders in a manner best suited for its purpose.

b) Historical-cum-Traditionalist:

Another approach taken by most Justices to interpret and evolve unenumerated rights is to look at whether the interest in question has been the subject of historical and traditional protection[45]. The history-and-tradition method has the advantage of providing a touchstone outside the judge's own perceptions because it requires the judge to consult an ostensibly objective source: the opinions of others, expressed over an extended period of time. According to McConnell[46], fundamental rights "were understood by the Founders to be pre-political and pre-constitutional." There was no one 'source' of these rights. They came from many sources: 'from nature, from divine law, from custom, from common law . . . even from reason.'

c) Natural Fundamental or Inherent Rights Theory:

Droddy discusses various methodologies of unenumerated rights by citing reference to various authors.[47] One theory pertinent to my argument as propounded by Suzanna Sherry[48] is that the founders of the Constitution believed in the existence of fundamental or inherent law that was not dependent upon a written document for its existence. These natural or inherent rights cannot be identified by reference to any particular printed documents. Since these rights are inherent and protected, it was not necessary for them to be enumerated in the Constitution or any other legislatively enacted document

V. Interpretation Of Theories

There are nevertheless various other theories for enumerating unenumerated rights but at this juncture the abovementioned suffice for substantiating my argument. In all the theories explained, the existence of rights other than enumerated rights is not denied thought the limits of judicial power and their enforceability are an issue. My argument agrees with the

[45] *Supra* nt. 43

[46] Michael W. McConnell, David C. Baum Memorial Lecture: Tradition and Constitutionalism Before The Constitution, 1998 U. ILL. L. REV. 173, 192 (1998)

[47] J.D. Droddy, Originalist Justification And The Methodology Of Unenumerated Rights, 1999 L.REV. M.S.U. – D.C.L. 809

[48] [illegible]na Sherry, The Founders' Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1157-61 (1987)

theory of existence of these rights apart from the rights 'mentioned', and to expand the sphere of the 'mentioned' rights, these unenumerated rights help to interpret the rights and Constitution best suited for the present generation. For the expansion of the flesh of the skeleton or to determination of the vagueness of the rights, these unenumerated rights come into existence through judicial creativity. It is submitted that the enforceability of these unenumerated rights cannot be carried out separately, but through the enforceability of the 'mentioned' or enumerated rights which act as the skeleton.

Consider the example of the Indian Constitution. The 'golden triangle' of Articles 14, 19 and 21 have been considered to be the basic structure of the Constitution.[49] It can be presumed that the sphere within the triangle consists of unenumerated rights. This sphere of the triangle can be expanded by enumerating rights which are fundamental in nature or which fall within the ambit of life, liberty, the due process and the equal protection clause. Further, various freedoms under Article 19(1) can be/have been expanded by the Justices. It is only an expansion of the skeleton or giving precise contours to the vagueness of the rights or recognizing the moral/natural rights within the sphere of the enumerated Articles. Some detractors to this theory may argue that there exist no other rights than those which have been expressly guaranteed and the so-called unenumerated rights are merely situations under the rights enumerated. This proposition is also true; so much so that it is in consonance with my argument.

To understand this we have to divide the levels of enumeration in three parts. At the topmost level is the enumerated 'mentioned' right which has its existence in the Constitution. The next level consists of the right which is enumerated as an expansion of the sphere of the enumerated right by taking into account positive law and its moral/natural acceptability. This level enumerates a specific unenumerated right. At the basic and ground level are the situations which arise as a result of the varied interpretation of the first and the second level.

[49] *I.R. Coehlo* v. *State of Tamil Nadu*, AIR 2007 SC 861

If we consider Article 21 in our Constitution to be the 'vague' or skeleton provision, then the right to a healthy environment[50] is considered as an unenumerated right enumerated under the second level under the skeleton. In the last level of enumeration lie the *situations* wherein the Court has opined that closure of tanneries[51], or when the Bangalore Medical Trust wrongly takes over public lands[52], or the removal of pollution of water and air[53] etc. are violations of the first two levels of the skeleton. And this is not the only example of the various levels of enumeration. Rights of privacy[54], quality of life[55], livelihood[56], etc have all been determined from natural/moral principles to evolve the second level of enumeration. In addition to these, there are various *situations* arising thereunder. Similarly, freedom of press and information rights expanding the sphere of 19(1)(a). The right to education[57] as recognized under our Constitution within the ambit of Article 21 has been held to be *inalienable* under the Universal Declaration of Human Rights, 1948. This only substantiates my argument of the existence of unenumerated rights, of the nature of inherent/natural/moral rights, within the sphere or ambit of enumerated rights. It is accepted that the enforceability of these rights is not possible since they are unenumerated. But whenever the Constitutional validity of a legislation is challenged, it is challenged from the standpoint of a 'mentioned' right only, i.e. Art.21, even if the challenge is on the issue of protecting a healthy environment.

In *Union of India* v. *Association for Democratic Reforms*[58], the Hon'ble Apex Court accepted this skeleton theory and said that the Court has filled in the skeleton from time to time with soul and blood and made it vibrant. In *Unnikrishnan*[59] and *PUCL*[60] the Court enlisted various unenumerated rights emerging under the ambit of Article 21. It is submitted that only upon analysis can it be understood whether they fall under the second or the third level of enumeration.

---

[50] *Bandhua Mukti Morcha* v. *Union of India*, 1984 (3) SCC 161; *Rural Litigation and Entitlement Kendra* v. *State of U.P.* AIR 1985 SC 652; *Chhetra Pardushan Mukti Sangarsh Samiti* v. *State of U.P.*, AIR 1990 SC 2060

[51] *M.C. Mehta.* v. *Union of India*, AIR 1988 SC 812

[52] *Bangalore Medical Trust* v. *B.S. Mudappa*, AIR 1991 SC 1902

[53] *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2721

[54] *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295

[55] *Francis Coralie* v. *Administrator, Union Territory of Delhi*, AIR 1981 SC 746

[56] *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180

[57] *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858

[58] *Union of India* v. *Association of Democratic Reforms*, (2002) 5 SCC 294

[59] *Unni Krishnan* v. *State of A.P.*, AIR 1993 SC 2178

[60] *Public Union for Civil Liberties* v. *Union of India*, AIR 2003 SC 2363

Unlike the American Ninth Amendment to the American Constitution which preserves certain rights *'retained'* by the people or the Due Process clause under the Fourteenth Amendment, the Indian Constitution does not have a specific protection for unenumerated rights. But inspite of this express protection, the reasoning of the Supreme Court in *Griswold* v. *Connecticut*[61] and *Roe* v. *Wade*[62] are termed as rather confusing and debatable. On the contrary, like the Indian Constitution, the Irish Supreme Court in *Ryan* v. *A.G.*[63]agreed on the interpretation of Article 40.3.1 to include unenumerated rights on the principle that there exist an *undefined residue* of personal rights, guaranteed by the Constitution.[64] It is submitted that these serve as just examples to various Constitutions recognizing unenumerated rights, but conceptually, the existence of unenumerated rights prevails wherever there is a Bill of Rights.

VI. Judicial Creativity and Concluding Remarks

The existence of unenumerated rights cannot be denied. Not only conceptually but also in reality, these rights emerge from the ambit of enumerated Bill of Rights. The rights of each generation are thus determined not only though the fixed skeleton but also by expanding that skeleton through judicial interpretation for the needs of the subjects of the Constitution and the enumeration of these rights is an important task of the judiciary upholding a robust and dynamic Constitution.

In all the theories of enumeration, the most pivotal part is played by a Judge enumerating an unenumerated right. Neither the Constitution not the Bill of Rights is a self-executing instrument. It is what the judges say it is. And whether the judiciary is the safeguard of our rights under the Constitution will depend upon its interpretation of the Constitution and, in particular, of the Bill of Rights.[65] Though not the scope of this paper, but the questions yet arise; what is the limit to which the Courts should recognize unenumerated rights and where is the balancing needle in judicial creativity?

A Constitution often contains expressions that are open-textured and conceptual and a judge who wants to do justice to his work of justicing is

---

[61] 381 US 479 (1965); The issue involved in the case was Right to privacy

[62] 410 U.S. 113 (1973); The issue involved in the case was Right of abortion

[63] [1965] IR 295

[64] J.M. Kelly, Fundamental Rights In The Irish Law And Constitution (2nd Ed., Oceana Pub., 1968) at pg. 37

[65] *Supra* nt. 3

bound to be creative.[66] J. B.N. Cardozo of the American Supreme Court favoured the growth of law through judicial creativity. He remarks, "Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. Innovate, however, to some extent, he must, for with new conditions there must be new rules."[67]

The task of the judge in the hard case is to construct that part of the ruling through a political and moral theory relevant to the case before him, and to apply the rights recognized by that theory to the facts of the case. There are no fixed standards to judicial discretion and judicial restraint. In determining what extra-legal factors to apply and how to apply them, judges need to recognize the only justification for their powers in a democracy: to protect the fundamental rights, and this judicial function in hard Constitutional cases can only adequately be performed by a judge aware of his discretion.[68] It is submitted that the Constitution and the skeleton of fundamental rights themselves impose an implied limitation upon the power of the judges to balance judicial discretion. If this is not adhered to, then theories of judicial activism will undoubtedly interrupt the excessive judicial discretion.75 ■

---

[66] S.P. Sathe, Judicial Activism In India – Transgressing Borders And Enforcing Limits (Oxford University Press, 2002) at pg. 30

[67] B. N. Cardozo, The Nature Of Judicial Process (Yale University Press, 33rd Printing) at pg. 137

[68] Judicial Discretion, David Pannick as published in Rajeev Dhavan, R. Sudarshan and Salman Khurshid. Judges And Judicial Power, (Sweat & Maxwell)

PART II: COMPARATIVE CONSTITUTIONAL LAW AND UNENUMERATED RIGHTS

A Question Of Interpretation: A Comparative Study Of 'Unenumerated' Rights Recognition In India And South Africa*

Avinash Govindjee[*] and Rosaan Kruger[**]

I. Introduction

At the most basic level the unenumerated fundamental rights debate is about whether judges ought to be allowed to read rights into, or infer rights from the text of the constitution. Reflection on this debate forces one to 'go back to basics'. One needs to consider (or re-consider) the purpose of the constitutional state and the significance of fundamental rights within the framework of the doctrine of separation of powers as it operates in a constitutional democracy. Furthermore, the actual meaning and scope of accepted fundamental rights must be interrogated.

In this article we attempt to contribute to the discussion on unenumerated fundamental rights by 'going back to basics' as a background to our comparative consideration of the phenomenon. The comparative part of the paper considers unenumerated rights recognition in India and South Africa. These countries were chosen for comparison in view of the general similarity of the socio-economic and welfare challenges they face.[1] The constitutions of India and South Africa are, however, very different, especially in relation to the textual protection afforded to socio-economic rights. This difference makes for interesting comparative analysis of the unenumerated rights debate. Our ultimate aim is to determine how these countries could work within the structure of their constitutions, and specifically how reliance can be placed on the rights contained in their constitutions, to address the socio-economic challenges facing their respective societies.

---

* This Paper is prepared for the ILS Law Review Volume IV 2012. The first draft of this paper was presented in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010.

* Associate professor, Nelson Mandela Metropolitan University, South Africa.

** Senior Lecturer , Rhodes university, South Africa

1 For recent remarks regarding this similarity in the context of the India-Brazil-South Africa (IBSA) initiative, see the closing remarks of President Jacob Zuma at the conclusion of the 4th IBSA summit in Brasilia at http://www.polity.org.za/article/sa-zuma-closing-remarks-by-the-president-of-south-africa-at-the-conclusion-of-the-4th-ibsa-summit-brasilia-15042010-2010-04-15 accessed on 19 April 2010.

II. Back to Basics

Constitutions embody abstract principles of political morality, creating a framework for governance by politicians and adjudication by judges, allowing the latter to interpret the principles and apply legal standards distilled from the abstract principles of political morality to concrete circumstances.[2] All constitutional provisions, whether they are rights-creating or government-enabling thus require interpretation.

Constitutional interpretation is a subject of great controversy raising the counter-majoritarian dilemma.[3] Unelected judges are given the responsibility of assigning meaning to constitutional provisions and the power to declare legislation and executive acts unconstitutional on the basis of the meaning that they assign to the constitution. In the context of the current discussion, the power of unelected judges seems limitless: judges are given licence to 'invent' rights not approved by the electorate. But the power to interpret the constitution authoritatively is not intended to be unconstrained. Judges interpret constitutional provisions, both specific and broadly framed provisions, with reference to values cherished in the particular polity that can be found both in- and outside the text of the constitution. Tribe and Dorf[4] explain this process in relation to the identification of unenumerated rights as one of:

> *'Interpolation and extrapolation- From a set of specific liberties that the Bill of Rights explicitly protects, he [the judge, in this instance the reference is to Justice Harlan] inferred unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense'.*

In this process the judgments that judges make are constrained by the constitutional text, precedent and tradition which, used in combination,

---

2 R Dworkin *Life's Dominion* (1994) 119. See also R Dworkin 'Unenumerated rights: whether and how Roe should be overruled' (1992) *University of Chicago Law Review* 381.

3 See D Davis, M Chaskalson and J de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers and D Davis (eds.) *Rights and Constitutionalism The New South African Legal Order* (1994) 1ff.

4 LH Tribe and MC Dorf 'Levels of generality in the definition of rights' (1990) *University of Chicago Law Review* 1057 1068.

minimise judicial subjectivity and ensure congruence with the constitutional ideal. This approach ensures the upholding of the constitution as a *living constitution*.[5] The text of a constitution is thus viewed as the soil within which constitutionalism is rooted.

When it comes to interpretation of the Bill of Rights and identification of unenumerated rights a number of questions arise. What qualifies a right for inclusion in a Bill of Rights? Or put differently, what makes a human right a fundamental right? A meaningful answer to this question will necessarily be contextualised.[6] In its *Certification*[7] judgment, the South African Constitutional Court remarked as follows in explaining the meaning of the phrase 'fundamental rights, freedoms and civil liberties':

> *'What the drafters had in mind were those rights and freedoms recognised in open and democratic societies as being the inalienable entitlements of human beings. Viewed in this light one should not read "fundamental", "rights", "freedoms" and "civil liberties" disjunctively. There is of course no finite list of such rights and freedoms. Even among democratic societies what is recognised as fundamental rights and freedoms varies both in subject and formulation from country to country, from constitution to constitution, and from time to time'.*[8]

---

5 Tribe and Dorf 1100-1103. See also WJ Brennan Jr 'The Ninth Amendment and Fundamental Rights' in J O'Reilly *Human Rights and Constitutional Law: Essays in honour of Brian Walsh* (1993) 109 at 121-122: 'Justice Brandeis once wrote that the American Constitution "is a living organism. As such it is capable of growth – of expansion and adaptation to new conditions. … Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people"'.

6 See in general FI Michelman 'Unenumerated rights under popular constitutionalism' (2006) *University of Pennsylvania Journal of Constitutional Law* 121 and Tribe and Dorf 1057.

7 *In re: Ex parte Chairperson of the Constitutional Assembly, Certification of the Constitution of the RSA 1996*. 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) (Hereinafter *Certification*).

8 Para 50.

III. Comparative Analysis

1. Rationale for the comparison

There are good reasons, in addition to those described above, for legal comparison of India and South Africa.[9] India and South Africa are countries which share significant historical links.[10] Both still experience great inequality and large-scale poverty. Laws, policies and judgments tend, therefore, to be attuned to the economic and social realities facing the countries' people while the implementation of such laws and policies continues to be a problem.[11] Just as the drafters of India's Constitution viewed a range of preceding constitutions in drafting India's historical document, South Africa's drafters learnt lessons from India and elsewhere in drafting the Constitution. Judges in South Africa have also been impressed by the judgments of their Indian counterparts. Former South African Constitutional Court judge, Albie Sachs noted as follows in an academic contribution:

> *'We look to the Indian Supreme Court which had a brilliant period of judicial activism when a certain section of the Indian intelligentsia felt let down by Parliament. They were demoralized by the failure of Parliament to fulfil the promise of the constitution, by the corruption of government, by the authoritarian rule that was practiced so often at that*

---

9 See in general Justice K G Balakrishnan 'The role of foreign precedents in a country's legal system' (Lecture at Northwestern University, Illinois (October 28, 2008)) accessed at www.supremecourtofindia.nic.in/speeches accessed on 27 April 2010.

10 India had been in the forefront of the international community in supporting the anti-apartheid struggle in South Africa ever since Mahatma Gandhi started his Satyagraha movement in South Africa a century ago. India was the first country to sever trade relations with the apartheid Government in 1946, and imposed a complete - diplomatic, commercial, cultural and sports- embargo on South Africa. India worked consistently to put the issue of apartheid on the agenda of the UN, NAM and other multilateral organisations and for the imposition of comprehensive international sanctions against South Africa. The African National Congress (ANC) maintained a representative office in New Delhi from the 1960s onwards. Against the background of India's consistent support to the anti-apartheid struggle, there has been a steady consolidation of ties with South Africa, both bilaterally and through the trilateral IBSA Dialogue Forum. A number of bilateral agreements have been concluded between the two countries since the assumption of diplomatic relations in 1993 in diverse areas ranging from defence, culture, heath, human settlements, public administration, science and technology and economic cooperation.

11 In *Pathumma v State of Kerala* AIR 1978 SC 771, 779, the court held that it was not necessary for the Supreme Court to rely on the American Constitution for the purpose of examining the seven freedoms contained (at that stage) Article 19 of the Indian Constitution precisely because the social conditions and habits of Indian people were different. See also *Jagmohan Singh v State of Uttar Pradesh* AIR 1973 SC 947, 952 as quoted in AP Datar *Datar Commentary on Constitution of India* (2001) 176.

time. Some of the judges felt the courts must do something to rescue the promise of the constitution, and through a very active and ingenious interpretation bringing different clauses together they gave millions of people the chance to feel "we are people in our country, we have constitutional rights, we can approach the courts..." '[12]

The South African Constitutional Court and Supreme Court of Appeal have respectively also relied upon Indian precedent in interpreting the meaning of 'appropriate relief'[13] and in encouraging a broad notion of *locus standi*.[14] Both jurisdictions also emphasise the foundational values of equality, human dignity and freedom.[15]

Despite the existence of good reasons for comparing the jurisprudence of the two countries, it must be ensured that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied. There are important reasons why solutions developed in one jurisdiction may be inappropriate in another. Political and social realities, values and traditions differ across countries.[16] The economies of South Africa and India, for example, are as different as the make-up of the respective societies.[17] It has also been held that whilst the Indian jurisprudence on certain subjects (such as the development of the right to life to include the imposition of positive obligations on the state in respect of the basic needs of its inhabitants) contains valuable insights, it is necessary to bear in mind that the Indian Constitution is structured differently to the South African Constitution.

---

12 A Sachs 'Making Rights Work – The South African Experience' 1 10 in P Smith *Making Rights Work* (1999). See also N Rao 'Human Rights Initiatives' in CJ Nirmal *Human Rights in India: Historical, Social and Political Perspectives* (2000) 53 at 68.

13 *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 para 51

14 *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* [2001] ZASCA 85 footnote 11. See the discussion of the leading Supreme Court case *SP Gupta v Union of India* 1982 2 SCR 365 520, AIR 1982 SC 149 189 in C Loots 'Standing to enforce fundamental rights' (1994) *SAJHR* 49 50.

15 *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 para 63.

16 C L'Heureux-Dube 'Human Rights: A Worldwide Dialogue' in BN Kirpal, AH Desai, G Subramanium, R Dhavan and R Ramachandran (eds.) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 214 226. See also *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 26 per Kriegler J: 'Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. ... Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management.'

17 C Heyns and D Brand 'Introduction to Socio-economic Rights in the South African Constitution' in G Bekker (ed.) *A Compilation of Essential Documents on Economic, Social and Cultural Rights* Economic and Social Rights Series Vol 1 (June 1999) 1 14-15.

This is of particular importance when comparisons extend to notions such as a 'basic structure' doctrine or, as in this case, the status of 'unenumerated' fundamental rights. The South African Bill of Rights imposes certain direct positive obligations on the state and it is the court's duty to apply the obligations as set out in that Constitution without unnecessarily drawing inferences that would be inconsistent therewith.[18] Whether a South African court could rely upon the Indian experience in recognising 'unenumerated' rights in order to assist a poverty-stricken person or community receives further attention below.

2. India

'Political, social and economic changes entail the recognition of new rights, and the law in its eternal youth grows to meet the demands of society.'[19]

2.1: Introduction: The relationship between fundamental rights and directive principles

After two centuries of British colonial rule, the Constituent Assembly of India was created in 1947 to write a constitution for and on behalf of the people of India.[20] The Indian Constitution which emerged is the lengthiest and the most detailed of all the constitutions in the world.[21]

The key to understanding India's lengthy constitution lies in the relationship between the 'directive principles of state policy' and the 'fundamental rights' contained therein.[22] The directive principles possess two characteristics which appear to be anomalous. First, they are not enforceable in any court in terms of article 37. If a directive is not obeyed or implemented by the state, its obedience or implementation cannot, strictly speaking, be secured through judicial proceedings. Secondly, they are

---

18 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC); 1998 (1) SA 765 (CC) para 15.

19 *Mohan J in* JP Unnikrishnan v State of Andhra Pradesh *AIR 1993 (1) SCC 645.*

20 AK Rajsekhariah 'The Indian Constitution and Socio-economic Justice: The Ambedkar Perspective' in RG Singh and RD Gadkar, RD *Social Development and Justice in India* (1995) 230; Some scholars argue that the ethos of human rights values have existed for more than 5000 years in India and that this longevity has resulted in the revelation of valuable lessons pertaining to the interrelationship of human rights: I Bhat *Fundamental Rights* (2004) 56.

21 N Kumar *Constitutional Law of India* 2nd ed (2000) 14.

22 See in general A Govindjee 'Lessons for South African Social Assistance Law from India: Part I – The Ties That Bind: The Indian Constitution and Reasons for Comparing South Africa with India' (2005) 575 – 594.

acknowledged by Indians as being fundamental in the governance of the country and it is the duty of any government to apply the principles in making laws.[23]

The anomaly is highlighted by court decisions which have significantly diluted the first characteristic of non-enforcement in practice and which have, on occasion, enforced certain directive principles.

The Constitution was drafted on the basis of the view prevailing at the time of its formation that social, economic and cultural rights could not easily be made justiciable and that it would require continuous policy making over a period of time before it would become possible for the majority of people in India to enjoy these rights. What was not realized was the fact that as communities developed and became rights-oriented, more and more social, economic and cultural rights came to be judicially acknowledged as groups and communities in the country positioned themselves to enforce and enjoy those rights.[24] More importantly, the judiciary has on occasion interpreted certain socio-economic rights as being fundamental rights because of their importance, as will be illustrated below.

2.2: Pragmatic reasoning or wishful thinking? The Supreme Court of India's interpretation of fundamental rights

The Indian Supreme Court has, from its inception, afforded recognition to a number of fundamental rights which are not expressly mentioned in the Chapter on Fundamental Rights. This judicial exercise was performed on the premise that certain unspecified rights are implicit or inherent in the express enumerated guarantees.[25] The so-called 'new creed' of welfare rights or positive rights recognized in India is not expressly enumerated in the traditional constitutional Bill of Rights. The judiciary has, instead, carved out some of this recognition from clauses guaranteeing the right to life or equality, or via the due process clause.[26]

---

23 MP Singh *VN Shukla's Constitution of India* (2001 reprint November 2003) 298.
24 S Manohar 'Human Rights Agenda: A Perspective For Development' (2003) *Journal of the Indian Law Institute* 163 169.
25 S Sorabjee 'Judicial Activism: Boon or Bane?' *Fifth Nani A. Palkhivala Memorial Lecture* (March 2008) 21.
26 Bhat 52.

Judgments such as *Hanif v State of Bihar*[27] are important for understanding the development of recognition for unenumerated rights in India, having upheld the principle of 'harmonious construction'.[28] Such a construction necessitates directive principles being read into fundamental rights where appropriate so that both fundamental rights and (non-justiciable) directive principles may be effected to the benefit of Indian citizens. The approach adopted by the Supreme Court in India has been to evolve, affirm and adopt principles of interpretation which will further, and not hinder, the goals set out in the Directive Principles of State Policy.[29] This view has seen the accelerated recognition of unenumerated rights in the country.

For example, the Supreme Court read into article 14 the notions of 'fairness', 'reasonableness' and 'absence of arbitrariness' and thus widened the protection of that provision which provides for equality before the law.[30] In addition, while the Indian Constitution does not specifically guarantee freedom of the press as a fundamental right, several decisions of the Supreme Court from 1950 onwards have held freedom of the press to be implicit in the article 19 guarantee of freedom of speech and expression, thereby conferring the status of a fundamental right on the right to press freedom.[31]

Unarguably the greatest development along such lines has occurred with respect to article 21 of the Indian Constitution which provides that: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' This article has seen the birth of human rights jurisprudence in a number of areas. For example, the recognition of the right to legal aid and a speedy trial,[32] the right to means of livelihood,[33] the rights to dignity[34] and privacy,[35] the right to health,[36] the right to go abroad,[37] the

---

27 [1959] S.C.R. 629 at 655. Also see *Keshavananda Bharati v State of Kerala* 1973 Suppl 521.
28 In *Minerva Mills v Union of India* A.I.R 1980 S.C. 1789, Chandrachud CJ quoted with approval the simile used by Granville Austin that Parts III and IV were 'like two wheels of a chariot'.
29 *U.P.S.C Board v Harishankar* A.I.R 1979 S.C. 65.
30 TK Tope 'Supreme Court of India and Social Jurisprudence' (1988) 1 SCC (Jour) 8. See for example *Moti Ram v State of M.P* AIR 1978 SC 1594; (1978) 4 SCC 474; 1978 Cr LJ 1614.
31 *Express Newspapers v Union of India* [1959] S.C.R. 12. The court held that 'the freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental and personal rights of the citizens."
32 *Hussain Ara Khatoon v State of Bihar* [1979] 3 S.C.R 532; *Hoskot v State of Maharashtra* [1979] 1 SCR 192.
33 *Olga Tellis* [1985] Supp. 2 S.C.R. 51.
34 *Francis C Mullin v Administrator, Union Territory of Delhi* [1981] 2 S.C.R. 516.
35 *Karak Singh* [1964] 1 S.C.R. 332; *Govinda v State of U.P* [1975] 3 SCR 946 701, relying on *Griswold v Connecticut* 381 US 479 at 510.
36 *Vincent v Union of India* [1987] 645 2 S.C.R. 468.
37 *Satwant Singh v A.P.O New Delhi* [1967] 3 SCR 525.

right against solitary confinement[38] and even the right to pollution-free environment[39] have stemmed from the provision. In *Bandhua Mukti Morcha v Union of India*,[40] Bhagwati J read article 21 to include protection of all workers, including children, against abuse and to incorporate the development of children in a health manner and in conditions of freedom and dignity.

Prior to the introduction of article 21A,[41] article 21 was also read in a manner which afforded citizens of the country a fundamental right to education.[42] The *Unnikrishnan* case provides a good example of the manner in which article 21 may be interpreted in the Indian context.[43] The majority of the court held that despite the right to education not being specifically included as a fundamental right, when considering the importance of education for the life of an individual and for the nation, the right was implicit and flowed from the right to life guaranteed by article 21.[44] This implied that the state could not deprive a citizen of their right to education except in accordance with the procedure prescribed by law.[45]

The concurring judgment of Mohan J, in particular, emphasised that article 21 acted as a shield against deprivation of 'life' or 'personal liberty', both of which had come to enjoy expanded meanings.[46] His opinion was that concepts such as life and personal liberty had deliberately been left open for interpretation and that the directive principles could serve as a valuable tool during this exercise.[47]

---

38 *Sunil Batra v Delhi Administration* [1978] 4 SCC 494 at 545.
39 *MC Mehta v Union of India* 1988 1 S.C.R. 279.
40 [1984] 2 S.C.R 67.
41 Inserted by the Constitution 86th Amendment Act, 2002.
42 *Unnikrishnan*. The right is not absolute and its content and parameters have to be determined in the light of Articles 41 and 45.
43 The court confirmed that Article 21 enjoyed both negative and affirmative dimensions and that the provisions of Parts III and IV of the Indian Constitution were supplementary and complementary to each other, the former being a path towards the goal of the latter: 645C, 652E.
44 644G, 652G-H and 653A-B. Interestingly, limitations similar to those adopted with respect to socio-economic rights in South Africa, and stemming from the provisions of the ICESCR were also read into this interpretation in the judgment of Mohan J: 716D-F. It should also be noted that the court hastened to add that not all obligations referred to in Part IV of the Indian Constitution would be read into Article 21, but that the court had been prepared to do follow its chosen course on account of the fundamental importance of education to the development of society.
45 654E-G.
46 The learned judge found that 'it would not be incorrect to hold that life which means to live with dignity takes within it education as well.' 697E, 705C.
47 699D, 697E, G, 701G; *Maneka Gandhi v Union of India* A.I.R 1978 597; *Kharak Singh v State of UP*, [1964] S.C.R 332; *Bandhua Mukti Morcha v Union of India* [1984] 3 S.C.C. 161; *Olga Tellis v Bombay Municipal Corporation* [1985] 3 S.C.C. 545

An expanded interpretation of the phrase 'personal liberty' had been offered by the Bench from as early as 1962 in the judgment of *Singh v State of Uttar Pradesh and Ors*:[48]

> *'We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" as used in the Article is a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Art. 21 takes in and comprises the residue.'*

And in *Olga Tellis*, Chandrachud CJ spoke eloquently for the court regarding the meaning of 'life' when observing:[49]

> *'The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such depravation would not only denude the right of its effective*

---

48 [1964] 1 S.C.R. 332. The majority opinion relied heavily on the dissenting judgment of Field J in *Munn v Illinois* [1877] 94 U.S. 113/142, which attributed a broader meaning to the word 'life' in the fifth and fourteenth amendments to the U.S. Constitution, which corresponds to Article 21 of the Indian Constitution. Also see *Puthumma* [1978] 2 SCR 537 on the scope of 'personal liberty'.
49 AIR 1986 SC 180; 1985 (3) SCC 545.To this may be added the words of Justice Iyer, as quoted in Tyagi *Judicial Activism in India* (2000) 126: 'I do not want any people just to survive. I want them to live a life of human dignity and, for that, they must have the basic necessities of life including food and health. The right to life in my opinion includes the right to basic necessities of life. One of the major events in the judicial history of India has been the fuller exploration of the right to life guaranteed under Article 21 of the Constitution. This right is not merely lexical and legal, but expands as we conceptualise the dignity and divinity of the human personality. I would prefer the expression "right to live".' Also see *Francis C Mullin v Administrator, Union Territory of Delhi* [1981] 2 S.C.R. 516, *Bandhua Mukti Morcha v Union of India* [1984] 3 SCC 161 at 183-184 and *Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi* [1992] 4 SCC 99 at 110, which expanded this notion to include a qualified right to work.

content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law if the right to livelihood is not regarded as a part of the right to life.'

2.3: Conclusion

The judiciary in India has shouldered a heavy burden when addressing cases which highlight the country's struggle with poverty, in particular due to the manner in which the Indian Constitution separates fundamental rights from directive principles of state policy. The structure of the Indian Constitution, in particular the textual separation between Parts III and IV, combined with the social challenges facing Indian society made it inevitable that creative measures would be required in order to ensure that socio-economic rights (and other rights unenumerated in the part of the Constitution dealing with fundamental rights) received due recognition. The limited number of justiciable rights included under Part III of the Indian Constitution could not, on an ordinary interpretation, satisfy the needs of the Indian population. The directive principles provided the vehicle for judges to interpret the fundamental rights at their disposal in a broader fashion so as to address these needs. Courts developed a preference for interpreting the Constitution in a fashion which allowed a fundamental right to incorporate a directive principle.[50] The judicial creativity required during this process developed into what some have termed 'judicial activism' and has resulted in a spate of landmark judgments which has seen the judiciary carve out a decision to the advantage of the poor.

This development has, however, also brought the issue of access to justice into acute focus, as only those who are fortunate or privileged enough to access the legal system tend to benefit from the judiciary's approach. Lack of legal aid and the wherewithal to access the legal system is a serious obstacle in India. Another obstacle is the actual practicality of being able to access a court, tribunal or forum to hear the particular complaint, given the large numbers of people in India and the vast area of land which may need to be covered in order to be heard.

[50] M Hidayatullah. M *Constitutional Law of India Voln 1* (1984) 686.

3. South Africa

3.1: Introduction

Constitutional democracy in South Africa is a mere 15 years old. The South African texts, experiences and jurisprudential analyses of age-old constitutional questions draw heavily on that of older jurisdictions. The benefit of youth allows South Africa to learn from experience and to avoid pitfalls that have beset other jurisdictions. In order to understand how South Africa has benefited from the experience of other jurisdictions it is necessary to provide a brief overview of the recent constitutional history of South Africa.

1994 saw the formal end of apartheid with the coming into operation of the interim Constitution.[51] This Constitution introduced radical changes to the constitutional system – franchise rights now vested in every adult irrespective of race; parliamentary sovereignty was replaced with constitutional supremacy and the new Constitution introduced a justiciable bill of rights. According to the political agreement reached between the representatives of the liberation movements and the apartheid government in the early 1990s the transition to constitutional democracy would be staggered; with governance in accordance with the politically negotiated interim Constitution in the first phase, followed by the drafting of the final Constitution by a democratically elected constitutional assembly after first democratic elections. The agreement further stipulated that the constitution-making process after the first democratic elections was to be guided by 34 constitutional principles which were included in the interim Constitution. The final Constitution would furthermore only come into operation after it was certified as compliant with the 34 constitutional principles by the Constitutional Court.[52]

Principle II guided the constitution-making process insofar as fundamental rights were concerned:

> *'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable*

[51] The Constitution of the Republic of South Africa Act 200 of 1993.
[52] *Certification* paras 13-15.

provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.'

Before we consider the Bill of Rights that was certified as compliant with this principle and its relation to the enumerated/unenumerated rights debate, it is fitting to consider the debate vis-à-vis the Bill of Rights contained in chapter 3 of the interim Constitution in the light of the proviso set out in Principle II and in view of the continued relevance of the precedents set under this Constitution.[53]

3.2: Unenumerated rights and the interim Constitution: A question of 'residual freedom' rights?

In a 1994 academic contribution on the drafting of the Bill of Rights of the interim Constitution, Lourens du Plessis, convenor of the Technical Committee on Fundamental Rights during the negotiating process, remarked that the Bill of Rights was not 'a *full* bill of rights'.[54] The term 'full bill of rights' is not explained in that contribution and its meaning is far from obvious. Du Plessis's account of the negotiations that lead to the acceptance of this transitional Bill of Rights paints a picture of sharp political disagreement about the constitutionalisation of rights. Chapter 3 that was crafted during the negotiations was thus a compromise entrenching 25 fundamental rights,[55] ranging from civil and political rights to socio-economic and group rights. The rights contained in chapter 3 were expressed 'as general norms, as broadly as possible, and reliance on lists of specific and detailed guarantees and conditions [were] avoided'.[56] This style of drafting was favoured because it allowed for the use of simple language making the Bill of Rights more accessible to everyone, for ease of interpretation, to avoid

---

53 In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15 Ackermann J delivered his judgment under s 9 of the Constitution 'on the assumption that the equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim Constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions'

54 LM du Plessis 'The genesis of the chapter on fundamental rights in South Africa's transitional constitution' (1994) *SAPL* 1 1, 10.

55 A Cachalia, H Cheadle, D Davis, N Haysom, P Maduna and G Marcus *Fundamental Rights in the New Constitution* (1994) 5.

56 Du Plessis 12.

unnecessary restriction through the use of detailed lists and to allow for 'evolutionary interpretation and growth' of the Bill of Rights.[57]

The broad formulation of rights and the further textual prompt to interpret the Bill of Rights in a manner that promotes 'the values which underlie and open and democratic society based on freedom and equality' (that is, in a purposive manner),[58] led early commentators to remark as follows:

> *'when a court is confronted with a problem of unenumerated rights it should seek to answer the question as to whether the development of a right which is unenumerated in the Constitution would foster or promote those values which underlie an open and democratic society based on freedom and equality'.*[59]

It would seem that it was self-evident for these authors that the constitutional protection of fundamental rights extended beyond those rights that were specifically enumerated in the text. But did the Constitutional Court share this view in respect of the provisions of the interim Constitution?

In the first judgment of the newly established Constitutional Court, delivered in April 1995 by Kentridge AJ for the unanimous court, the learned judge noted that the Constitution, even though it embodies values which must be respected and given effect to in the interpretative process, remains a written legal instrument the language of which must be respected.[60] This sentiment is also evident from subsequent judgments, and specifically that of

---

57 Du Plessis 12.

58 See I Currie and J de Waal *The Bill of Rights Handbook* 5th ed (2005) 149: 'Purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values'.

59 D Davis, M Chaskalson and J de Waal 'Democracy and constitutionalism: the role of constitutional interpretation' in in D van Wyk, J Dugard, B de Villiers and D Davis (eds.) *Rights and Constitutionalism The New South African Legal Order* (1994) 1 127.

60 *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) paras 17-18. Kentridge AJ (para 16) also referred with approval to the oft-quoted dictum of Dickson J of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985)18 DLR (4th) 321,395-6: 'The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be .... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection'.

Ferreira v Levin NO,[61] delivered later in 1995 and in which the court specifically commented on the issue of unenumerated fundamental rights.

In *Ferreira*, the applicants challenged the constitutionality of legislative provisions that allowed for the questioning of company officials in winding-up proceedings as violating their constitutional rights against self-incrimination [62] In the course of his minority judgment, Ackermann J considered the issue of unenumerated rights in relation to the right to freedom. His conclusion in that regard elicited a response from the other judges which clarifies the court's stance on the debate under the interim Constitution. It is therefore necessary to consider this judgment more closely.

In *Ferreira* Ackermann J held that the applicants did not stand accused in criminal proceedings at the time of their constitutional challenge of the provisions which meant that they could not rely on the right to a fair trial (and thus the right against self-incrimination) as that was protected in the Constitution specifically in relation to accused persons.[63] This narrow view of the protection afforded to accused persons did not, however, result in the learned judge concluding that the applicants were without constitutional protection. The Constitution also protected the right to freedom and this right provided the applicants with protection against self-incrimination.[64] Ackermann J interpreted the right to freedom and security of the person set out in s 11 as encompassing two aspects, namely the right to freedom on the one hand, and the right to security of the person, on the other.[65] The right to freedom entailed, according to Ackermann J, 'the right of individuals not to have obstacles to possible choices placed in their way by the state'.[66] This broad freedom right existed alongside the specifically enumerated freedom rights in the Bill of Rights, such as the right to freedom of movement.[67] The unenumerated freedoms protected by this constitutional provision should, according to Ackermann J, 'more properly be designated "residual freedom rights"'.[68] Thus, the judge held that the 'proper methodology' when the infringement of a freedom right was alleged, would have been to determine

[61] 1996 (1) BCLR 1 (CC).
[62] *Ferreira* para 21.
[63] Paras 40-41.
[64] Para 87.
[65] Para 47.
[66] Para 47
[67] Para 47
[68] Para 57.

whether the right allegedly infringed was a specifically enumerated freedom right and if it was found not to be, it had to be determined whether a residual freedom right had been infringed before the limitations analysis was engaged as per the two-stage approach approved by the court in its first judgment.[69] It has to be noted that the general limitations clause (contained in s 33 of the interim Constitution) set different requirements for justifiable limitations of specifically enumerated freedom rights (such as the right to freedom of movement) and what Ackermann J called 'residual freedom rights'. In the latter instance, the Constitution required a limitation of the right to be reasonable and necessary, while a limitation of an enumerated right would be justifiable if it were reasonable only. This appears to be a stark and inexplicable difference which was rightly criticised as anomalous by Chaskalson P in his majority judgment.[70]

Ackermann J interpreted the right to freedom to protect not only physical integrity, but to hold constitutional protection for freedom in the broadest sense, and in doing so he relied extensively on broad interpretations of the concept in other jurisdictions. He explained:

> *'It is important to define s 11(1) broadly in the first stage of the enquiry because it cannot function as a residual freedom right if narrowly defined at this stage. If a broad residual freedom right is not acknowledged by the Court, the Court will not be able to develop any form of due process jurisprudence – procedural or substantive. There may be concerns about substantive due process and Lochner, but in the absence of a broad interpretation of s 11(1) we will not have a general procedural due process right either. In the present case we are concerned with process as much as with substance. We are not creating rights, we are asking the state to be consistent – procedurally – when it denies individuals their rights'*.[71]

Ackermann J stood alone in his broad construction of the freedom right.[72] Chaskalson P, with whom the majority of the court concurred, was of the view that the right protected in s 11 was concerned only with physical

[69] Para 57.
[70] Para 173.
[71] Para 87.
[72] Sachs J supported Ackermann J's application of the freedom right in this matter, but construed the right itself more narrowly: para 249.

integrity.[73] This followed from his assessment that the Bill of Rights contained 'an extensive charter of freedoms'[74] and that the structure of the Bill of Rights and the detailed textual formulation of the different rights could not be ignored in favour of a broad construction.[75] The detailed provisions of the written legal instrument demanded respect.[76] Chaskalson P specifically contrasted the South African Constitution with that of the United States of America. The lack of detail in the 200 year old text of the US Constitution has compelled the Courts in that jurisdiction to construe the its provisions broadly so as to heed the demands of the preamble of that Constitution and to keep up with the changing demands of society.[77] The same would not be appropriate in the South African context where the constitutional text enumerated rights in some detail. Chaskalson P further noted that a wide construction of s 11 would lead to anomalous results when it came to the application of the two-stage approach since it would mean that the limitation of residual freedom rights would be subjected to closer scrutiny than the limitation of enumerated freedom rights.[78]

The narrower view of the right protected in s 11 did not cause Chaskalson to pin the right down rigidly. As an aside, he remarked:

> *'This does not mean that we must necessarily confine the application of s 11(1) to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demand it. But, because of the detailed provisions of chap 3, such occasions are likely to be rare. If despite the detailed provisions of chap 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provision in chap 3, there may be a reason to look to s 11(1) to protect such a right. But to secure such protection, the otherwise unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny which all limitations of s 11 are subjected'.*[79]

[73] Para 169-170.
[74] Para 171.
[75] Para 172.
[76] Para 176.
[77] Para 176-177.
[78] Para 174.
[79] Para 184. Mokgoro J expressed her support for this approach pertinently: para 212.

What do these different constructions of the constitutional text in *Ferreira* say about unenumerated fundamental rights? While the judges disagreed about the applicability of an unenumerated right against self-incrimination in the particular instance, they all seemed to agree that the interim Constitution protected both enumerated and unenumerated freedom rights and that it was the task of the court to identify these rights in appropriate circumstances with reference to the text and framework of constitutional values established in terms of the text. For the majority of the court, the detailed provisions of the Constitution meant that the scope for identification and application of such rights was limited. The question whether this position has changed with the coming into operation of the 1996 Constitution remains.

3.3: Unenumerated rights and the final Constitution

It will be recalled that Principle II required the final Constitution to entrench 'all universally accepted fundamental rights, freedoms and civil liberties' and that it furthermore required the drafters of the Constitution to pay due consideration to the rights entrenched in the interim Constitution. In making sense of the direction provided by this constitutional principle, the Constitutional Court explained in its *Certification* judgment that it interpreted 'fundamental rights, freedoms and civil liberties' as a composite idea requiring the inclusion of the rights and freedoms recognised as inalienable entitlements of human beings in open and democratic societies and it added that the list of such rights was not finite. Therefore, according to the court, the qualification of 'universal' was added which required 'that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included'[80] in the Bill of Rights of the final Constitution. The directive that due consideration had to be paid to the rights that were entrenched in the interim Constitution meant, according to the court, that the Constitutional Assembly had to consider these rights in deciding on the rights to be included in the Bill of Rights, but that it was not bound by the provisions of that Constitution.[81] According to the court 'universally accepted fundamental rights, freedoms and civil liberties' form a 'narrower group of rights' than those entrenched in the interim

[80] *Certification* para 51
[81] Ibid.

Constitution.[82] The Constitutional Assembly was thus free to go beyond the levels of protection provided for in the interim Constitution, or to reduce the level of protection in the final Constitution, provided that the protection measured up to a standard that is 'universally accepted'. Of the Bill of Rights as a whole the court said:

> *'It should be emphasised that in general, the Bill of Rights drafted by the Constitutional Assembly is as extensive as any to be found in any national constitution'.*[83]

Despite this comprehensiveness,[84] objections to the certification of the text were raised by several groups and individuals who were of the view that Principle II demanded the inclusion or the exclusion of particular rights from the Bill of Rights.[85] In response thereto the court remarked:

> *'In respect of each objection [relation to the rights included or omitted from the text], however, the basic flaw is that the CPs [Constitutional Principles] contain nothing which lends support to it. We repeat that it is not for us but for the CA [Constitutional Assembly], the duly mandated agent for the electorate, to determine – within the boundaries of the CPs – which provisions to include in the Bill or Rights and which not.'*[86]

Notwithstanding this general rejection of complaints regarding the inclusion or exclusion of particular rights, the court dealt with one of the objections, relating to the constitutional recognition of family as the basic unit of society and/or the right to marry, an aspect on which the text of the Constitution is silent, pertinently.[87] In dismissing these objections, the court held that family forms in South Africa were diverse and that failure to

---

82 *Certification* para 52.
83 Ibid.
84 M wa Mutua 'Hope and despair for a new South Africa: the limits of rights discourse' (1997) *Harvard Human Rights Journal* 63 66 note 9 states: 'The Constitution has a strong bill of rights (S. AFR. CONST. (1996 Constitution) ch. 2) that in all probability protects the widest range of rights of any constitution in the entire world'.
85 *Certification* para 104. Objectors raised issues relating to the reinstatement of the death penalty, abortion, education and specifically the language medium of eduction, the rights to equality, privacy, the environment, freedom of movement in relation to illegal immigrants, language, culture and the right to present petitions, pornography, obscenity, blasphemy, the right to defend oneself and possess arms, discrimination against homosexuals and the prohibitions on restraint of trade.
86 Para 104.
87 Para 96.

constitutionalise the protection of a particular family form avoids disagreement.[88] The court held that choices regarding marriage and raising a family would be protected by the values of human dignity, equality and freedom, and the right to human dignity that is entrenched in the Constitution.[89] In making these remarks, the court did not identify an unenumerated right to family life or marriage, but merely indicated the scope of the interests protected by the right to dignity. These early tentative remarks about the role of the right to dignity in the protection of family life were confirmed by the court in *Dawood v Minister of Home Affairs*[90] in which the high costs and stringent requirements of spousal immigration permits were challenged as unconstitutional. In confirming the unconstitutionality of the requirements, O'Regan J relied on the right to dignity as it is provided for in the Constitution. It was the right to dignity that was infringed by legislation that prohibits the right to form a marriage relationship ... [and] legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right'.[91]

Thus insofar as family interests are concerned, the South African Constitutional Court has chosen to interpret the right to dignity purposively so as to recognise the agency of human beings in making important life decisions.[92] In doing so, the court did not label the constitutional protection afforded to family life an unenumerated fundamental right, but it interpreted the concept of dignity expansively to protect family life.

3.4: Conclusion

The Bill of Rights in chapter 2 of the South African Constitution contains detailed provisions outlining the protection of fundamental rights. On the strength of the precedent set in terms of the interim Constitution, one can conclude that the existence of detailed provisions in the text of the Constitution means that it would rarely be necessary for the court to resort to

---

88 Para 99 and 103.
89 Para 100.
90 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 36-38.
91 Para 37
92 Ibid: 'The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.'

the identification of unenumerated rights to further the constitutional ideal, including that of transformation of the South African society.[93] More often than not, the rights enumerated in the text will be adequate for the protection of citizens' interests. However, in setting out the detailed provisions, the Constitution also employs imprecise terms such as 'freedom', 'dignity' and 'equality'. It is the task of the court to assign meaning to these terms as used in the Constitution with reference to the text, context and values of the Constitution.

The South African Constitutional Court has chosen not to label its expansive interpretation of imprecise concepts to protect unlisted interests as the identification of unenumerated rights. Such expansive interpretation has the same effect as the identification of an unenumerated right and is thus susceptible to the same criticisms as those levelled at the identification of unenumerated rights. Issues relating to the separation of powers and certainty regarding the scope of protection afforded by broad concepts such as freedom and dignity arise. In order to minimise the effect of these criticisms, the court has to respect the boundaries of the doctrine of separation of powers without undermining the protection afforded by the Bill or Rights and articulate its interpretative approaches and interpretations clearly to enhance certainty.

IV: Conclusion: Constitutional Interpretation For Poverty Alleviation In India And South Africa

Modern Bills of Rights do not represent strict codifications of human rights without room for interpretation and expansion. A view of a Bill of Rights as a legislative enumeration of protectable interests that has to be construed narrowly without reference to extra-textual realities is unrealistic, untenable and undesirable. It may therefore be argued that human rights are not 'fundamental' merely on account of their express enumeration in a

[93] It is widely accepted that the South African Constitution embodies the idea of transformative constitutionalism. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. Klare 150 explains that transformative constitutionalism is "a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'. See also P Langa 'Transformative Constitutionalism (2006) *Stell LR* 351; D Mosekene 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309; AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1.

written constitution. The Indian Supreme Court and the South African Constitutional Court both seem to support this view.

Accepting that rights are not only worthy of protection when they are enumerated to the letter leaves the question as to who should be responsible for extending recognition to 'new' rights (i.e. rights not specifically mentioned). While the elected branches of government could, conceivably, consider such issues on a case-by-case basis, the practice in constitutional democracies has been for the courts to decide the scope of protection afforded by the constitution. Judges in different jurisdictions have, at different times in history, recognised a variety of rights not specifically mentioned in the constitution they are mandated to interpret. Such recognition, in other words, has been time-, context- and society-dependent, especially with respect to socio-economic rights recognition.

Considering that this recognition occurs on a case-by-case basis and is ultimately a matter of interpretation, it is unsurprising that the concept of 'unenumerated' rights has been controversial. What is beyond question, however, is that the most appropriate forum for interpretation of enumerated rights is the courts. Indeed, judicial interpretation of constitutional texts appears to have become a key component of a well-functioning constitutional democracy, to the point where this duty appears to be an important extension of democracy itself (with society, through its elected representatives, choosing to leave constitutional interpretation in the hands of well-trained judges).

As is clear from the experience in both India and, in particular South Africa, this task has generally been undertaken by judges in a circumspect manner. In each case where so-called 'unenumerated rights' are recognised, this expansion is pegged to an appropriate enumerated right (such as liberty, property, expression, life or freedom), broadly construed through the processes of interpolation and extrapolation described by Tribe and Dorf. The relationship between an expanded interpretation of constitutional rights and a country's constitutional values is also striking.

The Indian Supreme Court has readily afforded recognition to a number of fundamental rights which are not expressly mentioned in the Chapter on Fundamental Rights. This has been achieved by the evolution, affirmation and adoption of principles of interpretation designed to promote

the goals set out in the Directive Principles of State Policy. Article 21, in particular, has been moulded by judicial interpretation so as to advance socio-economic rights. In this way, the Indian courts have certainly managed to alleviate the situation of marginalised members of Indian society through their interpretation of the Indian Constitution – albeit in isolated cases where claimants have managed to access the courts and sustain a legal challenge long enough to receive a judgment,

The key question may be to ask what causes Indian courts to apply directive principles in circumstances where they are not compelled to do so? One part of the answer to this question is that some cases of injustice are so serious that they clearly require judicial intervention. The Indian courts appear to be more than happy to oblige with a favourable judgment in such cases, using whichever section of the Constitution is most appropriate (often coupled with extensive and lucid commentary on the pertinent issues). If this argument is accepted, then the crux of the matter becomes deciding which cases require serious judicial intervention? What is beyond dispute is that it is the judges in India who are deciding the outcome of this question in each and every case. This is problematic for a number of reasons and raises issues directly concerned with judicial certainty, consistency and the separation of powers between the judiciary and the legislature. It also brings into focus the importance of access to justice.[94]

South Africa, by contrast, included an impressive range of enumerated human rights in its final Constitution, including civil and political, socio-economic and group rights. The need for reliance on unenumerated rights in South Africa will, as a result, not be extensive in view of the detailed provisions of the constitutional text. This detail that the text provides does not, however, eliminate the need for interpretation of the Constitution. The text and context demand interpretation of the rights included in the Bill of Rights with specific reference to the facts of a particular case and the socio-economic realities prevailing in the country. This process of interpretation would appear to enhance the possibility of judgments addressing some of the challenges faced by disadvantaged members of South African society satisfactorily.

[94] See Justice S Muralidhar 'Access to Justice' *Seminar Web-Edition* (January 2005) accessed at www.india-seminar.com/2005/545/545%20s.%20muralidhar1.htm accessed on 27 April 2010.

Because of the detailed and justiciable human rights provisions (including socio-economic rights clauses) contained in the South African constitution, it appears as if South African courts will hesitate to be over-liberal in their interpretation of such rights. Despite this restraint, it is submitted that the broad notions of life,[95] freedom, dignity and equality which are contained in the South African constitution could, by way of careful judicial construction in accordance with the text, context and values of the Constitution, be interpreted so as to advance the needs of those crippled by poverty in the country. Such an approach would allow South African judges, by way of an approach not dissimilar to that used in India, to interpret and apply the South African Constitution in a manner which ensures that the document grows to meet the numerous challenges facing South African society.

Constitutional rights entrenched in the constitutions of countries such as India and South Africa are the culmination of hard-fought struggles. They embody society's promises to its people. The true test of a constitution's effectiveness may well be its ability to change the plight of the poor and the marginalised, the oppressed and those in suffering. While it is difficult to quantify the precise impact of the Constitutions of India and South Africa using this test, it is undeniable that both constitutions have succeeded in having a positive impact on such groups of people through the judgments of the courts. Given the differences in the structure of these Constitutions, it is natural that the manner or techniques which have been used by Indian and South African courts to achieve this end has differed in style and approach. Nevertheless, these differences in approach make for an interesting comparison and it is reasonable to argue that each country could take a leaf out of the other's book, as alluded to above. There is an undeniable allure to the Indian courts' activist-type approach of addressing the problem before them and then pegging the ratio for the decision on a broad construction of one of the enumerated rights. Such an approach may result in greater victories for disadvantaged groups of people in South Africa and would be

[95] In *Victoria & Alfred Waterfront v Police Commissioner, W Cape* 2004 (4) SA 444 (C) Desai J held that the right to life included the right to livelihood. This generous interpretation was rejected by Gauntlett JA in the Lesotho Court of Appeal in *Baitsokoli v Maseru City Council* [2005] 3 All SA 79 (LesCA) who held that the right to life in the context of the Lesotho Constitution did not extend that far in view of a textual provision of that Constitution securing the opportunity to work as a policy of State principle.

more appropriate than an over-cautious approach which equates the large number of enumerated rights with a need for narrow interpretation. Support for a more expansive interpretation has the potential to enhance a social justice agenda and would, arguably, be justifiable given the values upon which South African society is based.

It is submitted that there is a tremendous responsibility on Indian judges to address the challenges of society in accordance with a principled approach which takes its cue from constitutional values and accepted techniques of constitutional interpretation. This will ensure that judgments are justifiable and that the discretion exercised by the courts never becomes arbitrary. Indian judges also have to avoid the spectre of being accused of breaching acceptable boundaries of separation of powers. It is, once again, adherence to a principled system of legal reasoning, including appropriate smatterings of judicial deference, which holds the promise of ensuring a justifiable basis for 'unenumerated' rights recognition in this country. Judgments of the South African Constitutional Court, pertaining to both the interim and final Constitutions, may serve as a useful reference point to assist the Indian judiciary in striking a balance in this regard.

■

Enumerating The Unenumerated : Unenumerated Rights Under The U.S. Constitution

Kalyani Tulankar*

The paper seeks to study the conception and evolution of unenumerated rights in the United States of America.

There are two instances of deriving individual rights in the American Constitution. The first instance is the much controversial and open ended Ninth Amendment to the Constitution which refers to rights of people not specified in the Bill of Rights. The Second Amendment, does not form a part of the Bill of Rights and is by far the most widely applied amendment while referring to and identifying unenumerated rights in the constitution.

It is generally accepted that the American Constitution recognizes unenumerated rights under the Ninth Amendment in the Bill of rights and under the Privileges and immunities clause of the Fourteenth Amendment.[1] Even though there is an express provision recognizing unenumerated rights in the form of the Ninth Amendment, the court has upheld various unenumerated rights by bringing them under the ambit of the Fourteenth amendment.

Through the years, reliance has been placed on the fourteenth amendment than the ninth Amendment to recognize unenumerated rights. Since its adoption, the ninth amendment lay in abeyance for over 150 years till it stirred considerable interest after *Griswold* v. *Connecticut*.[2]

I. Ninth Amendment

'It cannot be presumed that any clause in the constitution is intended to be without effect'[3]

One of the well-known rules of interpretation of statutes, constitutions and similar instruments seems to be the rule that the expression of one subject, object or idea is the exclusion of other subject object or ideas.[4] The

* Author was student of V B.S.L. LL.B., I.L.S. Law College, Pune at the time of presentation of this paper in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010.

1 Randy Barnett, Reconceiving the Ninth Amendment, 74 Cornell L. Rev. 1 (1988-89)

2 381 U.S. 479 (1965).

3 Marbury v. Madison, 5 U.S. 137, 174 (1803)

4 '*Expressio Unius Est Exclusio Alterius*', Clifton Williams, 15 Marq. L. Rev. 191 (1930-1931).

Ninth amendment to the American Constitution creates an exception to this rule.

When the Constitution was ratified, it was opposed by anti federalists on the ground that there was no bill of rights to the constitution and that it lacked express provisions for protection of rights of people. The federalist, however, were of the view that a bill of rights was unnecessary for as the constitution had enumerated and limited powers, the government did not have the power to put a restraint on such rights. In the words of Alexander Hamilton, *Why declare that things shall not be done when there is no power to do so?*[5]

The Bill was not only considered unnecessary, but was also feared to be a potentially dangerous one. The federalist's major apprehension against such a bill of rights was that enumeration of certain rights would exclude other rights from being recognized and enforced and that it was impossible to give an exhaustive list of rights.

James Madison, a federalist, drafted the original draft of the XII amendments, ten of which were later adopted as the bill of rights.

The first draft of the Ninth Amendment read:

> *"The exceptions [to power] here or elsewhere in the constitution made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations on such powers, or as inserted merely for greater caution."*

After much deliberation the ninth amendment, was adopted, and stands as follows:

> *"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."*

Over the years, the amendment has turned to be a conundrum for scholars and practitioners. Robert Bork in his confirmation hearing said,

[5] The Federalist No. 84

> *"I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says, "Congress shall make no" and then there is an ink-blot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot."*

Let us now consider various approaches that have evolved through the years for interpreting the Ninth Amendment.

II. Textual Approach

The amendment concerns with rights that are '*retained by the people*' other than those rights specified. *Prima facie* easy to understand, a careful reading presents the interpretational difficulties posed by the vague and ambiguous wording of the Amendment. Legal experts have long debated whether the Ninth Amendment is a Source of Rights or a mere legal truism.[6]

In both the Ninth Amendment and the Privileges or Immunities Clause, the written Constitution seems to gesture beyond itself, toward rights not textually specified in the document itself.[7] The vague language of the Amendment leaves little scope for mere textual interpretation to understand the real and practical meaning. In an attempt to understand the meaning of the amendment, it would not suffice to limit it by textual constraints, but to relate it with the contextual devices of evidence, knowledge and logic.

III. Theories of Ninth Amendment

Various theories of interpreting the rights given in the Ninth Amendment have been proposed. According to the followers of the Natural rights theory, the Ninth Amendment was meant to preserve the "other" individual, natural, pre-existing rights that were "retained by the people" but were not included in "the enumeration of certain rights."[8] The most common assumption is that this refers to the natural rights that the people "retained" when they entered into civil society by agreeing to live by the social contract

[6] Kurt T. Lash, The Lost Original Meaning Of The Ninth Amendment, 83 Tex. L. Rev. 331(PG. 7)
[7] Akhil Reed Amar, Textualism And The Bill Of Rights, 66 Geo. Wash. L. Rev. 1143.
[8] Randy E. Barnett, THE NINTH AMENDMENT: IT MEANS WHAT IT SAYS, 85 Tex. L. Rev. 1.

that forms their system of government.[9] The Ninth Amendment then, is not a source of these rights, for these rights existed even before the Bill of Rights.

Another approach to the Ninth Amendment recognizes the rights of the people that remained with them after they gave power to the government.

IV. Modern Interpretation

Until 1965, the ninth amendment rarely figured in the Supreme Court's decisions. In 1947, in the case of *United Public Works* v. *Mitchell,*[10] J. Reed stated,

> *"The powers granted by the constitution to the federal government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by those rights, reserved by the ninth and tenth amendments must fail."*

The Tenth Amendment,

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

J. Reed's above statement appears to be a no more than a corollary to the tenth amendment. While concluding that rights begin where power ends, it ignores the meaning of the ninth amendment with the tenth amendment, thereby confusing the rights in the former with the confines of power in the latter. That is to say, it relies only on the tenth amendment, ignoring the ninth while concluding that rights begin where power ends. While coming to this conclusion, the ninth amendment seems to be equated with the Tenth amendment. Also, there seems to be a confusion between the Rights in the

---

9 Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, And American Constitutions: The Fourteenth Amendment And The Concept of Unenumerated Rights*, 36, Wake Forest L. Rev.747 (2001).

10 330 U.S. 75 (1947).

former and Power in the latter to mean the same, rendering the ninth amendment conception of 'other rights' 'retained by people' inefficacious.

In 1958, J. Robert H. Jackson wrote that '*the rights are still a mystery.*' In less than a decade, would come a milestone in the evolution of the Ninth Amendment, which would relaunch the inquisition in its true meaning questioning the very basis of the common perception of the amendment.

The revival of the ninth amendment from its state of neglect is generally credited to J.Goldberg in *Griswold* v. *Connecticut.*[11] J. Douglas, who wrote the opinion for the court, wrote that the statutes violated the right of marital privacy created by the penumbral rights emanating from specific guarantees in the first, third, fourth, fifth, and ninth amendments. The right to privacy, which is not specifically recognized as right in the text, was held to be implicit by reading together the above mentioned articles. But it was J. Goldberg's opinion, concurred by Chief Justice Warren and Justice Brennan that brought the ninth amendment into the spotlight.

Recognizing that the Ninth Amendment confers judicially ascertainable and enforceable rights he further said,

> *"To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.*
>
> *Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment."*

The test in his opinion of determining whether an unenumerated right exists. He says,

> "………… *In determining which rights are fundamental, judges are not left at large to decide cases in*

---

11 381 U.S. 479 (1965)

light of their personal and private notions. Rather, they must look to the "traditions and collective conscience of our people" to determine whether a principle is "so rooted there . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those `fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."

Even though the decision was not based solely on the ninth amendment, it revived the interest in the much-neglected amendment.

In *Roe* v. *Wade*[12], the court viewed the Ninth amendment as supporting the Due process clause of the Fourteenth Amendment and upheld a woman's right to procure abortion. The Supreme Court has further cited the Ninth Amendment in support of unenumerated rights such as such as Right to Sexual orientation,[13] right to procure an abortion.[14]

V. The Fourteenth Amendment

One of the Amendments of the reconstruction era, it was ratified in 1868, and includes Privileges and immunities, Due Process and equal protection clauses. The amendment was drafted after the civil war with a view to overrule the decision in the *Dred Scott* case[15], which had in essence upheld slavery and for a good measure also fuelled the American Civil War. Prior to the amendment, It was well settled that the bill of rights was applicable only to the federal government, but not to states.[16] The 14th amendment brought about a major change in American Constitutional Law by making the Bill of Rights applicable on the states.

[12] 410 U.S. 113 (1973)
[13] *Lawrence* v. *Texas*, 539 U.S. 558 (2003)
[14] *Roe* v. *Wade*, 410 U.S. 113 (1973); *Planned Parenthood* v. *Cassey*, 505 U.S. 833 (1992).
[15] Scott v. *Sandford*, 60 US (19 *How)* 393 (1857)
[16] Barron v. *Baltimore*, 32 U.S. 243 (1833).

Evolution of the Fourteenth Amendment - The Privileges and Immunities Clause:

Prior to the fourteenth amendment, Article IV (Section 2, clause 1) in the privileges and immunities clause prohibited states from discriminating against citizens of other states. Much before the ratification of the 14th amendment, J. Washington held the clause to mean those privileges and immunities *"which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."*[17]

There are at least two questions of relevance to evaluating whether a person can make a claim under the Privileges or Immunities Clause of the Fourteenth Amendment: "(1) what are the fundamental rights guaranteed under the Amendment and what is the nature of the protection afforded these rights."[18]

The narrow interpretation of the clause in the *Slaughter-House* cases[19] that restricted the scope of the privileges and immunities has been widely criticized, though it has never been overruled. Much of the damage done by slaughter House case has now been undone under the due process. The due process clause has been used by the court in various cases to protect enumerated as well unenumerated individual rights from state's violation.[20]

It was in 1925, in the case, *Gitlow* v. *New York*[21], where it was held that the freedom of speech and expression was an integral part of fundamental rights and liberties and was protected by the due process clause of the fourteenth amendment, from state infringement. This proved to be a milestone in American Constitutional History as it refuted the settled position at that time and the bill of rights was held enforceable against the states.

[17] *Corfield* v. *Coryell*, 6 Fed. Cas. 546, no. 3230 C.C.E.D. Pa. 1823
[18] Smith, *supra* note 156, a t 190 n.101 (citing Michael J. Perry, Theconstitution In The Courts Law Or Politics 24, 127 (1994).
[19] 83 U.S. (16 Wall.) 36 (1872).
[20] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of sisters in the name of Jesus and Mary*, 268 U.S. 510 (1925)
[21] 268 U.S. 652 (1925)

VI. Identifying Unenumerated Rights

The controversy regarding the Unenumerated Rights surrounds

(1) The source and content of the rights

(2) Their judicial enforceability. [22]

The Ninth Amendment suffers from a major shortcoming; it does not identify the rights, and fails to provide an effective mechanism for identifying the rights.[23] The vague, ambiguous and the open-ended language of the Ninth Amendment has led to many interpretations as to the meaning of the amendment.

It is feared by some that the content of unenumerated rights is too uncertain and contestable to be enforced by the courts.[24]

Take for example J. Scalia's views in his dissenting opinion in *Troxel* v.*Granville*[25], where he wrote, '*the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.*'

The process of identifying the content of Unenumerated Rights appears to be indistinguishable as a practical matter from adopting a Judge's personal preferences.[26] The Court has been hesitant to identify and enforce rights solely based on the Ninth Amendment and has found the due process, equal protection and the privileges and immunities clause of the fourteenth amendment more definitive.

Based on the evidence available to us, parallel studies undertaken to decipher the meaning of the Ninth Amendment may not, and in all likelihood, will not result in similar findings. The critical differences in the opinions of the court at various times about the existence and content of unenumerated

[22] Randy Barnett, UNENUMERATED CONSTITUTIONAL RIGHTS AND RULE OF LAW, 60 Cornell Law Review 231.

[23] POSNER, Legal Reasoning, *The University of Chicago Law Review*, Vol. 59, No. 1, The Bill of Rights in the Welfare State: ABicentennial Symposium. (Winter, 1992), pp. 433-450.

[24] RANDY E. BARNETT, Who's afraid of Unenumerated Rights?, 9 U. Pa. J. Const. L. 1-22 (2006)

[25] *Troxel et vir.* v.*Granville*, 530 U.S. 57 (2000).

[26] RANDY E. BARNETT, Who's afraid of Unenumerated Rights?, 9 U. Pa. J. Const. L. 1-22 (2006)

rights shows that it is no easy task to discern a clear understanding of such rights.

VII. Indian Background

Unlike the U.S. Constitution, the Constitution of India does not have an express provision reserving rights apart from those enumerated in the constitution.

It is significant here to note that the first draft of fundamental rights considered by the constituent assembly included the '*due process clause*' from the American Constitution. J. Frankfurter, of the United States Supreme Court, had advised that the due process clause should be removed. The due process clause was subsequently discarded for the term 'procedure established by law' from the Japanese Constitution[27] primarily to avoid the uncertainty surrounding the due process concept in the U.S.A.[28]

However, the Supreme Court of India has on several occasions upheld rights that do not find explicit mention in the Constitution, mostly under the ambit of Article 21. The Court has in some such cases, appears to have derived inspiration from American Jurisprudence with regard to the recognition of such rights. In *Maneka Gandhi* v. *Union of India*[29], the court reinterpreted Article 21 to broaden its interpretation to imply various fundamental rights. Since then Article 21 has been on its way to emerge as the Indian version of the American concept of Due process. [30]

The theory of penumbral rights[31]has been cited in the Indian privacy rights cases.[32]

Whether considered as a source of rights or as a rule of interpretation, the ninth amendment gives legitimacy to the courts' decisions going beyond the text, to find other rights not specifically enumerated in the constitution. However, in the absence of similar provisions in the Indian Constitution and the enumerative and exhaustive nature of Part III of the constitution, the legitimacy of the court's reading unenumerated rights in the text is questionable.

[27] *See* T.R. Andhyarujina, *The Evolution of Due Process of Law*, in 'Supreme but Not Infallible: Essays in Honour of the Supreme Court of India' editedby B.N. Kirpal et al. (Oxford University Press, 2000) 197-198.

[28] Prof. M. P. Jain, Indian Constitutional Law

[29] (1978) 1 SCC 278.

[30] Prof. M. P. Jain, Indian Constitutional Law

[31] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)

[32] *Govind* v. *State of Madhya Pradesh*, AIR 1975 SC 738; *R. Rajagopal* v. *State of T.N.*

Unenumerated Fundamental Rights In The Irish Constitution

Sharath Chandran*

I. Introduction

The issue of unenumerated fundamental rights has been a hotly debated one, and continues to play a seminal role in the growth of constitutional jurisprudence in most countries in the world having a written constitution. In Ireland, four score and seven ago, a case set the tenor for the growth of unenumerated rights in the Irish Constitution. The case, Ryan Vs The Attorney General[1], continues to be widely hailed as a classic in the study of constitutional law.

In Ireland, the doctrine of unenumerated rights, has been interpretively deployed to evolve numerous other substantive rights for the people .Therefore, in one sense, the doctrine has functioned as a social trigger, enabling the constitution to meet and tackle newly emerging problems. This paper tries to document this journey of constitutional interpretation in Ireland, and thereby aims at highlighting the core issues, both of interpretation and constitutional evolution.

II. Nature of the Irish Constitution

The Bunreacht na hÉireann, or the Constitution of Ireland replaced the Constitution of the Irish Free State in 1937[2].It established an independent state[3] based on a system of representative democracy and guarantees certain fundamental rights, along with a popularly elected president, separation of

* Author was student of II.LL.B , ILS Law College Pune at the time of presentation of this paper in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010

1 [1965] I.R. 294

2 The Constitution was chiefly the work of Eamon de Valera. The Constitution contained a distinct flavor of catholic spiritualism . These can be clearly deduced from the preamble which sets out *"In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, and seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained,the unity of our country restored, and concord established with other nations,do hereby adopt, enact, and give to ourselves this Constitution."*

3 Ireland was formally declared a Republic only in 1949

powers and judicial review. Amendment of the constitution may only be through referendum[4].

Fundamental Rights Provisions:

The fundamental rights provisions under the Constitution are found under Articles 40-44.Art. 40.3.1 states that *"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."* Art 40.3.2 reads *"The State shall,* ***in particular,*** *by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."*. Other guarantees include 40.1. 3 which protects the right to life of the unborn. Art. 40.4 protects the right to habeas corpus; Art. 40.5 establishes the inviolability of the home; Art. 40.6 guarantees rights to free expression, peaceable assembly, association and unionization, all subject to "public order and morality." Art. 41 recognizes the "Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Art. 43 recognizes that "man, in virtue of his rational being, has the natural right, antecedent to positive law, to private ownership of external goods." The influence of specifically Catholic moral teaching is also seen in Art. 45 which lays out Directive Principles of Social Policy intended to promote social justice, though the text makes these provisions explicitly non-justiciable: they can only be interpreted by the Oireachtas (Irish Parliament)[5].

The Irish courts during the 1960s and 1970s, finding a need to render the law concerning individual rights more explicit, began to hand down decisions protecting personal rights that were not specifically enumerated in the Constitution. The justification for these holdings came from the wording of Article 40 .3.1 as well as from natural law jurisprudence, which suggest that there are certain fundamental rights which are superior and antecedent to

4 Vide Article 46 (2).

5 Bradley Lewis : Natural Law in Irish Constitutional Jurisprudence The Catholic University of America, Washington D.C

any man-made law[6].The express recognition of unenumerated Fundamental Rights in the Constitution came only after the landmark decision in Ryan Vs Attorney General[7]. However in order to better understand the development of unenumerated fundamental rights an attempt is taken to survey the jurisprudence in this area.

III. Development of the Law

Initially, very little litigation was taken before the courts on the question of justiciable rights for instance in The State (Ryan) v Lennon, established the dominance of the positivist view that there are no constitutional rights guaranteed, other than those expressly mentioned[8] . Judicial reluctance to consider an expansive view was reiterated forcefully in *The State(Burke) v Lennon*[9] by Johnson J. and The State (Walsh)[10] v Lennon where Maguire J. spoke of potential "mischief and inconvenience." In *Re Article 26 and the Offences against the State (amendment) Bill*[11] Sullivan C.J. "emphatically rejected" the suggestion that the clause was applicable to particulars and established the court's view that the rights of individuals concerning the rights of citizens in general lay within the sphere of the Oireachtas (Irish Parliament).

Ryan's Case: The Turning Point

It was not until 1964 that the doctrine of unenumerated rights was enunciated for the first time in the case of *Ryan Vs The Attorney General*[12]. A Dublin housewife challenged a law mandating the fluoridation of the public water supply. There were several grounds for her challenge, but the most important was that she thought fluoridation a threat to the health of her

---

6. Amy M Buckley "The Primacy of Democracy over Natural law in Irish Abortion Law" *9 Duke J. of Comp. & Int'l L. 275*
7. Supra at note 2.
8. Keane has commented that constitutional jurisprudence was "inhibited" by the fact that the judges "had been, in the main, educated in the English constitutional tradition. See Keane, "Judges as Lawmakers- The Irish Experience" (2004) 4(2) Judicial Studies Institute Journal 1 at 9
9. [1940] I.R. 136.
10. [1942] I.R. 112 at 124.
11. Re Article 26 and The Offences Against the State (Amendment) Bill [1940] I.R. 470.
12. Supra at note 2

children and claimed that it violated a right to "bodily integrity" under Art. 40.3.1. While that article does not mention any such right, her attorneys claimed that that article protected rights which were "unspecified" in the text. In the High Court's decision in *Ryan*, Kenny J had recourse to the "Christian and democratic nature of the state" to determine what specific personal rights Art 40.3.1 should embrace. Kenny J proceeded to find a right to bodily integrity supported by a papal encyclical[13].On appeal, the Supreme Court found Kenny J.'s definition of the right too narrow, but the court agreed that "personal rights" are not exhausted by the enumeration of life, good name and property[14].

Since the landmark decision in *Ryan* many personal rights having diverse textual bases such as the right to earn a living[15], to the right to litigate[16], have been found within the sphere of Art. 40.3.1. The right to communicate in *AG v Paperlink*[17] was based on "the citizen by his human personality," while the right to earn a living in *Murtagh Properties v Cleary*[18] was premised on the directive principles in Art 45. Additionally, natural law was found to be the base for the right to privacy in both in the *Norris* and *McGee* cases[19].

McGee v. the Attorney General[20] decided in 1974, concerned Ireland's ban on the sale and importation of contraceptives. Mary McGee, a married mother of four had been advised by her doctor to avoid further pregnancies due to several health problems. She and her husband decided to use contraceptives which their doctor prescribed and ordered from England. They were seized by customs officials and McGee applied for a declaration that the statute in question violated her family's rights under Art. 42 and her personal

---

13. In order to show that the Christian and democratic character of Ireland protected such "unspecified" rights, Kenny appealed to *Pacem in Terris*, an encyclical letter of Pope John XXIII which stated that bodily integrity was a natural human right
14. In Chief Justice Dalaigh's opinion unspecified rights were said to be due to one's status as a human person
15. Murtagh Properties. v. Cleary [1972] IR 330.
16. Macauley v. Min for Posts and Telegraphs [1966] IR 345
17. [1984] ILRM 373.
18. Supra at nt 16.
19. See generally Donal Small , "Ryan Vs AG , A Bottomless Pit of Rights? A proposal for reform" 2 GALWAY STUD. L. REV. 40, 48-50 (2003).
20. [1974] I.R. 284.

rights under Art.40.3.1. Her claim was that the family rights created a right to privacy in the sexual lives of married couples and the prohibition on contraceptives created an unconstitutional risk to her own health. The High Court upheld the law, but was reversed by the Supreme Court which ruled in McGee's favour[21].In his opinion, Justice Brian Walsh explicitly referred to the unspecified rights under Art. 40 as following from natural law. Furthermore he argued that Art. 40 protected rights that were not created by law but anterior to it. The Constitution, then, recognized these rights under natural law, but did not create them. He concluded that marital privacy was such a right and that the state could not interfere with it. The *McGee* Court was the first to recognize the right to marital privacy as either an unenumerated personal right guaranteed under Article 40 or as a familial right under Article 41 of the Constitution.

Justice Walsh's in his opinion took the occasion to reflect on the problems of natural law interpretation in an increasingly pluralistic society. He acknowledged that the natural law content of the Constitution was inseparably linked to the Christian element in the Constitution most forcefully expressed in the preamble[22].

In *Norris* v. *Attorney General*[23] concerned Ireland's criminal statute against sodomy which the plaintiff contended violated his right to privacy. Chief Justice Thomas F. O'Higgins, writing for a 3-2 majority, rejected the complaint which he saw as a challenge to the notion that the state could regulate private morality. O'Higgins CJ while holding that the state had the right to do this observed that the morality of Irish law was essentially Christian and that since Christianity had always condemned sodomy, no law prohibiting it could possibly be unconstitutional absent a specific constitutional provision stating otherwise. Justice Henchy and Niel McCarthy both wrote dissenting opinions. Henchy J admitted the Christian influence on the Constitution, but, interpreting this along the lines suggested by Justice

21 The Court however rejected her claim that the law violated her right to conscience

22 See also I.R Coelho Vs State of TN (2007) 2 SCC 1 , for a similar approach by the Indian Supreme Court . See also Bradley Lewis : Natural Law in Irish Constitutional Jurisprudence The Catholic University of America, Washington D.C, *Catholic Social Science Review*, vol. 2 (1997): 171-182

23 [1984] I.R. 36. 61-65

Walsh's notion of "Constitutional Charity", argued that in prohibiting immoral acts the onus was on the state to show that the common good required such prohibition[24].

Though abortion had always been illegal in Ireland, in 1983 the people of Ireland voted for an amendment to the Constitution, making abortions illegal and thereby to save the right to life of the unborn[25]. About 4,000 women a year travelled to England[26] for abortions since none were performed in Ireland unless medically necessary to save the life of the mother. Two women's counselling centers in Dublin were advising women on foreign abortions and in some cases arranging for their travel to England. An anti-abortion group brought this to the attention of the Attorney General who obtained an injunction prohibiting this counselling as a violation of the right to life provision of the Constitution. In the case of *The Attorney General v. Open Door Counselling*[27] the Supreme Court agreed with the Attorney General and the injunction was granted. In *S.P.U.C.* v. *Coogan*[28] *a* student group at University College Dublin was prevented from distributing abortion information. In both cases the Court stated that the right to life amendment was merely the Constitution's recognition of a natural right which was anterior to positive law[29].

In The Attorney General v. X[30] (known as the "X" case), what is now regarded as one of the most important in the history of modern Ireland, concerned a fourteen year old girl who had been raped by her friend's father. During the course of the criminal investigation of the rape, her parents let the police know that she planned to travel to England for an abortion which she was then enjoined from doing by the Attorney General. The young girl was under an extraordinary amount of stress and had stated on numerous

24 The petitioner however succeeded to vindicate his rights before the European Court of Human Rights , in 1988 in the case of Norris Vs Ireland.

25 Ann Sherlock, "The Right to Life of the Unborn and the Irish Constitution," *Irish Jurist* 24 (n.s.) (1989): 13-50.

26 See Supra nt 23

27 [1988] I.R. 593.

28 [1989] I.R. 734. However in a March 1997 judgment, the Supreme Court lifted the injunction against the student group on grounds of the "X" case ruling

29 See *The Attorney General (S.P.U.C.)* v. *Open Door Counselling Ltd.* [1988] I.R. 593,598-99.

30 [1992] I.R. 1.

occasions that she would commit suicide if forced to carry the pregnancy to term. She claimed a right to travel under the general guarantee of personal liberty in Art. 40.4 of the Constitution which the High Court refused, holding that the right to life of the unborn child outweighed this. The Supreme Court overruled the High Court here ruling that since the right to life provision of the Constitution also protected the life of the mother and since the preponderance of psychological evidence in this case established a "real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible[31].

In *Re: Article 26 and the Regulation of Information (Services for Termination of Pregnancies) Bill 1995*[32] the Regulation of Information bill was passed in the legislature and then referred by the President to the Supreme Court under Art. 26 of the Constitution which allows the reference of legislation, the constitutionality of which may be in doubt, to the Court for an opinion. If the Court approves the legislation, it can never again be challenged on constitutional grounds. The Court's ruling was extraordinary in that it answered the arguments about natural law directly and concluded that they were inapplicable given that the information amendment which grounded the legislation in question was approved in a valid constitutional referendum[33]. The Court argued that the Constitution enshrined principles of popular sovereignty limited only by the *express* provisions of the Constitution itself which could themselves be changed in any way whatsoever by referendum. Similarly, the Court applied what it took to be the substance of Walsh J's thesis about the historical development of the constitution and the hermeneutic principles of prudence, justice, and charity. The case represents a "backlash,"[34] against the super textual approach and O'Hanlon J.'s strong endorsement of natural law[35].

---

31 Sat want and . In the context of abortion laws in Ireland, a present dispute is pending before the ECHR. The case is X,Y and Z Vs Ireland

32 [1995] 2 I.L.R.M. pp 102-104

33 Bradley Lewis : Natural Law in Irish Constitutional Jurisprudence The Catholic University of America, Washington D.C

34 Carey, "Police Targeting and Equality Rights" (2001) 19 Irish Law Times 8 at 15

35 [illegible]ith Molloy : Unenumerated Constitutional Rights : The Current Problematic Position , in the Symposium Unenumerated Rights in the Irish Constitution : The Debate Continues

IV. The Present Position

In the years following the *Regulation of Information case* the Supreme Court has grown increasingly conservative in its approach to the discovery of unenumerated rights. Describing the potential for the evisceration of "non-textual" rights, Keane C.J. recently wrote that he felt at unease regarding the "dubious premises" on which unenumerated rights rest and that he recognises the danger of "unrestrained judicial activism in this area[36]."

The Constitutional Review Group in 1996 recommended the relocation of the unenumerated rights by amending the Constitution to expressly mention them within other suitable provisions[37]. The CRG also observed that while the development of the unenumerated rights doctrine has in many respects proved to be beneficial, unease had been expressed in many quarters that from the language of Article 40.3.1 as there appears to be no objective method of ascertaining what these personal rights are[38].

Keane also observed that judicial lawmaking has receded in the Supreme Court because "unease persists as to the underlying basis of the decision in Ryan."[39] This can be observed in the recent case of *T.D. v Minister for Education*[40], where Keane addressed the unenumerated rights of children as endorsed by the court in Ryan v Attorney General and Re: Ansbacher (Cayman) Ltd[41] which McCracken J. presiding over in the High Court held that the plaintiff's right to privacy did not justify anonymity(of parties) in the court proceedings.

In conclusion it does appear that the judiciary in Ireland seems to have come a full circle currently taking a much more restrictive and positivist attitude towards the issue of unenumerated rights as had been done prior to 1964. The current view favours a "harmonious" approach and the judiciary have on many occasions called upon the "*legislative organ of the State to*

---

36 Keane, "Judges as Lawmakers- The Irish Experience" (2004) 4(2) Judicial Studies Institute Journal 1 at 14.

37 Report of the Constitutional Review Group at pg 263

38 See The Report of the Constitution Review Group, Articles 40 - 44, starting at page 214:

39 See supra

40 [2001] 4 I.R. 259

41 [2002] I.R. 517

decide the broader issues."[42] The era of judicial activism and "result oriented constitutional jurisprudence,"[43] as Gerard Hogan describes it, which has been strongly criticised for its unprincipled approach to problems on a very individualistic basis, seems to be over[44].

But perhaps the hesitancy on the part of Courts to resort to liberal interpretation may find its justification in the words of Kenny J who, writing extra judicially observed:

"*They [the judges of the High Court and, on appeal, the judges of the Supreme Court] have the power to recognise and enforce constitutional rights which are not expressly stated in the Constitution. To many people this would seem to be a function of the legislature only and, in many ways, this exciting feature is the most unusual aspect of the Constitution. Judges have become legislators and have the advantage that they do not have to face an opposition.*"[45]

■

---

42 Hamilton, "Remark: Matters of Life and Death," 65 Fordham Law Review 543 at 559 (1996-97).McCracken J in Re Ansbacher had also expressed similar views.

43 Coulter, "Hogan Criticises Attorney General's Model for European Rights," The Irish Times, 16 October 2000

44 Orlaith Molloy : Unenumerated Constitutional Rights : The Current Problematic Position , in the Symposium Unenumerated Rights in the Irish Constitution : The Debate Continues . Some authors such as Gerard Casey have gone on to argue that there are no unenumerated fundamental rights in the Irish Constitution.See Casey :Are there unenumerated rights in the Irish Constitution, ILT 2005 23(8)

45 John Kenny, "The Advantages of a Written Constitution Incorporating a Bill of Rights,' 30 (16 n.s.) NILQ (Autumn 1979) 189, 195-196.

PART III: SPECIFIC UNENUMERATED RIGHTS

Supreme Court Of India Conjuring Up New Rights!

Sathya Narayan*

Unenumerated rights are rights, which are not, expressly contained or "enumerated" in the written constitutions. Unenumerated rights mean rights, which are perceived and recognized by the courts, sometimes consciously and sometimes instinctively. During the last few decades the Supreme Court of India has conjured up many unenumerated rights, which are neither stated in Part III of the Constitution, nor elsewhere. Reason for the increase in the number of unenumerated rights under the Indian legal system, one can say, is due to productive imagination of the Indian Judiciary. This judicial skillfulness has magnified the reach and ambit of Article 21 of the Constitution, rather than limiting or underscoring its meaning and content by simple judicial interpretation. The Indian judiciary expanded the concept of life, and personal liberty to include within its bounds all such rights, which would give a person to live with dignity[1]. The Supreme Court of India while interpreting Article 21[2] of the Constitution of India has impliedly accepted the theory of 'unenumerated rights'.

The drafters of the Constitution had honoured certain rights of individuals, which they inherited from natural law. One such right is the right to life and personal liberty which is a basic human right needed for human existence. Article 21 was thus included as part of the Constitution which respected the right to life and personal liberty of a person. The apex court, in tune with the rationale behind inclusion of Article 21, in a number of occasions has held that a person is entitled to all the bare necessities of life that is necessary for a person to lead a dignified life, viz. adequate nutrition, clothing and shelter, basic education, right to free movement, clean water and clean environment etc. The apex court has interpreted the right to life guaranteed under Article 21 to include the right of a person to live with human dignity. Any form of inhuman or degrading treatment of a person has been held to be offensive to human dignity and would constitute violation of such person's right to live and would be violation of Article 21, unless it was

* Director, Institute of Advanced Legal Studies

[1] See http://www.legalserviceindia.com/article/l399-A-Mandate-To-Pollution-Free-Environment.html

[2] Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law

in accordance with the procedure prescribed by law. While defining Right to Life, the Supreme Court in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* said[3]:

> " ... *that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about, mixing and commingling with fellow human beings, of course the magnitude and economic development of the country, but it must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities to constitute the bare minimum necessities of the human life.*"

While describing the characteristics of right to personal liberty under Article 21 a division bench of the High Court of Delhi had observed as under:[4]

> *"There are various other elements of personal liberty ...will find their guarantee in Art. 21, such as the right to exist and the right to enjoyment of life while existing and to enjoy life according to nature, temperament and lawful desires of the individual. Article 21 may also be said to recognise the sanctity of a man's home and the privacies of his life, the freedom from arbitrary personal restraint or servitude, and right to acquire useful knowledge, to marry to establish a home and bring up children, and generally to enjoy those privileges long recognised at common law as necessary to the orderly pursuit of happiness by free man".*

This attitude of the Supreme Court towards right to life of a person is clearly exhibited in a catena of cases. The magnitude of Article 21 has been elevated to new levels by the generous articulation and interpretation of Article 21. As a consequence many rights such as a) right to legal aid[5];b)

[3] AIR 1981 SC 746 , para 7

[4] *Rabinder Nath v. Regnl. Passport Officer*, AIR 1967 DELHI 1

[5] *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544

right to privacy[6] c) right to go abroad[7]; d) right against solitary confinement[8]; e) right against bar fetters[9]; f) right against public hanging[10]; g) right to speedy trial[11]; h) right to clean environment ; i) right to water; g) right to growth and nourishment are some such rights recognized by the apex court, and included within the ambit of Article 21.

Most of these judgments are assessed, as either based on personal or political considerations of the judges, rather than on existing law. A run-through the compendium of such rights recognized by the Supreme Court, it appears that privileges of individuals are translated into fundamental rights when the Supreme Court considered so. Such judicial crafting is commonly addressed as judicial activism. Judicial creativity though is acrimonious to the anglo-saxon traditional theory of judicial function, which asserts that judges do not make law; they merely interpret, Lord Denning had remonstrated that "judges cannot afford to be timorous souls"[12]. He had observed that: they cannot remain impotent, incapable and sterile in the face of injustice"[13].

The judiciary in India has during the last few decades, has transformed from its traditional role of being merely an arbiter. The Supreme Court has since then been an activist court, attempting to correct mistakes in law through their decisions. It has not lost a single opportunity to make law and fill in the gaps, in the system of administration of justice by creating many unenumerated rights.

Right To Sleep A New Unenumerated Right

In this article, the author enquires the elusiveness and as an upshot, the enforceability of unenumerated rights: particularly about the recently declared right the Right to Sleep by the Supreme Court of India. In the following paragraphs, the author has attempted to take an appraisal of the recent Supreme Court judgment *In re: Ramlila maidan incident*

---

6 *Gobind v. State of M.P.*, (1975) 2 SCC 148
7 *Satwant Singh Sawhney v. D. Ramaratmam, A.P.O., New Delhi*, (1967) 3 SCR 525 : AIR 1967 SC 1836
8 *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494
9 *Charles Sobraj v. Supdt., Central Jail*, (1978) 4 SCC 104
10 *Attorney-General of India v. Lachma Devi*, (1989) Supp (1) SCC 264 : AIR 1986 SC 467
11 *Hussainara Khatoon v. Home Secretary, State of Bihar*,(1980) 1 SCC 81
12 *Candler vs. Craine Christmas & Co. (1951) 2 K.B. 164*
13 Chief Justice P.N. Bhagwati, '*Judicial Activism in India*', Gargoyle Alumni Magazine (University of Wisconsin Law School Forum, Vol. XVII, No.1, summer 1986), pg. 6 http://law.wisc.edu/alumni/gargoyle/archive/17_1/gargoyle_17_1_3.pdf

dt.4/5.06.2011 v. Home secretary, Union of India & ors,[14](for brevity sake henceforth referred to as Ramlila Maidan judgment) the apex court, apparently has declared the **right to sleep** as a fundamental right. Right to sleep is not a specific right under Part III of the Constitution or under any other statute. The predicament is whether the *Ramlila Maidan* judgment has in reality facilitated creation of another unenumerated right? Can the judgment be considered to have the effect of law? Can the said right be enforceable? By whom and against who?

In the Ramlila Maidan Case, the apex court had taken *suo motu* cognizance of media reports, which had showed brutality of the Delhi Police, against the yoga guru Ramdev and his followers between the midnight of June 4th and 5th 2011. Ramdev and his followers had assembled at the Ramlila Maidan for a peaceful demonstration in support of the anti-corruption agitation. A division bench consisting of Justice Swatanter Kumar and Justice B. Chauhan heard the matter. Justice Swatanter Kumar delivered the judgment in the said case, with an ostensible concurring judgment by Justice Chauhan. The scope of the petition was very limited as observed by Justice S. Kumar:[15]

> *This Court would only examine the circumstances that led to the unfortunate incident on 4th June, 2011, its consequences as well as the directions that this Court is called upon to pass in the peculiar facts and circumstances of the case.*

Justice Swatanter Kumar set forth the decision of the court in the said case wherein, he elaborately dealt with the arbitrary way in which the Police had used the prohibitory orders to disburse a crowd of about 20,000 persons, who were sleeping. They were Baba Ramdev's supporters. They had gathered at the Ramlila Ground, Delhi, to peacefully remonstrate against countrywide corruption. The Police forcibly waked them up, during weird hours of night. They were assaulted physically and were virtually thrown out of their tents. This was done in the alleged exercise of powers conferred on the Delhi Police, under Section 144 Cr. P.C. Under the said section of the Criminal

---

14 *In Re: Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India*, Suo Motu Writ Petition (Crl.) No. 122 of 2011
15 *Ibid*, para 181

Procedure Code wide powers are conferred on an Executive Magistrate to deal with emergent situations. Magistrates are empowered to impose restrictions on the personal liberties of individuals, whether in a specific locality or in a town itself, where the situation has the potential to cause unrest or danger to peace and tranquility in such an area, due to certain disputes.

In the said case, predominantly, the concern of both the judges appears to be the arbitrary action of the State Police. A huge contingent of about more than thousand policemen in exercise of the police powers conferred upon them and under the prohibitory order on the strength of section 144 of Criminal Procedure Code, entered Ramlila Maidan, at about 12.30 a.m. on the 5th of June, 2011.They surrounded the persons who were camping on the Maidan and were fast asleep. At the relevant time, there was nothing intrinsically dangerous to public safety nor public peace and order, which the police had to intervene to abate and prevent happening of any such act. The supporters, who had gathered at the Ramlila ground in fact, were doing nothing dangerous but were merely exercising their fundamental right to protest, right to peacefully and lawfully assemble and right to freely express their opinion. They were exercising their rights guaranteed under Article 19 of the Constitution of India. The chain of events as narrated in the course of hearing of the petition, revealed that it was a case of police excess and "to a limited extent, even abuse of power".

The test laid down in Section 144 of Criminal Procedure Code, is not merely 'likelihood' or 'tendency'. The section says that the magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger[16].

[16] Section 144: (1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and **immediate prevention** or speedy remedy is desirable, such Magistrate may, by a written order stating the material fact of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

Opinion of both the judges was concurrent on the issue of arbitrariness of the police action under section 144 of Criminal Procedure Code. Both the judges agreed on the issue that there was abuse of power by the Police, granted to them under section 144 of Criminal procedure Code. Application of the prohibitory order cannot be on a mere tentative perception of threat but it has to be a definite and substantiated one. This judgment restated the consistent view of the Supreme Court since *Babulal Parate* .v. *State of Maharashtra* [17] that Section 144 Cr.P.C. cannot be resorted to "merely on imaginary or likely possibility or likelihood or tendency of a threat"[18].

The apex court in *Babulal Parate* had observed that[19] ;

> *"The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger."*

In Ramlila Maidan case according to Justice Swatanter Kumar[20]:

> *"... there is nothing on record which explains the extra-ordinary emergency that existed on midnight of 4th/5th June, 2011 which led the police to resort to waking up sleeping persons, throwing them out of the tents and forcing them to disperse using force, cane sticks, teargas shells and brick-batting."*

The judge was astonished at the fact that why could not the police wait for the enforcement of the prohibitory order until early next morning i.e. 5th June, 2011.

According to Justice Swatanter Kumar's considered view[21] :

> *"..., the State and the Police could have avoided this tragic incident by exercising greater restraint, patience and resilience. The orders were passed by the authorities in undue haste and were executed with force and overzealousness, as if an emergent situation existed. The*

[17] (1961) 3 SCR 423.
[18] Supra note 14, para 150
[19] Supra note 17
[20] Supra note 14, para 152
[21] Supra note 14, para 234

decision to forcibly evict the innocent public sleeping at the Ramlila grounds in the midnight of 4th/5th June, 2011, whether taken by the police independently or in consultation with the Ministry of Home Affairs is amiss and suffers from the element of arbitrariness and abuse of power to some extent. The restriction imposed on the right to freedom of speech and expression was unsupported by cogent reasons and material facts. It was an invasion of the liberties and exercise of fundamental freedoms."

In the said case, the primary issue, which was deliberated, was not the right to sleep of the individuals who had assembled at the Ram Lila Maidan. The uneasiness was about the police action. The police had used their power even when there was no need to. It was an attack on the right to freedom of speech and expression, attack on the right to peaceful demonstration. Both the judges shared the view that the manner in which the Delhi police had misused the power demonstrated that how mighty the State can be. According to the judges, it was a clear invasion of the democratic values enshrined under the Indian Constitution.

Justice B. Chauhan in his seemingly concurring judgment is in agreement with all the observations and findings of his colleague on the issue of arbitrariness in the exercise of police power granted to them under section 144 of the Criminal Procedure Code. He concurred with Justice Swatanter Kumar's observation on this issue:[22]

"I respectfully agree with all the observations and the findings recorded by my colleague and I also concur with the observation that the findings recorded on the sufficiency of reasons in the order dated 4.6.2011 are tentative which could have been challenged if they so desired before the appropriate forum in proper proceedings. "

Nevertheless, Justice Chauhan had reservations about the State Police action *vis-a-vis* the incident in question. In his opinion, the incident in question directly curtailed the right of privacy of sleeping individuals. Justice Chauhan was agitated at the implementation of the order as it was enforced

[22] Supra note 14. para 2 of Justice Dr. B.S. Chauhan's Judgment

on a "sleeping crowd and not a violent one"[23]. The judge appears to be more concerned about the violation of the right of privacy of the individuals, who were sleeping. In his opinion[24]:

"... the curtailment of the right of privacy of sleeping individuals has to be expressed as it directly involves the tampering of inviolate rights, that are protected under the Constitution. Proceedings under Section 144, even if resorted to on sufficient grounds, the order could not be implemented in such unruly manner."

In fact, Justice Chauhan while expressing his observation about section 144 Cr.P.C. said that[25]:

"The sine qua non for an order under Section 144 Cr.P.C. is urgency requiring an immediate and speedy intervention by passing of an order. The order must set out the material facts of the situation. Such a provision can be used only in grave circumstances for maintenance of public peace. The efficacy of the provision is to prevent some harmful occurrence immediately. Therefore, the emergency must be sudden and the consequences sufficiently grave"

Besides expressing his displeasure about the manner in which section 144 was used by the police, the judge appears to have given excessive significance to the fact of sleeping at the relevant time when the crowd was woken up by the police, and made it a central theme of his verdict. In his concurring judgment, Justice Chauhan, together with with being in agreement with Justice Swatanter Kumar on the point of arbitrariness of the police action, has gone further, and declared that the right of privacy, includes right to sleep. This is a significant expanse of the right to life and liberty as enshrined under Article 21 of the Constitution.

It is curious to note the process by which the judge recognized right to sleep as a fundamental right. It involved a combination of legal and non-legal tools. Apart from referring extensively to a number of judgments, which have

[23] *Ibid*, para 10 of Justice Dr. B.S. Chauhan's Judgment
[24] *Ibid*, para 2 of Justice Dr. B.S. Chauhan's Judgment
[25] *Ibid*, para 30 of Justice Dr. B.S. Chauhan's Judgment

recognized right to privacy as a fundamental right, the judge also took into account health factors with respect to Sleep. This case illustrates how judges, sometimes, become pompous actors. He has described the physiognomies of sleep and has justified the essentials of sleep to an individual in the following words:[26]

> *"It (sleep)(emphasis supplied) is a necessity and not a luxury. It is essential for optimal health and happiness as it directly affects the quality of the life of an individual when awake inducing his mental sharpness, emotional balance, creativity and vitality. Sleep is, therefore, a biological and essential ingredient of the necessities of life. If this sleep is disturbed, the mind gets disoriented and it disrupts the health cycle. If this disruption is brought about in odd hours preventing an individual from getting normal sleep, it also causes energy disbalance, indigestion and also affects cardiovascular health."*

Justice Chauhan's discourse on sleep is worthy of reading, more for a health enthusiast, than a member of the legal alliance. Justice B. Chauhan, uneconomical in his words, has shown great anxiety about the ill effects on the health of persons, when they are deprived of sleep. Sleep according to him is an essential ingredient of the necessities of life. He went to the extent of saying that if sleep is interrupted during odd hours in sleep is disturbed, "it also causes energy disbalance, indigestion and also affects cardiovascular health". He continued to narrate the importance of sleep to the health of an individual in the following words:[27]

> *"... sleep so essential that its deprivation would result in mental and physical torture both. It has a wide range of negative effects. It also impairs the normal functioning and performance of an individual which is compulsory in day-to-day life of a human being. Sleep, therefore, is a self rejuvenating element of our life cycle and is, therefore, part and partial of human life. The disruption of sleep is to deprive a person of a basic priority, resulting in adverse*

[26] *Ibid*, para 11 of Justice Dr. B.S. Chauhan's Judgment
[27] *Ibid*, para 11 of Justice Dr. B.S. Chauhan's Judgment

> *metabolic effects. It is a medicine for weariness which if impeded would lead to disastrous results."*

With this background, Justice B. Chauhan was of the opinion that[28]:

> *"Deprivation of sleep has tumultuous adverse effects. It causes a stir and disturbs the quiet and peace of an individual's physical state. A natural process which is inherent in a human being if disturbed obviously affects basic life. It is for this reason that if a person is deprived of sleep, the effect thereof, is treated to be torturous. To take away the right of natural rest is also, therefore, a violation of human rights. It becomes a violation of a fundamental right when it is disturbed intentionally, unlawfully and for no justification."*

Mercifully, the hon'ble judge, Justice B. Chauhan has not gone into sleep pattern distinctions of persons.

Notably Justice Swatanter Kumar in his entire judgment running into 238 paragraphs did not pass any comment on the right to sleep nor defend the right to sleep of the followers of Ramdev Guru gathered at Ram Lila Maidan, nor once expressed his concern about the violation of the said right of the members of the crowd. His judgment chiefly stressed on the legitimacy of anshan (fast-unto-death) as a means of protest. Justice Swatanter Kumar's emphasis was on the right to peaceful protest of the crowd, which was disrupted by the police, which according to the judge "*was an indirect infringement of the rights and protections available to the persons present there, including Article 21 of the Constitution.....*"[29]. Yet, honourable Justice B. Chauhan declared that right to sleep was a fundamental right, especially in the context of those who were fast asleep, being rudely woken up by a brutal police force past the midnight hour.

Nonetheless, immediately within the next few days after the said judgment was delivered there were manifest announcements about the judgment in the media. What was announced to the public through the media was only part of the judgment. What the media publicized were only enlightenments of Justice Chauhan (one member of the division Bench) on

[28] *Ibid*, para 12 of Justice Dr. B.S. Chauhan's Judgment
[29] Rajeev Dhavan, 'A confused verdict on Baba Ramdev fiasco', *India Today*, 5th March 2012 http://indiatoday.intoday.in/story/supreme-court-verdict-ramdev-fiasco-delhi-police-p.-chidambaram/1/176482.html

the Right to Sleep. It was in fact a misleading version of the actual judgment. Media is referred to as the Fourth Estate of Indian democracy, and thus they have to ensure that accurate versions of the judgments are reported. Accurate reporting will safeguard administration of justice in the right perspective. It helps the newspaper readers to understand the nature and contents of judicial proceedings. Wrong interpretation of judgments and followed by incorrect analysis of judgments by the media leads to misrepresentation of facts, to the public at large. Some of the passages published in some of the national newspapers, immediately after the judgment, are as under:

> ***Right to sleep a fundamental right, says Supreme Court: The Supreme Court has broadened the ambit of right of life to bring in a citizen's right to sleep peacefully under it. A citizen has a right to sound sleep because it is fundamental to life, the Supreme Court said on Thursday while ruling that the police action on a sleeping crowd at Baba Ramdev's rally at Ramlila Maidan amounted to violation of their crucial right.*** :[30]
>
> ***Right to sleep a fundamental right, says SC New Delhi: The Supreme Court took strong objection to the Delhi Police's mid-night crackdown on yoga guru Ramdev's supporters saying unlawfully depriving a person from sleep is a violation of his fundamental rights***[31].

The 'Chauhan''s heroic judgment defending the Right to Sleep[32] was given such wide publicity by the Media that the civil society believes that it is their fundamental right to sleep. Undoubtedly, sleep is absolutely necessary; it is an essential requirement. Nevertheless, granting it the status of a right at par with right to food is stretching the concept of right to a preposterous level[33]. Sleep, like any other normal human function, viz., breathing, smelling etc., is an important pillar of sustenance for any human life. How can an inseparable part of human sustenance be given the status of a fundamental right[34]?

---

[30] Dhananjay Mahapatra, 'Right to sleep a fundamental right, says Supreme Court', *TNN*, Feb 25, 2012 http://articles.timesofindia.indiatimes.com/2012-02-25/news/31100031_1_sleep-disruption-privacy
[31] http://ibnlive.in.com/news/right-to-sleep-a-fundamental-right-says-sc/233488-3.html
[32] *Supra*, note 14.
[33] http://www.dnaindia.com/analysis/column_is-sleep-a-fundamental-right_1654932.
[34] Ibid

Ratio In Ramlila Maidan's Judgment

The unclear question, which remains to be answered is whether the Supreme Court, has indeed declared, the "right to sleep" as a fundamental right in the said case. Is it law according to Article 141 of the Constitution when only one of the two judges of the division bench in the Ramlila Maidan judgment declares that the right to sleep is a fundamental right? Whether it is law and would be binding on the lower courts? Does the scheme of culling out the *ratio* of a decision and determining its value as "law declared" according to the basic principles of common law tradition can be applied in this case?

Ratio is a ruling on a point of law and the decision on a point of law depends on facts of a case. Ratio of a decision is the "the reason for the decision." It refers to the legal, moral, political and social principles on which a judge rests his/her decision. It is the basis for reaching the decision in a particular case. It is binding on lower courts through the principle of *Stare decisis*. Culling out ratio from a judgment is difficult. It is furthermore difficult in case of judgments delivered by multiple judges. According to Lord Denning where the bench consists of more than one judge and judges do not agree on a single reasoning, there can be no *ratio*. In Lord Denning's opinion, culling out a ratio is to cull out "*the reasoning on which the majority based their decision*"[35]. This seems that, in case of multiple judge benches, all the judges on the bench should agree on a single line of reasoning. In case of conflicting opinions by different judges on the Bench, who also differ on the reasoning it is difficult to identify what exactly is the verdict. Such an exercise becomes even more amusing in the case of inconsistent approaches to the same issue and the opinions of the judges are different. Sometimes a judge who agrees with the judgment delivered by one of the judges on behalf of the court may differ with the reasoning the other member.

---

[35] *In Re Harper and Others v National Coal Board*, [1974] Q.B. 614

In the instant case, the bench consisted of only two judges[36].The learned Judge Swatanter Kumar had expressed his displeasure about the misuse of police powers, which was subscribed to by the second judge on the bench Chauhan J. On the other hand, S. Kumar J had not subscribed to view of Chauhan J about the violation of Right to Sleep. This judgment is a very good example wherein the two judges of the bench agree on giving the final order but are based on completely different reasoning. In fact, this judgment is a classic illustration where both the judges in principle agreed upon the issue of unfairness in the exercise of police powers, while of one of the judges in major part of his judgment spoke exclusively about such police excess resulting in violation of the right to sleep. Chauhan J's judgment in effect is a different and an independent judgment.

If the judge who was so much troubled that the sleeping crowd was woken up, had made sure about whether right to sleep can be declared as a fundamental right, he would have discovered that "sleeping simply does not figure as a fundamental right anywhere in the world except with reference to those without shelter (homeless) on winter nights". The judge of course did not seem to be worried about the plight of the 78 million Indian homeless, who were living without a home, across India. His words are as under[37]:

> *"More so, I am definitely not dealing herein with the rights of homeless persons who may claim right to sleep on footpath or public premises but restrict the case only to the extent as under what circumstances a sleeping person may be disturbed and I am of the view that the State authorities cannot deprive a person of that right anywhere and at all times."*

[36] Justice Swatanter Kumar and Justice Dr.B.S. Chauhan
[37] Supra note 14. para 27 of Judgment by Justice Dr. B.S. Chauhan.

Are Unenumerated Rights Enforceable?

Elements of unenumerated rights are, too ambiguous and contestable which makes it difficult to enforce such rights. The manner of finding the content of unenumerated rights appears to be hazy. Is it because an unenumerated right does not have a well-founded precise connection or nor an established social norm? Robert Bork says that : "[L]egal reasoning must begin with a body of rules or principles or major premises that are independent of the judge's references."[38] Rights that are declared by the courts and if they are difficult to be enforced, it takes away the credibility of the judiciary in the end. Nonetheless, enforcement of unenumerated rights, just like the enumerated rights is what is hoped-for, though it seems to be unrealistic at times. Nevertheless, "the symbolic value of their constitutional status should not be underestimated"[39].

■

[38] Robert H. Bork, The Tempting Of America: The Political Seduction Of The Law, Touchtone Books 264–65 (1991).
[39] Judicial Activism Under The Indian Constitution' Address by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India (Trinity College Dublin, Ireland – October 14, 2009) http://www.supremecourtofindia.nic.in/speeches/speeches_2009

Right To Privacy: An Unenumerated Fundamental Right? A Journey From Kharak Singh Till Today*

Rajalaxmi Joshi**

The Constitution of the United States of America by its ninth amendment (1791) states, *"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".*

By this amendment, the United States' constitution expressly recognized the unenumerated rights in the year 1791. Though the Indian constitution nowhere expressly recognizes the existence of unenumerated fundamental rights, the judiciary has played a vital role in recognizing them. Acting as a protector and guardian of the fundamental rights under the Constitution, the Indian Supreme court has been interpreting Art. 21 in the widest sense. Right to life is interpreted as right to live with dignity. Therefore, it includes all such unenumerated rights, which make life of an individual more dignified and meaningful.

Since the law cannot be static and everything that is important cannot be stated, it gives rise to the concept of unenumerated rights. With the changing needs of the society and people becoming more and more civilized the courts started recognizing various rights like right to pollution-free environment[1], right to livelihood[2] etc.

Right to privacy is supposed to be one of such unenumerated fundamental rights. In many cases before the judiciary right to privacy was contended to be an unenumerated fundamental right under Art .21.

Through this paper an effort will be made to understand the status of right to privacy by dealing with it on case-to-case basis under the Indian constitutional law. Before undertaking the examination of these cases, it is proposed to take a bird's eye view of the right to privacy under the Indian legal system.

* This paper was presented at the conference on 'Unenumerated Fundamental Rights' organized during 'The 4th Remembering S.P. Sathe' event. This paper is homage to Dr. Sathe.

** Author was Student of BSL LLB final year ILS law College, Pune at the time of presentation of this paper in Fourth Sathe Memorial Conference on 'Unenumerated Rights' Dated- 27-2-2010

1 See *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598

2 See *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 259

Law of Tort and Privacy

In the area of law of Tort, the Indian courts hardly had any opportunity to lay down the law about right to privacy either by recognizing the right or by refusing to recognize it.

However, the law of nuisance developed under law of Tort speaks of right to privacy to some extent that is to the extent of protecting peaceful enjoyment of the property and aspects leading to comfort of a person viz. health.

Statutory law and Privacy

The statutory law in India recognizes and enforces the right to privacy and protects it against invasion e.g. The Indian Easements Act, 1882 in Sec.18 speaks of customary easements and specifically says in illustration (b), "no owner or occupier of the house can open a new window therein so as substantially to invade his neighbour's privacy"[3].

The Right to information Act, 2005 in its Sec. 8(j) makes a reference to informational privacy. It prohibits disclosure of personal information if such disclosure invades privacy of a person. The Information Technology Act, 2000 under Sec. 72 recognizes informational privacy and confidentiality and breach of such confidentiality is made an offence. The Protection of Human Rights Act, 1993 defines the expression human right, which in its turn makes a further reference to the following international covenants, The International Covenant on Economic, Social and Cultural Rights [4], and The International Covenant on Civil and Political Rights are referred to which India is a party. This International Covenant on Civil and Political Rights refers to right to privacy.[5] Thus The Protection of Human Rights Act, 1993 recognizes the right to privacy.

Thus it may be observed that the Indian legal system as such was and is never unmindful of the concept of privacy. Right to privacy does exist under Indian legal system. The question for our consideration is whether such legal recognition is adequate enough to give the right to privacy the status of fundamental right under the constitution?

3 See The Indian Easements Act, 1882 in Sec.18 See. Illustration (b)

4 See The Protection of Human rights Act, 1993 Sec. 2 (f)

5 See The International Covenant of Civil and Political Rights see Article 17

This question was agitated before the Supreme Court time and again from 1962 till date.

Based upon the analysis of important judgment of the Supreme Court it is proposed that the Indian Supreme Court has not recognized right to privacy as part of Art. 21 of the Constitution and is not a fundamental right.

Right to privacy and Constitutional Frame work

The first discussion on the right to privacy in India had taken place in the year 1962 in the case of *Kharak Singh v. State of Uttar Pradesh*[6]. In this case the validity of U.P. police regulation was challenged on the ground that it violated fundamental rights of a person protected under Art 19(1) and Art 21. One of the contentions challenging this regulation was that it violated right to privacy of a person, which forms part of personal liberty under Art 21.

The bench of six judges[7] was constituted to decide the case and majority[8] held that the right to privacy is not a fundamental right. The four Judges by majority held, *"As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded, is not an infringement of a fundamental right guaranteed by Part III.'*[9]

Therefore the law laid down by the majority in 1962 expressly denied the existence of right to privacy as a fundamental right. The minority judgment[10] held that though right to privacy is not expressly guaranteed by the Constitution it can be read as a part of the term 'personal liberty' under Art. 21. As per the decision in *Kharak Singh* right to privacy was not fundamental right.

Post *Kharak Singh* in 1975 the case of *Govind v. State of Madhya Pradesh*[11] came up for discussion wherein the Supreme Court once again had a question to decide whether there was fundamental right to privacy? The

[6] See AIR 1963 SC 1295
[7] B.P.Sinha, C.J., Imam, Mudholkar, Ayyangar, Subba Rao and Shah JJ.
[8] B.P.Sinha, C.J., Imam, Mudholkar, Ayyangar JJ.
[9] *Supra* n. 6, para 20
[10] See Subba Rao and Shah JJ.
[11] See AIR 1975 SC 1378

Supreme Court in *Govind* extensively discussed *Kharak Singh* and also had taken note of majority and minority judgments laid down in *Kharak Singh*. It had referred to various U.S. judgments like *Griswold v. Connecticut*[12], *Jane Roe v. Henry Wade*[13]. The judgment delivered by Justice Mathew in *Govind* discussed right to privacy, its importance but nowhere in express and unambiguous words it stated whether right to privacy was recognized as a fundamental right.

Mathew J. writing for the Supreme Court stated as follows:

> *"The Right to Privacy in any event will necessarily have to go thorough a process of case-by-case development. Therefore, <u>even assuming</u> that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."*[14]

Further it was stated,

> *"<u>Assuming</u> that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and <u>that the right to privacy is itself a fundamental right</u>, that fundamental right must be subject to restriction on the basis of compelling public interest".*[15]

A close scrutiny of the judgment shows that even in *Govind* right to privacy was not recognized. For the sake of argument the judges had simply assumed the existence of the right to privacy as a fundamental right. However, their assumption was mistakenly interpreted as judicial pronouncement in the subsequent cases coming before the Supreme Court. The mere assumption was converted into a binding *ratio*. Apart from this lacuna in the interpretation of the *ratio* in *Govind's* case the subsequent benches of the Supreme Court had not taken note of the fact that the bench, which decided the case of Govind, was of three judges only. Even if it is

[12] See 381 U.S. 479 (1965)
[13] See 410 US 113(1973)
[14] *Supra* n. 11, Para 28
[15] *Ibid*, para 31

assumed that the court held that right to privacy is a fundamental right, technically speaking the coram being three judges only could not have overruled the majority judgment in *Kharak Singh*'s case which was decided by four judges constituting majority and which specifically denied the status of fundamental right to right to privacy.

After *Kharak Singh* and *Govind* another important case on issue of privacy came up. It was *R. Rajagopal v. State of T.N. and Others*[16] famously known as Autoshankar's case. The issue in this case was regarding publication of an autobiography written by the prisoner named Autoshankar. The objections were taken to its publication on certain factual grounds but the court did not go in to the factual questions like whether or not the autobiography was written by Autoshankar or whether he consented to its publication?

The court assuming that he never consented to its publication decided a question that whether publication of certain information without the consent of a person would infringe the right to privacy? The court came to the conclusion that no one can publish anything concerning a person without his consent whether truthful or otherwise. If he does so, the right to privacy of the person concerned would be infringed. While deciding the case the issue framed by the court was not whether the right to privacy exists? But the issue was whether such unauthorized publication would infringe the right to privacy? Though the case discussed the case of *Kharak Singh* and *Govind* it never went into the discussion as to the existence of right to privacy as a fundamental right. On the contrary the court took for granted that right to privacy is a fundamental right and went ahead on adding to this unenumerated and unrecognized right different facets and exceptions.

Living with this misconstruction of judgment in *Kharak Singh and Govind* the Supreme Court has traveled a long journey for nearly five decades while unveiling various dimensions of right to privacy.

The another landmark judgment in the case of *People's Union For Civil Liberties (PUCL) v. Union Of India*[17]popularly known as telephone tapping case delivered by the bench of two judges[18] of the Supreme Court

[16] (1994) 6 SCC 632
[17] (1997) 1 SCC 301
[18] Kuldip Singh and S. Sagar Ahmad, JJ

shows to what extent the *ratio* in *Kharak Singh* was misinterpreted and followed. The judgment reads,

> *"The word 'life' and the expression 'personal liberty' in Article 21 were elaborately considered by this court in Kharak Singh's case. The majority read 'right to privacy' as part of the right to life under Article 21 of the constitution".*[19]

The judgment further quotes various paragraphs from the case of *Kharak Singh* including minority judgment.

> It further reads *"Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh's case (majority and minority opinions) to include that 'right to privacy' as a part of the right to 'protection of life and personal liberty' guaranteed under the said Article".*[20]

Therefore, it can be seen that to what extent the Supreme Court has wrongly interpreted the *ratio* in *Kharak Singh* inspite of it being very clear on the point of non-existence of right to privacy as a fundamental right. The mistake as to the coram that is referring the judgment in *Kharak Singh* as seven judges bench judgment speaks for itself. The Supreme Court even earlier in *Autoshankar's* case had committed the same mistake.[21] Judges in *PUCL* by referring to *Kharak Singh, Govind and Autoshankar* came to the following conclusion,

> *"we have, therefore, no hesitation in holding that right to privacy is a part of 'life' and 'personal liberty' enshrined under Article 21 of the constitution"*[22]

After reading the judgments mentioned above a law student who is, taught precedent as sources of law, binding effect of *ratio* and a doctrine of *stare decisis* is surprised and perplexed, as to the obvious mistakes committed by the Supreme Court by wrongly quoting the number of judges on the bench

[19] *Supra* n. 17, Para 12
[20] *Ibid*, Para 14
[21] *Supra* n.16, Para 13
[22] *Supra* n. 17, Para 17

and by putting forward as a view of the majority which view the majority had totally negated.

Another facet that has been added to right to privacy was in the very famous case of *X. v. Hospital 'Z'*[23]. In this case the judiciary has dealt with the conflict between right to life of one person and right to privacy of the other. The issue was whether disclosure of information that a person is infected with HIV AIDS to his would be wife would infringe the privacy of the person? It was held that the right to life would over weigh the right to privacy. The Supreme Court stated that whenever there is a clash of two fundamental rights viz. right to privacy as a part of right to life and right to lead a healthy life, then the right which would advance the public morality or public interest would alone be enforced through the process of court.

The above-mentioned judgments clearly show the status of right to privacy. It can be concluded that till today the right to privacy has not been recognized and the decision in *Kharak Singh* holds as good law even today because there has been no larger bench decision overruling *Kharak Singh*. Therefore, though technically speaking the right to privacy has not been recognized the courts have now assumed its existence and has dealt with many other questions that have arisen due to its recognition and has added various facets to it. Insipte of various facets being added to right to privacy the million-dollar question remains that is, if the mother right that is right to privacy is not recognized by the courts can its various facets have any existence?

In the recent case of Naz *Foundation v. Government of NCT and Ors*[24], the Delhi High Court elaborately dealt with the question of right to privacy and misconstrued the judgments in *Kharak Singh once again*. The paragraph in the judgment considering *Kharak Singh's* case reads, *"In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21".*[25]

[23] See (1998) 8 SCC 296
[24] See MANU/DE/0869/2009
[25] *Ibid*, Para 34

Applying the doctrine of ***stare decisis*** the Supreme Court has never given the status of fundamental right to the right to privacy and majority judgment in *Kharak Singh* is still a valid declaration of law.[26]

Another landmark judgment of the Supreme Court that came in the year 2010 in the case of *Smt. Selvi and Ors. v. State Of Karnataka and Anr*[27]. (decided by 3 judge bench) involved a challenge to administration of certain scientific techniques, namely narco analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation in criminal cases. Administration of such techniques was challenged on the touchstone of fundamental rights and one of such fundamental rights was 'Right to Privacy'. The court raised a question whether such impugned techniques are compatible with the various judicially recognised dimensions of 'personal liberty' such as the 'right to privacy'?

The question framed by the Supreme Court for its consideration clearly shows assumption on its part as to the existence of 'right to privacy'. The said case never discussed the question whether right to privacy exists or not? By referring to the list of cases the Supreme Court inquired and came to the conclusion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy.

In the case of *Amar Singh v. Union of India and ors.*[28] the writ petition was filed under Art. 32 alleging that action of intercepting, recording and monitoring telephone conversations of the petitioners infringed his right to privacy under Art. 21 of the Constitution. The two- judge bench held that it was a serious step of intercepting the telephone conversation of a person and by doing so the service provider was invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution, as has been held by the Supreme Court. It is clear that the Supreme Court has made this observation in ignorance of the fact that the ruling in *Kharak Singh* had never established right to privacy.

[26] Since an appeal from the *Naz Foundation* judgment of the Delhi High Court is pending before the Supreme Court, the Court at the earliest opportunity should refer the matter to the larger bench and settle the law regarding privacy and remedy the misconstruction of its judgment in *Kharak Singh*.
[27] See 2010 (7) SCC 263
[28] See (2011) 7 SCC 69

It must be noted that presently the focus of inquiry has shifted in considering whether particular act violates right to privacy rather than considering a fundamental question whether such right exists at all which may be violated.

Five decades have passed since the judgment of the Supreme Court in case of *Kharak Singh*. Over the period of time the judiciary has accepted existence of right to privacy, but in terms of analytical structure and doctrine of *stare decisis* the right still lacks a sound basis. The Indian social fabric has become more mature and more sophisticated and sensitive about the privacy issues. It would be appropriate for the Supreme Court to expressly overrule the *ratio* in *Kharak Singh's* case and to confer the status of fundamental right on right to privacy in India as a part of Art. 21.

In case in future the Supreme Court overrules the judgment in *Kharak Singh* the Supreme Court still needs to answer some questions viz. will the right to privacy as part of Art. 21 be suspended during proclamation of emergency or will it enjoy the same immunity guaranteed to Art. 21?

Whether the right to privacy can be treated as an unenumerated restriction on Art. 19(1)(a) which guarantees freedom of speech and expression?

■

Right to Property, Now State's Right to Confiscate: A Case for the Inclusion of the Right to Property as an Un-enumerated Fundamental Right under the Right to Life

Pallav Shukla*

I. Introduction

It would be no exaggeration to say that without the Right to Property it would be impossible to work the Constitution.[1]

The aim of this paper is primarily to analyse the constitutional and factual situation with respect to private property rights in India, post the 44th Amendment of 1978, and to discuss whether the time is ripe for the right to property to be more firmly and better secured. In the light of the devastating effects of uncontrolled land acquisition for Special Economic Zones and private projects, it becomes imperative to question the Constitution and it guarantees of property, livelihood, dignity and security.

The research for the paper is primarily inspired by two documents. The first being the news report of the admission of a PIL in the Supreme Court to quash the 44th Amendment and restore the Fundamental Right to Property.[2] The second being the hopeful reflections of Prof. P.K. Tripathi on the better status of property rights of the citizens as well as non citizens, post 44th Amendment.[3]

However, all hopes and promises of Prof. Tripathi have failed miserably and sadly in the last three decades and, more so, since the liberalisation of the economy in the 1990s. The second part of the paper shall analyse the arguments of Prof. Tripathi, to begin with, and move on to the failures of the Constitutional mechanism to protect the property rights. The third part shall consequently deal with the nuances of the proposed Land Acquisition (Amendment) Bill and the Rehabilitation and Resettlement Bill,

---

* The author was Student of BSL LLB Final Year ILS Law college, Pune at the time of presentation of this paper in Forth Remembering S.P. Sathe Memorial International Conference on 'Unenumerated Rights' Dated- 27-2-2010

1 Palkhivala, N.A. *Our Constitution-Defaced and Defiled* Page vii

2 Available at http://www.hinduonnet.com/2009/02/28/stories/2009022855071500.htm Saturday, Feb 28, 2009

3 Tripathi, P.K. *Right of Property after Forty-Fourth Amendment- Better Protected Than Ever Before*, AIR 1980 (Journal Edition) 49

2007. Lastly, the paper shall analyse the criticisms and forward recommendations with respect to the proposed changes and its implementation.

II. Does Article 300-A provide actual protection to the Right to Property of the people?

The PIL, filed by Shri Sanjiv Kumar Agarwal, founder of the Kolkata-based Good Governance India Foundation, brought to the notice of the Apex Court the grievances of millions of citizens concerned by the rampant land acquisition schemes which have targeted fertile agricultural land, tribal lands and mineral rich zones of the country.[4]

The reality, thus, runs contrary to what Prof. Tripathi expected in 1980. He argued that the right to property, as included in Art. 300-A, provides a better protection than what it did under Arts. 19(1)(f) and 31.[5] The basic contentions were:

1. Any amendment to Art. 300-A is not possible without the compliance with procedure under Art. 368 as well as the consent of the states as prescribed in the proviso to Art. 368.
2. The demise of the other express provisions of Art. 31 imply the return of the *Doctrine of Eminent Domain* in its true sense, i.e. a valid law, public purpose and just compensation.
3. No difference is made between mere regulation of the use and enjoyment of property without actually transferring the ownership or possession of property, and acquisition and requisition of property.[6] The state shall be liable to pay compensation in both cases.
4. The controversial term "amount"[7] has been dispensed with, providing greater scope for courts to venture into compensation aspects of compulsory acquisition.

This view received support from other contemporary jurists and especially from Prof. S.P. Sathe[8]. However, the real consequences have been far removed from what was theoretically envisioned.

---

[4] Supra note 2
[5] Supra note 3
[6] See repealed Art. 31(2)
[7] Id

The land acquisition for the State is governed as per the Land Acquisition Act of 1894 and has had an adverse affect on the social, political and economic life of the people. It has only brought misery and led to violent protests across the country. Evidently, Article 300-A has failed the promise to provide an effective legal remedy. A major hurdle is the doubt whether it can be enforced through Art. 32,[9] since the current legal position stands that Art. 300-A can only be enforced either under Art 226 or through a civil suit. The saving grace being the fact that property cannot now be deprived by an executive order, but only through the authority of law.[10] In *Basantibai v. State of Maharashtra*[11], the Bombay High Court sought to read the dual requirements of public purpose and compensation in to Art 300-A. The order of the High Court was reversed by the Supreme Court, in appeal[12]. But the Apex Court, in principle, concurred with the rationale of the High Court on the essentials of the *Doctrine of Eminent Domain.*

The Supreme Court has, ever since the 44th Amendment held that Art 21 does not apply to property area[13] and that the matters of land acquisition are not covered under the Right to Life[14], unless the deprivation of property would lead to deprivation of life, liberty and livelihood[15]. The concept of property is vast and encompasses a plethora of rights. It has a broad connotation and is indicative and descriptive of every possible interest which a person can have.[16] Even *dominium* or right of ownership, possession, etc are included along with actionable claims.[17] The Doctrine of Eminent Domain presupposes the right of the individual to acquire hold and dispose of property. Even the Social Contract Theory also included protection of property with recognition of the power of the ruler to act only in public faith and in emergency.[18]

---

[8] Prof. Sathe supported the views of Prof. Tripathi to be valid in his article titled *Right to Property after the 44th Amendment: Reflections on Prof. P.K. Tripathi's Observations*, AIR 1980 (Journal Edition) 97
[9] *Dharam Dutt v. Union of India* (2004) 1 SCC 712
[10] *Bishan Dayal Chandra Mohan v. State of U.P.* AIR 1982 SC 33
[11] AIR 1984 Bom 366
[12] *State of Maharashtra v. Basantibai* AIR 1986 SC 1466
[13] *Ambika Prasad v. State of U.P.* AIR 1980 SC 1762
[14] *Butu Prasad Kumbhar v. SAIL* 1995 Supp (2) SCC 225
[15] See note 12. Also Jain, M.P. *Indian Constitutional Law* 5th Edition, page 1305
[16] Jain, M.P. *Indian Constitutional Law* 5th Edition, page 1256
[17] Id
[18] J. Hidayatullah in *Golak Nath v. State of Punjab*. Quoted in Hidayatullah, M. *Right to Property and The Indian Constitution*. Arnold Heinemann (1983)

Colley states that, *Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment and disposition of.*[19]

As we explore whether the Right to Property is fit to be included as a Fundamental Right under Art 21, the following arguments are put forward:

1. Post liberalisation, the State policy is noticeable by a shift from the Socialist or left- leaning tendency to one of privatisation and disinvestment. Most of the welfare functions such as development of public infrastructure, power, airports and industries are now run by private corporations and some in a public-private-partnership.[20] The private organisations, while performing a sovereign function, seek immense profits from the projects. It is but natural that they should negotiate the sale of property from the owners directly and not channelize the process through compulsory acquisition of land by the State, on their behalf. Neither the buyer, nor the vendor must be considered as acting under compulsion and price must be the price a willing vendor would expect to obtain from a willing buyer. The potentiality of land for lucrative future use must be considered.[21]
2. Another major issue is the type of land that has been targeted by the State to be acquired for the purpose of Special Economic Zones (SEZ). The state proposes to set up over 500 SEZs, targeting an area of over 1,50,000 hectares.[22] Most of the land acquired or proposed to be acquired is fertile agricultural land, protected tribal areas and mineral rich zones of the country.[23] This raises serious concerns of wastage of fertile land, food security and loss of livelihood to the farmers, along with the

[19] Colley, *Constitutional Law*, 4th Edition page 392

[20] See generally *The Truth about Land Wars*. Available at www.goodgovernanceindia.com/the_truth_about_land_wars.pdf

[21] Lord Macmillan, Lord Romer and Sir George Rankin, *Raja Vyaricherla Narayana Gajapatiraj v. Revenue Division Officer, Vishakhapatnam* (1939) L.R. 56 I.A. 104. The view was confirmed in *Babu Kailashnath Chandra Jain v. Secretary of State* (1946) L.R. 73 I.A. 134 and *Nauroji Rustomji Wadia v. Bombay Government* (1952) L.R. 52 I.A. 367.

[22] *SEZs and Land Acquisition: Factsheet for an Unconstitutional Economic Policy* at Page 2. Available at *www.sacw.net/Nation/sezland_eng.pdf* Accessed on 18th February 20, 2010

[23] Id at Page 4

displacement and exploitation of the Scheduled Tribes and incidences of human rights violations in the course of forced acquisition[24].

3. As has been discussed above, most of the power, infrastructure development and SEZ projects are undertaken by private firms and that creates the fundamental problem with the term "public purpose" that is a necessary condition for the exercise of the power of Eminent Domain. An SEZ is an especially demarcated area of land, owned and operated by a private company, which is deemed to be a foreign territory for the purpose of trade, duties and tariffs.[25] For all practical purposes, an SEZ can be set up for any export related activity. As an illustration, it is questionable as to what "public purpose" was being served by the forced and violent acquisition of agricultural land of the farmers of Singur in West Bengal, to be given over to the Tata Group to set up their Nano car factory. An acquisition that would not serve any "public purpose" or where it was for a private purpose could be challenged as being "colourable".[26] Since the policy is now focussed primarily on retaining the confidence of the foreign investor than on responding to the needs of the electorate[27], any attempt to dilute the constitutional imperatives in order to promote the so-called trends of globalisation may result in precarious consequences[28].

[24] *India: violations of tribal peoples' land rights continue in Nagarnarndia: Torture and sexual exploitation of a 14 year-old Dalit girl.* In an open letter addressed to the then PM, Shri Vajpayee, the Director of OMCT Geneva enumerated the brutal violence that has been caused by the State against the SCs and STs. Available at http://www.omct.org/index.php?id=SCR&lang=eng&articleSet=Events&articleId=2162 Accessed on 15th February 20, 2010

[25] See supra note 23 at page 1.

[26] *Somawati v. State of Punjab,* AIR 1963 SC 151

[27] Athreya, Venkatesh. *Myth of Socialism*, Frontline February 26th 2010. page 32.

[28] Justice Ganguly, *Harjinder Singh v. Punjab State Warehousing Corporation,* Decided by the Supreme Court on January 5th 2010.

4. Both Seervai[29] and Palkhivala argue that the Right to Property is necessary for the meaningful exercise of other Fundamental Rights, especially those enshrined under Art 19. They cite the same illustrations and argue that the Freedom of Press is deprived under Art 19(1)(a) if a printing plant and building is confiscated without compensation. The Freedom to Reside under Art 19(1)(e) is taken away if the citizen's house is expropriated. The Freedom of Religion under Articles 25 and 26 is lost if the property held for religious and charitable purposes is seized without compensation.[30]
5. The State has clearly gone against the Directive Principles of State Policy that are supposed to be the guiding light for any policy or legislative action. There has been a clear violation of Article 39(b) which contemplates measures to secure equitable distribution of community resources. The ownership and exploitation of mineral rich areas and fertile agricultural land should be such that it sub-serves the best interest of the people of the country and not the private interests of a few business houses. Further, Art 46 creates an obligation on the state to promote with special care the education and economic interests of the weaker sections of society and especially the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.[31] The actions of the State have also disregarded the *Doctrine of Public Trust*[32].
6. Finally, the 5th Schedule to the Constitution provides for Scheduled Areas and affords special status to them because they are inhabited by the Scheduled Tribes, who need protection- socially, economically and culturally. Further, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also affords certain special protection to the person and property of the aborigines and members of the Scheduled Castes. The land acquisition schemes have not even spared these tribal areas and

[29] Seervai, H.M., *Constitutional Law of India*, vol. 2. 4th Edition (1993), page 1359. Palkhivala, N.A. *Our Constitution-Defaced and Defiled*, page 38.
[30] Id
[31] Supra note 17, page 1389.
[32] *M.C. Mehta v. Kamal Nath*, (1996) 1 SCC 38

have led to their economic exploitation and intrusion in their distinct culture and way of life.

Therefore, we understand that the problems faced by the loss of land are complex and interconnected. The question is now not merely restricted to matters of compensation and public purpose, but has encompassed serious issues such as human rights violations, violence, mass displacement, intrusion into tribal culture and loss of nation's precious natural resources to the private individuals for profit.

It would now be interesting to briefly analyse the amplitude of Article 21, post *Maneka Gandhi*[33]. The Supreme Court has been liberal with the term "life" and has interpreted it to mean a life with dignity[34], free from exploitation[35], where tradition culture and heritage is protected in full measure[36] and not only the law but also the procedure must be just, fair and reasonable[37].

III. The Land Acquisition (amendment) Bill and the Rehabilitation and Resettlement Bill, 2007: An Analysis

1. Important provisions of the proposed legislations

Moving forward, it is true that Right to Property is not a Fundamental Right and thus no constitutional mandates may be sought to address the grievances of the citizens. However, The National Policy for Resettlement and Rehabilitation of Project Affected Families was implemented from February, 2004. This was replaced by the National Rehabilitation and Resettlement Policy of 2007 in October 2007. The Policy provided certain mandates that the purchaser of land must fulfil to rehabilitate the persons who had to be involuntarily displaced.

Further, the government framed the Rehabilitation and Resettlement Bill, 2007 on the lines of the Policy of 2007. The Bill is yet to become an Act. It provides for certain positive steps. So does the Land Acquisition (amendment) Bill, 2007. The author would high light certain key features of the latter, in brief:

[33] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597
[34] *Francis Coralie v. Union Territory of Delhi* (1981) 1 SCC 608
[35] *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161
[36] *Ramsharan Antyanuprasi v. Union of India* AIR 1989 SC 549
[37] See supra note 34

a) The Land Acquisition (amendment) Bill defines certain key terminologies such as "persons interested"[38], "cost of acquisition", "public purpose", and "infrastructure project", etc.

b) The party who wishes to acquire land must first purchase 70% of the land directly from the people on a "willing buyer- willing seller" basis. Only then will the government step in to acquire the rest of the 30 % so that the project is not stalled because of the minority.[39]

c) The Bill provides for the constitution of State level and Central Land Acquisition Compensation Disputes Settlement Authority.[40]

d) Involuntary displacement over a certain threshold shall require compulsory Social Impact Assessment.

e) Inserts Section 11 B to determine the market value and method of assessment of value of land by the District Collector.

2. Criticisms

The provisions of the Bill are laudable and generally progressive. However, certain points may be considered. *Firstly*, the whole process of negotiation, rehabilitation, payment of price and compensation, etc should be time bound. *Secondly*, the scope of the definition of "public purpose" should be restricted and not be left open ended. *Thirdly*, there should be an express clause for restrictions on utilisation and subsequent transfer of land. *Finally*, the land which has not been utilised for the purpose it was acquired for must be released back to the original owners.

[38] Section 5 of the Bill amends Section 3 of the principal Act.
[39] Id
[40] Inserts Section 17A to the principal Act

IV. Conclusion

The task of integrating the Right to Property with the Right to Life is a task of mammoth proportions and shall require judicial creativity and activism of a high order. Since long, the Supreme Court and the High Courts have held that the Right to Property and the justiciability of compensation cannot be taken up under the Right to Life. But with dramatic changes in circumstances and with new and more pressing issues that haunt the land acquisition schemes, it is imperative that the case be taken up urgently and analyzed in the correct perspective.

> A line needs to be drawn as was done in *Kesavnanda Bharti*[41] case with respect to Constitutional Amendments. There is a need in our time and land to remind ourselves that this Constitution is intended not merely to provide for the exigencies of the moment but to endure through long lapse of years.[42] Thus the need is now for both the bar and the bench to deliberate upon the issue with sensitivity and responsibility and appreciate that the case is fit to be included under the umbrella of the Right to Life.

What is sad is the lack of institutional and political will in the judiciary and legislature, upon this issue. So is the lack of politically responsible behaviour in the bar. Politicians have been able to get away with the virtual destruction of our Fundamental Rights simply because of the ignorance and apathy of our people.[43]

To sum up, the author would cite a piece of the deliberations that were held in the Constituent Assembly, upon the issue of property rights. Sardar Patel, in his Committee on Fundamental Rights, stated that, "Not only the

[41] AIR 1973 SC 1461
[42] See supra note 2.
[43] Id

land but so many other things may have to be acquired; and the state will acquire them after paying just compensation and not expropriate them."[44]

The Land Acquisition and the Rehabilitation & Resettlement Bills have still to see the light of the day. The important point is that unless the Constitution mandates that Property is a Fundamental Right, whether by way of an amendment or by way of incorporating Property under Article 21, the people shall not have the necessary mechanism and platform to rise against the decades of oppression.

[44] Quoted in Hidayatullah, M. *Right to Property and The Indian Constitution*. Arnold Heinermann (1983) at page

FOURTH SATHE MEMORIAL PUBLIC LAW LECTURE

Judicial Accountability In India : Some Reflections*

Prashant Bhushan**

Principal of this college, teachers, members of the governing body, students, friends, Ladies and Gentlemen, its indeed a great pleasure and great honor, for me to be invited to deliver the 4th Prof. Sathe memorial lecture with you here today. The judiciary is a lot in the news particularly in recent days. If you see the number of obi vans, parked outside the Supreme Court every day, and the amount of space given by the media to reportage about various orders passed by the Supreme Court and by the judiciary in general, you realize that the judiciary must be a very important and powerful institution in this country, and indeed it is.

The judiciary today passes orders on all kinds of things. Not merely striking down government action, not merely striking down laws and sometimes even constitutional amendments but it also issues all kinds of directions to the government and various other authorities, asking them to do this or that even going to the extent of saying that well any kind of activity will be permitted in forest areas without the express permission of Supreme Court, no public transport vehicles other than CNG will ply on the roads of Delhi, that all hawkers must be moved out of the cities of Delhi and Bombay, that all zuggi dwellers must be moved out of the cities of Delhi and Bombay.

All kinds of orders, which have enormous socio-economic impact on large numbers of people in this country are being issued by Supreme Court and other High Courts in the country. So, indeed, for good reasons the media gives considerable space to what the judiciary is doing and what's going on in the judiciary. But recently, as all of you might have noticed, the judiciary has been a lot in the news for the wrong reasons. A large number of judicial scandals have erupted in quick succession in the recent past; there was, as

* This Article is transcript of 4th Remembering S.P. Sathe memorial public lecture delivered by Shri Prashant Bhushan on 12th Dec. 2009 at ILS law college Pune. The Transcript of his Speech was prepared by Smt. Swati Kulkarni and same was also sent for the approval of author and with some minor language editing this lecture is being published.

** The author is Advocate Supreme Court and High Court and a noted social activist, New Dehli.

you all know a scandal involving a former Chief Justice of the Supreme Court, Justice Sabarwal, when it was reported by a newspaper called Mid-day, that while he was passing orders for sealing of all commercial properties in the residential areas of Delhi, his own sons were running commercial enterprises from his own house as well as from his official house and they had entered into partnerships with very big shopping mall and commercial complex developers and thus they were direct beneficiaries of his orders.

There was another big scandal, which is known as the Gaziabad provident fund scam. Some of you may be familiar with the facts involved in that scam, but for those who are not familiar, I just briefly outline what happened. One administrative officer along with a number of successive district judges of the Gaziabad District Court withdrew large sums of money to the tune of around Rs. Seven corers from the Gaziabad District Court's treasury as provident fund advances for various employees of that Court. It was later found that these amounts which had been withdrawn were all illegitimate because these employees were not entitled to the provident fund advances. In fact, some of these funds were withdrawn in the name of persons who were not even employees, and these funds were thereafter misappropriated by the administrative officer, in connivance with all the successive district judges.

The administrative officer later on made a confession in the Court saying that he had withdrawn these moneys on the instructions of the successive district judges and on their instructions he used the money to pay for their house constructions, for the education of their children, and for giving expensive gifts to a number of High Court judges of the UP Courts that is the Allahabad Court and one Supreme Court judge. The name of the man who made this confessional statement in Court was Mr. Asthana, who unfortunately died in judicial custody in the Gaziabad District Jail in very mysterious circumstances. The whole investigation involving this scam was eventually entrusted to the CBI. Even though the CBI is investing it now for more than 7-8 months, till this date no charge-sheet has been filed against either any judicial officer or district judges. We do not know what is the exact status of that investigation. Needless to say, this particular scandal aroused a lot of public interest, particularly media interests and it has been very widely reported in the media.

Then came the assets disclosure controversy. It arose because one person called Mr. Subhash Agarwal, who has been making right to information requests, to the Supreme Court and to the ministry of justice, relating to the judiciary, asked the question under Right to information Act and his question was please let me know whether any judges of the supreme Court, have declared their assets to the chief justice in accordance with a resolution unanimously adopted in the chief justices' conference in 1997 and 1999 which provided that all judges must declare their assets to the chief justice and further adopted a code of conduct which included this assets declaration clause, and said that if any judge violates the code of conduct, an in-house enquiry may be conducted against him of a committee formed by the Chief justice of India, and action could be taken against him by way of requesting him to resign, getting him resigned or recommending for his impeachment. This happened in a case of one particular judge of Kolkata recently, Justice Shoumitra Sen, who was found to have misappropriated large amount of funds which were entrusted to him as the Court receiver in a case, which he misappropriated to himself, used those funds himself. When this was found out, an in-house committee was constituted, they conducted an enquiry, found him guilty, and then the chief justice asked him to resign, he did not resign and therefore he recommended his impeachment, as a result of which 50 MPs of the Rajyasabha signed the impeachment motion and now a statutory enquiry committee of two judges and one jurist has been constituted, which is going into the matters, we don't know what is the stage of proceedings. (Impeachment proceedings were initiated against Sen J. and he also appeared in Rajya Sabha to defend himself, but ultimately he resigned and his resignation was accepted).

So Mr. S.C. Agarwal asked this question that please let me know whether any judges have been filing their assets declaration or not. To which the Supreme Court's answer was that well this information does not exists in the Supreme Court. And it was later found that they were making a bogus distinction between the Supreme Court and the Chief justice's office. They said that this information exists in the chief justice's office, but Chief justice's office is not part of the Supreme Court. In fact, they went on to claim that Chief justice's office is not a public authority, does not come under the Right to information Act. This matter went to the Central information commission, which stated in its order that this is a bogus distinction. The

chief justice's office must be clearly regarded as an office within the Supreme Court and therefore it directed the Supreme Court to furnish this information from the Chief justice's office and provide the same to the applicant.

Of course, at that time this person had not asked for the details of asset declaration. He had only asked whether the judges are filing this declaration or not. So the information commission asked the Supreme Court, to provide this information and give it to him. The SC through it Central public Information officer, however, challenged this order by way of a writ petition in Delhi High Court, and there again they argued that this information is not in the public domain because the same has to be given confidentially to the office of Chief justice of India and therefore Right to information Act does not apply to it. It was further argued that the asset declarations are exempted from disclosures under the Right to information Act because the information is provided in a fiduciary relationship, this argument was rejected. The other argument of the Court was that this consists of personal information which also was exempted under the Right to Information Act, but the same was also turned down by pointing out that Right to Information Act itself says that even the personal information can be given out if there is some very strong public interest involved in the disclosure of that information, and it overrides the interest of privacy. Eventually a single judge of the Delhi High Court rejected all these arguments made on behalf of Supreme Court and directed it to provide this information i.e. whether judges have been declaring their assets. However, the Delhi Court left the question open, whether actual asset declarations could be accessible under Right to Information Act. However, the SC provided this information but it still went up in appeal further to a division bench of HC and which is still pending. Meanwhile another thing happened very recently. You might have read it in the media, that the same applicant of RTI, Mr. Subhash Agarwal asked the Supreme Court to provide access to the files relating to the recent appointment of certain judges in the Supreme Court, as he wanted find out why other judges of the High Court, who were senior to these people had been overlooked for appointment. In other words, he wanted to know on what basis certain judges have been superseded and other junior judges been appointed. Again the Supreme Court rejected the request on the same ground that this information is not in the Supreme Court, it is with the Chief justice's office, which is not a public domain and so on. Again the Central Information commission ordered the

Supreme Court to provide this information and disclose these files. This time, instead of going to the High Court against the orders of CIC, the Supreme Court moved itself by way of a Special Leave Petition under Article 136 of Constitution of India.

These are some of the recent controversies. Of course, there is also the case of Justice Dinakarana, which I am sure all of you must have read. He is the chief justice of the Bangalore High Court, and has been recommended for the appointment to the Supreme Court. The forum for judicial accountability, a group of very responsible lawyers based in Chennai, sent a series of four representations to the collegium of the supreme Court and to the government making a very large number of serious allegations against Justice Dinakaran, viz. acquiring agricultural land of more than 500 acres, well beyond the limits of ceiling in benami names of several companies established by him and which directors being his wife, daughters etc..; encroaching on more than 200 acres of public land which is all village common land or land meant for distribution for Dalits etc. It is alleged that all this land was fenced under a common fence by him. Besides, there are about possession of vast assets and properties grossly disproportionate to his known sources of income. The properties are said to be in excess of 70 crores. He has purchased large number of urban properties either in his own name or in the names of his relatives or in the benami names etc. For example one of the properties he said to have purchased in Uti in August this year, in the name of his mother in law, the consideration of which he has shown is 35 lacs, whereas the government value of the same is more than 3 crores, and the market value is supposed to be 9 crores, apart from this there are also charges against him to hear and decide the cases involving conflict of interests. For example he went and stayed with a couple in Toronto, at the time of his daughter's admission and after coming back to India, he got hold of one of the cases of this couple and decided the case in their favour. So there are large number of serious charges against Justice Dinakaran, which are fully backed with documentary evidence and the same have been represented before the collegium and the government. It is voice across the sections of the society that, neither he be appointed to the Supreme Court nor be allowed to continue as the Chief Justice of High Court. It is urged by the forum that since he has committed a number of serious criminal offences, he must be investigated and prosecuted in accordance with law. The same is requested against the backdrop of the

Supreme Court judgment in 1991 in Veeraswami's case, which says that no FIR can be registered and no investigation can be done against a judge of High Court or of the Supreme Court without the prior written permission of the Chief Justice of India. The Chief justice of India acted on this representation only after the same being publicized in the media. The CJI took the decision to appoint an inquiry in this mater. Accordingly, the District collector was directed to conduct an enquiry and send a report about the disputed agricultural land to the Supreme Court. A District collector sent a report saying that yes, he is in possession of 550 acres of agricultural land, which is far far beyond the limits of agricultural ceiling and out of this 550 acres land 200 acres is government land, which he has encroached upon illegally and he has put it under a common fence. When that report came and the Chief justice asked for Justice Dinakaran's explanation, Justice Dinakaran asked his managers to uproot the fence in order to destroy the evidence. When this was reported to the collector, he sent the tahasildar there. When the tehesildar reached their, and found that the fence was being uprooted, the manager spoke on phone to J. Dinakaran and handed over the phone to tehesildar, and thereupon J. Dinakaran threatened the tehesildar that he will have him arrested for trespassing on his property. Despite all these things having been confirmed, yet the collegiums far from recommending his criminal investigation and prosecution, far from recommending his removal from the Court or recommending his impeachment, did not even withdraw the recommendation for his appointment or his elevation to the Supreme Court. They said, no, no we will now get a further enquiry conducted, by the department of survey of India. The Department said, look we are not competent to conduct the enquiry because we do not know to whom this land belongs and the District collector is the competent person to conduct the enquiry. He has already conducted the enquiry. Therefore, the Chief justice of India finally said that all right we will now ask the law ministry to conduct the enquiry, if the ministry find him innocent, he can be appointed. We are not going to withdraw the recommendation. Fortunately because this matter had become a public scandal by now, and since an impeachment motion against J. Dinakaran has been prepared by us and was sent to various political parties, the central government has decided to reject the recommendation for his elevation to the Supreme Court and has sent it back to the Supreme Court collegium. But till today the Supreme Court collegium has not decided to withdraw their recommendation in accordance with the judgments of the

second and third judge's case. If the collegium unanimously reiterates the recommendation for his elevation then the govern would be forced to appoint him. Of course, I do not think that they will unanimously reiterate their recommendation. But the fact that till today they have not withdrawn the recommendation speaks volumes about what is really going on. (Since then, Dinakaran J. has resigned)

And now I come to the heart of the problem. Today we have the situation where we have a powerful judiciary which as I said, cannot only strike down government actions, laws but can also direct the government to do this, that or the other. However, today we have a judiciary with enormous power but with zero accountability. I say zero with responsibility and I will explain the same.

The first problem today is the judiciary has become a self appointing institution that the judges of the High Court and Supreme Court are being appointed by the judiciary itself. The collegium of the five judges in the Supreme Court is ultimately deciding the appointments of all the judges. Now there are two problems with this appointment process. One is that there is no system in place at all to regulate such appointments to be made by the collegiums. On the other hand, when the UPSC selects people for any job or any post including that of IAS, a method for selection is based on a clear criteria laid down in advance. That means, if a method or a criteria is to be laid down for selection of the judges of the High Court or Supreme Court, we would first have to lay down what is that what are the qualities we are looking for in a judge. Although, they say that we look for competence and integrity because these are the only relevant things yet there is no machinery or process for the same. We asked, why are you not looking for judicial temperament? After all a person may be very competent, but he may lack judicial temperament. Judicial temperament means the ability to listen dispassionately to both sides and then decide rather than making up once mind in advance and shutting out people. There are judges who are otherwise competent but who lack judicial temperament. That is a very important quality in a judge.

Secondly why are you not looking at their understanding of and sensitivity towards the problems of common people of the country? One of the problems that we have with today's judiciary is that a large number of judges come from a very elite background and without any real understanding of problems of common people and that is one of the reasons, why they make such orders like remove all the hawkers from the streets of Delhi and Bombay, remove all Rikshaw pullers from the streets Delhi, remove all the zuggies or slum dwellers from Delhi and Bombay.

Unfortunately, there has never been a discussion or debate anywhere in this country about what is the criterion or what are the qualities which are needed in a judge. We have to also lay down what are the methods or ways by which one would evaluate whether an individual person has these qualities or not. How shall we make a comparative assessment of the merits and demerits of the various competing or eligible candidates to decide who is the best person? Nothing of this sort has been laid down. On the other hand, the method which is followed is that the members of the collegium arbitrarily pick up some people and recommend them. Are bhai, how have you come to that conclusion that he is the best person? On what basis have you considered other people? Which are the other people you have considered? How have you come to the conclusion that one is the better than the other people? Nothing is laid down. As a result this whole process of appointment and selection of judges is totally arbitrary and has therefore become largely nepotistic. Members of the collegium are by and large recommending and promoting those judges who owe some allegiance to them, who belong to their camp or related to them. Not only this, but as Mr. Nariman pointed out recently, all kinds of bargains are being struck between members of the collegium in the matter of appointment. If one member of the collegium wants one particular judge to be appointed or does not want another particular judge to be appointed, then he bargains with other members of collegium, ' all right I will agree to your recommendation regarding this if you agree to my recommendation to block him'. And therefore this whole process has become thoroughly corrupted.

We therefore really need for the appointment of judges full time, independent and Professional body, like the Union public service commission, or Judicial appointments commission. It can be entrusted with the job of appointing not only judges but also members of all tribunals and commissions. It will not be an ex officio body in the sense of three senior judges of Supreme Court, Prime minister and Law Minister, as has been proposed in the present bill by the law ministry. This ex officio body is not

going to serve any purpose because all these sitting judges, law minister, prime minister etc. are very busy people, they have lots of things on their plate, judges have more than a full time job in hearing and deciding the cases. They do not have time to go into the exercise of selecting judges in a scientific, fair and dispassionate manner. This exercise can only be done by a full time body. In fact, we need a full time body which is both independent of the government and that of the judiciary. We have suggested that there can be a five member judicial appointment commission. The chairman can be appointed by a collegium of all the judges of Supreme Court. Second member can be appointed by a collegium of the Chief justices of the High Courts, third member can be appointed by union cabinet, fourth member can be appointed by a committee comprising of leader of opposition in the Loksabha, leader of opposition in the Rajyasabha, speaker and vice president and the fifth member can be appointed by a committee of Chairman-National Human Rights Commission, the Chief of the Central Vigilance Commission, the Chief Election Commissioner and the controller and auditor general. So, this way we will have five members body having a tenure of five years, and it will be full time and look after appointments of all Supreme Court judges, High Court judges and members of all tribunals etc.

The second important thing about this process is that the whole process of appointment must be totally transparent because today there is no transparency. Even when the Central Information Commission orders the Supreme Court to disclose as to on what basis some judges were selected superseding some other judges, the information is not furnished. Nobody comes to know in the present system that who is being appointed until he actually comes to be appointed. In case of Justice Dinakaran it is only because The Hindu News paper got access to the information that his name had been recommended by the collegium to the government and when it published this information people came to know before his appointment. Otherwise normally people would have come to know only after his appointment, at which stage nothing could have been done to stop his appointment.

We are of the opinion that we need a system like 'US system of conformation hearings' i.e. to confirm an appointment of a judge who is recommended even by the Judicial Appointments Commission. Thus, when they recommend a judge, thereafter there should be public confirmation

hearing, all members of the public are entitled to participate and say, look this is what we know about this person, which renders this person unfit or unsuitable for appointment. But the most important thing is that this Commission must first prepare criteria. That criteria must be publicly debated before they get finalized. And lay down a system by which it will be judging people on that criteria.

There is also the problem of handling the complaints against judges. Presently, under the provisions of Constitution of India, the only way in which the action can be taken against the judge for commission of gross misconduct, is by way of impeachment. To get impeachment motion drawn up, it has to be signed by more than 50 MPs of Rajyasabha, or more than 100 MPs of Loksabha, then it is submitted to the speaker or the Vice president as the case may be, they admit the motion, appoint an enquiry committee of three persons, one sitting judge of the SC, one sitting Chief justice of HC and one other jurist. Then that committee enquires the judge and if it finds him guilty, then the matter goes further to the Parliament for being voted upon. It has to be voted upon by two thirds of majority of both houses present and voting and absolute majority of the total membership of the house and then only the impeachment motion is adopted. If you recall, V. Ramaswami's case is the only case, where impeachment motion went till parliament. (The Calcutta judge's case is the second case where impeachment motion against a judge also went till Rajyasabha.) But in between there were many cases where we tried for the impeachment of many other judges, including Justice Punchi, Justice Anand, Justice Bhalla, Justice Subhashan Reddy . In all those cases we found, that though we had more than enough documentary evidence of serious acts of misconduct by these judges, we still could not get the signatures of requisite number of MPs of parliament, because the matters did not turn into public scandal. What we found is that political parties and MPs are unwilling to sign impeachment motion against a judge, especially a Chief Justice or a Judge of Supreme Court, unless and until two conditions are satisfied; First, you must have an open and shut case of very serious charges backed with documentary evidence against that judge and second, it should have become a public scandal. Unless both these conditions are satisfied, we find that it is virtually impossible to get an impeachment motion signed by the requisite number of MPs, and therefore the process does not take off. In V. Ramaswamy's case the process took off because it has become a public

scandal. More than 100 MPs of Loksabha signed the motion, inquiry committee was constituted, the same held him liable for number of charges. The matter went for voting to parliament, however, in the parliament the Congress party as a whole decided to abstain and the motion failed, and as a consequence of the same, the man continued till he retired i.e. for a year or a year and a half. The only saving grace was that the then Chief Justice, Justice Venkatachaliah decided not to give him any judicial work after the laps of the motion. As a result, he just twiddled his thumbs at home and drew his salary without any actual work. The same demonstrates that the process of impeachment is not an effective, practical, and credible method for dealing with judicial misconduct. And that is why we have been saying for a long time, almost last 20 years, since the time of V. Ramaswamy, that we need an alternative by way of an independent judicial complaints commission, which can entertain complaints against judges, and enquire into them, and thereafter recommend whatever action it deems fit against the judge including his removal. This judicial complaints commission should be like the judicial appointments commission, a full time body, completely independent of the government as well as of the judiciary. The process of constitution and appointment of this commission should be similar to that of the judicial appointments commission. It should have an investigative machinery under its control through whom the commission can get anything that it deems fits to be investigated against the particular judge and it can take any action. Unfortunately, this proposal which we have been making for last 15 years, has just fallen over deaf ears of the government, who just keeps on talking about it. In my opinion, in-house bodies as suggested by govt. do not function effectively.

In fact, in 1997 and 1999, during chief justices' conferences, the Supreme Court adopted a resolution for having an in-house procedure to investigate complaints against judges. It was resolved that if we receive a complaint against a judge, the chief justice will look into it and if he finds that the complaint is serious, he will constitute an in-house committee of three judges and they will inquire into it and if they hold him guilty, they will ask him to resign or recommend his resignation and if he does not resign, they may recommend his impeachment. That is what happened in case of Justice Shoumitra Sen of Calcutta. But that's the only case where it happened. There are large number of other cases where we had made

complaints against several judges to the chief justice, but no action was taken. We were not even given the benefit of receiving a response from chief justice as to why he is not taking any action to our complaint. The complaints were not made by anybody but by committee on judicial accountability, consisting of several former law ministers, several former chief justices etc. They had made these very serious complaints formally against several judges but the chief justice at that time because he had various connections, the chief justices of those times because they had connection with the judge against whom we had complained, decided to just ignore them and not even respond to us. As a matter of fact, the in-house committee has numbers of problems. First, being an in house committee of sitting judges, it does not have the time to devote. For example if the Dinakaran's case were to be examined by an in-house committee, then several sitting judges would have to give up their judicial work and spend several months just in examining the charges , which they are not supposed to do, or which they can't do, because already we are short of judges for doing judicial work. Second problem is that the members of in-house committee being sitting judges have connections with the other sitting judges. It's a incestuous process and therefore we say that they have conflict of interest and therefore we need a completely independent body to deal with complaint. Thus, there is no credible system for entertaining/ examining complaints against judges other than impeachment, which we have seen is not a practical process. The third problem is created by the Veeraswamy judgement, which says that no judge of High Court or Supreme Court can be subjected to criminal investigation without a prior written permission of Chief Justice of India. The rationale for the judgement was, as stated therein that the judicial independence should be protected because the police or the investigating agencies are under the control of the Government; and therefore, the government can use the investigation agencies to harass the judges by criminal investigation and thereby compromise their independence. Therefore to protect the judges from the harassment and the independence of judges from being compromised, we are directing that no such investigation can be conducted unless the written permission of the Chief justice of India is taken. Of course, the rationale itself is faulty because if a malafide investigation is done against a judge, then the judiciary has adequate powers under section 482 of Cr.P.C., or under Articles 226 and 32 of the Constitution India to stop such an investigation or quash the same if they find it to be malafide. Any way no police officer can dare to do investigation of any

Supreme Court or High Court judge malafide. We have to therefore ask, why do the Chief Justice of India needs additional administrative power so that a police officer has to first approach him/her before even commencing investigation. You know what happened in that Karnataka judges case, where several judges of Karnataka High Court allegedly found in some hotel or brothel whatever it was misbehaving with some women. Now the husband of one of the victim woman complained to the police about molestation of his wife. The police came and started registering her complaint into an FIR. The judge or judges whoever were there, threatened the police officer. They said look we are the High Court judges and according to the judgment in Veraswamy's case, no FIR can be registered against us without a written permission of Chief Justice of India. As a result of which, no FIR was registered, and no police officer had the guts to approach the Chief Justice of India for getting his permission, even if he has credible evidence that a judge has committed a criminal offence. This is the problem and that is why in a large number of cases like in the case of Justice Bhalla police does not approach CJI directly against the judges. Our complaint against Justice Bhalla was he had purchased land in Noida worth 10 crores for 10 Laks from members of a Land Mafia and these facts were not invented by us. These facts were mentioned in a formal letter written by the Superintendent of police to the District magistrate of Noida saying that this is the way, the land mafia operate here, and gets hold of land and. encroaches on public land, thereafter sells these lands to various persons and give some land to some influential persons to buy their influence and one of them was Justice Bhalla. Presently he is the Chief justice of Rajasthan. We made a complaint, against this man, based on the letter of the SP to the Chief Justice. Of course the SP wrote the letter to District Magistrate but he dared not approach the Chief Justice for his permission to register an FIR. This was clearly a criminal offence being committed by a public servant that is purchasing land from a land mafia whose cases are pending in a Court for a long, When we got a copy of this letter, we wrote to the Chief Justice that please give us permission to prosecute against him and we also requested him that please initiate an in-house inquiry against this judge. This was not the only charge, there were other charges as well. However, there was no response. Then we said that well you are not initiating in-house inquiry, please allow us to register an FIR so that at least the police can investigate into the matter. Again no response. Probably, our complaints were thrown into the waste

paper basket. The Gaziabad provident fund scam became prominent only because it became a public scandal, not only a public scandal, in this case the then Chief Justice of the High Court asked the vigilance officer to prepare a detail report, who has given the same to CJ of Allahabad High Court. Based on the same Chief Justice of Allahbad asked the vigilance officer to register an FIR and therefore the FIR came to be registered. In order to investigate these judges of the High Court, the SP in charge of the investigation wrote to the Chief Justice of India, seeking his permission to interrogate them. The response of the Chief justice of India was, no, you cannot interrogate these judges, you send me the questions in writing and if I found them to be valid , I would seek answers from the concerned judges and forward the same to you but you cannot directly interrogate them. So what kind of interrogation is this? If you can't even question, then every time you ask some question, wait for the response for two months or three months whatever, then you ask another question, then wait again for 3 months, effectively this means there is no investigation. Thus, judgement in Veeraswamy is totally problematic. There is no rationale or justification for this judgment and the same needs to be overruled/ nullified. It can be overruled either by the Supreme Court itself by the larger bench or by Parliament by enacting legislation. Of course, the Supreme Court can declare such a law to be unconstitutional. It may or may not but we have to see.

There is also problem with contempt of Court. See, under the Contempt of Court's Act, contempt may be of civil or criminal nature. Civil contempt is disobedience of the orders of the Court. There is no problem with the same. Criminal contempt is again defined in two parts, part one deals with the interference with administration of justice, and there is no problem with the same. The second part deals with scandalizing the Court or lowering the authority of the Court. This is the problematic area of the Contempt of Court Act. We have been saying for a long time that, look there is no justification for this part. When the amendments to Contempt of Court Act came before parliament and the standing committee called us for our views, we said look it is not adequate that you make truth to be a defense, you have to delete part two lock stock and barrel, i.e. 'scandalizing the Court or lowering the authority of the Court must be deleted from the definition of criminal contempt, because it is this part which is being used by the judiciary to even silence public exposure of misconduct in the judiciary. For example

Arundhati Roy was sent to jail, for what? For making a statement in response to carlier contempt notice. What happened was that a contempt notice was issued to her, Medha Patkar and me on application by some alleged lawyers.. I mean I don't know them or never seen them practicing in the Court but some lawyers were asked to file a contempt petition against us which was absurd.. I mean it was totally grotesque. It stated that Arundhati Roy caught them by their hair and slapped them and beat them up and so on and therefore they filed this kind of contempt petition, on which the SC issued a notice to all of us. All of us including Arundhati Roy filed the reply. Arundhati Roy in her reply said that for the SC to have issued notice on such ex-facie absurd petition against us shows a disquieting inclination on the part of the Court to muzzle dissent and stifle criticism. The Court discharged the first notice against all of us including against Arundhati Roy by pointing out that no contempt is made out. But on the above quoted sentence in her affidavit, the Court issued her a second contempt notice. The same judge, Justice Patnaik, who issued the first contempt notice and against whom her criticism was directed, that same judge sat in the second proceeding as well, held her guilty of contempt and sent her to jail, though only for a day, but sent her to jail. So it shows that the clause in the contempt of Court Act pertaining to scandalizing the Court is totally arbitrary. It just depends upon the judge, what he feels scandalizes the Court. In this case Justice Patnaik felt that the criticism against him scandalized the Court. In my opinion it was a very mild criticism.

Midday, in the Midday case, Midday published the series of stories about how Justice Sabarwal's sons were running their companies from his official residence, from his personal residence, while he was ordering sealing of all commercial establishments running in residential areas. It also published that how his sons were in partnership with shopping malls and commercial complex developers who stood to gain enormously by his sealing orders, forcing people to go to the shopping malls and how the prices of shopping malls doubled overnight because of the sealing orders. These stories displayed excellent investigative journalism and were published at the time when Sabarwal J had already retired. High Court issued contempt notice to Midday, Midday said that what we have written is absolutely true. That this is the truth. High Court said that may be true against Justice Sabarwal, we are not going into that but Justice Sabarwal was not sitting alone, there was

another judge or judges along with him when they passed those orders. So your criticism, though you have mentioned only Justice Sabarwal, it is also a criticism against the other judges and therefore we hold you guilty of contempt and sent you to jail for four months. The SC has stayed the matter and the matter is pending before it.

So far as case against myself is concerned, I have given interview to Tehelaka magazine, in which among other things, I said two things which they made the basis of this contempt. First I had said that ..... she asked me, why did you get involve in the campaign of judicial accountability? I said, "look, in my 26 years in the Court, I had been witnessed to a lot of corruption in the judiciary. In fact in my view about half of the last 16-17 judges-chief justices have been corrupt". So this is the first basis for contempt. Then at the end she asked me that are there other ways in which corruption manifests in the judiciary? So I said, yes, there are many. For example, such example is Justice Kapadia, who heard the case of a company know as Vedant Sterilities, in the SC, and passed a series of peculiar orders, in favour of this company, while he held shares in this company. He openly admitted that he held shares in this company. He still continued to hear the case of this company and pass orders in favour of this company. So this is the second thing on the basis of which a contempt notice had been issued to me. I have said in my reply, I just read out a part of it, as to why this should not be considered as contempt, I have said, "in this context, it is pertinent to remember the words of Lord Denning in R v. Metropolitan Police Commissioner, where while dealing with a particularly harsh criticism of the Court of appeal by Mr. Quinton Hogg, he observed as follows:

"This is the first case so far as I know where this Court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we most sparingly exercised. More particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our dignity. That must rest on surer foundations. Nor will we use to suppress those who will speak against us. We do not fear criticism nor do we resent it for there is something far more important at stake, it is no less than the freedom of speech itself. It is the right of every man in the parliament or out of it, in the press or over broadcaste to make fair comment, even outspoken comment on matters of public interest."

It is the application of the doctrine enunciated by Lord Denning that contempt of Court or scandalizing the Court or lowering the authority of the Court gradually fell into disuse in UK. Then I have said that "it is a mistaken notion to think that the authority or dignity of the Courts can be maintained by using the contempt of Court jurisdiction to punish and thus stifle the public criticism however harsh of the judiciary or even public discussion of the perception of the extent or levels of corruption prevailing in the judiciary be they at the apex of the judiciary. That dignity, authority and public confidence in the Courts or judges cannot be maintained by seeking to silence outspoken criticism or even outspoken expression of perception of corruption in the judiciary. That confidence is maintained by the public perception of the actions of the judiciary and the conduct of its judges. And whether they are perceived to be generally fair, just and in public interest. The public perception of the conduct of judiciary and its judges is built on the basis of observation over a long period of time and by the shared perception of large number of people. Any wild accusations or allegations by irresponsible person or disgruntle litigants are dismissed by the people with the contempt that they deserve. It is only when the people who are generally perceived to be responsible are voicing opinion and criticism which is perceived by the public to be responsible and based on facts and circumstances which are relevant that such opinion is taken seriously by the people and it is going to affect their perception about the judiciary. And this is exactly how it should be in a democracy. Any attempt to use the contempt of Court jurisdiction to silence such voices of criticism or dissent or the airing of corruption, would cause far greater damage to the image the public perception and public confidence in the judiciary. It would in fact lead people to suspect that things are even more serious in judiciary than they suspect. And it will endanger even greater contempt for the judiciary. Such actions would have exactly the opposite effect of what the contempt law seeks to prevent." This is also obvious from the backlash that has followed from the most celebrated recent contempt cases sentencing Arundhati Roy and investigative journalists of Midday, The result of use of contempt powers against the journalists was again to heighten the suspicion about corruption in the judiciary. These actions have contributed in no small measures to the drastic increase in the perception of corruption in judiciary in the eyes of the civil society. Therefore the argument that provision pertaining to scandalizing the Court is necessary for the dignity of the Court is not very sound.

In the light of present Contempt of Court law, you can't even expose corruption in the judiciary. You can't take any action against corrupt judges, you can't even get criminal investigation done against them, you can't even speak freely or expose corruption or misconduct in the judiciary for the fear of contempt.

The last problem is created by the totally malafide application of the Right to Information Act, when it comes to the judiciary. This problem is created at two levels. At the first level several High Courts have formed the rules although the Supreme Court rules are alright, but several High Courts have formed rules which effectively deny the information about the High Courts. They said that no administrative of financial information will be given out, only judicial information will be provided. They also said that no information will be given to anybody who does not have a personal interest in the matter. This is completely against the Right to Information Act. High Courts ought to know that they can't frame rules which are against the Act, but they have done so. Many High Courts are using these rules to deny information.

The second problem is created by the Supreme Court. Though the Supreme Court rules are alright but the Court has completely stonewalled any information sought about the functioning of the Court, about the administrative functioning of the Court, the recommendations for the appointment of the judges, their transfers, whether judges are complying with the declaration of assets or not, all that has been stonewalled and refused to be given by the Supreme Court.

Thus, appointment of judges, removal of judges, criminal investigation of judges, contempt of Court and the non application of Right to Information Act regarding the judges has led to what I call to the situation of 'zero accountability of the judiciary'. We have a situation in this country where we have a judiciary which has enormous powers with no accountability whatsoever. Whenever you have a situation like that it is tailor-made for an explosion of misconduct. We have come across large number of cases of persons who were completely fine till the time they became judges but against whom large number of allegation of misconduct came after they became judges. It is only because as soon as you become a judge you enjoy enormous powers with no accountability. That is tailor-made for promoting. We know a large number, who before becoming judges were OK but after

becoming judges thoroughly corrupt. So these are the problems of judicial accountability in this country.

It is only by building public opinion on this issue and recently lot of public opinion has been built on this issue, now the issue is being discussed. Though the solutions are propagated by the government and the judiciary, they are totally half hearted measures, they are not serious measures designed to correct this whole problem and therefore we need more public opinion on this, more exposure by the media in order to bring that much pressure to bear on the authorities, on the government, on the judiciary so that this problem will get corrected.

Thank you.

References

1. K. Veeraswami vs Union Of India And Others 1991 SCC (3) 655
2. Arundhati Roy, in Re (2002) 3 SCC 343
3. Shanti Bhushan v Union of India (2009)1SCC657
4. Court On Its Own Motion vs M.K. Tayal And Ors. *judgement of Delhi High Court)* available at http://Courtnic.nic.in/dhcorde (mid-day contempt of court case)
5. The CPIO, Supreme Court Of India Vs. Subhash Chandra Agarwal & Anr Available at *www.indiankanoon.org/doc/1342199/(2009 judgement of Delhi High Court)*
6. The CPIO, Supreme Court Of India Vs. Subhash Chandra Agarwal & Anr (Supreme Court of India Nov 2010) Available at (www.indiankanoon.org/doc/1748342
7. Justice P.D. Dinakaran vs Judges Inquiry Committee & Anr. on 26 August, 2011 Available at www.indiankanoon.org/doc/593706/
8. See www.judicialreforms.org

[The above references are drawn by the Editor]

■

Statement of ownership and other particulars about the ILS Law Review as required under Rule 8 of Newspaper (Central Rules, 1956)

FORM IV
(See Rule 8)

Place of Publication	ILS Law College, Chiplunkar Road (Law College Road), Pune 411 004 (India)
Language	English
Periodicity	Annual
Printer's Name, Nationality and Address	Shree J Printers Pvt. Ltd., Indian, 1416, Sadashiv Peth, Pune 411 030 Tel. 020 2447 4762
Publisher's Name, Nationality and Address	Mrs. Vaijayanti Joshi, Indian, Principal, ILS Law College, Chiplunkar Road (Law College Road), Pune 411 004
Editor's Name, Nationality and Address	Sanjay Jain Lecturer ILS Law College, Chiplunkar Road (Law College Road), Pune 411 004
Owner's Name	ILS Law College Pune

I, Principal, Vaijayanti Joshi, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Mrs. Vaijayanti Joshi
Principal
ILS Law College, Pune