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DESIGNING THE REPOSITORY: FINDING A PLACE FOR UNENUMERATED RIGHTS IN THE CONSTITUTIONS OF INDIA, GERMANY, AND THE USA.

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Abstract

Written constitutions protect and guarantee certain rights and freedoms that accrue to citizens and the people within the territory. The positivist theory of rights suggests that the peoples' rights are limited to those granted to them by the State. The theory of natural rights, on the other hand, posits that there are certain rights that are inherent to human beings, antecedent to and irrespective of their textual codification. At the interface of these theories, lies the protection of unenumerated rights by courts, through constitutional interpretation.

In India, Germany and the USA, courts have created a "constitutional repository" of unenumerated rights. Broadly defined, a constitutional repository is an enumerated provision, or a set thereof within a constitution to which several unenumerated rights are judicially attributed. The present research aims to comparatively understand the design and practice of such repositories.

Chapter 1: Introduction to the Constitutional Repository

Most fundamentally, a written constitution serves three main functions. First, it defines the nature and structure of the State. It sets out the fundamental principles and values upon which the State is established, delineates the State's identity, its form of government, and outlines the fundamental purpose and guiding philosophy of the State.

Second, it delineates state power and regulates its exercise. It specifies the scope and limits of authority granted to various branches and levels of government, by setting out the form, functions and powers of the executive, legislative, and judicial branches, along with other critical institutions.

Third, it protects and guarantees certain rights and freedoms that accrue to citizens and the people within the territory. This role of written constitutions is the primary focus of my research.

1.1. Theories of Rights

There are two primary ways to theorise about the source, basis and justification of rights.[1]

According to the positivist theory, the rights that individuals possess are limited to those that are conferred upon them by the State. Rights are therefore contingent upon laws and decrees, and are seen as privileges that can be given, altered, or rescinded by the State. This conception of rights underscores the importance of legal and political frameworks in defining and

[1] Doyle, Oran. "Legal Positivism, Natural Law and the Constitution." *Dublin ULJ* 31 (2009): 206.

protecting the rights of individuals, suggesting that without the explicit grant of rights by codification, individuals have no inherent claims to specific freedoms or entitlements.

In contrast, the theory of natural rights posits that there are certain rights inherent to all human beings, which exist independently of any government or legal system. These natural rights are believed to be universal and inalienable, meaning that they cannot be justly taken away or denied by any authority. These rights find its basis in human nature itself, or in a higher moral order. Under this conception, therefore, individuals have certain rights simply by virtue of being human, and these rights are valid and enforceable regardless of whether they are recognised or codified in law.

It is at the interface of these two conceptions that the constitutional enumeration of rights, and the recognition of unenumerated constitutional rights occurs.

1.2. Enumeration of Rights

Constitutionally enumerated rights are distinguished from ordinary rights, that are granted and restricted by statutory law. The purpose of such enumeration within the more enduring constitutional document is to place certain rights above the potential tides of legislative fancy. These are generally rights that are deemed essential, basic, and inalienable. In the three constitutions chosen for this study, such rights have been entrenched under very diverse historical circumstances.

In the United States of America, the Bill of Rights was added as a set of amendments ratified between 1789 and 1791, after the Constitution had already been adopted. This was driven primarily by political reasons, with leaders unable to agree upon the inclusion of such rights at the time the constitution was adopted. However, the idea for enumeration of certain natural,

inherent and inalienable rights of humans to be secured from monarchical tyranny was established as early as 1776, in the Declaration of Independence.[2]

In India, fundamental rights were enumerated in the newly drafted Constitution of 1950, following independence and a violent Partition in 1947. The inclusion of an extensive catalogue of rights was driven by two primary objectives. First, it sought to mark a departure from the extensive restrictions on individual liberties that had characterized British India in the nearly two centuries of colonialism. Second, it aimed to establish an equitable society. Historically, the country's diverse socio-economic, cultural, and religious groups had not enjoyed the same level of rights. Embedding a guaranteed minimum set of rights in the Constitution was therefore deemed essential when laying the foundations of the new nation, grounded in the recognition of principles such as dignity, equality, fraternity, and liberty.[3]

Enumeration of constitutional rights in Germany dates back to the *Paulskirchenverfassung*, which was drafted during the Revolution of 1848-49, but was never enacted. Following the unification of German-speaking states under a parliamentary monarchy, the *Bismarcksche Reichsverfassung* was enacted in 1871. This constitution, however, did not contain a bill of rights. Fundamental rights were expressly enumerated in the Weimar Constitution for the Republic of Germany, enacted in 1919 after a few tumultuous decades on the continent. The enumeration of rights in the Basic Law of 1949, therefore, represents a unique combination of the nation's historical, revolutionary foundations in such enumeration, and the desire to protect individual rights from the administrative excesses of recent history.[4]

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[2] National Archives. 'Declaration of Independence: A Transcription', 1 November 2015. https://www.archives.gov/founding-docs/declaration-transcript.
[3] Singh, MP. 'Fundemental Rights'. In *Indian Constitutional Law*, Eighth Edition., p. 874-882. LexisNexis, 2018.
[4] *The Constitution of Germany: A Contextual Analysis*. Constitutional Systems of the World. Oxford ; Portland, Or: Hart Pub, 2011.

1.3. Unenumerated Rights

Such enumeration raises two significant questions. First, whether it is possible or even desirable to catalogue and codify every right that is inherent to an individual. Second, whether the enumeration of some rights necessarily denies the existence of any other right that may nevertheless be inherent and essential to human existence.

Some courts have used this force of what is inherent as the basis for recognising and enforcing certain acts or omissions that are not explicitly protected by the text of the constitution. This entails the application of several judicial methods and appears to selectively bridge the gap between what is and what ought to be the full extent of rights guaranteed to individuals.

To what extent this gap between natural law and positive law may be closed, however, is also a feature of the judicial system within which the court operates. In common law courts, it is not uncommon for the judiciary to be not only an interpreter of law, but also the creator thereof. The text of statutory law, on the other hand, plays a far more incontrovertible role in civil law systems. In these systems, courts are expected to merely apply the law to the legal question at hand; judicial interpretation aligns more closely to the text and is generally averse to issuing creative remedies.[5]

In spite of this divide, recognition of unenumerated rights has been demonstrated in various degrees by courts across a diversity of geography and judicial culture.

[5] 'Roman Law, Medieval Legal Science and the Rise of the Civil Law Tradition'. In *Comparative Law and Legal Traditions: Historical and Contemporary Perspectives*, 197–248. Cham: Springer International Publishing, 2019. https://doi.org/10.1007/978-3-030-28281-3.

In Latin America, for example, the Constitutional Court of Colombia recognised an unenumerated right to same-sex marriage in the absence of legislative action, by reading expansively the text of the Constitution.[6] The Constitutional Court of Taiwan has protected, *inter alia*, an unenumerated right to one's reputation.[7] In Africa, the High Court of Kenya has acknowledged the presence of unenumerated rights within the procedural guarantees captured by Article 50 of the Constitution.[8]

1.4. Choice of Comparators

The three comparators chosen for this study demonstrate different ways in which unenumerated rights may be protected. In doing so, they create "repositories" of unenumerated rights. By "repository", I mean one or more specific, enumerated constitutional provisions that serve as the basis for the judicial recognition of unenumerated constitutional rights.

I would like to first outline the design of constitutional repositories in the United States, India, and Germany. Relying on this understanding, I would like to then highlight and discuss some comparative themes that emerge. The United States serves as the basis to understand the development of the due process jurisprudence leading to the recognition of distinct unenumerated rights, that has been adopted by, and adapted to, the Indian context. Germany demonstrates a slightly different approach, where distinct rights find subjective recognition within a single, overarching right; it also represents the doctrinal approach embraced by a constitutional court nestled in civil law tradition.

[6] Decisions C-075 of 2007, C-577 of 2011, SU-214 of 2016. This analysis is of course, limited to the topic at hand. The Colombian case demonstrated several other aspects of constitutional re-interpretation and a dialogic approach to judicial lawmaking. *See also*: 'Equality'. In *Colombian Constitutional Law: Leading Cases*, First edition. New York, NY: Oxford University Press, 2017.
[7] Chang, Wen-Chen. 'The Constitutional Court of Taiwan'. In *Comparative Constitutional Reasoning*, edited by András Jakab, Arthur Dyevre, and Giulio Itzcovich. Cambridge University Press, 2017.
[8] Coalition for Reform and Democracy v. Republic of Kenya, Petition 628, 630 of 2014 & 12 of 2015, at para 313.

Chapter 2: The United States of America

2.1 Introduction

The Constitution of the United States of America was drafted and adopted as a negotiated contract between the newly sovereign States in the aftermath of the Revolutionary War with the British Crown. It sought to lay down the vertical separation of powers between the States and the newly formed Federation and was designed primarily to define and regulate Federal power.[9]

The Constitution vests the judicial power of the Federation in the United States Supreme Court (hereafter "USSC").[10] The USSC has been tasked primarily with resolving disputes between the Federation and one or more of the States, between States, or between citizens and States or the Federation.[11] It does not specifically grant the USSC the power of judicial review over legislation, or the power to protect and enforce individual rights. The Bill of Rights itself was introduced as a series of amendments to the Constitution, in the year 1791.

Since the landmark judgement in *Marbury v. Madison*[12], the USSC has played a prominent role in the interpretation of the Constitution, having empowered itself to review and invalidate legislation that may violate such an interpretation.[13] For the purpose of this research, the USSC's empowerment in the interpretation of the Ninth and Fourteenth Amendments is most informative. We shall deal with each of them in turn.

[9] National Archives. 'Constitution of the United States—A History', 4 November 2015. https://www.archives.gov/founding-docs/more-perfect-union.
[10] United States. Constitution. Article III, Section 1.
[11] United States. Constitution. Article III, Section 2.
[12] 5 U.S. 137 (1803).
[13] *See also*: "Marbury v. Madison." Oyez. Accessed May 9, 2024. https://www.oyez.org/cases/1789-1850/5us137.

2.2 Ninth Amendment

"The Bill of Rights spared us from the dangerous consequences of total silence, and the Ninth Amendment protected us from the unavoidable imperfection of enumeration."[14] This statement aptly summarises the purpose and effect of the Ninth Amendment to the US Constitution.

When the Bill of Rights was proposed, some States were concerned that conferring explicit textual protection upon some rights impliedly left other rights unprotected from intrusion by Federal power. The Ninth Amendment was inserted to assuage these concerns, by creating the possibility of extending constitutional protection to rights not expressly enumerated.[15]

It states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[16] Interpretation of this provision by the USSC provides the textual basis for the recognition of unenumerated rights, and the creation of the constitutional repository.

2.3. Fourteenth Amendment

Section 1 of the Fourteenth Amendment reads "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life,

[14] Farinacci-Fernós, Jorge. "The Ninth Amendment: The "Hard Problem" of US Constitutional Law." *University of Pittsburgh Law Review* 84, no. 4 (2023).
[15] LII / Legal Information Institute. 'Historical Background on Ninth Amendment'. Accessed 30 May 2024. https://www.law.cornell.edu/constitution-conan/amendment-9/historical-background-on-ninth-amendment.
[16] U.S. Const. Amend. IX.

liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis supplied)

Three separate phrases constituting this text are extremely pertinent to understanding the USSC's repository of constitutional rights.

2.3.1. Privileges or immunities

This clause was initially proposed as the basis for extending the reach of the Bill of Rights to the states. It was also proposed to be the repository for the protection of additional rights not explicitly protected by the Bill of Rights. This is also where I commenced my own enquiry. However, in the *Slaughterhouse Cases*, the USSC interpreted this phrase narrowly,[17] instead relying upon the due process clause for the wider protections claims.[18]

2.3.2. Due Process of Law

This clause provides a complex area of jurisprudence in US Constitutional law. Its development can be understood as divided into two strands – procedural due process and substantive due process.

Procedural due process has been interpreted to mean that the deprivation of a "liberty interest" by government action necessarily requires certain procedural safeguards. The USSC has, in this situation, empowered itself to identify which liberty interests are so protected, and to also

[17] 83 U.S. 36. It held, *inter* alia, "that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" and that the fundamental rights predating the creation of the Federal Government were not protected by the Clause", to quote from *McDonald v. City of Chicago*, 561 U.S. 742.
[18] 83 U.S. (16 Wall.) 36, 12. *See also*: Amar, Akhil Reed. 'The Bill of Rights and the Fourteenth Amendment'. *The Yale Law Journal* 101, no. 6 (April 1992): 1193–1284.

determine what specific procedural safeguards amount to a valid and acceptable due process for the deprivation or restriction of that specific interest.[19]

Substantive due process, on the other hand, protects two kinds of rights. First, the rights in the first eight amendments, and second, the rights not enumerated in the Constitution that are deemed "fundamental". When a right is deemed to be fundamental, the USSC applies a strict scrutiny, which requires any law restriction such liberty to be "necessary to achieve a compelling government interest". When the right is non-fundamental, the burden of proof shifts to the plaintiff, who must show that the infringing law does not have a "rational relation to a legitimate government interest".[20]

2.3.2.1. Incorporation

The interpretation of substantive due process also has specific relevance to the distribution of powers between the States and the Federation.

While the Fourteenth Amendment is directly applicable to the States, the first ten Amendments were initially envisaged as a restriction on Federal powers only. This, however, soon began to change.

In 1833,[21] the USSC found that a breach of the Fifth Amendment's protection against self-incrimination also comprised a violation of the due process requirement under the Fourteenth Amendment. This made the requirements of the Fifth Amendment implicit in the Fourteenth,

[19] 'The Primary Divide: Procedural versus Substantive Due Process'. In *The Arc of Due Process in American Constitutional Law*. Oxford University Press, USA, 2013.
[20] *Ibid*.
[21] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

thus "incorporating" them against the States.[22] Over the years, the USSC has made the entire Bill of Rights, comprising the first ten Amendments, directly applicable against the States by similarly incorporating them through the substantive due process requirement of the Fourteenth Amendment.[23] This extends the reach of every incorporated right to bind the States, thus empowering the USSC to invalidate any State law that violates the amendments so incorporated, and is settled precedent.

Within the paradigm of my research, this protects rights at the State level that are not explicitly enumerated in the Constitution as applicable to the States. Further, this precedent implies that any "new" right that is considered to be a part of any of the first ten amendments to the Constitution automatically applies against the States as well. The USSC's pertinent inquiry, therefore, is the identification and delineation of the scope of each of the ten amendments.

2.3.3. Liberty

The USSC has interpreted "liberty" as "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned", broader than the right to freedom from restraint upon physical liberty through incarceration.[24]

[22] Frankfurter, Felix. 'Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment'. *Harvard Law Review* 78, no. 4 (February 1965): 746. https://doi.org/10.2307/1338792.
[23] Malloy v. Hogan, 378 U.S. 1, 10, overruling earlier decisions holding that particular Bill of Rights guarantees or remedies did not apply to the States. *See also:* Amar, Akhil Reed. 'The Bill of Rights and the Fourteenth Amendment'. *The Yale Law Journal* 101, no. 6 (April 1992): 1193–1284.
[24] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Since then, an expansive interpretation of "liberty" has been the basis for protecting unenumerated rights through the due process clause. The most illustrative example of this process is the USSC's protection of a right to privacy, and the subsequent case law regarding the right to an abortion as an element of the right to privacy.

In *Griswold*, the USSC protected a right of access to contraceptives based on a constitutional right to marital privacy even though the Constitution did not expressly enumerate a right to privacy. The USSC found that the First, Third, Fourth, Fifth and Ninth Amendments create "penumbras", or zones of privacy, surrounding the distinct rights they enumerate. It found that these zones surrounding the explicit guarantees to freedom of speech, against quartering of soldiers in private homes, against unreasonable search and seizure and against self-incrimination, read in combination with the Ninth Amendment's allusion to the existence of unenumerated rights, provide incidental protection to the right to privacy.[25] Interpreting this precedent, *Roe* subjected the recognition of unenumerated rights to whether such a right is "implicit in the concept of ordered liberty".[26]

The USSC has further determined whether or not an unenumerated right is implicit in the concept of ordered liberty based on its relationship to "tradition".[27] What constitutes tradition, has received varied interpretations. In *Roe* and *Casey*,[28] the USSC interpreted tradition to

[25] Griswold v. Connecticut, 381 U.S. 479 (1965). Concurring opinions located the right to privacy more squarely within the Ninth and Fourteenth Amendments. *See also:* Oyez. 'Griswold v. Connecticut'. Accessed 11 May 2024. https://www.oyez.org/cases/1964/496.

[26] Roe v. Wade, 410 U.S. 113 (1973), applied this test to uphold the fundamental right to an abortion.

[27] The USSC has applied several formulations of what constitutes ordered liberty. For example, "deeply rooted in this Nation's history and tradition" in *Moore v. City of East Cleveland* (1977), "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," in *Snyder v. Massachusetts* (1934) and "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" in *Hebert v. Louisiana* (1926). *See also:* Fleming, James E., and Linda C. McClain. 'Liberty'. In *The Oxford Handbook of the U.S. Constitution*, edited by Mark Tushnet, Mark A. Graber, and Sanford Levinson, 0. Oxford University Press, 2015. https://doi.org/10.1093/oxfordhb/9780190245757.013.23.

[28] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

represent an "evolving consensus of aspirational principles", allowing for progressive realisation of rights not expressly rooted in historical practice.[29]

This interpretation has now been replaced,[30] such that the USSC must now examine whether unenumerated right is "deeply rooted in [our] history and tradition".[31] This interpretation was then applied to overturn the constitutional protection accorded to the right to an abortion, since such a right historically enjoyed no constitutional protection in American law before the 20th century.

2.4. Creation of the Repository

Protection of an unenumerated right requires the USSC to undertake a multistep analysis.

First, the claimed right is located within or outside the framework of the Constitution. For rights not expressly enumerated, the USSC locates them in their relationship with an interpretation of constitutional "tradition". The level of protection that this right is granted depends upon an analysis of its fundamentality in the second step.

If an unenumerated right is found to comprise a fundamental right, the USSC applies a strict scrutiny, requiring any law that infringes upon such a right to be "necessary to achieve a

[29] Fleming, James E., and Linda C. McClain. 'Liberty'. In *The Oxford Handbook of the U.S. Constitution*, edited by Mark Tushnet, Mark A. Graber, and Sanford Levinson, Oxford University Press, 2015. https://doi.org/10.1093/oxfordhb/9780190245757.013.23.
[30] Chemerinsky, Erwin. 'The Future of Substantive Due Process: What Are the Stakes?' *SMU Law Review* 76, no. 3 (2023): 427. https://doi.org/10.25172/smulr.76.3.3.
[31] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022), citing *Timbs* v. *Indiana*, 586 U.S. 146.

compelling government interest". Non-fundamental rights, on the other hand, may be infringed upon where the law demonstrates a "rational basis" for its infringement.[32]

[32] 'What Liberties Are Protected?' In *The Arc of Due Process in American Constitutional Law*. Oxford University Press, USA, 2013.

Chapter 3: India

3.1 Introduction

The Indian Supreme Court (hereafter "SC") is the apex judicial organ in India. It was established under the Constitution of India, in 1950 to replace the Federal Court of India that served the apex judicial role (with appeals possible to the Privy Council in London) under the colonial Government of India Act, 1935.

The SC exercises original jurisdiction over the protection and enforcement of fundamental rights[33] and is the highest court of appeal for judgements from lower courts and specialised tribunals. It holds the power of judicial review over legislation and executive action through petitions arising from a concrete dispute.[34] The Constitution also empowers the SC to pass any orders necessary for doing "complete justice" in a particular case.[35] In addition, the SC has substantially widened its own jurisdiction, for example, through the relaxation of locus standi for litigation undertaken in the furtherance of public interest.[36] In its capacity as the final interpreter of the Constitution, the SC has evolved into the forum of choice for ushering in transformative reform.[37]

In 1973, in *Kesavananda Bharati v. Union of India*[38], the SC firmly entrenched the Basic Structure Doctrine into Indian jurisprudence and asserted its own authority as the final word

[33] Constitution of India, art. 32.
[34] Constitution of India, art. 13.
[35] Constitution of India, art. 142.
[36] Sunil Batra v. Delhi Administration, (1980) 3 SCC 488.
[37] Chandra, Aparna, William H. J. Hubbard, and Sital Kalantry. "The Supreme Court of India: An Empirical Overview of the Institution." *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*. Ed. Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail. Cambridge: Cambridge University Press, 2019. 43–76. Print. Comparative Constitutional Law and Policy.
[38] AIR 1973 SC 1461.

on the interpretation of the Constitution. An equally significant development occurred in the year 1978, when Mrs Maneka Gandhi approached the Supreme Court against the action of the passport authority impounding her passport "in public interest", and the relevant provisions of the Passport Act, 1967.[39] The decision that followed[40] fundamentally altered the nature of judicial review in India and lay down the foundations for India's repository of unenumerated rights.

3.2. The Constitutional Repository

This repository of constitutional rights in India is located primarily in Article 21 of the Constitution. This provision, the right to life and personal liberty, states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Judicial interpretation of Article 21 began primarily with the examination of criminal procedure in the context of *habeas corpus* proceedings. Petitions against imprisonment – the deprivation of personal liberty – brought to fore questions regarding procedure, and the nature and extent of permissible interventions by the judiciary. The discussion regarding this interpretation surrounds two landmark decisions of the SC – *A. K. Gopalan v. State of Madras*[41] (hereafter "*AK Gopalan*"), and *Maneka Gandhi v. Union of India*[42] (hereafter "*Maneka Gandhi*").

[39] During the course of arguments, it was revealed that the Government's interest in preventing Mrs Maneka Gandhi – wife of Mr Sanjay Gandhi, and daughter-in-law of former Prime Minster Mrs Indira Gandhi – from traveling abroad was that her "presence [was] likely to be required in connection with the proceedings before the [Shah] Commission of Inquiry." The Shah Commission was set up in 1977 to inquire into the administrative excesses that occurred during the Emergency (1975-1977).
[40] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[41] AIR 1950 SC 27.
[42] AIR 1978 SC 597.

This Article comprises three main components, along which the SC's jurisprudence has developed: "life", "personal liberty", and "procedure established by law". We shall discuss each of these in turn.

3.3. Procedure Established by Law

In March 1950, Mr A. K. Gopalan, a communist politician, was served with a detention order under the Preventive Detention Act, 1950[43]. He challenged this order in the SC under Article 32[44] of the Constitution. In *AK Gopalan*, the SC was asked to review the constitutionality of this detention. Two arguments placed before this court are relevant to this research.

The first of these arguments surrounds the meaning of "procedure established by law". The petitioners argued that "law" necessarily implied a legal structure that was in compliance with the rules of natural justice, which had been denied to the petitioner. Therefore, they asked that the court substantively evaluate the fairness of the law and the procedure under which the detention had occurred. The SC rejected this interpretation. It limited judicial enquiry to the examination of whether or not the procedure for deprivation of personal liberty had basis in an enacted, statutory law, "not [..] law in the abstract or general sense embodying the principles of natural justice."[45] The use of uncodified natural justice principles for the judicial review of administrative actions or statutory law was therefore found to be outside the court's purview.[46]

[43] Act 4 of 1950.
[44] This provision empowers the SC to issue a writ of *habeas corpus* against illegal detention. *See also*: 'Article 32 in Constitution of India'. Accessed 11 June 2024. https://indiankanoon.org/doc/981147/.
[45] "The Article [21] presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for.": A.K. Gopalan, *per* Kania C.J., Mukherjea and Das JJ.
[46] This approach thus limited the SC's power of review to the curbing of extra-legislative administrative actions leading to the deprivation of life or personal liberty.

This interpretation was overruled in *Maneka Gandhi*. The SC asserted its power to substantively review any law that places a restriction on life or personal liberty. It held that not only must the procedure for the deprivation of life or personal liberty have a legal basis, but such a procedure must also be "fair, just and reasonable, not fanciful, oppressive or arbitrary".

3.3.1. Relationship between Articles 14, 19, and 21.

The second argument placed before the SC in *AK Gopalan* had substantial implications for another aspect of prevailing jurisprudence. Petitioners argued that the SC could alternatively invalidate the impugned law for being a breach of personal liberty under Article 21 on grounds that this law unreasonably restricted the enumerated neighbouring right to the freedom of speech and movement under Article 19.[47]

This was a crucial argument, since the rights under Article 19 – unlike those under Article 21 – expressly required any law infringing upon them to be reasonable. The reasonableness of such law could further be judicially determined through a substantive review thereof. This argument, therefore, went to the root of the SC's power to read separate fundamental rights holistically and in conjunction with each other when examining the full impact of restrictive legislation.

Rejecting this interpretation, the SC in *AK Gopalan* held that each of the fundamental rights formed airtight compartments, and that the independent right to free movement under Article 19 was not an actionable component of the right to personal liberty under Article 21. It held, therefore, that any law restricting the right to life and personal liberty under Article 21 could

[47] Article 19(1) – All citizens shall have the right – (a) to freedom of speech and expression; [..] (d) to move freely throughout the territory of India.

only be examined under the specific criteria set out within Article 21. As such, the SC held itself unable to import the criteria for the restriction of the rights under Article 19 into Article 21, to examine the reasonableness of the Preventive Detention Act.[48]

This position has changed diametrically since *Maneka Gandhi*, in which the SC held that all fundamental rights must be read in conjunction and complementarity with each other. For the purposes of the constitutional repository, this interpretation allows the SC to examine any law restricting life or personal liberty under Article 21 upon the substantive criteria of reasonableness as captured in Article 19, and "fairness" as a guarantee of equality as captured in Article 14.[49] A "fair, just, and reasonable"[50] procedure must therefore be "non-arbitrary" i.e., it must entail equal treatment of individuals placed equally, and the purpose of restriction must have a rational nexus to the means employed.

With the subsequent expansion of "life and personal liberty" to include rights that go beyond the confines of criminal procedure, the SC's interpretation of "procedure established by law" has been key to its power for substantive review of legislation.

[48] Article 19 (2) – Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes **reasonable** restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence; Article 19(5) – Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, **reasonable** restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. (emphasis supplied)

[49] Article 14 – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[50] "Procedure which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and, consequently, the action taken under it.", at 196-197 in Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180. *See also:* Singh, MP. 'Post Maneka Gandhi: Article 21'. In *Indian Constitutional Law*, Eighth Edition., p. 1171. LexisNexis, 2018.

3.4. Life and Personal Liberty

In the context of another *habeas corpus* case, the SC interpreted "life" in Article 21 to mean a life with human dignity, which is separate from a mere animal existence, and requiring access to adequate nutrition, clothing, and shelter.[51] In the years following this pronouncement, the SC has located within Article 21 a number of socio-economic rights that are deemed necessary for the realisation of this definition, like the right to a food[52], education,[53] and livelihood.[54]

The SC has also interpreted personal liberty expansively, beyond merely a freedom from detention or restraint. This began in 1967, a few years before *Maneka Gandhi*. The SC held that while the right to travel within the Indian territory is enumerated under Article 19, the unenumerated right to travel abroad is an implicit part of the right to personal liberty under Article 21.[55] Personal liberty under Article 21 is therefore understood as a "compendious term", which includes within it several distinct rights, including the liberties specifically enumerated in Article 19.[56]

The SC does not, however, always locate an unenumerated right within the one or the other definition. For example, in the landmark 2019 decision concerning the constitutionality of certain mandates regarding the collection and storage of personal data in exchange for access

[51] Francis Coralie v. Delhi, AIR 1981 SC 746.
[52] Peoples Union For Civil Liberties v. Union Of India, 2007 (12) SCC 135.
[53] Unnikrishnan v. State of Andhra Pradesh, (1993) 1 SCC 645.
[54] Olga Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545.
[55] Satwant Singh Sawhney v. D. Ramarathnam, 1967 AIR 1836. In acknowledging the existence of this right, the SC applied the prevailing interpretation of "procedure established by law" and struck down an administrative action by the Passport Authority withdrawing passport services to the petitioner on grounds that it did not have any basis in a legislative enactment. Parliament enacted the Passport Act, 1967 (Act 15 of 1967) in response to this decision.
[56] The liberties enumerated in Article 19 too, have received expansive interpretation. For example, sexual orientation has been held, *inter alia*, to be a form of expression protected by the freedom of speech and expression enumerated in Article 19(1). *See*: National Legal Services Authority v. Union of India, 2014 INSC 275.

to social security benefits, the SC has located a right to privacy at the interface of the right to a life of dignity, and the right to personal liberty.[57]

3.5. Creation of the Repository

When an unenumerated right is claimed by a petitioner, the SC undertakes a two-step analysis. First, the SC enquires into whether such a right is protected by an expansive interpretation of "life", "personal liberty", or a combination thereof. If so found, the right becomes a part of the repository of unenumerated constitutional rights. This inclusion empowers the SC to review the reasonability of any law that infringes upon such right.

In the next step, the SC reviews the infringing legislation for constitutional validity, using the criteria prescribed by Articles 14 and 19. If positive rulemaking is sought pursuant to a recognised unenumerated right, the SC may direct the legislature and executive to take the necessary steps, and issue additional interim guidelines if deemed necessary.

[57] Justice KS Puttaswamy v. Union of India, AIR 2017 SC 4161.

Chapter 4: Germany

4.1. Introduction

The Federal Constitutional Court of Germany (hereafter "FCC") was established in 1951, as the apex court for matters of constitutional interpretation. The primary source of these powers is the *Grungesetz* (hereafter "Basic Law") and the establishing statute *Bundesverfassungsgerichtsgesetz*, which sets out, *inter alia*, the mechanisms for abstract and concrete review of legislation by the FCC.[58] In addition to these textual sources, the FCC has developed a large body of its own jurisprudence, that has heightened the reach of judicial review. In the development of this judicial culture, while it may not have gone as far as some common law courts, it is definitely the outlier amongst its more *bouche de la loi* neighbours of the civil law tradition.[59]

The development of a constitutional repository of rights has been a significant milestone in the FCC's journey of empowerment. The identification of a specific provision where unenumerated rights may be protected transforms the very nature of the Basic Law and provides judges with great power in the progressive realisation of a more comprehensive protection of rights.

Article 2.1 is the locus of Germany's repository of constitutional rights.

[58] Art. 93 BL.
[59] Hailbronner, Michaela, and Stefan Martini. "The German Federal Constitutional Court." Chapter. In *Comparative Constitutional Reasoning*, edited by András Jakab, Arthur Dyevre, and Giulio Itzcovich, 356–93. Cambridge University Press, 2017.

4.2. The Constitutional Repository

Article 2.1 of the Basic Law reads: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." For the purposes of this research, we shall refer to this provision as the right under Article 2.1, the right to free development of personality, or the right to self-determination.

4.3. Delineation of protected actions

The most important development in definition of the repository occurred in the *Elfes Decision*[60]. The facts, stated briefly, are that Wilhelm Elfes, a vocal critic – both domestically and internationally – of the Adenauer administration's policy of western integration, was denied a renewal of his passport. He alleged, in this denial, a violation of his right to freedom of movement under Article 11.[61] In holding that the right under Article 11 did not include a right to travel abroad, the FCC nevertheless held that such a right is a part of the right to free development of personality under Article 2.1 of the Basic Law.[62] The FCC then tested the impugned law against this right using the proportionality test and found the law to be constitutionally valid.

[60] BVerfGE 6, 32 (1957).
[61] Article 11 [Freedom of movement]
(1) All Germans shall have the right to move freely throughout the federal territory.
(2) This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the com- munity, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect or to prevent crime.
[62] BVerfGE 6, 32 (1957).

The Court, in this case, made a choice between what it saw as the two possible interpretations of Article 2.1.[63] The first of these being that the right to free development of personality was animated by the right to human dignity under Article 1.1 of the Basic Law. This interpretation required the protection of only those actions that were essential to human dignity; and as the FCC then saw it, would have rendered Article 2.1 and 1.1 nearly identical in their scope. Instead, the FCC applied a much wider interpretation of Article 2.1, such that it protected human freedom of action in the broadest sense.

In a comparative study like this one, the form that a constitutional provision takes may be understood as much by delineating what it is, as what it is not. A significant indication of the latter comes in 1989, from the FCC's decision and dissent in the *Horse-Riding in the Woods Decision*[64].

This case arose from a claim that a law limiting the outdoor recreational area within which horse-riding is permitted violated the applicant's right under Article 2.1. This brought the FCC at an interesting crossroads with regard to the interpretation and application of *Elfes* – while Article 2.1 was found to be broad enough to accommodate a right as significant as the right to travel abroad, was it also broad enough to include a comparatively insignificant right like unrestricted horse-riding in the forest?[65]

[63] *Elfes* decided between two interpretations – either "human freedom of action in the widest sense" or "the protection of a minimum amount of this freedom of action...without which the human being cannot develop his essential nature as an intellectual and moral person".
[64] BVerfGE 80, 137 (1989).
[65] Although this is not the first time the FCC had applied *Elfes* to comparatively trivial rights, the *Horse-Riding in the Forest Decision* is where a significant dissenting interpretation was written in this context. *See also*, for example: *Prohibition of pigeon feeding* BVerfGE 54, 143 (1980).

The opinion of the Senate proceeded in accordance with the determination of *Elfes*, holding that Article 2.1 protects "every conceivable form of human activity" and that "if an act of public authority affecting freedom of action is based on a legal norm, the constitutional complaint can test by reference to Art 2 (1) GG whether this norm belongs to the constitutional order, that is to say is formally and materially in harmony with the norms of the constitution."[66] It then proceeded to conduct a constitutionality analysis of the impugned legislation, using the proportionality test.

The dissenting opinion, however, highlights important features of the court's interpretation of this Article. In considering the two alternative interpretations before the *Elfes* bench, the dissent proposes a third potential method of interpreting and applying Article 2.1, whereby the FCC must make an initial determination regarding the relevance of the action for which a right is claimed, to the free development of one's personality.[67] This implies, therefore, that any action for which a right is claimed must first satisfy a threshold condition before it is used as a basis for the judicial review of any legislation.

This third approach merges two important features of the two approaches of *Elfes*. First, it limits the circumstances under which judicial review may be undertaken by prescribing a threshold condition for the right against which judicial review may be conducted. This resolves the perceived difficulty that comes with the FCC's current practice, whereby the restriction of any action may rightfully be the grounds for judicial review. Secondly, it retains the

[66] BVerfGE 80, 137 (1989), Translated by DeepL (free version).
[67] "Individual behaviour which, in the absence of special basic right guarantees, claims the protection of Art 2 (1) GG must possess a greater relevance for the development of the personality, comparable to the protected interests of the other basic rights. Where this relevance is lacking, the reason for the special protection effected by the basic rights is also lacking and it is left to the rules and remedies of ordinary law." *See*: Young, Raymond. 'Decision of the First Senate 1 BvR 921/85 | Foreign Law Translations | Texas Law'. Accessed 13 June 2024. https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=608.

independence of Article 2.1 in delineating its own meaning, such that a threshold condition may nevertheless be applied without reliance upon or conflation with any other provision of the Basic Law. Since the proposed threshold condition here is the relevance of the claimed liberty to the free development of personality itself, the FCC is not required to look beyond the text of Article 2.1, for example, to Article 1.1, to find its meaning.

By expressly rejecting this interpretation, however, the FCC has established and clarified that Article 2.1 remains a "fall-back" or "catch-all" right, that does not require the prior fulfilment of any threshold condition. Thus, a legitimate limitation thereof remains in the act of balancing, through the proportionality test, as we shall see below.

4.4. Creation of the Repository

The prevailing interpretation of Article 2.1 provides that an impugned legislation prima facie falls within the scope of a constitutionally protected right. Such a right may nevertheless be legitimately restricted under certain conditions.

Article 2.1 itself provides for three permissible restrictions: (a) the rights of others; (b) the moral law; (c) the constitutional order. Of these, the "constitutional order" presents the most significant and comprehensive limitation.

At this stage, it is necessary to distinguish the purpose of judicial review undertaken by the FCC from that of the SC or USSC. In *Elfes*, the FCC interpreted "constitutional order" to mean the general legal order, which goes beyond merely the provisions of the Basic Law and "fundamental constitutional principles". Therefore, any validly enacted legislation becomes a part of this constitutional order, and as a consequence, a legitimate restriction upon the right to free development of personality. The focus of the FCC's review of legislation is therefore the

assessment of its substantive and procedural compliance with the constitution to determine whether such law is a part of the constitutional order. Purpose and framing aside, this approach demonstrates functional equivalence to the approach of the SC and USSC.

For a law to become a part of the constitutional order, it must satisfy the proportionality test. The test is applied by the FCC in four steps – proper purpose, rational connection, necessity, and proportionality *stricto sensu*[68].

4.5. Personality Rights

An interesting evolution of the jurisprudence in this area is the development and protection of "personality rights" at the interface of Article 2.1 and Article 1.1.

In *Elfes*, while rejecting the narrow application of Article 2.1 that conflated exactly with Article 1.1, the FCC nevertheless acknowledged the existence of an inviolable core of human freedom, which is free from interventions by any public authority.[69] This inviolable core of privacy has then been affirmed and elaborated in later judgements, giving rise to the domain of personality rights.[70]

[68] Lübbe-Wolff, Gertrude. 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court'. *Human Rights Law Journal* 34, no. 1–6 (2014): 12–17.
[69] The FCC observed in *Elfes* that the intention of Article 2.1 could not have been the protection of a very narrow area of freedoms that are informed by the protection of human dignity, because it would be impossible for an individual to violate the rights of others, the moral law, or the constitutional order, within this zone. These restrictions are only permissible for aspects of human activity that require regulation in a co-existing society. BVerfGE 6, 32 (1957).
[70] This inviolable core of privacy was also elaborated upon in the *Medical Records Decision* BVerfGE 32, 373 (1972) and the *Secret Tape Recording Decision*, BVerfGE 34, 238 (1973). *See also*: Michalowski, Sabine, and Lorna Woods. *German Constitutional Law The Protection of Civil Liberties*. Dartmouth Publishing Company, 1999.

The FCC has identified this "core area of control of one's private life" by reading Article 2.1 in light of Article 1.1. Therefore, when any activity for which protection is sought under Article 2.1 is found to fall within this interface, it is deemed to attract a higher degree of protection and can be restricted only in the presence of an overriding public interest.[71] This application of Article 1.1 to the interpretation of Article 2.1 has created, in essence, two separate categories of rights within the repository.

[71] *Census Act Decision*, 1 BvR 209, 269, 362, 420, 440, 484/83 (1983). Although the FCC in its later *Riding in the Forest Decision* appears to be of the opinion that the "core area of control of one's private life" is in principle immune from statutory regulation. *See also:* Vormbaum, Dr Thomas. "§ 103 StGB–bald Rechtsgeschichte? Elf Fragen zur „Affaire Böhmermann "Und Elf Versuche zu ihrer Beantwortung." *Journal der Juristischen Zeitgeschichte*10, no. 2 (2016): 47-54. Translated by DeepL (free version).

Chapter 5: Comparative Themes

5.1. Nature and Contents of the Repositories

This research limits the comparisons in this area to India and Germany only. USA has been excluded because of the doctrinal uncertainty surrounding the contents of the repository post-*Dobbs*.[72]

The repository under Article 21 in India consists of distinct, individually justiciable rights. This means that every time a claim for an unenumerated succeeds at the SC, it expands the catalogue of rights available under Article 21. The SC has often gone one step further, to recognise certain rights as arising from previously recognised unenumerated rights. In 2018, for example, the SC recognised a right to sexual autonomy, while striking down colonial legislation criminalising homosexual intercourse.[73] Such recognition was grounded, *inter alia*, upon the fundamental right to privacy[74] which was in turn recognised as an unenumerated right arising from the guarantee of human dignity, in 2017.[75]

The second feature is the nature of rights in the repository. Although the text of Article 21 is couched in negative terms, its interpretation by the SC has resulted in the recognition of distinct positive rights. The positive nature of right allows the SC to issue directions for legislative and executive action protecting a particular unenumerated right. The SC has, for example, directed

[72] Chemerinsky, Erwin. 'The Future of Substantive Due Process: What Are the Stakes?' *SMU Law Review* 76, no. 3 (2023): 427. https://doi.org/10.25172/smulr.76.3.3.
[73] Navtej Singh Johar v. Union of India, 2018 INSC 790.
[74] *Ibid*, at p.11.
[75] Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161.

legislative action for the regulation of noise pollution as a part of the right to a clean environment under this Article.[76]

The *Elfes* interpretation and its application in Germany, on the other hand, has largely resulted in the creation of a single negative right against the State, whereby any action that is not validly forbidden, is permitted. This means that the repository does not consist of distinctly identified and individually justiciable rights. Its interpretation does not extend or add to the catalogue of rights available under the Basic Law. An exception is the case of rights identified at the interface of Article 2.1 and Article 1.1. For example, in the *Soraya Decision*[77], the FCC reaffirmed the use of personality rights at this interface as a positive right rather than the merely negative or "protective" nature of Article 2.1 generally.

Article 2.1 of the Basic Law, like Article 21 of the Indian Constitution, is available to all individuals. A non-citizen in Germany may therefore claim the right to form associations under Article 9.1, for example, through Article 2.1.[78] Similar attempts have been made, unsuccessfully, in India. The SC rejected, for example, a petition claiming that the fundamental right to freely travel and reside in the country, which is available to Indian citizens only, be made applicable to all individuals through this route.[79]

[76] In Re: Noise Pollution, AIR 2005 SC 3136.
[77] BVerfGE 34, 269 (1973).
[78] Office of the United Nations High Commissioner for Human Rights. 'Germany'. Accessed 11 June 2024. https://www.ohchr.org/sites/default/files/Documents/Issues/FAssociation/Responses2012/MemberStates/Germany.pdf.
[79] Louis De Raedt v. Union of India, 1991 AIR 1886.

5.2. Source of Legitimacy

An interesting theme arises from a study of the basis for recognizing unenumerated rights from the text of the Constitution, specifically with respect to the origin and design of the repository in each of the three comparators.

5.2.1. USA

The USSC recognises an unenumerated "liberty" based on its relationship with constitutional tradition. The legitimacy of the protected right, therefore, relies on a conception of its relationship with, and proximity to, either the requirements of due process, or an existing enumerated right. Determination of this proximity relies upon at least one kind of an originalist interpretation of the text. Therefore, recognition of unenumerated rights by the USSC derives legitimacy from the text of the constitution itself, or a textualist conception thereof.

While the Ninth Amendment provides the textual basis for the recognition of unenumerated rights by the USSC, no such explicit grounds exist in Germany or India.

5.2.2. Germany

In *Elfes*, the FCC briefly considered the relevance of the reframing of Article 2.1 by the Parliamentary Council. The Article was initially drafted to say, "Every person shall have the right to do or to leave undone what does not violate the rights of others and does not offend against the constitutional order or the moral law", before it was changed to its current form. The judgement rules that it was "not legal considerations, but linguistic reasons" that lead to a

change in formulation,[80] without further expounding upon this reasoning.[81] The interpretation of Article 2.1, however, has remained unchanged ever since.

As a result of my research, I find that the repository in Germany finds legitimacy primarily in two sources of the FCC's jurisprudence. First, the power and practice of balancing competing rights, and second, the application of broad principles, like *Rechtsstaat, Sozialstaat,* and human dignity.

The balancing jurisprudence can be traced back to the *Lüth Decision*.[82] In this case, the FCC found that the Basic Law is not just a subjective shield, but also "an objective order of constitutional values that amounts to a fundamental constitutional decision and therefore applies to all areas of law".[83] It found that while the right to freedom of speech could be permissibly restricted by "general laws", as prescribed in Article 5(2), the right itself has a "radiating effect" on statutory law which much be considered, and balanced, when making laws and judicial decisions that place a restriction upon it.

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[80] "However, the solemn formulation of Art. 2 para. 1 GG was the reason to see it particularly in the light of Art. 1 GG and to deduce from it that it was also intended to shape the image of man of the Basic Law. However, this says nothing other than that Article 1 of the Basic Law is in fact one of the fundamental constitutional principles which - like all provisions of the Basic Law - also govern Article 2.1 of the Basic Law. In legal terms, it is an independent fundamental right that guarantees general human freedom of action. **It was not legal considerations, but linguistic reasons that moved the legislature to replace the original version "Everyone may do as he pleases" with the current version** (cf. v. Mangoldt, Parliamentary Council, 42nd session of the Main Committee, p. 533). Apparently, the fact that the second half of the sentence also mentions the constitutional order as a barrier to the development of the citizen's personality has contributed to the theory that Article 2.1 of the Basic Law only intended to protect a core area of the personality. In the endeavor to interpret this term, which also occurs elsewhere in the Basic Law, in the same way everywhere, one finally came to see the constitutional order as a narrower concept than the constitutional legal order; as a result, one was forced to conclude that it should be the constitutional order that is to be protected." (Emphasis supplied) Translated with DeepL.com (free version)

[81] A reference to the original conflicting drafts of the judgement been recorded in Prof. Dieter Grimm's upcoming publication "Behind the Scenes: The Genesis of the *Elfes* Judgment", of which he has kindly provided me with an advance copy.

[82] 1 BvR 400/51 (1958).

[83] Bundesverfassungsgericht, 1 Senat. 'Bundesverfassungsgericht - Decisions - Freedom of expression permeates private law (Lüth judgment)'. Gerichtsentscheidung. Bundesverfassungsgericht, 15 January 1958. De. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html.

Human dignity finds textual basis in Article 1.1 of the Basic Law, and provides a comprehensive limitation on statutory, executive and judicial authority. However, it has also been applied by the FCC as an overarching constitutional principle, that animates its interpretation of the Basic Law.[84] In *Efles,* for example, the FCC highlights the importance of the principles of *Rechtsstaat, Sozialstaat,* and the inviolability of human dignity, when scrutinising legislation to decide upon its incorporation into the constitutional order.[85]

Such application often requires a degree of judicial doctrinality.[86] In the *Soraya Decision*[87], the FCC aptly summarises how it perceives the role of judges to be one of "creatively determining the law", applying such an analysis where the written text of the law is insufficient to provide its full meaning, an approach comparable to that of India, as discussed below.[88]

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[84] Enders, Christoph. 'The Right to Have Rights: The Concept of Human Dignity in German Basic Law'. *Revista de Estudos Constitucionais, Hermenêutica e Teoria Do Direito* 2, no. 1 (29 June 2010): 1–8. https://doi.org/10.4013/rechtd.2010.21.01.

[85] "They must also be materially in line with the supreme fundamental values of the free democratic basic order as the constitutional order of values, but also correspond to the unwritten elementary constitutional principles and the basic decisions of the Basic Law, primarily the principle of the rule of law and the principle of the welfare state. Above all, the laws must therefore not violate human dignity, which is the supreme value in the Basic Law, but also not restrict the intellectual, political and economic freedom of man in such a way that it would be affected in its essence (Art. 19 para. 2, Art. 1 para. 3, Art. 2 para. 1 GG)", para 24. Translated by DeepL (free version).

[86] Eberle, Edward J. 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview'. *Liverpool Law Review* 33, no. 3 (1 November 2012): 201–33. https://doi.org/10.1007/s10991-012-9120-x.

[87] BVerfGE 34, 269 (1973).

[88] *Soraya Decision* at para 39, translated by DeepL. (free version) "The traditional binding of the judge to the law, a fundamental component of the principle of the separation of powers and thus of the rule of law, is modified in the Basic Law, at least in its wording, to the effect that jurisdiction is bound by "statutes and law" (Art. 20 para. 3). According to general opinion, **this rejects a narrow legal positivism**. The formula upholds the awareness that law and justice generally, but not necessarily and always, coincide in fact. Law is not identical with the totality of written laws. **In contrast to the positive statutes of state authority, there may under certain circumstances be a surplus of law that has its source in the constitutional legal order as a whole of meaning and is able to act as a corrective to the written law; it is the task of the judiciary to find it and to realize it in decisions**. **According to the Basic Law, the judge is not obliged to apply legislative directives to the individual case within the limits of the possible meaning of the word. Such a view would presuppose the fundamental completeness of the positive state legal system, a state that is justifiable as a postulate of legal certainty in principle, but unattainable in practice.** Judicial activity does not only consist of recognizing and pronouncing the decisions of the legislature. **The task of adjudication may require, in particular, that values which are intrinsic to the constitutional legal order, but which are not or only imperfectly expressed in the texts of the**

5.2.3. India

The approach of the Indian SC presents an interesting comparison. The SC has often grounded the identification of unenumerated rights in three prominent sources – the Preamble, non-justiciable or directory provisions of the Constitution, and international treaties and conventions, or a combination thereof.

The Preamble to the Constitution sets out "We, the People" as the source of the Constitution's legitimacy. It further sets out the nature of the Indian State and the broad guiding principles like dignity, justice, liberty, fraternity, and secularism that lie at its foundation. The SC has held the Preamble to comprise an integral part of the Constitution and its Basic Structure, with its contents serving to guide constitutional interpretation.[89] Part IV and Part IVA of the Constitution comprise non-justiciable portions of the Constitution – Directive Principles of State Policy, and Fundamental Duties respectively.

In the monist-dualist classification of the incorporation of international norms into national law, the SC's approach presents an almost hybrid approach. While the Constitution provides

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written laws, to be brought to light in an act of evaluative cognition, which does not lack volitional elements, and to be realized in decisions. The judge must keep himself free from arbitrariness; his decision must be based on rational argumentation. It must be possible to show that the written law does not fulfill its function of solving a legal problem fairly. The judicial decision then closes this gap according to the standards of practical reason and the "well-founded general ideas of justice of the community" (BVerfGE 9, 338[349]). This task and authority to "creatively determine the law" has never been denied to the judge in principle - at least under the Basic Law (see, for example, R. Fischer, Die Weiterbildung des Rechts durch die Rechtsprechung, Schriftenreihe der Juristischen Studiengesellschaft Karlsruhe, Heft 100 [1971], and Redeker, NJW 1972, p. 409 ff., in each case with further references). The supreme courts have made use of it from the outset (see, for example, BGHZ 3, 308[315]; 4, 153[158]; BAG 1, 279 [280 f.]). The Federal Constitutional Court has always recognized it (cf. for example BVerfGE 3, 225[243et seq.]; 13, 153[164]; 18, 224[237 et seq.]; 25, 167[183]). **The legislature itself has expressly assigned the task of "further developing the law" to the Grand Senates of the supreme courts of the Federation (see, for example, Section 137 GVG).** In some areas of law, such as labor law, it has gained particular importance as a result of legislation lagging behind the flow of social developments. The only questionable point is the limits that must be placed on such creative lawmaking with regard to the principle of the binding nature of case law, which is indispensable for reasons of the rule of law. They **cannot be captured in a formula** that would apply equally to all areas of law and to all legal relationships created or governed by them." (emphasis supplied)

[89] Keshvananda Bharati v. Union of India, AIR 1973 SC 1461 at 1506.

legislative means for the incorporation of international law into national legislation,[90] the SC has often relied upon the content of international law as the basis for recognising certain fundamental rights.[91]

The interpretation that the right to life requires a life of dignity, for example, finds its basis in the broader principles enshrined in the non-justiciable Preamble of the constitution.[92] The right to a clean environment has been placed within the right to life and personal liberty under Article 21 upon a combined reading of international conventions, the fundamental duty to protect the environment and the corresponding directive principle of state policy.[93] In *Unnikrishnan v. State of Andhra Pradesh*[94] the SC referred to international treaties and the directive principles while identifying the right to primary education as an aspect of the right to life under Article 21.[95]

The legitimacy of the repository, therefore, appears to primarily rely upon an importation of higher principles from relevant sources, of what is deemed inherent, and the principles of natural law, into explicit constitutional guarantees.

[90] Article 51(c), a non-justiciable directive principle, encourages the State to foster respect for international law and treaty obligations. Article 253 of the Constitution further empowers the central government to make laws for the implementation of any international treaties, agreements or conventions. The Constitution makes no specific references to India's accession to any international organisations, and the obligations arising thereunder, nor does it refer specifically to the status of customary international law.

[91] This has significant implications for the national hierarchy of norms – international norms incorporated into the fundamental right of Article 21 technically supersede norms that are incorporated into legislation.

[92] Dr D Y Chandrachud, J (as he then was), in Justice KS Puttaswamy v. Union of India, AIR 2017 SC 4161, at pg 94.

[93] G.Sundarrajan v. Union of India, AIR 2013 SC (SUPP) 615.

[94] (1993) 1 SCC 645.

[95] Following this judgment, Parliament amended the Constitution to include the right to education as a separate right within the section on Fundamental Rights: 21A. Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. *See also*: Constitution (Eighty-sixth Amendment) Act, 2002.

5.3. Substantive Due Process

All three comparators conduct the functional equivalent of a due process enquiry when examining legislation restricting a claimed right. In the USA, this revolves around the examination of procedural and substantive aspects of impugned legislation. In India, post-*Maneka Gandhi*, the SC is empowered to examine both the existence and constitutionality of a procedure established by law for the deprivation of life or personal liberty.

In Germany, the functional equivalence to due process arises at specific steps of the proportionality test. Judicial review of any legislation alleged to have violated the complainants' right under Article 2.1 occurs at a procedural and substantive level, since admission into the "constitutional order" requires both procedural and substantive compliance with the text and principles of the Basic Law.[96]

5.4. Threshold Conditions and Judicial Discretion

The dissenting opinion to the *Horse-Riding in the Forest Decision* posits an interpretation of Article 2.1 of the Basic Law that essentially applies the phrase "free development of [his] personality" as a threshold condition for the recognition and protection of an unenumerated right, i.e., its entry into the repository.

This method of interpretation, I propose, would be very similar to the approaches adopted in India and the USA, where "life and personal liberty" and "liberty" respectively provide broad entry conditions for the evaluation of an unenumerated right in the context of the repository.

[96] Currie, David P. 'Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany'. *Supreme Court Review* 1989 (1989): 333–72.

This has interesting consequences for the nature and design of the repository itself. I propose that applying this approach necessarily requires two things. First, is the identification of distinct rights. Once the threshold is applied, it leads to the recognition of a right that either falls within or outside the repository. This is no longer a relatively subjective or case-to-case activity. The court's decision regarding the application of the threshold condition to every action or omission that claims protection as an unenumerated right serves as precedent for any future adjudication surrounding such right, or any other rights that are similarly situated.

The second is the definition of a hierarchy between the set of rights protected. A right that is recognised as having met the threshold criterion, for example, may nevertheless fail to be protected as a consequence of the proportionality test applied at the next step. Such rights, that are found above the threshold but are validly restricted by the law in question, potentially comprise a set of secondary or non-fundamental rights. This must necessarily result in the creation of a well-defined hierarchy of rights for meaningful execution.

Such a hierarchy is, to some extent, inherent in the USSC's approach. The determination of fundamentality necessarily creates a category of non-fundamental rights. This creates a definitive hierarchy among the unenumerated rights which are granted constitutional protection. Socio-economic rights, for example, have largely enjoyed only a non-fundamental level of protection.[97]

There is, on the other hand, much less clarity regarding the hierarchy of unenumerated rights protected by the SC within the right to life and personal liberty. This often compels the SC to

[97] Kadlec, Joseph F. 'Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights'. *Boston College Law Review* 48, no. 2 (1 March 2007): 387-432.

undertake an all-or-nothing approach to rights protection by inclusion in or exclusion from the repository.[98]

Finally, the dissent also indicates that this would aid the tempering of judicial power, by placing limits on the circumstances under which the FCC analyses impugned legislation using the proportionality test. The experience in India would, however, indicate that the application of the criteria permits at least as much, if not more, amplitude for judicial subjectivity.

This analysis must, however, be adequately contextualised. I argue that a change in Germany's approach to the repository would not necessarily reduce the amount of discretion that courts exercise over choosing cases or recognising unenumerated rights. It is equally difficult to predict, however, that the opposite would necessarily be true.

Several comparative factors may influence such an outcome. First, is the comparative composition of the judiciary in the SC and the FCC. The judges at the SC are formerly practising lawyers or judges, serving tenures with a uniform retirement age. Judges to the FCC are appointed from similar sources, and most significantly, from legal academia, for fixed twelve-year terms.[99] The professional background and length of tenure, among other factors, influences the self-conception of the role of the judiciary, and of the FCC, which is the second significant factor.

[98] *See*: Surendranath, Anup. 'Life and Personal Liberty'. In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, 1st ed., 774. Oxford University Press, 2017. https://doi.org/10.1093/law/9780198704898.003.0042.

[99] 'Bundesverfassungsgericht - Structure'. Accessed 10 June 2024. https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html.

While the SC originally positioned itself as an "apolitical institution concerned with politically significant issues"[100], this position has changed significantly, largely driven by the SC's own decisions.[101] The USSC has historically gone to great lengths in attempting to preserve its apolitical nature.[102] The political nature of the FCC's role has on the other hand, been at the forefront of discourse ever since its establishment.[103]

Each of these factors also plays out in its distinct socio-political and judicial context. Judicial culture, historical experience, ease of constitutional amendment are some of the factors that may affect the nature and exercise of judicial power that is both expected and accepted from constitutional judges.

5.5. Empowerment

Viewing the constitution as a comprehensive document in order to properly examine the impact of restrictive laws upon constitutional rights has been a necessary step for the development of all three repositories. In each of the three comparators, such an understanding has arisen from judicial self-empowerment, having little to no explicit basis in the text of the constitution.

[100] Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India (Oxford University Press 2010), pp. 80-97.
[101] Baxi, Upendra. "The avatars of Indian judicial activism: Explorations in the geographies of [In] Justice." *S. Verma and Kusum (eds) The Indian Supreme Court: Fifty Years Later* (2000): 156-209.
[102] *See, for example*: Henkin, Louis. "Is There a" Political Question" Doctrine?." The Yale Law Journal 85, no. 5 (1976): 597-625.
[103] Shortly after the Court issued its Southwest State decision, Justice Gerhard Leibholz wrote: "It may be said that the raging political controversies which ensued from the disputes in southwestern Germany, especially between Württemberg and Baden, subsided visibly as a result of the judgment of the Federal Constitutional Court, which was readily accepted by all parties concerned. Even at this early date there can be no doubt that the judgment of the Court had a **pacifying influence on the political life** of all states involved in the controversy, and that it cleared the political atmosphere considerably. Beyond that, it had a **politically unifying effect** which proved beneficial to the new German state as a whole." *See*: Kommers, Donald P., and Russell A. Miller. 'Federalism'. In *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., Durham, NC: Duke University Press, 2012.

In *Maneka Gandhi*, the SC emphasised the interrelation between constitutional provisions, and the role of natural law in their interpretation and application. A pronouncement that had an arguably similar effect upon German jurisprudence was made by the FCC in the *Southwest State Case*.[104] In this case, the FCC found that overarching principles of democracy, federalism, and the rule of law are embedded in the Basic Law, on a comprehensive reading thereof.[105] Applying these to the case at hand, the FCC found the impugned federal reorganisation laws violative of these principles, and of the procedure prescribed by the text of the Basic Law. The USSC's use of the penumbral analysis in *Griswold* also demonstrates a similar tendency in the repository's early years.[106]

Finally, an interesting pattern was observed in all three comparators regarding the nature and process of judicial self-empowerment in the areas associated with this research – judicial review, and the authority to recognised unenumerated rights.

In the USA, the Constitution does not specifically grant the USSC the power of judicial review. In *Marbury*, the USSC was petitioned to compel the delivery of the signed and sealed commission for the petitioner's appointment as a judge, pursuant to its power to issue the *writ*

[104] 1 BVerfGE 14 (1951).
[105] *Ibid* at Headnote, para 4: "The individual constitutional provisions cannot be viewed in isolation and interpreted on their own. The overall content of the constitution gives rise to certain constitutional principles and fundamental decisions to which the individual constitutional provisions are subordinate. These must therefore be interpreted in such a way that they are compatible with the elementary constitutional principles and fundamental decisions of the constitutional legislature."; at para 28: "The fundamental principles of the Basic Law include the principle of democracy (das Prinzip der Demokratie), the principle of the federal state (das bundesstaatliche Prinzip) and the principle of rule of law (das rechtsstaatliche Prinzip)." Translated with DeepL.com (free version).
[106] The USSC has long demonstrated a reluctance to engage in penumbral analysis as the only ground for securing rights protection. This analysis is further unlikely to be reused since *Dobbs. See*: Thomas J (concurring) in *Dobbs v. Jackson Women's Health Organisation* on pg. 3, footnote: "*Griswold* v. *Connecticut* purported not to rely on the Due Process Clause, but rather reasoned "that specific guarantees in the Bill of Rights"—including rights enumerated in the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations," that create "zones of privacy." 381 U. S., at 484. Since *Griswold,* the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process."

of *mandamus* under the Judiciary Act of 1789. The USSC refused to grant this prayer, instead striking down the empowering provision of the Judiciary Act. It found that this power exceeded that prescribed by Article III of the Constitution. In doing so, the USSC refused to exercise the extra-constitutional power granted to it by statute, but instead asserted its authority to interpret the Constitution and invalidate conflicting legislation.

In this journey of empowerment, the cases of India and Germany demonstrate a fascinating comparison. In both *Elfes* and *Maneka Gandhi*, the question before the courts surrounded the protection of an unenumerated right to travel abroad. Both courts chose to protect this right, and yet both the courts located this right outside the enumerated constitutional right to freedom of movement. In doing so, both courts lay down the foundation for extensive judicial review of legislation, and asserted their own power to recognise and protect unenumerated rights. Interestingly, both the courts also refused immediate relief to the petitioners: while the FCC found the restriction valid upon an application of the proportionality test, the SC agreed to close the matter upon an agreeable undertaking by the impugned passport authority. The independent evolution of this jurisprudence across language, geography, and legal culture is a fascinating phenomenon – *Maneka Gandhi*, decided in 1973 makes no reference to *Elfes*, decided in 1957.

An interesting further comparison may be made with Ireland. In 1965, the Irish Supreme Court found the phrase "in particular" used in Article 40.3.2 as indicative of the existence of unenumerated rights protected by Article 40.3.1. This led to the creation of the unenumerated rights doctrine, and its constitutional repository within Article 40.3.1. It then relied upon the Christian and Democratic nature of the State as set out in the Preamble, to recognise an

unenumerated right to bodily integrity. It found, however, that the fluoridation of water as alleged by the petitioner did not violate such a right and denied her the requested remedy.[107]

These developments may, I argue, point to a trajectory – whether intentional or incidental – whereby empowering courts are able to lay the groundwork for their own empowerment in relative obscurity.[108] This may be linked to the fear of repudiation by the executive and/or legislature – a direct confrontation with popularly elected organs could potentially hurt the courts' legitimacy.[109] Further research of surrounding circumstances in a larger sample size of cases is, however, necessary to make more concrete conclusions about this phenomenon.

[107] Ryan v. Attorney General, [1965] IR 294. *See also*: Doyle, Oran. "Legal Positivism, Natural Law and the Constitution." *Dublin ULJ* 31 (2009): 206.

[108] While *Marbury* was received with substantial criticism, *Elfes* and *Maneka* received little, and mostly positive attention. "Outside the legal culture, the case was unopposed by politicians and almost unnoticed by the public. Though the judgment claimed for the Court enormous authority to enforce fundamental rights against the state, it elicited almost no official disapproval. After all, the authorities won their case. An international nuisance had been silenced. Like other early landmarks, Elfes has been compared to Marbury v. Madison—a technical victory for the state, that gave judges enormous authority, in future cases, to restrain the state. In this respect Elfes was, in the title of a later monograph, 'more than a judgment'." in 'Consolidation, 1951–1959'. In *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001*, First edition., 1–61. Oxford New York: Oxford University Press, 2015.

[109] On the timing of the *Lüth* Decision, "It certainly couldn't, or at least didn't, respond to Erich Lüth's petition. Whatever the reasons for delay, the First Senate released its judgment in the Lüth controversy at a time—January 1958—when the Constitutional Court had effectively consolidated its position at the summit of the German judiciary and when its status as a coordinate constitutional organ was universally recognized. It was a time, too, when the Federal Republic itself had found broad popular acceptance, when the 'Economic Miracle' was at its crest, and Adenauer at the zenith of his power. It was a time when the Court, in a case posing little threat of popular backlash, could deliver a decision whose outcome was impressive and whose grounds were revolutionary." *See*: Collings, Justin. 'Consolidation, 1951–1959'. In *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001*, First edition., 1–61. Oxford New York: Oxford University Press, 2015.

Chapter 6: Concluding Remarks

Having briefly understood the practice and design of constitutional repositories in these three countries, it may be appropriate to reflect upon a few of its deficiencies. The recognition of unenumerated constitutional rights, by design, has little to no textual basis. This creates three important and related consequences – a lack of democratic legitimacy, a lack of capacity, and inconsistency.

6.1. Democratic Legitimacy

Courts stepping in to protect rights that are not entrenched in the text through the democratic process has serious implications for a system of government that relies upon the separation of powers. To understand this, I would like to briefly describe the role of the courts, and their relationship with popular legitimacy.

The role of constitutional courts in constitutional interpretation creates two *loci* for the court's relationship with the people. First, as a source of legitimacy for the exercise of judicial power, through the judicial appointment process. Second, the people and society serve as the recipient and critic of the court's extra-textual decision-making.

In the USA, the USSC was primarily designed as a judicial body aimed at preventing overreach of federal power, and to protect the interests of the contracting states.[110] This is reflected in the procedure for judicial appointment. Judges are nominated by the head of the Executive and

[110] U.S. Const. art III.

undergo a process of confirmation in the Senate (comprising two representatives from every state) by a simple majority, before they are appointed to the USSC to serve lifetime terms.[111]

In Germany and in India, the protection of socio-economic, cultural, religious minorities is central to the practice of constitutional adjudication. As such the courts play a certain counter-majoritarian role. This makes their relationship with popular legitimacy even more significant. Yet, the process of judicial appointments varies substantially between the two. Half the judges to the FCC are appointed by the *Bundestag*, and the other half by the *Bundesrat*, by a two-thirds majority.[112] In India, judicial appointments are conducted by the Collegium, consisting entirely of members of the judiciary.[113]

Therefore, the degree of democratic participation in the judicial process varies across all three comparators. Yet, none of them have the direct democratic legitimacy that is arguably embodied by a constitutional amendment process. As such, the very practice of creating constitutional repositories of unenumerated rights suffers from a democratic deficit.

This brings us to the second locus of the courts' relationship with the people. When recognising unenumerated rights, courts imply unto themselves an authority to grant or repeal individual entitlements. The need for recognising "new" rights is also often linked to the changing needs of society. Under these circumstances, the acceptance of the courts' decisions by the society, or

[111] U.S. Const. art II. sec. 2. *See also*: 'Frequently Asked Questions: General Information - Supreme Court of the United States'. Accessed 14 June 2024. https://www.supremecourt.gov/about/faq_general.aspx#.
[112] Section 6 and 7, Bundesverfassungsgerichtsgesetz (1951).
[113] Supreme Courts Advocates-on-Record Association v. Union of India, 2015 SCC OnLine SC 964. *See also*: Chandra, Aparna, William Hubbard, and Sital Kalantry. "From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 51, no. 3 (2018): 273–89.

the people at large, is central to the legitimacy of the court, and of the rights it protects. This places the courts in a particularly uncomfortable position, for two reasons.

First is the question of capacity. Courts have, by design, limited means of directly gauging the very public opinion upon which they rely. Access to justice remains a substantial issue, leading to selective participation by stakeholders in the adjudicatory process. Hurdles of judicial pendency also mean that the courts are simply unable to devote the time that decisions with potentially widespread implications upon public policy require.

Second, even when they are relatively successful in doing so, the very practice of courts "playing to the gallery"[114] this way – with the abstract concept of public approval inevitably becoming a factor in judicial outcomes – has harmful implications for the impartial exercise of judicial power.

6.2. Inconsistency

This portion of my critique focusses primarily on the Indian Supreme Court, since it presents the most comprehensive of the three repositories. Having grown up and educated in this jurisdiction, the shift in perspective that comes from a comprehensive study of other constitutions has greatly enhanced my understanding in this area.

The SC's recognition of unenumerated rights on broad doctrinal grounds has created inconsistency and uncertainty in judicial outcomes. Reliance is often placed on more than one grounds, and the court may expound upon doctrine in a manner that goes beyond the needs of

[114] Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India (Oxford University Press 2010), pp. 80-97.

a specific dispute. The SC's decisions that ruled against the unlawful interreference with statutorily protected heterosexual marriage, for example, led to the SC recognising a fundamental right to marry as a part of Article 21's repository, making broad pronouncement about the choice of partner being essential to self-determination, and a life of dignity. This right was, however, not extended to recognise same-sex marriage in 2023, citing, *inter alia*, the need for extensive judicial lawmaking,[115] a task the SC has often undertaken in other areas.[116]

Additionally, SC's practice of verbose judgements, multiple concurring opinions, and of frequently engaging in *obiter dicta* makes it difficult to discern which parts of the judgement comprise binding precedent.[117] In addition to the potentially frivolous litigation, this also poses a great barrier to legal education and awareness as an aspect of a well-informed civil society. To paraphrase Dr Swift, therefore, the more the court says, the less we actually know.[118]

[115] Supriyo @ Supriya Chakraborty v. Union of India, 2023 INSC 920.
[116] Vishaka v. State of Rajasthan, AIR 1997 SC 3011.
[117] Singh, MP. 'Introductory'. In *Indian Constitutional Law*, Eighth Edition., p. 3. LexisNexis, 2018.
[118] Swift, Taylor. *Willow*. Evermore. Republic, 2020. https://youtu.be/7EvwIw4gIyk?si=Ma2Ac3bkiMec_Jj_&t=70. *See also*: AP News. 'Taylor Swift Gets Honorary Degree from New York University', 18 May 2022. https://apnews.com/article/taylor-swift-honorary-doctorate-NYU-fd824b0123766d2a2738afeffc863b00.

6.3. Bridging the Gap

While the practice of constitutional repositories is far from perfect, it serves several important functions.

First, constitutional repositories of unenumerated rights provide a judicial solution for the co-existence between natural and positive law rights. Natural law rights, which are considered inherent and universal, often suffer from vague and subjective definitions. Incorporation into the repository provides a concrete legal basis to unenumerated rights, that allows for their enforcement and protection by the judiciary. This process effectively rescues natural law rights from the inevitable dangers of imperfect definition, offering a structured legal foundation that can safeguard actions or inaction which may otherwise remain vulnerable.

Second, constitutional repositories facilitate significant strides towards the progressive realisation of rights. This function is particularly relevant in two critical situations. Firstly, in contexts where majoritarian narratives have disincentivised the legislative protection of certain rights, courts may step in to protect vulnerable, underrepresented minorities. Secondly, constitutional repositories can be invaluable tools to usher in policy changes when the legislative response is slow, inefficient, or otherwise dysfunctional. Even well-designed legislative mechanisms are prone to political gridlock, partisan conflicts, or bureaucratic inertia, making it challenging to enact substantial policy changes or protect rights effectively. Constitutional repositories thus offer a mechanism through which citizens can nevertheless have a forum for the progressive realisation of rights, especially in the face of legislative inaction or resistance.

6.4. Way Forward

A certain level of abstraction was unfortunately found necessary for the generation of meaningful outcomes from this comparative study within the present constraints of time and space. Deeper insights into each of these jurisdictions will likely provide greater nuance to my observations within each of the comparative themes discussed in this research.

An interesting avenue for further study is the examination of Ireland's approach to the doctrine of unenumerated rights. The Irish judiciary has several formal and informal influences from the USSC, and its jurisprudence. Like India, the Supreme Court of Ireland has utilised the non-justiciable portions of its constitution to grant constitutional protection to unenumerated rights. Like Germany, the free development of personality is central to the recognition of these rights. A study of the Irish jurisdiction could therefore provide an interesting dimension to take this research forward.

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