

EMERGENCE OF UNENUMERATED RIGHTS: A CRITICAL ANALYSIS

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Constitution itself does not secure right, it is formulated on a theory of government that treats rights as paramount and authorizes and describes the governmental and political institutions designed to secure them. Fiss believes that 'the process by which the values embodied in that text are given meaning' is the central in securing of the rights. The concept of structural transformation is based on the values which are circumscribed in the text of the constitution.

The concept of unenumerated rights has been developed by the judicial interpretations as discussed in the earlier chapter. The Supreme Court, during the last decade has developed a new jurisprudence which may be called as 'social jurisprudence'. It has achieved a balance between political rights and social rights which is in a way unique balance.

India is not only the country which has recognised this concept but in United States of America also, there is move towards securing some rights as core rights which are called as subsistence rights or rights to minimal economic security. These rights basically incorporate 'unpolluted air, adequate shelter, adequate clothing and minimal preventive health care'.

These rights are justified by Professor Louis Henkin. He says, "In the United States, rights are essentially freedoms. Neither the Constitution nor the economic, social, political system of the United States entrenches economic and social rights in the spirit of the Universal Declaration of Human Rights and the Covenant on Economic and Social Rights.¹ Thus if this view of the Constitution of United States stands true then it is much more true with respect to Indian legal system because Indian Constitution have provision Article 51 and Article 51-A, which makes a clear statement that Union of India has been constituted to secure all its citizen social, economic and political justice. This has been impliedly accepted by Supreme Court of India and has thus enumerated the theory of 'unenumerated rights' in its interpretation of Article 21. Hence by this interpretation there is now adequate scope for development of theory of 'core rights' or subsistence rights'.² Hence this will give a huge scope to Article 21 and as a matter of consideration the apex court has already accepted this and has laid down a rule in *Minerava Mills Case*.³ This is the new approach which is being followed by judiciary now and that needs to be looked.

¹ Quoted by Henry Shue in 'How does the Constitution secure rights' (edited by Robert A. Goldwing and William A. Schambrav) (American Enterprise of Institute Constitutional Studies) (1985).

² These subsistence rights do not conflict with traditional liberties. On the contrary, they enhance these liberties. For, traditional liberties arose out of protest against oppressive political institutions, while the subsistence rights arise out of protest against oppressive social and economic institutions. The concept of human rights is complete only when there is acknowledgment of subsistence rights along with traditional liberties.

³ there is harmony and balance between fundamental rights and the directive principles of State policy and this harmony and balance is a basic feature of the Constitution. The Supreme Court upheld traditional liberties i.e. fundamental rights when there is political threat to these rights. Similarly, the Supreme Court has to uphold subsistence rights when there is social and economic threat to these rights. Political threats to traditional liberties may be conscious or otherwise. But, the social and economic threats to subsistence rights being conscious these rights command greater attention from the judiciary. As the Supreme Court ensures

The another reason for evolution of these unenumerated rights is that India being a welfare state needs to develop social jurisprudence and has thus evolved this concept. The main characteristics of Welfare States are basically it provides a wide range of benefits to be made available by state to the citizen as right, but at the same time it enhances the power of the bureaucracy, since the benefits thus provided are inevitably administered by government departments or their agents.¹ Thus the concept of unenumerated rights is being evolved by judiciary in Indian legal system. The concept and the regime of so many rights is created under Article 21 but their implication are not given any importance or any consideration.

IMPLICATIONS OF INCORPORATING UNENUMERATED RIGHTS UNDER ARTICLE 21

The wide jurisprudence of Article 21 has envisaged so many unenumerated rights which does have certain implications. Meaning thereby, positive implications and then the enforceability aspect.

POSITIVE IMPLICATIONS

The intervention by the court in developing the jurisprudence of unenumerated rights under Article 21 has lead to certain positive implications. Such as *Vishakha's Case* the court generated a space for a such an important issue which was not given sufficient attention. The judgement was applauded because it brought into public discourse the issue of sexual harassment of women at workplace. This issue was otherwise ignored by the executive as well as legislature.

The other most important positive implication of these rights is development in the sphere of socio economic justice. Right to livelihood, right to health and various such other rights as discussed in previous chapter have been generated. This process of getting rights is always a positive step as the individual is getting rights.

Development of human rights jurisprudence by Article 21 is also one of the positive implications.

Besides these positive implications there are various other factors also which needs consideration.

COURTS AS ARBITER OF THE CONFLICT OF PUBLIC INTERESTS

Court by interpreting so many rights under the broad purview of Article 21 may cause conflict of public interests. The famous *Narmada Bachao Andolan Case* involving the construction of over 3,000 large and small dams across Narmada River gives a site for the contest of public interests. The conflicting interests were the right of the inhabitants of the water-starved regions of Gujarat and Rajasthan to water for drinking and irrigation on the one hand and the rights to shelter and livelihood of over 41,000 families comprising tribals, small farmers, and fishing communities facing displacement on the other.² hence this development of the concept of so many rights gives way for the development of more complexities and the court may itself sometimes create the conflicting public interest.

the enjoyment of fundamental rights by warding off political threats, similarly the court has also to ensure enjoyment of subsistence rights by warding off social and economic threats.

¹ Conference Papers and Proceedings of the Third International Conference of Appellate Judges, New Delhi, March 1984, Supreme Court of India, New Delhi, 280 page. For further discussion on the role of judiciary in a Welfare State, see T.K. Tope : '*Expanding role of Judiciary in a Welfare State*'. Conference papers and W. Friedmann : '*Law in Changing Society*', Pelican edn.

² The Court acknowledged that in deciding to construct the dam 'conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural and would be submerged in water' . However, 'when a decision is taken by the Government after due consideration and full application of mind, the court is not to sit in appeal over such decision¹²⁶'. Even while it was aware that displacement of the tribal population 'would undoubtedly disconnect them from the past, culture, custom and traditions', the Court explained it away on the utilitarian logic that such displacement 'becomes necessary to harvest a river for the larger good.

With reference to this conflicting interest another point could also be made that Article 21 also includes non citizens and hence if any of the rights is being enumerated under Article 21 then the benefit of that right shall also be given to non citizen also. Thus by giving this interpretation the court may encounter the condition in which there is the interest of the citizen involved as the state is duty bound to secure its entire citizen justice: social, economic and political; on the other hand a non citizen is involved and he has been brought into the umbrella of rights due to this wider interpretation. This can cause a conflict of interests.

JUDICIAL POLICY MAKING AND DEMOCRATIC OBJECTION

Judiciary by giving such decisions as discussed in the earlier chapters is setting standards to judge the executive or the legislature. The policy framing in certain cases involved executives and also gave directions to them some times. Since the framing of the constitution judiciary has put itself in various policy making process. This has in a way weakened the theory of separation of power. The court has sought to replace the division of powers among three branches of government with a 'Unitarian' claim of formal judicial supremacy.¹ This supremacy emerged out of both substantive and procedural developments in Indian Supreme Court's jurisprudence. The directive principles of state policy were drafted as non justifiable guidelines but have become justifiable rights under right to 'live with dignity' in Article 21.² This right to life has been made effective through Article 32 and has enabled the apex court to adjudicate on the socio economic rights. For example 'Right to food' litigation, this exemplified this transformation in judiciary, and made it a major player in formulating national socio economic policies. In 2005, the court in that particular case has issued four interim orders and appointed two commissioners charged with 'monitoring and reporting to this court this implementation by the respondents of various welfare measures and schemes'.³ This kind of judicial policy making demands for a serious concern over democratic objection.

The Court today constrains democratic decision making on a wide range and potentially indefinite set of policy issues, leading many commentators to declare it the "most powerful court in the world."⁴

The jurisprudential Rawlsian liberal conception of democracy does not stand at footing with this kind of role of the courts. This concept is not based on strict separation of power but then also this role which is being played by judiciary does not stand at the footing of democracy. Michelman does not rely on separation of power completely in which the legislature frames policy without giving any importance to law and then courts at the later stage review the legality of such policies. He instead argues that society needs to understand this narrow concept of separation of power in fact he sets out a different view in which constitutional law figures prominently in the "conduct of public affairs," constraining the acts of the executive and legislature.⁵ Thus this view relies on a framing of socioeconomic guarantees as directive

¹ Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70 (2007).

² *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516.

³ A TOOL FOR ACTION, *supra* note 125, at 7. The Supreme Court has passed a number of interim orders since 2005. For a representative list, see *Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN* <http://www.righttofoodindia.org/orders/interimorders.htm>

⁴ Alexander Fischer, *Higher Law Making as a Political Resource: Constitutional Amendments and the Constructive Fragmentation of Sovereignty in India*, in SOVEREIGNTY AND DIVERSITY 186 (Miodrag Jovanović & Kristin Henrard eds. 2008) (pointing out that both Upendra Baxi and S. P. Sathe have referred to the Indian Supreme Court as the "most powerful in the world"); Sathe, *supra* note 187, at 89 ("None of the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are heard, but they are from those whose vested interests are adversely affected.").

⁵ "Socioeconomic justice" broadly refers to what Professor Michelman describes as "social rights" or policies aimed at the "satisfaction of certain material needs or wants, or access to the means of satisfaction." Such rights or policies include the provision or access to a minimum adequate standard of living, food, and shelter. See generally Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political*

principles guiding legislative action toward certain societal goals, and not as judicially enforceable rights. Even if courts are kept away from adjudicating socioeconomic rights, there is still value in placing these rights within a Constitution.¹ The value lies in a subtle but important effect that constitutional status confers it would create a “certain pressure on the frame of mind” of citizens and their representatives to consider principles of socioeconomic justice in their deliberations and public policy decisions.² These principles would not overly constrain democratic policymaking but give a “certain inflection to political public reason.”³

This is how in the Indian Constitution under Article 37 it is provided that the fundamental rights are separated with the directive principle of state policy and the later is not enforceable by the courts. However the Indian judiciary has fundamentally altered the original constitutional framework with justifications given in *Minerva Mills*.⁴ The ‘right to food’ shows that how the court has altered its position as discussed earlier that it widened the scope of Article 21 and now includes the issues of homelessness, maternity and child development.

The recent case included right to sleep under the ambit of right to life then that raises another question of enforceability.

THE QUESTION OF ENFORCEABILITY

The phenomenon of taking swipes at sitting judge of the Supreme Court over the verdicts they have passed is not common. Hence, when Chief Justice of India SH Kapadia, remarked recently at a function that “judges must apply the principle of enforceability before propounding legal principles and passing orders”, the statement generated a great amount of buzz.⁵ Chief Justice of India was referring to Justice B S Chauhan. In a judgement of Justice B S Chauhan has given a verdict that fundamental rights also included ‘right to sleep’. The Supreme Court held that

The citizens/persons have a right to leisure; to sleep; not to hear and to remain silent. The knock at the door, whether by day or by night, as a prelude to a search without authority of law amounts to be police incursion into privacy and violation of fundamental right of a citizen.⁶

The then Chief Justice of India did not criticized the interpretation of right of citizen to sleep as one of the fundamental right but he said that

Justification, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 21–24 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

¹ Rehan Abeyratne, “Socio economic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy” *Brook Journal of International Law*, available at : Electronic copy available at: <http://ssrn.com/abstract=2189277>, last visited on 26th March, 2015.

² *Id* at 39.

³ *Id*.

⁴ Intention of the constitution makers if could be gathered from the constitutional assembly debate then it focuses on the point that Fundamental Rights should operate within socio-economic structure or a wider continuum envisaged by directive principles, for then only would the fundamental rights become exercisable by all and a proper balance and harmony between fundamental rights and directive principles will be secured. Held in *Minerva Mills v. Union of India*, AIR 1985 SC 945.

⁵ Dhananjay Mahapatra, TNN, “How can judiciary enforce right to sleep? CJI asks”, available http://articles.timesofindia.indiatimes.com/2012-08-26/india/33401705_1_human-rights-fundamental-rights-justice-kapadia.

⁶ *Ramlila Maidan Incident v. Home Secretary, Union of India*, 2012 (2) SCALE 682.

Right to privacy had been made a fundamental right. Now we hear that right to sleep is also a fundamental right. If we lay down a policy and the Government says it cannot implement it, can we enforce it by resorting to contempt jurisdiction?

These are the points which has always been debatable and by making such statements he has reopened the debate that is ‘to what extent the scope of right to life and personal liberty can be expanded?’ the matter of such enforceability flows from that widening canvas, because the larger and more broad the right to life gets, the more difficult it can become to be implemented.

Cases like this indicate that the right to life has wide scope and in other words it could be concluded that it has infinite scope. It calls to mind W.E. Forbath’s right to “social citizenship” that would provide assurances to all citizens that they can make a decent living through forms of social participation that provide the opportunity for self improvement, material interdependence, and security for all.¹ As *Michelman* noted, such a broadly conceived right would leave “no leading [political] issue untouched.”² This is the core of the democratic objection—when constitutional rights are couched in some of the widest imaginable terms, as they are by the Indian Supreme Court, the Constitution unduly restricts democratic decision making on a range of issues.³

The Supreme Court is continuing to locate a number of rights within the ambit of ‘right to life’ and in doing so instead of formulating its own policies for those rights it has simply held a reasonable standard for executive actions.

These rights created by the courts have given certain positive implications but certain other points also need a consideration with regard to these rights. The question of enforceability is one of the important question which needs to be looked into and then the limits on the judicial power is also one the important point which shall be considered.

¹ Forbath, *Constitutional Welfare Rights*, *supra* note 116, at 1827

² *note* 154.

³ *Id.*

By contrast, the South African Constitution couches its socioeconomic rights in much narrower terms. It includes judicially enforceable rights to a clean environment, housing, food, water, social security, and education.³²⁸ Faced with this finite, enumerated list of socioeconomic rights, the South African Constitutional Court is much more constrained than its Indian counterpart. For instance, it could not recognize a “right to sleep.” Moreover, with regard to the rights to housing, food, water, and social security, the South African Court requires only that the government take reasonable measures toward the progressive realization of these rights for all citizens.³²⁹ The Indian Supreme Court, however, is not so constrained—it has not set forth a clear standard of review for socioeconomic policies, giving it a greater license to intervene as it sees fit.