Chapter III

Positive and Negative Rights

Isaiah Berlin introduced the distinction between positive and negative liberty in his famous essay *Two Concepts of Liberty*. He attributed the term ‘negative freedom’ to “what is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?” The second sense of liberty, what he called freedom in the positive sense is involved in the answer to the question “What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?” According to him the two questions are clearly different, however they may overlap. Negative freedom, therefore, is the right to be left alone. Its focus is on the potential violator and not the right holder, which is why negative freedom as a right is available against the State as a fundamental right or the first generation Civil and Political Right. Negative freedom, therefore, means absence of constraints.

The potential violator has to step back and allow the right holder to enjoy his liberty. Lesser the interference by the potential violator; more is the right enjoyed by the right holder. The positive sense of freedom instead, as put by Berlin is the ‘freedom to’ and not ‘freedom from’. In contrast to the negative freedom, the focus of positive freedom is the individual i.e.

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204 Supra note 117 at 29.
205 Ibid.
206 Ibid.
207 Ibid.
the right holder and not the potential violator. Berlin though was sceptical about the merits of positive freedom and therefore, preferred negative freedom.

The difference between negative and positive rights has been classically expounded by Charles Fried:

“A positive right is a claim to something – a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment – while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the right not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation.”

Thus, the fundamental distinction between negative and positive right, is actually the duty distinction as some rights are negative because they impose a negative duty and some right are positive because they impose a positive duty. Duty distinction is the reason for distinguishing the Will (Choice) theory and Interest theory of rights. Will theory of rights of which H. L. A. Hart was a major proponent argues that one has a right when one can choose to demand or waive the performance by other party of what it is that this party must do. On the contrary the interest theory of right, propounded mainly by Joseph Raz; one has right if

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208 Ibid.
209 Supra note 36 at 40.
210 Id. at 41.
the interest one has is important enough to hold some other person under some duties. 212 Will theory happens to be theory which has found the popular acceptance in most of the legal systems. However, significantly apart from presupposing the right holders to be capable individuals, the will theory does not actually insist on the actual realisation of the right as the very theory of right rests on the fact that rights give to the right holder the claim to demand or waive off the observance of the duty corresponding to right. Will theory, therefore does not focus on the consequence of the right holder not getting his right.

The judicial review of legislations and rules in a way guarantee the protection of fundamental rights; however, except for the judicial review of legislations and statutory rules, the manner in which legal rights are traditionally understood, the demand for the observance of duty corresponding to the right can actually be claimed pursuant to breach of such rights and therefore right of peremptory relief safeguarding the guarantee of rights is very often belied. For example under the Constitution of India if the right to life and personal liberty is guaranteed by a recourse to Article 32 of the Constitution (which happens to be the popular understanding of how fundamental rights under the Indian Constitution are guaranteed) then the fact that Article 32 can only be invoked by a person pursuant to the breach of fundamental rights clearly establishes the fact that Article 32 actually cannot guarantee the right to life and personal liberty, what in fact is guaranteed by Article 32 is a remedy in case of breach of the rights given under Article 21. The dawn of this realisation though would make the fundamental rights vulnerable and therefore would demand the assurance against the breach of rights as the first measure and judicial remedy in case of breach a secondary

212 Supra note 110 at 14.
measure with the acknowledgement of the failure of protection of fundamental rights in the first instance.

Article 32 as a measure for the guarantee of fundamental rights, presupposes that the presence of the remedial measure in case of breach of fundamental rights would actually pave the way for the protection of the fundamental rights by the State i.e. duty bearer vis-a-vis fundamental rights. A guarantee for the protection of fundamental rights has to be a positive assurance against the violation of rights, which can only be argued for if the deterrent effect of the existence of a provision like Article 32 is empirically proven to the extent that it actually ensures the protection of fundamental rights. Individual recourses to Article 32 otherwise would continue to buttress the argument against the guarantee of fundamental rights, since; in an ideal case scenario resort to Article 32 should actually become an obsolete practice, as its recourse is premised on the breach of guaranteed rights. This capacity to invoke this remedial right pursuant to the breach of fundamental rights, again presupposes the capable individuals and does not address the cause of persons not capable financially or socially to resort to this remedial right. So, you have a situation where the measure guaranteeing the protection of right envisages breach of the guaranteed right and the remedial right therefore which is claimed to be guaranteeing the observance of duties corresponding to the rights again presupposes the capacity of the right holder to enforce this remedy and therefore again does not focus on the consequence of the right holder not getting his right.

Interestingly though the right to recourse for judicial remedies under Article 32 pursuant to the breach of fundamental rights is actually a positive right but since most of the fundamental
rights including Article 21 are couched as negative rights, the recourse to Article 32 would always be contingent upon the breach of fundamental right. Even an impending breach of Article 21 cannot be the ground to invoke Article 32 as it would then make the content of right under Article 21, positive and not negative. So, the right to life and personal liberty is to be guaranteed, the right first of all has to be a positive right, so that the judicial remedy under Article 32 can actually ensure the protection of this right and not merely provide for a remedial measure pursuant to the breach. So, Article 21 should actually provide for a positive assurance against the violation of right, this will still be dependent, however, on the capacity of the right holder but at least the possibility for the protection of right by way of recourse to judicial remedy can actually work logically.

A measure like public interest litigation which primarily addresses this absence of capacity in the right holder to realise the rights by allowing public spirited persons to espouse the cause of incapable right holders can then be a relatively effective substitute for the protection of fundamental rights. This kind of measure though would first of all demand the concern for the consequence of the right being not realised which does not seem to be the concern of will theory of rights. Concern for the realisation of rights is to found in the interest theory of rights, which is premised on the realisation of the content of right. However, this would also demand a positive right and therefore a corresponding positive duty, because if the content of right is a negative duty i.e. not to intervene, then the fact remains that until the right is violated the duty is observed automatically and therefore legal recourse for the protection of such a negative right would invariably be premised on the breach of the very negative duty. All the more reasons therefore to insist that if respect for rights are to be cultivated in our
legal system, it can only happen by making rights positive, imposing positive duties. This is not to say that rights should therefore be stripped of its negative facet, it should be there but as a secondary measure but not as the very content of right.

Frank B. Cross in his powerful attack on positive legal rights\textsuperscript{213} makes a very important point by arguing that the proponents of positive legal rights presume that since negative legal rights give to the right holder a right against the State, therefore protection of the very thing for which the individual has the negative right of non-intervention against the State, in itself is a value to be preserved to such an extent that every individual has a right to that very thing and not only a negative right to not to be deprived of that very thing.\textsuperscript{214} He also has referred to the arguments advanced by Stephen Holmes and Cass R. Sunstein\textsuperscript{215} that every right including the negative rights require positive government enforcement.

Cross argues that this presumption that the activity for which the negative right exists against the State is in itself a virtue to be protected as right, ignores the fact that merely because it is the right of a person to not to be prohibited from doing an act, the act in itself does not become a very desirable thing to do by the right holder. For example, a person has the right against self incrimination; it does not therefore mean that a person can never implicate himself voluntarily with a view to seek punishment\textsuperscript{216} or help the case of the prosecution. Likewise unrestricted freedom of speech completely devoid of the norms of society, other organisations or private associations could actually lead to excess of rude and undesirable

\textsuperscript{214} Id. at 875.
\textsuperscript{216} As in plea bargaining.
speech. However, interestingly Cross did not talk about the desirability of any of the second
generation rights or socio-economic rights here which have been read as implicit in a
constitutional right to life by constitutional courts in several jurisdictions. Based on this
argument he also argues that Amartya Sen’s argument in Resources, Values and Development\(^\text{217}\) that the theoretical distinction between negative and positive rights is
philosophically unsupportable. Sen in Resources, Values and Development has stated the
following:

“......valuing negative freedom must have some positive implications. If I see that negative
freedom is valuable, and I hear that you are about to be molested by someone, and I can stop
him or her from doing that, then I should certainly be under some obligation to consider doing
that stopping. It is not adequate for me to resist molesting you; it is necessary that I value the
things I can do to stop others from molesting you. I would fail to value negative freedom if I
were to refuse to consider what I could do in defence of negative freedom.”

Cross argues that Sen’s argument has an unsupported premise that because the society
provides me a negative right to do something, it is therefore a good thing to do. Cross,
therefore succinctly argues that “granting a private freedom to do Z does not necessarily
imply that Z is a good thing; it might merely imply that freedom of choice is a good thing or,
alternatively, that the pragmatic consequences of such freedom from governmental restraint
might yield a better society than permitting restriction by the government.”\(^\text{218}\) However,
Amartya Sen’s argument that the philosophical grounding for the distinction between first

\(^{217}\) Supra note 213 at 875,876.
\(^{218}\) Id. at 876.
generation and second generation rights have been rather fragile has primarily been directed against the rejection of socio-economic rights from the ambit of justiciable right.\textsuperscript{219}

Cross has then provided for his second theoretical challenge to the conception of positive rights as justiciable legal rights by arguing that the premise for any right is the consequences that the rights will have in terms of making our society better.\textsuperscript{220} He therefore, argues that since negative rights would only require courts to effectively proscribe governments and not compel government to advance rights in case of positive rights; it is plausible to conclude that protection of negative rights would be useful for us as the positive rights are dependent upon the resources of State. In recent decades, however, philosophers have largely disagreed with this opinion and have turned towards the positive freedom.\textsuperscript{221} Amartya Sen in his book refers to the factors constitutive of impediments in the way of a person’s enjoyment of negative freedoms as unfreedoms\textsuperscript{222} and argues for substantive freedom, i.e. capabilities – to choose a life one has reason to value.\textsuperscript{223} Sen identifies poverty as a factor which results in deprivation of basic capabilities. The notion of substantive freedom and capability relates to the idea of positive freedom. Absence of capability would result in lack of capacity to choose a life one has reason to value which can be logically be attributed to the absence of positive freedom for a person otherwise endowed with negative freedom. Poverty is the reason behind the felt need for the cause of socio-economic rights and would therefore make the existence of negative freedoms meaningless for an impoverished person because negative freedoms presuppose

\begin{footnotes}
\item[219] Supra note 113 at 385; Amartya Sen argues that distinguishing socio-economic rights from civil and political rights as non-justiciable is like drawing a line in the sand.
\item[220] Supra note 213 at 876.
\item[221] Supra note 36 at 30.
\item[222] Supra note 28 at 15.
\item[223] Id at 74.
\end{footnotes}
right holders as capable individuals and not capability deprived individuals.

3.1 Two Often Conflated Distinctions

Matthias Klatt observes that all first generation classical liberal rights may actually have a positive dimension, and socio-economic rights also protect a *status negatives* i.e. sphere of individual freedom where the State is prohibited to intervene.\(^{224}\) This is interesting because Klatt argues that it is myth to consider that only second generation rights are positive right and that all first generation rights are negative rights, in fact he argues that positive rights are there in classical first generation liberal rights and negative rights are there in the second generation socio-economic rights. In fact his article published in the International Journal of Constitutional Law\(^{225}\) is titled “Positive Rights: Who Decides? Judicial Review in Balance” wherein, he addresses the justiciability issues related to the adjudication of positive rights and observes that positive dimension of rights is debated mostly in relation to socio-economic or social rights such as right to education, health, housing or water, however, “the positive dimension is by no means limited to social rights”\(^{226}\) and in fact it extends to the first generation traditionally conceived negative rights as well.\(^{227}\)

The distinction between civil and political rights on one hand and social rights on the other, coupled with the distinction between the negative rights and positive rights have often been

\(^{224}\) *Supra* note 119 at 354, 355.

\(^{225}\) *Ibid.*

\(^{226}\) *Id.* at 355.

\(^{227}\) *Ibid.*
Not all traditional civil and political rights are negative because they impose a duty on State not to intervene. However, going by the fact that it is correct to distinguish between negative and positive rights according to nature of duties imposed by these right on the holders of duty i.e. State corresponding to the right, it is quite clear that the civil right to a fair trial is not a negative right, since it actually demands for the establishment an entire judicial system. Likewise, the right to seek redressal in the court is a positive right as it imposes an obligation on the State to exercise justice and therefore serve people’s cause. Among all the civil rights, those which pertain to the relationship between the individual and the courts are positive rights.

Turning to political rights, such as right to freedom of political association and to freedom of expression in the political context are negative rights. However, they are in fact that political version of more general civil rights and as such they are not in essence political rights. Interestingly, though the constitution of India in Article 19(1) of the Constitution puts this right in the sense of it being a positive right. Article 19(1) (a) states that “All citizens shall have the right to freedom of speech and expression.” This is significant to note that Article 19 unlike Article 21 of the Constitution which puts the right to life and personal liberty categorically in negative terms presents the fundamental freedoms enshrined as fundamental rights in Article 19 as positive rights. Significantly, though the fact that even Article 19 can only be enforced in a court of law by way of Article 32 or Article 226 of the

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228 Supra note 36 at 43.
229 Supra note 36 at 44.
230 Ibid.
231 Ibid.
232 Ibid.
233 Ibid.
234 Article 21 – No person shall be deprived of his right to life and personal liberty except according to the procedure established by law.”
Constitution, even the rights enshrined in Article 19 technically become negative rights as recourse to Article 32 and 226 of the Constitution presupposes breach of fundamental rights. It is certainly a vexed puzzle though because if we say that the recourse to Article 32 and 226 is contingent upon the breach of fundamental rights then whether the right violated is the negative right of non-intervention with the individual’s freedom by the State or the positive right of and individual to have that freedom? The fact that fundamental rights are available against the State would indicate that right violated is actually the negative right of non-intervention by the State since the positive right of being able to have that freedom extends the ambit of right by making it available against entities other than State as well. However, at least can it be said that the right in the positive sense can be limited to the right to have freedom from State; this automatically makes the right negative in the manner in which fundamental rights are traditionally conceived, since the right would be talked about only in case of violation by the State, since for protecting the right the State really does not need to do anything, in fact not doing anything automatically protects the right of the individual. This very importantly tells us how the two concepts of negative and positive rights are actually conflated.

Frank B. Cross in his strident defence for the argument that only negative rights can be legal rights has said that the proponents of positive rights presume that negative protection of rights does automatically means that the right not to be deprived of an interest would mean automatically that such an interest is to be protected positively as well. According to him, this is not the case. A logical corollary of this argument would be that if you have freedom that you should not be stopped from expressing your point of view it does not automatically means
that your interest in freedom of your speech should be protected positively as well. This can further be buttressed from the fact many a times your speech is not needed or in fact is irrelevant. However, the questions actually is whether the positive protection is being claimed for the speech or freedom of speech, because freedom of speech signifies that though the freedom of speech exits but it is not incumbent upon the right holder to necessarily express herself. So, the question is; whether we can actually say though it is a right of a person that his freedom of speech is not interfered with but there is no right of that person that he has a right to freedom of speech. This confounding of the interest that is protected by law can only be decoded if we look how legal rights are conceived in statutes. In a statute an interest is a right of person if there is a positive right of what is known as enforcement of that interest which is a right and the enforcement necessarily presupposes violation of the interest protected. Therefore, legal right have been traditionally construed as negative but does that mean that there is no positive right in the protection of the interest before it is actually snatched from the right holder. This appears to state the obvious that it is actually very strenuous to still maintain the dichotomy between negative and positive rights.

It can generally be said about freedoms available to human beings under the Indian Constitution that along with the freedom in relation to the exercise of something it is also implicit in the right that the right holder is free not to exercise that freedom. So, absence of compulsion to exercise the right is also included in the ambit of rights. However, right to life under Article 21 of the Constitution is not to be read in the same sense as other freedoms. The Supreme Court in Gian Kaur v. State of Punjab235 while declaring constitutional the criminalisation of attempt to commit suicide under section 309 the Indian Penal Code held

that making a comparison between the right to freedom of speech etc. and the “right to life”\textsuperscript{236} is “inapposite”\textsuperscript{237} as the two cannot be compared because of the difference in the nature. This appears to be an emphatic denouncement of the argument that protection for a negative right in all cases does not presuppose a positive right to the protection of the interest. In fact the Supreme Court reiterated several times what it called the “right to life” under Article 21 of the Constitution.

This argument of the nature of right to life and right to other freedoms being different also very significant for the point of view of socio-economic rights as the source of socio-economic rights being enforceable fundamental rights under the Constitution of India is Article 21. As human dignity happens to be the cornerstone which is compromised because of the absence of socio-economic rights and human dignity being repeatedly pointed out by the Supreme Court of India as comprising the essence of what right to life actually means, the argument that socio-economic rights are the sole beneficiary of the wrong reading of Article 21 as including positive right to life, also falls flat. If Article 21 includes a positive right to life which relates to the first generation civil and political rights then certainly finding faults with the reading of socio-economic rights as positive rights and therefore outside the ambit of enforceable right to life being not a negative right gets weakened considerably. It follows therefore that liberal rights cannot be distinguished from socio-economic rights using the dichotomy of positive-negative rights.\textsuperscript{238}

\textsuperscript{236} Id. at 660.
\textsuperscript{237} Ibid.
\textsuperscript{238} Supra note 119 at 355.
3.2 Civil and Political Rights as Positive Rights

Positive civil and political rights as enforceable rights may actually pose equal amount of problematic questions which the adjudication of socio-economic rights poses. However, interestingly it has seldom been argued as instances of judicial overreach in the annals of Indian polity. Therefore, positive civil and political rights certainly have an edge over socio-economic rights since it does not have to actually overcome the challenge of constitutional legitimacy, however, if fundamental rights are actually negative rights then even the judicial enforcement of positive civil and political rights should be contested on the point of its constitutional legitimacy with equal vehemence.

The legitimacy challenges pertaining to civil and political rights, if any have been limited to the technical ground of *locus standi* of the petitioner, since most of these petitions were filed in the court by way of public interest litigations. Therefore, the challenge to substantial question of positive civil and political right being not adjudicatory has often escaped unchallenged. Though, the positive civil and political rights may have escaped scrutiny on the point of its constitutional legitimacy but the overwhelming cause for this appears to be the presumption that fundamental rights in the form of civil and political rights have been provided for by the Indian Constitution to every person in India regardless of its positive and negative character. In this context, the challenge to the argument of socio-economic rights being adjudicatory legal rights by referring to its positive character appears to be an argument which is logically incoherent when compared with the positive civil and political rights.
In *D. K. Basu v. State of W. B.*\(^{239}\) the Supreme Court expressed its deep anguish over the lack of respect for constitutional ethos particularly the fundamental rights of the persons in the police custody by the police. With a view to safeguard the fundamental right to life which prohibits torture in police custody the Court insisted on the fulfilment of certain guidelines to be followed by police and recognised the same as the rights of the arrested persons. This clearly establishes the fact that the fundamental right to life as civil and political rights also gives rise to positive obligations upon the State to guard itself against the possible excesses. The guidelines given by the Court includes the right of the arrested person to be informed of the rights of the person arrested person under the law, the right to meet the lawyer during the investigation, a next friend of the arrestee to be informed about the arrest as soon as possible and at the request of the arrested person be examined for any minor or major injuries at the time of arrest along with medical check up by an approved doctor appointed by the Director Health Services every 48 hours during the custody.

It is also important to understand that positive civil and political rights involve the kind of positive duties not only in relation to State but even in relation to acts which are not attributable to State. Therefore positive civil and political rights also impose upon the State a duty not to omit to protect the life and freedom of right holders from the State but even ordinary individuals. Not accepting this premise would mean that the protection of life of an ordinary Indian from other Indians is not a duty owed by the State corresponding to the fundamental right of the individuals as the violator of the right is not State and only if the potential offender is an agent of State that the positive duty to protect is owed by the State. This point is also very significant because another argument often raised against the judicial

\(^{239}\) (1997) 1 SCC 416.
enforcement of socio-economic rights has been that it forces the State to protect the interest of the right holder, when in fact the interest of the right holder is not in peril owing to the commission of some act or likely act by the State; whereas fundamental rights are available against the State. Therefore, a political duty not to omit the protection of life of the ordinary individual from anyone cannot be made into a legal duty. The fact that a person’s access to basic amenities to life meant for the survival of human life is not impeded by a positive act attributable to the State, therefore, there cannot be a legal socio-economic right. But if we go by the fact that even such enforcements of positive civil and political rights which are not in peril owing to some action attributable to the State but owing to some inaction attributable to State are judicially enforceable under a petition filed for the enforcement of fundamental right only goes to show that State’s inaction can also result in violation of enforceable fundamental right. Therefore, again the mounting of the challenge against the judicial enforcement of socio-economic rights by arguing that it actually treats even State’s inaction as violation of right whereas it is only the actions of the State which can logically violate fundamental rights, appears to be logically incoherent when compared with the cases wherein, petitions have been entertained by the Court against the State inaction in relation to acts not committed or not likely to be committed by the State, simply because the civil and political rights of the right holder had been in jeopardy.

In National Human Rights Commission v. State of Gujarat\textsuperscript{240} converting a special leave petition into a petition under Article 32 of Constitution of India the Supreme Court while holding that right to a reasonable and fair trial is a fundamental right flowing from Article 21 and 14 of the Indian Constitution ordered for the protection of witnesses by the Government

\textsuperscript{240} (2008) 16 SCC 497.
of Gujarat, their families and relatives in nine different criminal cases pending before the
different courts in the State of Gujarat until further orders. These cases were lodged against
the alleged perpetrators of one of the worst communal riots that India has ever seen in the
State of Gujarat in the year 2002. Now in this order of the Court one can clearly see that the
witnesses are not to be protected against the possible excesses by the State Government. In
fact the witnesses require protection from the friends and sympathisers of the persons
accused. Failure to provide protection to the witnesses is inaction on the part of State and yet
this possible failure is amenable to judicial intervention. This clearly establishes that
fundamental rights are not to be protected positively only when the possible violator happens
to be State, in fact the fundamental right to life of a person includes his right to be protected
by the State against the possible excesses that may be committed against him by persons not
affiliated to the State as well. In this case State is legally accountable for its inaction and not
for doing some act resulting in the violation of rights.

In *National Human Rights Commission v. State of Gujarat*\(^\)\(^241\) disposing off a petition filed by
the National Human Rights Commission under Article 32 of the Constitution the Supreme
Court of India ensure faith of the people in general in the criminal justice system in the State
of Gujarat in the aftermath of one of the worst communal riots ordered the constitution of a
Special Investigation Team (SIT) lead by P. K. Raghavan (a retired IPS officer and former
Director of CBI) to investigate into several criminal cases. The constitution of SIT by the
Court however was not objected to by the State of Gujarat on the same grounds of ensuring
people’s faith and specially that of the victims of communal riot. The Court also agreed to
monitor the progress of the investigations to be performed by the SIT by asking it to submit

\(^{241}\) (2009) 6 SCC 342.
its report after investigation within three months to it. This is significant because, this signifies that the remedy of continuing mandamus which is common in case socio-economic rights adjudication is not unique to it.\textsuperscript{242}

In *National Human Rights Commission v. State of Gujarat*\textsuperscript{243} in another instance, wherein continuing the task of monitoring the investigation by the SIT, the Supreme Court asked the SIT to continue to investigate the cases until the completion of the trial and to file supplementary charge-sheets in case of new evidence being discovered or evidence of involvement of new persons in the commission of the crime is found. The Court also empowered the SIT to provide for the protection of witness if it is demanded by witnesses. The Court regretted the absence of a witness protection law in India and only owing to practical difficulties did not order for a general witness protection scheme. It also emphasised the necessity of fairness of trial and held the victim to be an inseparable stakeholder in the process of trial and therefore asked the State Government of Gujarat to appoint public prosecutors in the cases in consultation with the SIT and the opinion of SIT was made binding in this regard. In its order the court also highlighted the purpose of a criminal trial which according to is to discover, vindicate and establish the truth. This emphasises how even in common law systems, the quest for truth remains the ultimate purpose and not the fulfilment of formalities of trial. The Court also requested the High Court of Gujarat to appoint experienced judges for the trial and also ordered the said courts to hear the matters related to post Godhra incidents on a day to day basis, as expeditious disposal of cases is to required in communal riot matters.


\textsuperscript{243}(2009) 6 SCC 767.
In *Zahira Habibullah Sheikh v. State of Gujarat*\(^{244}\) the Supreme Court very significantly ordered the retrial of a case outside the State of Gujarat as part of the communal violence that happened in the aftermath of Godhra incident in the year 2002. The case is popularly known as the ‘Best Bakery’ case. In this case, though the matter had come to the Supreme Court as a special leave petition under Article 136 of the Constitution against the decision of the Gujarat High which had rejected the giving of additional evidence in the case after the conclusion of the trial practically affirming the decision of the Sessions court acquitting all the accused persons. The petitioner Zahira Sheikh who also happened to be an important witness in the case had claimed that she was repeatedly threatened by several men not to depose as a witness supporting the case of the prosecution while the trial was ongoing before the Sessions court. The Supreme Court considering the gravity of the case converted the special leave petition into a writ petition and took very serious note of the callous indifference with which the State Government had taken up the case both in the Sessions Court and the High Court. The Court observed that the public prosecutors in this case have acted like a defence counsel. The confidence of the Supreme Court in the capacity of the State of Gujarat in conducting a free and fair trial was so shaken that it ordered a retrial of the case in the State of Maharashtra under jurisdiction of Bombay High Court.\(^{245}\)

In *State of W.B. v. Committee for Protection of Democratic Reforms*\(^{246}\), the Supreme Court held that the High Courts and the Supreme Court order for the investigation of a cognizable offence be conducted by the Central Bureau of Investigation (CBI) with a view to protect the

\(^{244}\) (2004) 4 SCC 158.

\(^{245}\) Ironically though, in *Zahira Sheikh v. State of Gujarat*, (2006) 3 SCC 374, the Supreme Court also convicted Zahira Sheikh for contempt of court and sentenced her to undergo simple imprisonment for one year for frequently changing her opinion while talking to press.

\(^{246}\) (2010) 3 SCC 571.
fundamental rights of the persons in general and right to life in particular without the consent of the State Government, even if such a course in not envisaged in the Delhi Special Police Establishment Act, 1946 under which the CBI is formed. However, the Court also gave a caveat that such a power should be exercised sparingly only when the same is necessary to instil the confidence and credibility in the investigation.

The aforesaid cases on positive civil and political rights are in the nature of individual remedial actions though espoused by way of public interest litigations by public spirited organisations, individuals. In some cases the aggrieved has also approached the Supreme Court. It is however important to note that positive civil and political rights litigations have also resulted in prescriptive guidelines coming for the Court for observance other than the ones which are generally discernible from the ratio decidendi of the Supreme Court judgements. In a very significant development, the Supreme Court in *Vishaka v. State of Rajasthan* the Supreme Court of India gave elaborate guidelines to be followed for the prevention of sexual harassment of women at workplaces in the absence of a statutory law. The public interest litigation was filed before the Court by several non-governmental organisations seeking judicial intervention for the absence of laws dealing with the issue of protection of women from sexual harassment at workplace. The immediate cause for the filing of the petition was the brutal gang rape of a village social worker in the State of Rajasthan.

The Court speaking through J. S. Verma, C.J. held each such incident of sexual harassment to be violative of the fundamental right of ‘gender equality’ and ‘right to life and liberty’ of women.

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248 Id. at 247.
and 21 of the Constitution of India. The Court definitely was not referring to acts of sexual harassment by State under Article 12 of the Constitution but to any act of sexual harassment at the workplace in general. Therefore, it again reiterates the fact that fundamental rights are not available only against the excesses of State but also against State’s inaction the excesses committed by other actors not associated with State. The Court thereafter relying on the developments in the field of international human rights law related to gender equality specifically the provisions of the Convention on Elimination of All Forms of Discriminations Against Women which are consistent with fundamental rights under the Indian Constitution and relying for this purpose on the definition of human rights given under the Protection of Human Rights Act, 1993 gave detailed guidelines to be followed by every organisation employing women for their protection from sexual harassment at workplace.

The guidelines imposed the obligation upon such organisations to provide for a grievance redressal mechanism in every such organisation to address the complaints of sexual harassment. So, it imposed a positive obligation upon such organisations. Though, this redressal mechanism would take complaints after the commission of alleged acts of sexual harassment but the fact remains that this positive obligation to establish such grievance redressal mechanism exists corresponding to fundamental rights of working women is worth noting. The Court also emphasises that the guidelines would be treated as law declared by the Supreme Court as per Article 141 of the Constitution of India. So, a prescriptive law in the form of guidelines was given by the Court. This is a significant example of a class action succeeding by way of a prescriptive measure for future beneficiaries in a petition filed for the enforcement of positive civil and political rights. Interestingly though, the order imposes
obligations on the private organisations as well. However, whether it is still the responsibility of the State to ensure that every State and private organisations employing women adhere to these guidelines was not gone into by the Court.\footnote{However, it took 16 years for the Supreme Court to implement its own guidelines in the Supreme Court and the guidelines were adhered to only in the year 2013. See, http://delhidurbar.in/supreme-court-gender-panel-delayed/, November 18, 2013 (last visited on 12 January’2017).} But clearly, if it an act amounts to violation of fundamental rights then the onus of ensuring its prevention is the obligation owed by the State. The Parliament has now enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and therefore the Vishaka Guidelines stand substituted by this Act now as the judgement had categorically stated that the guidelines have been given only fill the void in the absence of a legislation regulating this field.

This establishes the fact that denying justiciability to socio-economic rights based on the claim that it obliges the State to fulfil the corresponding duties of rights in the absence of the fact that the fundamental rights of the right holder are not in jeopardy owing to some excesses committed by the State is an argument coined mainly against the socio-economic rights and has therefore no logical consistency when seen in the light of the decisions of the Court enforcing civil and political rights flowing from fundamental rights owing to State’s inaction as aforesaid. This also brings to fore the fact that fundamental rights are not available ‘against’ the State necessarily as the content of right in such instances suggests that the corresponding duty of the State in respect of fundamental rights does extend to duties of protecting the life of the right holders against the possible act of others putting his life and limb in peril. Compared to socio-economic rights, this is a situation where the life of a person is in danger because of the act of others.
It is not the fact that only the positive rights flowing from the traditionally conceived negative fundamental rights exhibit this character. In fact the fundamental rights contained in Part III of the Constitution itself envisages safeguards against the acts of other private persons as fundamental right. For example Article 17 abolishes untouchability and makes the practice of untouchability an offence punishable under in accordance with law. Clearly, it imposes a positive duty upon the State to ensure that untouchability is not practiced by anyone. Accordingly, Article 23 makes human trafficking and forced labour offences, punishable in accordance with law; this again imposes a positive obligation upon the State to ensure that human trafficking and forced labour is not practiced by anyone in India. In respect of bonded labour Prof Upendra Baxi critically commented that “.......although the Constitution of India declared as impermissibly exploitative and violative of the fundamental rights of Indians the practice of bonded labour, and commanded Parliament to make a law declaring this an offence, it was only in 1976 that it enacted a Bonded Labour System (Abolition) Act. Till then, at the national level, bonded labour was legally just, though constitutionally prohibited. Article 23, a fundamental right, stood cancelled for about a quarter century by legislative indifference, and is even now made nugatory by the stout refusal to implement the promise of the law.”250 This clearly proves that the omission of the Parliament to enact the law required and lack of implementation of the law, itself resulted in violation of fundamental rights.

In case of socio-economic rights the life of the right holder is in peril owing to factors which disable him from accessing basic human needs which are generally not because of the acts attributable to some identifiable right and duties bearing persons. However, what is important is that the right against the State’s inaction is not actually because of the life of the right

250 Supra note 43at 1.
holder being in peril owing to some act of another person but simply because the life of the right holder is in danger.

This, however, does not mean that the precedents illustrative of the adjudication of positive right to life present no difficulty in terms of legitimate judicial role in the adjudication; as such adjudications also may have possible budgetary implications, the argument which is given primarily against the adjudication of socio-economic rights. Nevertheless, such is the extent of the dominance of narrative around the enforceability of civil of political rights that these implications emanating from the enforcement of positive right to life often does not invite the scrutiny, which it perhaps deserves. Matthias Klatt has argued that judicial review of all positive rights whether first generation or second generation give rise to problems that can be categorised under the four headings of justification, content, structure and competence.251

3.3 Socio-economic Rights as Negative Rights

In the popular conception, socio-economic rights are understood as positive rights as opposed to civil and political rights which are understood as negative rights. However, positive civil and political rights though not understood as a legal concept in the popular conception, certainly the positive civil and political rights was not outside the theorisation of rights as political rights, if not legal. Socio-economic rights on the other hand, even in the academic theorisation as a political right does not find much support. It is nevertheless, an interesting proposition; if socio-economic rights as positive right are enforceable fundamental right, then

251 Supra note 119 at 355.
not protecting negative socio-economic rights become a difficult proposition to defend, logically. For example if a person not having access to the shelter has a right to shelter then whether such a person can be forcibly ejected without offering an alternative accommodation, from a government land, if he happens to construct a temporary shelter on the land?

In *Olga Tellis v. Bombay Municipal corporation* an interesting question arose before the Supreme Court owing to the order of the then Chief Minister of the State of Maharashtra to implement the provisions of the Bombay Municipal Corporation Act, 1888 which empowered the Commissioner of the municipal corporation to forcibly evict illegal encroachers of public land, be it pavement or slum dwellers in the Mumbai city even without a notice to this effect. The provisions, so empowering the Commissioner was challenged by the multiple petitioners who were pavement or slum dwellers and a public spirited journalist before the Court on the ground that since such a power deprives a person of his right to livelihood, since shelter is inextricably attached to livelihood in a city like Mumbai. It was argued that right to livelihood is part and parcel of the constitutionally guaranteed right to life under Article 21 of the Constitution of India. The Court accepted the argument that right to livelihood is part of the right to life as a fundamental right but at the same time stated that right to life is subject to a procedure established by law and therefore it remains to be seen whether this right to livelihood is rightly taken away under the provisions of the Bombay Municipal Corporation Act, 1888 or not.

It is interesting to compare here a negative civil and political right and a negative socio-economic right in a case of judicial review of legislation. The claim for negative protection of

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252 (1985) 3 SCC 545.
right to life, on its failure in the Court means that the right in question is not violated by the legislative measure and therefore State is true to its obligations imposed under the Constitution. Whereas, the failure of a claim against a legislative measure based on the violation of a negative socio-economic right, as is the case here in Olga Tellis does still seem to not extricate the State from the obligations emanating from the right. So, if the procedure which is taking away the right to livelihood is just and fair, as it was held by the Supreme Court in this case where the Court held that there is no fundamental right to reside or squat on pavements or slums on the public land and that the eviction without notice provision is to be exercised using judicious discretion, as the provision for bye passing the notice is an optional measure. But the Court did not even talked about the consequent breach of positive socio-economic rights by the State in this case.

Since, eviction of pavement and slum dwellers in this case was declared constitutionally valid, so court recognised that there is no negative socio-economic right of the pavement and slum dwellers, not to be evicted from the public property. But simultaneously, the Court also recognised the right to livelihood which in this case is dependent upon shelter. But if mere proving of the fact that the legislative measure is a fair measure to deprive a person of his livelihood, the question to be asked is, against whom a person has this right? It cannot be said that the right to livelihood is only for those who have a legally valid accommodation available. Socio-economic right as a fundamental right means that the obligation to fulfil it is owed by the State and therefore, if the procedure to evict the pavement and slum dwellers from public land is valid procedure under Article 21, the State is still in breach of its duty, as it now owes the obligation to provide for an alternative mode of livelihood which is this case
is ensuring access to shelter. The Supreme Court, however, did not go into this question and simply ordered alternative accommodation for those pavement and slum dwellers who as per the past or existing housing schemes of the State Government are eligible for alternative accommodation.

The nature of negative socio-economic rights is such that it cannot become an issue in relation to several socio-economic rights. In fact it is majorly an issue in relation to right to shelter only and this happens because of the availability of public lands and spaces in the cities and State authorities very often allowing, by their inaction, vacant public space to be inhabited by the slum dwellers by construct temporary hutments, or sometimes even by constructing permanent houses. This does not seem plausible in case of food, cloth, education and health etc. as these resources are not available in public spaces to be grabbed by persons not having access to these, as can be case with those not having the access to shelter. However, this is considering the fact that access to shelter can be had and therefore there is a case for a negative right to shelter in the sense of not being deprived of shelter. Though, not in the same sense, but there can be a negative right in respect of other socio-economic rights as well. For example a child being thrown out of a primary school would amount to denial of a negative right to education.

3.4 The Complementarity Thesis

Professor Jeremy Waldron puts it, “there are many ways in which a given interest can be served or disserved, and we should not expect to find that only one of those ways is singled
out and made the subject matter of the duty”. Therefore, it is wrong to mean that only one of those ways is the subject matter of a right as is generally done about the popular positive-negative dichotomy in relation to the civil and political rights and socio-economic rights. The complementarity thesis rests more upon the conception of interest theory of rights. Cecile Fabre argues that supposing we have an interest Q, then it can be protected by a subset of the following five rights:

“1. a negative right against others that they do not harm us by interfering with us when we further Q;
2. a negative right against State that it does not harm us by interfering with us when we further Q;
3. a positive right against others that they give us the material means to further Q; and
4. a positive right against the State that it gives us the material means to further Q.
5. a positive right against other people that they protect us from third parties if they try to harm us by interfering with us when we further Q;
6. a positive right against the State that it protects us from third parties if they fail to fulfil their duties as stated in (1), (3) and (5); and
7. a positive right against the State, that steps be taken towards making possible the fulfilment of duties specified at (4) and (6).”

Fabre, however points out that the positive and negative social rights against private persons cannot be claimed in the absence of a special relationship. For example an employee can

254 Supra note 36 at 46.
255 Ibid.
256 Id. at 56.
have these rights against the employer. The extent of right a person in such relationships can have would depend upon the policies adopted by the State by way of legislative or executive measures. So, the minimum wages for the labourers though paid by the persons employing labourers but the fixing of minimum wage is the responsibility of the State. Rights mentioned in (6) and (7) would particularly depend upon such interventions by way of State’s policies if rights were to be invoked against the private persons.

Referring to the Olga Tellis\textsuperscript{257} case Prof. Sandra Fredman laments\textsuperscript{258} the failure of the Supreme Court in not recognising the interplay of positive and negative duties while ordering the eviction of pavement and slum dwellers in the absence of an alternative accommodation being provided to them by the State. It is pertinent to note here that the Indian Supreme Court’s approach in Olga Tellis is confounding as it effectively neither recognises a positive right to livelihood nor a negative right to livelihood though recognising in principle that the right to livelihood actually flows from the fundamental guarantee of the right to life under Article 21 of the Constitution. This can be said based on the fact that the Court ordered for the eviction of pavement and slum dwellers for they being living on the public land and therefore denied a negative right to livelihood to them and since the eviction order was not given based on the condition of they being provided with alternative accommodations; even a positive right to livelihood was practically negated. The Court only ordered alternative accommodation for those who are the legitimate beneficiaries of the housing schemes of the State Government. This aspect of socio-economic rights adjudication has been termed

\textsuperscript{257} Supra note 8.
\textsuperscript{258} Supra note 14 at 209.
‘conditional social rights adjudication’ by Madhav Khosla.\(^{259}\) This is based on the fact that socio-economic rights enforced through the court are contingent upon the existence of a legislative or executive policy to the State to this effect and the right therefore is accorded to the beneficiaries of such policies.

This approach in a way negates the existence of any constitutionally enforceable duty, negative or positive in the absence of an existing legislative or executive measure according benefits to the beneficiaries. Such policies only would give rise to enforceable positive and negative duties corresponding to right of the beneficiary of the policies owing to the policy itself. Though, this is not so much the depiction of the real situation rather it is an attempt to reconcile the judicial enforcement of socio-economic rights with the requirements ordained by the popular and accepted standards of separation of functions amongst the organs of the State in India. The fact remains that protection of an interest underlying a right can be best ensured by way of the complementarity of both positive and negative duties necessary to safeguard the interest constitution the content of right.

### 3.5 Understanding Positive Duties

It is important to understand the nature of positive duties especially because of our preoccupation with negative rights as lawyers. For the same it is important to examine the arguments advanced against positive duties.

\(^{259}\) *Infra* note 647.
3.5.1 Indeterminacy and Incommensurability of Positive Duties

Much of the discourse around the indeterminacy regarding positive rights is confined to defining the substance of the right itself, namely, what is a minimally sufficient income, and ignores the more significant indeterminacy questions about positive rights relating to their consequential nature.\(^{260}\) Even if we could state categorically what the poor were entitled to, there remains the question of what program and scheme would bring about that entitlement.\(^{261}\) The consequential demands of positive rights have not received much consideration.\(^{262}\) It seems that the advocates of such rights contemplate the provision of direct government assistance (be it cash, food, or health insurance).\(^{263}\) A positive right does not warrant that it be achieved through such direct assistance necessarily.\(^{264}\) Financial grants are not the only way to attain the purposes of positive rights, they might not be the best possible way, and they may not even be an effective way for the attainment of positive rights.\(^{265}\)

First and foremost the charge of indeterminacy and incommensurability\(^ {266}\) is levelled against the positive duties so as to argue against their enforceability. However, the fact remains that such predisposition is misconceived as it is based on the premise that negative duties are determinate and commensurate. It is commonplace to subject negative duties to reasonable restrictions. For example the right to not to be deprived of the life and personal liberty under Article 21 of the Constitution of India is subject to a procedure established by law. The

\(^{260}\) Supra note 213 at 901, 902.
\(^{261}\) Id. at 902.
\(^{262}\) Ibid.
\(^{263}\) Ibid.
\(^{264}\) Ibid.
\(^{265}\) Ibid.
\(^{266}\) Supra note 14 at 70.
Supreme Court has held that the procedure established has to be a just, fair and reasonable procedure.\textsuperscript{267} Now; just, fair and reasonable procedure is equally susceptible to value judgement and therefore not a good standard for taking decisions pertaining to right to life. Constitutionality of death penalty in India has been ascertained by the Supreme Court based on this yardstick. In fact even in the judgement of the Supreme Court\textsuperscript{268} which declared death penalty to be constitutional in India, the decision was delivered by the Court on the strength of 4:1 majority and the judge who gave the dissenting opinion found death penalty to be violative of the constitutional guarantee of right to life.\textsuperscript{269} This clearly demonstrates the fact that presumption in favour of the determinacy and commensurability of negative rights is overstated.

However, this indeterminacy can be studied by using the distinction between principles and rules.\textsuperscript{270} Ronald Dworkin has stated that principles unlike rules do not apply in all or nothing fashion as principles have an element of weight unlike rules and because of this two principles coming in conflict with each other can be balanced against each other.\textsuperscript{271} This quest for determinacy actually stems from the desire to see fundamental rights not in terms of normative standards but in terms of concrete rules. The argument from indeterminacy assumes that all norms must be rules. The problem of incommensurability actually stems from the absence of a common metric against which the principles can be weighed. Nevertheless, once we recognize that many positive duties are principles rather than rules we would understand that it is not the principles that create problems but weighing of competing

\textsuperscript{267} \textit{Maneka Gandhi v. Union of India}, (1978) 1 SCC 248.
\textsuperscript{270} \textit{Supra} note 14 at 71.
\textsuperscript{271} \textit{Supra} note 77 at
principles is the real problem; however, if we are ready to confront and accept the difficult
task of weighing of competing interests in case of negative rights, there is no reason not to
accept the same in case of positive rights. The fact that financial grants may not be the only
way to ensure the respect for positive rights only makes the case of indeterminacy associated
with positive duties, more complex.

It is argued that there is some amount of irresolvable element of indeterminacy in case of
positive human rights and therefore some autonomy always rests with the decision maker.
Moreover, the order of priority continues to be revisable in the light future argumentation.\textsuperscript{272}
In this respect Fredman quotes Habermas who said, decision making (whether by majority of
judges or majority of legislators) represents only a “caesura in an ongoing discussion. It
records the interim result of a discursive opinion-forming process.”\textsuperscript{273} He further quotes
Habermas, who stated that the decision can be viewed as the “rationally motivated yet fallible
result of a process that has been interrupted because of institutional pressure to decide but is
in principle resumable.”\textsuperscript{274} It is this which allows constitutional rights to resemble a living
tree.\textsuperscript{275}

However, significantly none of the aforesaid caveats deprive the duty of all normative content
– no decision could have been reached in the interim, if they did.\textsuperscript{276} The fact that the decision
arrived at is revisable does not rob the decision of its stability. The principle of stability and

\textsuperscript{272} Supra note 14 at 72.
\textsuperscript{273} J. Habermas, Between Facts and Norms as quoted in Supra note 14 at 72.
\textsuperscript{274} J. Habermas, Between Facts and Norms as quoted in Supra note 14 at 72.
\textsuperscript{275} Supra note 14 at 72.
\textsuperscript{276} Ibid.
certainty is independent and can be displaced to accommodate the cause of maximising other principles. The decision making therefore is setting of a priority in the interim.

3.5.2 The Progressive Realisation of Positive Duties

The second main challenge for positive duties is to overcome the charge of it being progressive and requires timescale for compliance. On the contrary negative are said to be immediate expecting only the State to desist from doing an act. The principal obligation in the International Covenant on Economic Social and Cultural Rights is expressed in article (2) (1) as the duty to “to take steps ...... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means.” So, the duty imposed is not to be complied with immediate as it is not an immediate obligation, which is the case in relation to the duties imposed by the civil and political rights. South African Constitution despite including socio-economic rights in the judicially enforceable bill of rights states that “The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” The Indian Constitution in DPSPs which includes most of the socio-economic rights asserts that “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

277 Supra note 14 at 80.
278 The South African Constitution, sections 26(2), 27(2).
279 The Constitution of India, Art. 37.
However, even where the duty to optimize the positive right is is progressive; it cannot be argued that the whole obligation therefore has been postponed.\textsuperscript{280} The State is under an immediate and continuous obligation to make efforts to ensure the progressive realization of the positive rights in accordance with the available resources. In particular resource constraint cannot be the excuse for the State not to devise strategies to achieve the fulfilment of positive duties. Secondly, there is an immediate obligation to monitor the extent of realisation of these duties.\textsuperscript{281} Thirdly, there is an immediate obligation that the relevant rights will be exercised without any fear, favour or discrimination.\textsuperscript{282} This criterion is about equity. If spending is inequitable as between gender, classes, regions or ethnic groupings, the Government would be in breach of its duty.\textsuperscript{283}

3.6 Inference

The fact remains that the protection of interests underlying a right can be best ensured by way of the complementarity of both positive and negative duties constituting the content of right. It is important to understand the nature of positive duties especially because of our preoccupation with negative rights as lawyers. First and foremost the charge of indeterminacy and incommensurability\textsuperscript{284} is levelled against the positive duties so as to argue against their enforceability. However, the fact remains that such predisposition is misconceived as it is based on the premise that negative duties are determinate and commensurate. It is commonplace to subject negative duties to reasonable restrictions. For example the right not

\begin{footnotesize}
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\item \textsuperscript{280} Supra note 14 at 81.
\item \textsuperscript{281} Ibid.
\item \textsuperscript{282} Ibid.
\item \textsuperscript{283} Id. at 82.
\item \textsuperscript{284} Id. at 70.
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to be deprived of the right to life and personal liberty under Article 21 of the Constitution of India is subject to a procedure established by law. The Supreme Court has held that the procedure established has to be a just, fair and reasonable procedure.\textsuperscript{285} Now; just, fair and reasonable procedure is equally susceptible to value judgement and therefore not a good standard for taking decisions pertaining to right to life. The second main challenge for positive duties is to overcome the charge of it being progressive and requires timescale for compliance. However, even where the duty to optimize the positive right is progressive; it cannot be argued that the whole obligation therefore has been postponed and the fact that positive rights include civil and political rights too, cannot be lost sight of.\textsuperscript{286} The State is under an immediate and continuous obligation to make efforts to ensure the progressive realization of the positive rights in accordance with the available resources.\textsuperscript{287} In particular the resource constraint cannot be the excuse for the State not to devise strategies to achieve the fulfilment of positive duties and this can definitely be ensured by way of judicial vigil.

\textsuperscript{285} \textit{Supra} note 267.
\textsuperscript{286} \textit{Supra} note 14 at 81.
\textsuperscript{287} \textit{Id.} at 80.