THE IDEA OF CONSTITUTION AND RIGHTS

PUBLIC AND PRIVATE

R. Venkataramani, Senior Advocate[1]

Supreme Court of India

Former Member, Law Commission of India

When you are part of trans-national gathering, we tend to drop aside, sectarian and other related frames of mind and are keen to practice assimilation. I understand that this assimilation is of exploring, understanding and bringing together various appealing elements in the splendorous diversity of human thought, culture, language, faith and aesthetics, not to leave behind, solemn poetical statements on compassion, which exist wherever human beings have brushed close to the mysteries of the universe. I am glad to be part of this assimilation that happens in congregations like this and am deeply indebted to the invitation to be here.

Human beings are a challenge to themselves. If we have evolved from the primates, we have given a challenge to ourselves. We create our conditions of life. Creation of conditions of life and sustaining them are both answers to several challenges and have become continuing challenges themselves. For instance settling down with agriculture brought about property ideas and inequality. Urbanisation has brought about several environmental concerns.

Faith and religion, philosophy and reason, justice and law are several tools, discoveries, opportunities as well as encounters, all in the endeavour of human beings to be engaged in the process of transforming, defective and non-fulfilling human conditions of yesterday, towards more fulfilling human conditions……… [2]

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[1] Keynote Speaker at the Annual Research Symposium of the Faculty of Law, University of Colombo[21/22.10.2016]

[2] See Rethinking Law a process. (Creativity, novelty, change) James Maclean Rutledge, 2012.

The problem of human consciousness is a matter that has baffled philosophers and scientists. The Philosopher David Charlmes says'

> "*For any physical process we specify there will be an unanswered question*".

Lao Tsu says:

> "*Thirty spokes converge at the wheel's hub, to a hole that allows it to turn.*
>
> *Clay is shaped into a vessel, to enclose an emptiness that can be filled.*
>
> *Doors and windows are cut into walls, to provide access to their protection.*
>
> *Though we can only work with what is there, use comes from what is not there.*"

We will notice in the course of our conversation today, that with every multitude of processes and answers we are able to fashion and generate to meet our challenges, there remain unanswered questions arising out of the human conditions themselves. A basic human condition is one that desires freedom to do as one wills and avoidance of any coercions against that will. We seek maximization of this freedom through ownership or possessions, creative exercises, relationships, building homes, cities and nations, as also making and selling of goods, playing music, creating arts, and literature: the silent unwritten dimensions of being humans.

The vexed question that however continues to be part of the process towards greater fulfillment, is whether we can have maximum amount of freedom to all individuals, consistent with equal freedom for all. This freedom maximizing principle for individuals seems to be the foundation for prominent private law rights namely, property, performance of contracts and bodily integrity. With a certain conception and entrenchment of property,

both as a social and personal institution, human relationships also get entangled and we witness rights associated with status, relationships, such as marriage and parenthood.[3] Immanuce Kant doubted whether a unilateral will of an individual to possess something external and the demand for its protection can legitimately serve as a coercive law for everyone? The coercion avoiding tendancy of the individual will and the coercion justifying conditions emerging from the diverse spread of the community is looked at by Kant in the following words:

> "*So it is only a will putting everyone under obligation, hence under a collective general (common) and powerful will, that can provide everyone this assurance.- but the condition of being under a general external (i.e., public) law in the fields of property and physical integrity giving, accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours.*"

Let us first look at some examples of conflicts and clashes in the field of Property and physical integrity. Physical integrity is a prime interest and indispensably associated with personhood. Individuals have claim against assault, battery and even wrongs arising out of negligence. Every legal system recognizes all this. Also pursuit of individual ends socially, or culturally sanctioned, entailed loss of freedom for some. Criminal law likewise protects physical integrity. These protections and their origins are ancient and pre-date any constitutional idea.

But, human deficiency in understanding the good or the desirable on an equal footing, has also produced the legal fiction of 'merger' by which the personhood of a married woman merged with that of her husband.

Blackstone in his commentaries says this:

> "*By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the women is suspended during the*

[3] Chapter 2 – Private law in the age of rights, by Farancois Du Bois. 'Private Law and Human Rights'

> *marriage, or at least is incorporated or consolidated into that of her husband, under whose wing, protection, and cover, she performs everything.*"

This doctrine of merger as understood and practiced in England precluded women from maintaining actions against their husbands. At common law women were unable to sue their husbands for personal injury. We learn with a smile on our faces, that some courts went so far to assert that husband as a guardian could put 'gentle restraints' on his wife's liberties.[4] Married women were even unable to sue their husbands for other severe harms such as transmission of diseases.[5]

Common law granted to husbands the defence of chastisement and confinement which was in accord with the power of correction available with husbands. Only a legislative intervention by way of the enactment 'Aggravated Assault on women and Children 1883' put an end to this "correction power of angelic husbands." An English Court of appeal forty years later decided that a husband was not entitled to confine his wife to enforce restitution of conjugal rights. Commentator says that what happened to women, who married, was in essence a category shift from person to property. This loss of personhood of women as a consequence of marriage is narrated by the practice of "wife sale," which was a common place practice in rural England in the 19th century. It is said that between 1780 and 1850, England witnessed three hundred wife sales and wife sale was a mutually agreeable means for dissolving dysfunctional marriages.[6]

Till independence, Gwalior was a separate princely State of India. One of its laws dealt with the custom of '*Dhareecha*' or remarriage of women. In several castes, other than Brahmins and certain high castes, women remarried, both after the death of their husband or after divorce. The second marriage of women did not have the same status and respect as the first

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[4] Abbott v. Abbott 1967 ME 304 (Supreme Judicial Court Maine)

[5] Schultzv. Christopher, 65 Wash 496 (Supreme Judicial Court Washington)

[6] 'The Mutually Constitutive Nature of Public and Private Law'- Article by Mayo Moran, The Goals of Private Law edited by Andrew Robertson and Tang Hang Wu, 2009-Edition, Hart Publishing.

marriage. Different set of words were used to describe the first and second marriages. Documented information shows that this practice virtually facilitated, treating women as disposable property and enabling men of all kinds to enter into diverse relationships with women in despair, all under the form of a *Dhareecha*. *Dhareecha* contracts were contracts after all. This contractual form of selling oneself for reason of security and life, came to be abolished later, after independence.

Courtesy the doctrine of merger or near equivalents elsewhere, the competence of a married woman to deal with her own property has not been free from doubt. Though in India, Streedhana remained the absolute property of the married women, in practice it stood subverted. This also had its implications to the competence of women to enter into contracts. The House of lords in the Balfour's case[7] held that mutual promises made between husband and wife were not legally binding contracts.

The above attention to rights, which were otherwise available to women, being lost on marriage or by entering into relationships, is only with the view to devote further attention to an important stand in public and private law discourse, namely that public and private law are mutually constitutive and that neither of them is subservient to the other. It is stated that "the relationship between public and private law is not characterized by utmost a unidirectional flow of values from public law into private law", but 'are best understood as complementing, supplementing and in some instances correcting each other'.[8] It is through such complementing relationships, that after over a century, laws relating to women are now premised on equality. For our purposes, I use the term public law to mean and comprehend Fundamental or human rights drafted constitutional law and not narrowly seen as, administration law.

A little digression here may be permitted. On any one of the following conceptions of rights namely, instrumentalist, consequentialist or even moral grounds, we find it difficult to escape debates concerning

[7] (1919) 2 KB 571

[8] The Mutually Constitutive Nature of Public and Private Law by Mayo Moran, 2009, Hart Publishing.

utilitarianism, production of better consequences or the prevention of bad ones. These factors virtually occupy vast spaces in our political and legal discourses. May be as T.M. Scanlon says:

> "*More commonly, skepticism about rights flows from consequentiality moral outlook. On such a view, there are moral truths, but no moral rights: all true moral claims are claims about what leads to the best consequences.*" [9]

Scanlon talks about, the competence of individual as that, where it would be reasonable for them to reject conduct of other individuals or of institutions that do not incorporate constraints on such conduct, that do not prevent consequences that are bad in themselves. He suggests "the basic question is not whether a principle defining certain duties would produce the most total welfare, but whether it (or alternatives to it) would affect individuals in what they could reasonably reject. So the ability of rights to act as trumps over appeal to aggregate welfare drives from a larger moral framework within which there are limits to what individuals can be asked to undergo for the sake of others."

The reason for exploration of the above statement is to find out as to whether, all individuals and their freedoms can co-exist on the understanding that there can be limits within which they can exist, and beyond which, what nobody can be asked to undergo for the sake of others.

This takes us to the widely presented debate on balancing of rights. Scholars have attempted to draw a scheme of hierarchy of rights or preferred rights and then do the mathematical exercise of balancing by suggesting various equations. In this exercise of balancing community interests or welfare, or structure, or even preservation of social institutions such as marriage, necessarily figure. The attempt is thus to reconcile community interests or community welfare, and the inviolable values that

[9] T.M. Scanlon, Rights and Interest, in Kausik Basu and Ravi Kanbur (eds) Arguments for a Better World, Vol-I, (2009), Oxford University Press.

are identified to be the foundation of certain rights. These are said to be values, as values in themselves, and not because or merely because the practice of rights has a productive outcome measurable in utilitarian logic or calculus. For e.g., Freedom of speech and expression which is a value by itself.

The following exit route suggested by Scanlon, however does not resolve a wide range of practical considerations which confront both legislators and courts in the context of formulating and applying the right principle to obtain the right answer:

> "That there is no need for such ranking of relative stringency, or any need to speak at all of balancing rights. The only balancing is balancing of interests. Rights are not balanced, but are defined, or redefined, in the light of the balance of interests and of empirical facts about how these interests can best be protected."[10]

The hesitation to go ahead with the above lies in the fact that analysis in private law bear a sustained attack on the relevance of policy or community welfare considerations as justifications for conclusions in private law rights conflicts. So how do you balance? Interests do not conveniently and without controversy merge and into rights vice versa. the House of Lord's position in Alcock v. Chief Constable of South Yarkshire Police has been criticised on the basis that if arbitrary limits ought to be imposed on the right that each of us has……..good against others that they take care not to damage our mental as well as physical health, that ought to be done by the legislature rather than courts. Perhaps after the Human Rights Act 1998 in England, and post the European Convention, this question might have been stated differently. Two leading private law academics concur that moral rights provide the legitimate justification for judges to recognize the private law rights. Interpersonal moral rights are the bedrock for the private law rights. The existence or otherwise of the common law rights cannot and

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[10] *Ibid.* On the subject of abandoning the rhetoric of rights as substituted by the terminology of needs. (See. Jeremy Waldron, Rights and Needs: The Myth of Disjunction, in Austin Serat and Thomas R. Kearns (eds) Legal Rights: Historical and Philosophical perspective, (1996) University of Michigan.)

should not be determined by reference to considerations of policy or community welfare.[11]

There is a view that “the function of tort law is to make the world a better place by granting people rights that they can assert against others and to provide for remedies for enforcements of those rights and courts would be wrong in this regarding public interest when they are about to decide what right should be recognized.”

The suggestion that there can be a valid claim in relation to a particular situation capable of being realized through law, was ultimately a question of justice and policy, is also not commonly shared. To deny the existence of private law right for the reason of community welfare is to confiscate what is due to the claimant and to treat him/her as a means to the ends of other. [12]

The following observations may also be seen in the above context;

“*A division of labour between constitutional and human rights law on the one hand, and private law on the other, is easily conceivable and perhaps indispensable." “Ultimately, therefore, the issue turns on what rights and duties (or values and principles) exist among private persons. That is inescapably a question of private law.*”[13]

I will revert back to these statements after the idea of constitution and its multiple forms are dealt with.

All these debates are however without reference to historical aspects that have slowly led to the emergence of the idea of constitution, and to constitutional schemes and the limits of constitutional interpretations and practices. We can continue to discuss private law rights in their exclusive

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[11] EJ Weinrib, ‘Does Tort Law Have a Future?’ (2000) 34 Valparaisao University Law Review561, 566; Beever, Rediscovering the law of Negligence, above n 4, at 176-77, see further the discussion in A Robertson, ‘Constraints on Policy-based reasoning in Private law’ in A Robertson and HW Tang (eds), The Goals of Private Law (Oxford, Hart Publishing, 2009) 261, 277-79.

[12] See, Chapter 5 and 6, Andrew Robertson and Tang Hang Wu (eds), Goal of Private Law, (2009) Hart Publishing.

[13] Francois Du Bois, ‘Social Purposes, Fundamental Rights and the Judicial Development of Private Law’, in Donal Nolan and Andrew Robertson (eds), Rights and Private Law, (2014) Hart Publishing.

historical patterns and origins as well as the special domains generating their own norms. But we cannot close our eyes to the social, economic or political factors that led to the forging of private law rights or their loss and the questionable, or undesirable list of such factors. We cannot also close our eyes to the slow unfolding of refinements in the social order – for instance the thinking that slavery of any sort is evil, or that all peoples are entitled to ordered equality of opportunities or that private contracts for private good, cannot suffocate social good such as environment. All the social changes seem to be constantly texting messages to people while they are entering into private law transactions.

In contemporary times, it is therefore possible to refer to the competence of an individual whose interests have been affected, or whose claims have justifications, or whose demands are not found to be remediable, to call upon the state to alter the legal relation between the parties. [14]

This competence of the individual to appeal to the state to alter legal relationships is different from the competence of the individual-in private law, articulating certain claims or rights as legally protectable, by their appeal to moral considerations, or appeal to the policy of doing justice by courts by shifting past precedents or traditions of legal reasoning, or appeal to legal principles deductible from the accumulated wisdom of the past in resolving certain conflicts. The second type of appeal and the way common law courts have dealt with them, is said to be the history of common law itself. In the absence of a central institution of law making on normative basis, courts alone would have been the arbitrators in resolving conflicts and enacting theories, norms, and principles as well as drawing limitations on all of the above. This role of the courts in England for example, has been treated as a role model.

We need to examine this in the context of statements that there are limits on what cannot count as private law rights. It is therefore said that "it

[14] BC Zipursky, 'Philosophy of Private law' in J Coleman and S Shapiro (eds), the Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford, Oxford University Press, 2002) 623, 633.

is meaningless to talk of a right not to be caused loss", "that parties cannot create any form of property rights good against every one that they choose;" "that there can be no right not to be exposed to risk" and that courts cannot create rights which requires the answer to questions they cannot give. [15]

The erection of these limitations is the realization, that law cannot usher in arbitrary solutions, and that there could be blind alleys in granting unmanageable claims. Current teaching of tors and social wrongs will necessarily explore these dimensions.

Let me next move on to the statement that in current times, human rights also shape the law governing the relations amongst citizens, and their impact have reached the heart lands of private law. In this context three broad positions are identified and stated as follows:

> "*The first is a skeptical one, which would prefer private law and constitutional human rights law to continue as separate pathways, albeit following generally the same direction and with occasional crossings. The second position takes the opposite line, urging the displacements of private law by constitutional human rights. The space between is filled by a stance that values the distinctiveness of private law but insists that it cannot do without the direction given by constitutional human rights. In the jargon of legal doctrine this third approach represents the 'indirect horizontal application' of fundamental rights, in contrast to the 'direct horizontal application' reflected in the second position and the 'purely vertical application' of the first*"[16]

I do not propose to delve deep into these aspects of methods of application (like an old time teacher with an unending supply of chalks and blackboard – or in current times with power point presentations). My endeavour will be to notice the emerging connections between Fundamental Rights, described in any way, and the motions in private law. Will the idea of

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[15] Right and Private Law, Donal Nolan and Andrew Robertson (eds), Chapter 1. (2014) Hart Publishing.

[16] Francois du Bois, Private law in the Age of Rights, in Elspeth Reid and Daniel Visser (eds), Private Law and Human Rights, (2013) Edinburgh University Press.

Constitution and its expanding frontiers seamlessly vanish the boundaries of private law or will it erect new fences flexible and mutually beneficial?

Let me ask the basic question. What is that individuals are generally obligated to do? Prof. Hart the positivist will say, where there is law there is obligation. Today when the role of a Great Teacher as the Bodhisattva, or that of other venerable guides of the human mind, is occupied by mere representative assemblies, the issue of obligation in human relationships, assumes suggested simplicity – viz., that of simply obeying the law; and laws that may enter and put its dense hands into all spheres of life.

The moral autonomy of individuals forever explaining, taming, or enriching the boundaries of one's liberty – thus deeply projecting the thought of responsibility into human conduct – is also being slowly cast aside in its primary role. Old obligations give way to new obligations. Ends of life or purposes of life are anchored in new and radical foundations. All of us are participants – (theoretically) in collective public interest reasoning, to reach at common goals of life [The American Constitutional expression: Pursuit of happiness].

There always existed a gap between abstract rights frame work, relating to bodily integrity, property with all its old and new connotations, interpersonal relationships including child, parent aspects, as well as contracts (execution of many of which now entails public interest and community welfare for e.g., matters relating to environment and health) and the concrete questions that are bound to arise in human intercourse. Many of these concrete questions arise out of rules or concepts and their applications.

Prof. Weinrib, whose contributions to the Private Law discourse and corrective Justice has generated a great deal of lively exchanges, says "*private law is concerned not with whether an act has increased or diminished welfare, but with, whether that act can co-exist with the freedom of another in accordance with practical reason*". This 'practical reason' is what perhaps Kant is talking about when he says "*so only in a civil condition*

can something external be mine or yours". What is this civil condition today if not a Constitution or the idea of Constitution? Kant also talks about union of choices of individuals in accordance with a universal law of freedom. This universal law of freedom can be said to be the constitutional space.

If this civil condition is, rule of law, aided and promoted by a constitutional document, can the concrete contents of private law, live and sustain themselves in complete isolation from connections or concerns with constitutionally generated norms and principles? Can the judicial development of private law even if nothing more than the exercise and dominance of the power of the courts and judges, also happen far removed from constitutional glances?

Two illustrations maybe looked at to draw few lessons. In the first case *(R. VS Cambridge-Health Authority)*[17] the English court reasoned that though the European Convention is not part of the domestic law, still it carries persuasive principles of public policy. Consequently termination of an ongoing health service can be faulted. The Supreme Court of India, following some of its earlier exercises in applying international Human Rights Instruments, in the Vishaka case[18], virtually super imposed principles laid down in *The Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), on the constitutional provision of right to Life and Liberty. The judgment of the House of Lords in *Campbell vs. MGN Limited*, (2004 UK HL 22) also saw that private law can gather well from the influence of fundamental rights even though the European Convention rights, did not apply between private parties. Do we still need to deal with public reason as a controversial entity and offer still further justification in the marriage between Constitutional rights, their meanings and their co-relations to the contents of private law?

[17] 1995 QBD5 (Though reversed in appeal on other grounds.)
[18] Vishakha v. State of Rajasthan , 1997 (6) SCC 241

For the purposes of our discourse it may not be necessary to undertake a detailed study of the distinctions if any between public law and private law. Explanations are offered with reference to the distinctions between wrongs, remedies and other matters of procedure respective to public law and private law. Correction of all executive errors, broadly constituted the public law sphere in England, and has been borrowed with or without modifications in all Commonwealth jurisdictions.

In the case of *State of Orissa v. Nilabati Behera* [1993] 2 SCR 581, the Supreme Court of India, used the expression Constitutional Tort. This phrase virtually conveys superimposition of constitutional language on the private law domain.

While these distinctions may have practical relevance in the administration of justice, the demand for deeper justification in support of the distinctions need not hold us from pursuing the prospect of laying down and expanding upon the correlation between public and private law. Is the question as to why corrective justice symbolizing private law and distributive justice which symbolizes public law, cannot merge is correct? The following observation seems opposite:

> *"It is both undesirable and unnecessary, for purposes of this case, to attempt to do that which has seemingly eluded scholars in the past and given rise to wide differences of opinion among them, namely, the drawing of clear and permanent line between the domains of private law and public law and the utility of any such accords….. Suffice it to say that it could be dangerous to attach consequences to or infer solutions from concepts such as 'public law' and 'private law' when the validity of such concepts and the distinctions which they imply are being seriously questioned"*[19]

All these questions would not have arisen if law and life of people's, the choices they have to make virtually on every aspect of life, have, not been internationalized and globalized and exposed to a steady stream of

[19] Fose v. Minister of Safety and Security, [1997]3 SA 786, 57 Judgment of the South African Constitutional Court.

influences from outside the domestic frontiers.one tends to profitably look at the rich explanations offered on the phrase "Laws partly common to all mankind”.

The demand for punishment of a wrong doer is a demand under the criminal law. Breaches of contracts and other promises may involve civil, claims accompanied by occasional, criminal sanctions. Is not the demand for an International Crimes Tribunal for prosecuting grievously erring Heads of State and public functionaries, a product of pervasive influence of international human rights law? Can citizens sue those in authority for even private rights violations, for restitution and damages?

Individuals as self-determining persons are in constant engagement with pursuits that appeal to them and which arise out of their capabilities and ‘Gunas’ (endowed nature). We are also drawn towards aesthetics; the conception of beauty and goodness.[20] Human beings have not learned to go about productive economic activities and activities that sustain us physically and those that give us creature comforts. Opposing tendencies, conflicts and disagreements thus seem to be part of the pursuits we are talking about. It is said that even among altruists there can be disagreements about what is good.

It seems private law emerged as a consequence of this human condition; it further seems that its role is to resolve these conflicts. This is a search for complete or full ‘right’ that alone can be the ideal answer in each case. Is the role of the Judge that of a scientist discovering an externally existing ‘right’?

Conflicts and clashes are thus the outcomes of freedom of pursuits by individuals and the will to avoid surrenders, or giving up, or obligations. The tendency to script and sustain justifications in favour of unbridled pursuits by some, and denial of dignity, equality, goodness, compassion etc.,

[20] ‘The Sense of beauty’ by George Santayana, (1896) Charles Scribner’sons.

is painted through various means legal systems, principles and Judges partake in this process.

The concrete content given to rights claims at any point of time is deeply connected to the content of the social order. Both mutually reinforce. In this sense private law participates in community organisation[21] and thus goes beyond mere correctional role, correcting wrongs in disparate atomic ways and this is no major anthropological discovery.

Going back to Prof. Weinrib, reference has been made to public reasoning organized by reference to beliefs, values and modes of reasoning that have public plausibility, Fundamental rights have been described as society's authoritative repository of legally supreme and publically accessible values concerning human dignity and thus "having systematic normative significance within private law? How do completely rule out the entry of distributive justice as part of fundamental rights and their values, from informing and exchanging views with corrective justice?

Even though this systematic normative significance private law may not be only about distributive justice, we may still look at some elements of distributive justice. Supreme Court of India in *Lingappa Pochanna Appelwar and ors. v. State of Maharashtra and another* [1985 (2) SCR 224] paraphrased distributive Justice in the following:

> *"The Concept of distributive justice in the sphere of law making connotes, inter alia, the removal of economic inequalities and ratifying the injustice resulting from dealings or transaction between un-equals in society. Law should be used as an instrument of distributive justice to achieve fair division of wealth among the members of the society based upon the principle: 'from each according to his capacity, to each according to his needs', distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or*

[21] In the sense integrity and performance of contracts must be free and essential in the interests of trade and commerce as also contracts in other walks of life.

> *distribution of property owned by on to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transaction and, perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving of fair division of material resources among the members of society or there may be legislative control of unfair agreements."*

Self-determining agents make demands as may suit their concerns and interests. It is only by creating institutions that can channelize these demands and making appeals, to these institutions, that the 'common good' is sought after. The idea of a constitution enters the picture in these and deeply related contexts. The common good of yesterday has been different in different societies. The common good of today has several fruits in the basket, diverse but existentially connected.

Determination of such appeals by Courts or other conflict resolution institutions, necessarily involve considerations of fairness and reasonableness. But fairness and reasonableness are not magic wands that perform by themselves. They are illuminated by a process of refinement of human relationships and newer cognitions thereof.

For instance, interpretation of contracts of employment[22] when the Supreme Court of India, forbid unequal bargaining power; or the notice of structural inequality in bargaining power by the German Constitutional Court.[23]

Thus the law of contracts will now say, that contracts cannot be instruments of domination. The doctrine of void-ness of contracts being opposed to public policy will receive new readings and interpretations – so

[22] Central Inland Water Corporation v. B. N. Ganguly (1986) 3 SCC 156

[23] 1BvR 567/89 in (1993) 89 B VerfGE 214

as to bring about equality of smiles and avoid inequality of disappointments. In the domain of marriage and divorce, discourse on dignity and mutual respect will displace coercive power, and brute demands. Wife sales will be seen as fossilized human practices, never to be revisited. We will then begin to practice robust self-determination by all without domination by any.

We shall quickly peep into the role of Fundamental rights assisting some aspects of private law reasoning by referring to few constitutional court pronouncements.

Privacy Right:

The activities of princes Caroline Von Hannover in public spaces were the subject of several photographs. They were mundane non official activities. She however complained that a publication of photographs violated her right to privacy. She was unsuccessful before the domestic courts in Germany. The European Court was however persuaded to delineate the approach to be followed by the National Courts deciding cases between private parties by a process of reasoning which involved the direct application of the European Convention to private persons, the Court said:

> "*A fundamental distinction needs to be made between reporting facts…capable of contributing to a debate in democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual, who, moreover, as in this case does not exercise official functions.*"[24]

In the case of Auto Shankar the Supreme Court of India put the general law of privacy and the constitutional recognition of the right to privacy together and held:

> "This right has two aspects which are but the two faces of the same coin- (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the

[24] Von Hannover v. Germany, (2005) 40 EHRR I.

constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion."[25]

The proprietary of the publication of the plaintiff's name along with financial details as part of a piece on billionaires of India figured in Indu Jain v. Forbes INC. the Delhi High Court found the suit to be maintainable on the basis of the Auto Shankar Principle.[26]

Injunctions have been granted by courts, for instance, against the press, restraining publication on the issue of legality of the debenture bonds issued by Reliance Petrochemicals[27] and against any party preventing publication of allegedly taped telephonic conversation of a political person belonging to a political party in Utter Pradesh with various persons.[28] In the former case the Supreme Court pressed into service the clear and present danger doctrine, part of US constitutional history of freedom of expression.

In the PUCL case the Supreme Court went on to hold that "*once facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed except according to procedure established by law.*"[29]

Telephone tapping undertaken in derogation of law will violate the right to respect for private and family life.[30] Monitoring of email and telephone records of an employee has been held to be unlawful surveillance though the employer had a right to know about the good conduct of the employee.[31]

All these cases illustrate indirect application of fundamental or human rights by National Courts and the hesitation required in unrestricted

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[25] R. Rajagopal v. State of T.N. (1994) 6 SCC 632
[26] Order passed in C.S. (OS) No. 2172 of 2006.
[27] Reliance Petrochemical Ltd. V. Inidan Express Newpapers Ltd. (1988) 4 SCC 592;
[28] Amar Singh V. Union of India (2011) 7 SCC 69
[29] PUCL v. UOI, (1997) 1 SCC 301.The Court has however not proceeded to offer any comprehensive definition of the right to privacy.
[30] Huvig v. France, Series A No. 176-B, Application No. 11105/84: (1990) 12 EHRR 528
[31] Copland v. United Kingdom, Application No. 62617/00 2007 ECHR 253 (03.04.2007)

direct application of fundamental rights, into the private law domain. The question that needs attention seems to be "*will it be relevant whether questions that are of significant concern to the public are discussed in serious and factual manner or, whether only private matters that serve only to satisfy curiosity are covered.*" [32] This question will necessarily go beyond the contours of private law.

Property Law Issues:

The German Constitutional Court in Parabolantennen, by reliance on Article 5 of the basic law held that a land lord may have no competence to object to the installation of a satellite TV instrument by a foreign tenant, who may be enabled to receive broadcast from his country of origin.[33] A syndicate of co-owners of an apartment complex, felt that two co-owners should be prevented from constructing a small temporary enclosure on their balconies, required for celebration of the Jews religious festival of Succot. Their application seeking injunction in this regard was turned down by the Supreme Court of Canada by reference to the right to religious freedom in the Québec Charter of Human Rights and Freedom.[34]

When Courts act in enforcement of rights between parties, their proceedings can constitute state action. Section 1 of the fourteenth amendment of the US constitution, imposing prohibition on discrimination will thus prevent courts from enforcing a restrictive Covenant stipulating sale of property only whites.[35] The State Action principle has been applied in several private rights context.[36]

The above narration and analysis is to comprehend the relevance of fundamental rights law entry into private law. This is not to unequivocally take a constitutional extremist position that all rights and all claims between individuals, who are entitled to be secured in their pursuits should

[32] Soraiya (German Constitutional Court) 1 BVR 112/65
[33] 1BVR 1687/92, reported in (1994) 90 BVerfGE 27, 33 ff.
[34] Syndicat North Crust v. Amselem (2004) 2 SCR 551.
[35] Shelly v. Kremar 334 US 1 (1948)
[36] Marsh v. Alabama 326 US 501 : 90 L.Ed. 265; Robinson v. Florida, 378 US 153 : 12 L.Ed. 2d 771

be subjected to the relentless and overarching gaze of fundamental and human rights. In Countries where the private rights themselves are in peril owing to the uncertainties obtaining in the socio- political order, purely for the purposes of restoration to healthy and enriched practice of such rights, greater constitutional intervention may be justified.

Legislations in promotion of competition are themselves in acknowledgment of the fact that a free market by itself may stifle competition. How does that matter? The consumer interest seen from all angle is a driving logic behind these legislations. Abuse of dominance distort competitions as it may include practices like restriction of quantities, impediments on technical development etc. so also predatory pricing is a matter of prejudice to consumer interest. In so far as competition can be affected by mergers of company, there will be discouragement. In Carew & Co. Ltd. V. Union of India[37], the Supreme Court while dealing with the Monopolies and Restrictive Trade Practices Act, 1969, observed as followed:

> "*The Constitution, in its essay in building up a just society, interdicting concentration of economic power to the detriment of the community, has mandated the State to direct its policy towards securing that end. Monopolistic hold on the nation's economy takes many forms and to checkmate these maneuvers, the administration has to be astute enough. Pursuant to this policy and need for flexible action, the Act was enacted.*"

The Competition Act of 2002 is the new avatar and restatement of the above observation though couched in economic and commercial jargon. This law ostensibly to aid and assist trade and business entities in moderating and subjugating their pursuits to the common good of the consumer, is traceable to Article 39 (b), (c) of the Constitution of India:

> *39 (b). That the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;*

[37] AIR 1975 SC 2260.

> *39 (c). That the operations of the economic system foes not result in the concentration of wealth and means of production to the common detriment;*

The National Green Tribunal Act 2010 has been hailed in India and elsewhere as one of its progressive and far reaching legislations. Besides other concepts and principles relating to protection and promotion of environment and resolution of environmental disputes, the Act focuses on restitutionary remedies, both in relation to property and to victims of environmental injury. All current notions of public and private nuisance, to some extent even trespass, to a considerable extent negligence, have all been woven together into a common corpus. Pronouncements of the National Green Tribunal often anchors its observations on constitutional provisions, particularly the right to life and liberty provision of Article 21 of the Constitution of India.

Reference to the competition legislation and the environment legislation has been made only to notice, how fundamental human rights concepts may not only have direct or indirect application through judicial processes, but also by legislative interventions, further facilitating both the direct and indirect application of both international and domestic human rights principles.

Virtually all writings on corrective justice and private law remedies advert to Aristotle. Let us look at what he says:

> "*People have recourse to a judge when they are engaged in a dispute. To go to a judge means to go to the just, for to be judge means, as it were, to be the embodiment of what is just.... The judge restores equality. As though there were a line divided into two unequal parts, he takes away the amount by which the larger part is greater than half the line and adds it to the smaller. Only when the whole has been divided*

into two equal parts can a man may say that he has what is properly his, i.e., when he has taken an equal part."[38]

Prof. E.J. Weinrib has this to say on the Aristotelian statement;

"*Justice between the parties obtains when the line is divided equally between them, the disturbance of the equality counts as an injustice which a judge undoes by restoring the initial equality…. If one where to ask Aristotle judge why he re-divided the line in this way, he would answer that this was the only just response to the defendant's action.*" *…..*"*Aristotle represents what properly belongs to each of the disputing parties as an equal segment of line*"[39]

What constitutes this equal segment of a line is to a large extant covered by constitutional statements, principles and prescriptions. The equal segment of line namely, the equal position of parties in several private transactions can no longer be merely tested on assumed equality. Thus we enter into the domain of the idea of a constitution and its expanding horizons.

As a Natural Law adherent I may say, that all the rights we seek to enjoy, are not created by constitutions. They are stated as constitutional prescriptions. The idea of a constitution is the impulse towards a consolidation of the power immanent in several strands of life of any community or nation captured kaleidoscopically. Rights, duties, culture, faith and notions of righteousness, predate constitutions or the idea of Constitution. But the beauty of this movement towards a constitution is the yearning towards preserving but redefining and refining the gains of the past, but providing for an orderly space for individual fulfillments.

History is strewn with examples of edicts of Emperors, which are in some sense or the other a codification process. From Hammurabi's Code in 1754 B.C., the 17 Article Constitution of the crown Prince *Shotoku* of Japan in the year 604 C.E, King *Asoka's* edicts, the *Ancestral Injunctions and the Great Ming Code* of the

[38] Aristotle, Nicomachean Ethics, V, 1132a19-29 (M Ostwald trans, 1962)
[39] Corrective Justice – Ernest J. Weinrib, Oxford – 2012.

founder of China's *Ming* Dynasty are some of the well-known chronicles of codifications.[40] There are other lesser known statements. The question of codification of State and all other powers in a given community, for the orderly pursuit of certain nominated ends and goals might not have been the central idea of these chronicles. The fact however remains that engagement of people in social and moral ordering, has been as powerful an idea, as the persuasions towards exploration and understanding of the material universe through tools of science.

It is documented that in the span of 300 years or so between 1600 and 1900 A.D., there has been a spurt in the activity of Constitution making. Large number of Constitution making exercises during this period, in some form or the other, have been noticed. It is a matter of interest and curiosity that while science and particularly mathematics and astronomy had developed in a big way in the Asian and Arab civilizations long prior to the west catching up with them, they seem to have happened in isolation from social and political structures or ideas. It will be a challenging task to project some of the seminal philosophical and religious ideas in these countries, for instance the concept of dharma in several Asian countries. (How can we not pay attention to the justice potential in the great story of *Angulimala,* and its parallel in the truth and reconciliation commission in post apartheid South Africa) It can be said when you practice dharma, your pursuit of happiness will neatly fit into it. The concept of dharma is as powerful and perennial as the triumvirate of the French revolution namely, liberty fraternity and equality.

For a society to be free and open and to honor the capacities and freedoms of all people, power is assumed or seen to be necessary for community organization on certain lines, called the governance power. From this comes the concomitant idea that all power, viz. (i) power to be exercised in the public sphere for purposes of governance (ii) the competence, capacity and freedoms, which are relevant for private human relationships in all their manifestations, should be codified. The challenge however, resides in the great appeal and the indestructible value of an open society where freedoms are splendidly honored as well as subject to interventions on the basis of socially constructed norms and principles. Private relationships and private law may thus not resist the impact of constitutional codifications. The argument that private law like love has no goals and the dangers of excessively seeing law as a means to an end has been seen earlier.

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[40] Constitutionalism in Asia Wen Chen Chang, Le-ann Thio et al Oxford, 2014.

It is possible to suggest that the post-world war II corpus of international and national thoughts on human rights, also owe their moorings to the idea of Constitution-namely an over-arching document, which codifies and regulates governance, which issues sign posts for governance, which acknowledges or grants powers and freedoms in the language of rights, and call upon members of the community to endeavour towards a happy marriage of the universe of private sphere with the universe of the community.

The idea of a Constitution in its manifold forms along with the thought processes on human rights, and pushed by human advancements in science and technology have led to a historical stage in human community organization. International, trans-boundary movements and sharing of ideas and resources and national motions of regulating the domestic spheres are both vehicles of this stage. Both the 'scares' namely the *'Brave New World'* of Aldous Huxley and those of 'Nineteen Eighty four' of George Orwell are also before us in their genetic mutations. This stage, because of the enormity of the issues and the wealth of possible ways of advancing human aspirations, goals and ends, is beset with its challenges. My attempt here has been to peep into all the above aspects and to suggest that the jurisprudence of post-Constitutional stage of human history may have to invent strong adhesives, towards sustaining an open society, which will cherish the sacred domains of some private rights in a non-antagonistic confluence with constitutional rights.

The idea of constitution, history of constitution including the constitution making process are in one sense grand narrative of the human mind willing to discover and to follow systems and patterns of community conduct. Without going into the reasons in this regard we may generally state that the need for this discovery was a product and consequence of several social, economic, and historical factors. Unlike statements and codification of moral precepts or imperial commands which were concerned with the mere maintenance of certain sets of orders and organization of the society, contemporary constitutional discoveries have several composite features. I use the word discovery because for instance the constitution making process in the colonial countries including other Asian countries such as Japan and China involved considerable survey of constitution making and of constitutions.

Talking about the rise of modern Japan, W.G. Geaseley remarks that one Ito Harobomi a London educated Samurai (1841-1901) was put in charge of the constitution drafting committee in 1881 this followed increasing demands for elections and representative governments. It is said that in march 1882 Ito left for a visit to Europe on a constitutional fact finding mission which lasted to eighteen months including securing the guidance of Herbert Spencer.[41]

In the year 1895 one K'ang Yu-wei submitted a memorial to Chinese Emperor Kuang-hsu (1875-1908), urging him to take a series of reform measures. Among the proposed reforms were the creation of a Parliament, the adoption of a constitution, and division of power between the executive, the legislature and the judiciary. In other words K'ang proposed a constitutional monarchy similar to that of Japan.

In 1905, the tiny constitutional monarchy of Japan defeated the colossal dictatorial Russian Empire. The famous scholar- turned-industrialist, Chang Chien, commented that 'the victory of Japan and defeat of Russia are the victory of constitutionalism and the defeat of monarchism.' He urged Yuan Shih- K'ai, then governor general of Chihli, to assume vigorous leadership in promoting the cause of constitutionalism.

A inspection mission was soon sent to Japan, Great Britain, France Belgium, the United States, Germany, the Austro- Hungarian Empire, and Italy. The mission returned in July 1906. The mission reported favourable impressions of the British and the German systems of government, but concluded that the Japanese Constitution was more suitable to China because of greater similarity between the two countries.[42]

We can notice and identify several themes and projects behind constitution making and constitutional structures. Moving away from monarchical rule was one such project. Organizing public power and

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[41] Old obligations give way to new obligations. Ends of life or purposes of life are anchored in new and radical foundations.

[42] Ibid.

codifying it through establishment of representative institutions is another project. Democracy yet another. Sometimes democracy and rule of law went together. Cataloging civil political and other rights was another project. Rights need not be necessarily drafted into the constitutional scheme for instance Germany had introduced a social security system in the 1880's that insured the workers against illness, disability, unemployment and provided old age pension. Charter of rights and freedoms can be through enacted law and grafted on to existing Constitutions. The Canadian charter has been hailed as a great discovery as important as the discovery of penicillin. The US constitution never added social elements to their liberal democratic constitution. It took several constitutional amendments in the US that has given stability to its internal structure. The French and German constitutions have been amended several times after the European convention or after the U.N. Declarations.[43]

Ideas in social and political thought in some form or the other circled around the notion of social contract, as the invisible process by which people desired to exit from the unregulated conditions of state of nature. After several centuries of changes, both moderate and radical, we find that there is no one single universal principle or unity of principles, which have informed constitution making and directed or guided the contents of constitutions.

What is however important both from the points of history and from the point of view of rule of law governance, that from constitutions being mere descriptive have for good reasons moved into the prescriptive age.[44] In this sense the idea of a constitution can be said to be the idea that is competent to make normative demands on reality. Yesterday's social reality, when all power public and private were in their disparate spheres and existence, has yielded to this idea, viz., that social reality is subject to orderly change through the idea of Constitution.

[43] Judicial Decision – Making in a Globalised World – Elaine Mak, Oxford and Portland, -2013
[44] Dieter Grimm – Types of Constitutions in The Oxford Handbook of Comparative Constitutional Law, Oxford,2012.

Even though the world has several types of constitutions, namely liberal democratic constitution, liberal non- democratic constitution, non-liberal democratic constitution, the social or welfare state constitution or socialist constitution, it appears to me that the above said idea of constitution not as a mere description of reality but as making normative demands on reality is closer to all constitutional experiences. A learned author has summarized the functional characteristics of constitution:

1. The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than having their sources in a pre-established truth.
2. The purpose of these norms is to regulate the establishment and the exercise of public power as opposed to a mere modification of a pre-existing public power. Regulation implies limitation.
3. The regulation is comprehensive in the sense that no pre-or extra-constitutional bearers of public power and no pre- or extra-constitutional means to exercise this power are recognized.
4. Constitutional law is higher law. It enjoys primacy of all other laws and legal acts emanating from government. Acts incompatible with the constitution cannot claim legal validity.
5. Constitutional law finds its origin with people as the only legitimate source of power. The distinction between *pouvoir constituent* and *puvoir constitue'* is essential to the constitution.[45]

All our social realities are heterogeneous and composed of diverse features. History has made it so. Different societies with different features of faith, religion, culture, economy, need and deserve finely tuned governance structures and responses. From the experiences that we have gained in the functioning of these different governance structure and performances, we may be able to consolidate our understanding on some common basic features of the idea of the constitution. The expansions which have taken place within the

[45] Ibid.

constitutions may owe it to external developments as well as internal features such as judicial reviews of far reaching character.

Article 79 (3) of the German basic law declares the principle of democracy, rule of law, the principle of social state, and the federal structure as well as the guarantee of human dignity as unalterable by amendment. The Keshavananda Bharti Judgment in India arrived at the same resting place.

In the above scheme of constitutional ideas and principles, two aspects seem to emerge. One is the codification and structuring of public power and introduction of normative principles governing exercise of such power. Second is what was stated earlier as the competence of individual to demand from the structure of such public power, to mediate and alter the relationships between private parties. The responses to this demand are mandated by constitutions. The framework and methods of responses are also designed in constitutions, though in varied forms.

Fundamental Rights and reasonable restrictions are the most important features in the regard. The competence we are talking about is thus not in the abstract. It is within the framework of rights and liberties which are themselves unalterable. The emergence of human rights instruments at the international level is a phenomenon, which has arisen as a reinforcing process towards the protection and promotion of fundamental rights. The freedoms of individuals will be such freedom as they are able to process through the charter of rights and liberties. Of-course the guarantee of an open society, is non-negotiable. The idea of Constitution and social reality will speak a negotiated language.

I may therefore say private rights or private law is neither a caged bird nor a free bird in the high skies. It is a domesticated companion to the constitutional idea. I think I can speak of the multi-dimensional

relevance of the story of Angulimala, where individuals, apparently in conflicts can reach out to each other and see law and life differently.

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