The Fundamental Right to Privacy: A Case-by-Case Development *Sans Stare Decisis*[*]

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The principle of *stare decisis*[1] is of utmost importance especially in relation to a Supreme Court decision, by virtue of Article 141 of the Constitution[2]. The reasoning behind this principle is to ensure consistency and stability in the law declared by the Supreme Court.[3] The Apex Court held that: "It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, ***but also because in doing so they embody a declaration of law operating as a binding principle in future cases.***"[4] In addition, in cases of conflict of opinions pronounced by the Supreme Court, the opinion expressed by the larger bench strength prevails.[5] Therefore, a decision by a Constitution Bench of the Supreme Court can in no circumstance be whittled down by a diametrically contrary interpretation provided by a Division Bench of the same Court. The instant case-comment deals with the fundamental Right to Privacy in the light of the doctrine of *stare decisis.*

The first case[6] wherein the Indian Supreme Court substantially dealt

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* The instant case comment ranges from *District Registrar & Collector, Hyderabad v. Canara Bank*, A.I.R. 2005 S.C. 186 to *M.P. Sharma v. Satish Chandra, District Magistrate,* A.I.R. 1954 S.C. 300; but it primarily revolves around the dictum given in the landmark case of *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295, as the present case comment is a *stare decisis* critique.

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1 The doctrine of precedent emanates from the legal maxim *stare decisis et non quieta movere* which literally means "to stand by decisions and not to disturb what is settled." 4 P. Ramanatha Aiyar, Advanced Law Lexicon 4456 (Y.V. Chandrachud et al. eds., Wadhwa & Co. Nagpur 3rd ed. 2005).

2 Art. 141 of the Const. of India states as follows: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

3 21 C.J.S. Courts § 140.

4 Union of India *v.* Raghubir Singh, A.I.R. 1989 S.C. 1933, ¶ 8. (italics supplied)

5 *See* State of U.P. *v.* Ram Chandra Trivedi, A.I.R. 1976 S.C. 2547; State of Orissa *v.* Titaghur Paper Mills, A.I.R. 1985 S.C. 1293; Poolpandi *v.* Supdt., Central Excise, A.I.R. 1992 S.C. 1795; CST *v.* Pine Chemicals Ltd., (1995) 1 S.C.C. 58, at ¶ 17; SBI SC/ST Employees' Welfare Assn. *v.* State Bank of India, (1996) 4 S.C.C. 119; C.I.T. *v.* Trilok Nath Mehrotra, (1998) 2 S.C.C. 289; N.S. Giri *v.* Corpn. City of Mangalore, A.I.R. 1999 S.C. 1958, ¶ 12; Lily Thomas *v.* Union of India, A.I.R. 2000 S.C. 1650, ¶ 56; Bharat Petroleum Corpn. Ltd. *v.* Mumbai Shramik Sangha, (2001) 4 S.C.C. 448; S.H. Rangappa *v.* State of Karnataka, (2002) 1 S.C.C. 538, at ¶ 11; P. Ramachandra Rao *v.* State of Karnataka, (2002) 4 S.C.C. 578, ¶ 28. *See also* N.K. Jayakumar, *Courts, in* 10 Halsbury's Laws of India 339 (M.N. Venkatachaliah et al. eds., 2001).

6 The first case of the Supreme Court of India where the Fundamental Right to Privacy was referred to, albeit in passing, was in the *M.P. Sharma case*, A.I.R. 1954 S.C. 300 at ¶ 24, wherein an eight-judge bench of the Supreme Court, in relation to Article 20(3) of the Constitution of India and the power of search and seizure, skeptically held as follows: "***When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental Right to Privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.***" (italics supplied)

with the issue of the Fundamental Right to Privacy with respect to Article 21[7] of the Constitution of India was in the case of *Kharak Singh v. State of Uttar Pradesh*.[8]

The present case comment attempts to shed light on the interpretation of this case by the Supreme Court of India in *District Registrar & Collector, Hyderabad v. Canara Bank*[9] and other contemporary decisions[10] of the Supreme Court. Furthermore, a 'case-by-case development' of the Right to Privacy as envisioned by the Apex Court[11] mandates a thorough analysis of the judicial process involved in the fundamental Right to Privacy. It is also pertinent to note that the issue of non-compliance with the doctrine of *stare decisis* has not been highlighted despite considerable legal scholarship[12] with respect to the fundamental Right to Privacy. The principal aim of this case comment is to establish firstly, the misinterpretation of the fundamental Right to Privacy as laid down in the case of *Kharak Singh v. State of Uttar Pradesh*[13] and secondly, the non-adherence to the doctrine of *stare decisis* by the Supreme Court in its subsequent decisions.

The brief facts of *District Registrar & Collector, Hyderabad case*[14] are as follows. The A.P. State Legislature amended Section 73 of the Stamp Act, 1899 which gave inspecting officers not only the power to search premises but also the power to seize deficiently stamped documents.[15] The purpose behind the amendment was to combat stamp duty evasion and also to supplement the stamp revenue of the state.[16] The amendment was challenged before the Andhra Pradesh High Court as the amendment had given unbridled power to the officers with respect to exercising discretion and, consequently the amendment was held to be arbitrary and violative of Article

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7 Art. 21 of the Const. of India states as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

8 A.I.R. 1963 S.C. 1295.

9 A.I.R. 2005 S.C. 186.

10 *See generally* R. Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264; P.U.C.L. v. Union of India, A.I.R. 1997 S.C. 568; Dr. Tokugha Yepthomi v. Apollo Hospital Enterprises Ltd., A.I.R. 1999 S.C. 495; Sharda v. Dharmpal, A.I.R. 2003 S.C. 3450.

11 Gobind v. State of M.P., A.I.R. 1975 S.C. 1378, ¶ 28 as per Mathew, J. *See also* B.D. Agarwala, *The Right to Privacy: A Case-By-Case Development*, (1996) 3 S.C.C. (Jour.) 9.

12 *See generally* Arvind P. Datar, Constitution of India 222 (2001); Durga Das Basu, Shorter Constitution of India 263-4 (Y.V. Chandrachud et al. eds., Wadhwa & Co. Law Publishers Nagpur 13th ed. rep. 2006); 1 D.J. De, The Constitution of India 950 (2nd ed. 2005); B.D. Agarwala, *supra* note 11; Madhavi Divan, *The Right to Privacy in the Age of Information and Communications*, (2002) 4 S.C.C. (Jour.) 12; Abhinav Chandrachud, *The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution*, (2006) 3 S.C.C. (Jour.) 31.

13 A.I.R. 1963 S.C. 1295.

14 A.I.R. 2005 S.C. 186.

15 *Id.*, ¶ 5.

16 *Id.*

14 of the Constitution of India.[17] The decision of the High Court was challenged by the Appellant before the Supreme Court, and the Respondent contended that the impugned provision amounted to a violation of the fundamental Right to Privacy.[18]

A two Judge Bench[19] of the Supreme Court upheld the A.P. High Court decision and reiterated *recent* Supreme Court decisions[20] and held that the Right to Privacy was implicit in the Constitution of India.[21] Furthermore, that the impugned amendment was arbitrary and violative of Article 14 of the Constitution, thus it cannot be construed as ***procedure established by law*** under Article 21 of the Constitution. Therefore the amendment was held unconstitutional as the Right to Privacy had been violated in the absence of procedure established by law.

It is respectfully submitted that the ***two Judge*** Bench in this decision[22] has grossly misinterpreted, the ***six-Judge*** Bench decision in the *Kharak Singh case*[23] wherein it was categorically held by the majority opinion[24] that:

> *"As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded, is not an infringement of a fundamental right guaranteed by Part III."*[25]

In addition, in the *Kharak Singh case*[26], it was conceded by the Respondent that the U.P. Police Regulations was not a law under Article 13(3)(a) of the Constitution of India[27], thereby taking away the only defence

17 Canara Bank v. District Registrar & Collector, Registration & Stamps Dept., (1997) 4 A.L.T. 118, ¶ 11.

18 *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶ 17.

19 R.C. Lahoti, C.J. & Ashok Bhan, J.

20 *See* R. Rajagopal v. State of T.N., A.I.R. 1995 S.C. 264; P.U.C.L. v. Union of India, A.I.R. 1997 S.C. 568; Dr. Tokugha Yepthomi v. Apollo Hospital Enterprises Ltd., A.I.R. 1999 S.C. 495; Sharda v. Dharmpal, A.I.R. 2003 S.C. 3450.

21 *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶ 39.

22 *Id.*, wherein it was stated as follows: "***The majority did not go into the question whether these visits violated the 'Right to Privacy'.*** But, Subba Rao, J. while *concurring* that the fundamental Right to Privacy was part of the right to liberty in Art. 21, part of the right to freedom of speech and expression in Art. 19(1)(a), and also of the right to movement in Art. 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy... *In effect, all the seven learned Judges held that the 'Right to Privacy' was part of the right to 'life' in Art. 21.*" (italics supplied)

23 A.I.R. 1963 S.C. 1295.

24 The majority consisted of B.P. Sinha, C.J., J.R. Mudholkar, N. Rajgopala Ayyangar & S.J. Imam, JJ. and the minority consisted of K. Subba Rao & J.C. Shah, JJ.

25 *Kharak Singh*, A.I.R. 1963 S.C. 1295 at 1303, ¶ 20.

26 *Id.*

27 Article 13(3)(a) of the Constitution of India states that: "In this article, unless the context otherwise requires,– *(a)* "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

of the state under Article 21, i.e., *procedure established by law.* Hence, the law laid down by the Supreme Court in the *Kharak Singh case*[28] was that there is no Right to Privacy under Article 21 of the Constitution *regardless of the existence of a law infringing the Right to Privacy*, because the U.P. Police Regulations were not considered to be law under Article 13(3)(a) of the Constitution of India. Therefore, regardless of the constitutional validity of the amendment in the *District Registrar & Collector, Hyderabad case*[29] the respondent cannot claim a fundamental Right to Privacy. Hence it is humbly submitted that the decision of the Supreme Court is bad in law insofar as it implicitly reads a fundamental right of privacy under the Constitution of India.

The second case which dealt with the Right to Privacy substantially was *Gobind v. State of Madhya Pradesh*[30] wherein, it stated that *even assuming* that the Right to Privacy existed under Article 21, it was not absolute and it was subject to procedure established by law. It is also pertinent to note that the obiter of Mathew, J. (notwithstanding his decision) went on to state that these arcane police regulations "were verging perilously near unconstitutionality".[31]

It is submitted that the controversy pertaining to the existence of Right to Privacy stems from the instant case. The petitioner in the *Gobind case*[32] contended that the Right to Privacy was guaranteed under Part III of the Indian Constitution. The Supreme Court through the words of Mathew, J. stated as follows:

> "*The Right to Privacy in any event will necessarily have to go thorough a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.*"[33]

The Supreme Court in later decisions stretched this *assumption* to the extent of recognising a fundamental Right to Privacy.[34] It is submitted that

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28 *Kharak Singh*, A.I.R. 1963 S.C. 1295.

29 A.I.R. 2005 S.C. 186.

30 A.I.R. 1975 S.C. 1378.

31 *Id.*, ¶ 33.

32 *Id.*, ¶ 24 wherein the Court inferred that the petitioner was claiming the Right to Privacy implicit in 'personal liberty' under Article 21 of the Constitution.

33 *Id.*, ¶ 28.

34 *R. Rajagopal*, A.I.R. 1995 S.C. 264, ¶ 9; *District Registrar & Collector*, A.I.R. 2005 S.C. 186, ¶¶ 37-39. *See also Malak Singh v. State of U.P.*, A.I.R. 1981 S.C. 760. ¶ 6: "But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution": as per O. Chinappa Reddy, J. *See also* V.N. SHUKLA, CONSTITUTION OF INDIA, 131 (Mahendra P. Singh ed., Eastern Book Company 10th ed. 2006) (1950).

Mathew, J. only stated that even in a hypothetical situation where a Right to Privacy existed under Article 21, such a right would be qualified and not absolute. Therefore *assuming but not conceding the existence of a fundamental Right to Privacy*, his Lordship made the above observation. Moreover, the *Gobind case*[35] was before a three-Judge Bench, and it could not in any manner over-rule the majority opinion of the Supreme Court in the *Kharak Singh case*.[36]

The Supreme Court after *Gobind case*,[37] dealt with the Right to Privacy in the case of *R. Rajagopal v. State of Tamil Nadu*.[38] It is submitted that this case before a two-Judge Bench is in derogation to the doctrine of *stare decisis* and it has misinterpreted the case of *Kharak Singh* v. *State of Uttar Pradesh*.[39] This was the first case wherein the Supreme Court held that the fundamental right of privacy is constitutionally guaranteed. The Supreme Court in this case stated that the majority opinion in *Kharak Singh v. State of U.P.*[40] merely referred to the Right to Privacy; and in effect diluted the observation of the non-existence of the Right to Privacy.[41] Therefore, the result of this case was that the minority opinion of Subba Rao, J. in the case of *Kharak Singh* v. *State of Uttar Pradesh*[42] erroneously became the law of the land. It is submitted that the two-Judge Bench decision in the present case cannot over-ride the six-judge bench decision, by virtue of Article 141 of the Constitution which embodies the doctrine of *stare decisis*; thereby the observations of B.P. Jeevan Reddy, J. in the instant case is respectfully submitted to be bad in law.

Moreover, it was also stated that the Right to Privacy has two facets, i.e., general law of privacy which affords a tort action on invasion and the constitutional recognition under Article 21 against governmental invasions. The instant case dealt with invasion of privacy by a private person.[43] The Supreme Court in recent times has made Article 21 of the Constitution enforceable against private persons.[44] However, it is submitted that this view is flawed as these decisions are *per incuriam*; because they consistently do not consider the five-judge bench decision of Supreme Court in the case of *Shrimathi Vidya Verma, through next friend R.V.S. Mani v. Shiv Narain Verma*[45]

35 A.I.R. 1975 S.C. 1378.
36 A.I.R. 1963 S.C. 1295.
37 A.I.R. 1975 S.C. 1378.
38 A.I.R. 1995 S.C. 264.
39 A.I.R. 1963 S.C. 1295.
40 *Id.*
41 *R. Rajagopal*, A.I.R. 1995 S.C. 264, ¶ 14.
42 A.I.R. 1963 S.C. 1295.
43 This is in contradistinction to *Kharak Singh*, A.I.R. 1963 S.C. 1295 and *Gobind*, A.I.R. 1975 S.C. 1378 where governmental invasions were questioned.
44 Bodhisattwa Gautam *v.* Subhra Chakraborty, A.I.R. 1996 S.C. 922, ¶ 6; *Zee* Telefilms Ltd. *v.* Union of India, A.I.R. 2005 S.C. 2677, ¶ 28.
45 A.I.R. 1956 S.C. 108, ¶ 8 *relied on* P.D. Shamdasani *v.* Central Bank of India, A.I.R. 1952 S.C. 59. *See also* 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA – A CRITICAL COMMENTARY 1160 (4th ed. 1994).

wherein it was stated unequivocally that Article 21 is not enforceable against private persons. Therefore, even if it is *assumed* that the Right to Privacy existed under Article 21, it is not enforceable against private persons. Hence, the only remedy available in cases of invasions of privacy by private persons is a tort action for damages.

It is submitted that with respect to governmental invasions of privacy also the only remedy available is tort law. It is pertinent to note here that the Apex Court has held that Article 21 is the sole repository of the right to life and *personal liberty* against the State.[46] It can be inferred that the Apex Court has held that 'Right to Privacy' does not come under the ambit of 'right to personal liberty' or any other fundamental right.[47] Hence, as the Right to Privacy is not implicit under Article 21; the right under common law/tort action will survive even against governmental invasions.

The Supreme Court after the *R. Rajagopal case*[48] revisited the Right to Privacy in the *PUCL case*.[49] In this case, the Supreme Court misconstrued the *Kharak Singh case*[50] and stated that the majority actually upheld the 'Right to Privacy'.[51] It is submitted that this view is erroneous as it was categorically stated in the *Kharak Singh case*[52] that the Right to Privacy is not a fundamental right.[53] The Supreme Court in this case also stated that under Article 17 of the International Covenant on Civil & Political Rights, 1966[54] conferred the Right to Privacy. However, the relevance of this international instrument was placed on the erroneous presumption that the Right to Privacy was a fundamental right. Hence, it is submitted that an implementation of Article 51(c)[55] of the Constitution read with Article 17 of the Covenant cannot create a 'Right to Privacy' which is directly contrary to municipal law.[56]

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46 Additional District Magistrate, Jabalpur *v.* Shivakant Shukla, A.I.R. 1976 S.C. 1207, ¶ 135 as per A.N. Ray, C.J. *Cf. Additional District Magistrate, Jabalpur*, A.I.R. 1976 S.C. 1207, ¶ 163 (H.R. Khanna, J. , dissenting).

47 *Kharak Singh*, A.I.R. 1963 S.C. 1295, ¶ 21.

48 A.I.R. 1995 S.C. 264.

49 A.I.R. 1997 S.C. 568.

50 A.I.R. 1963 S.C. 1295.

51 P.U.C.L. v. Union of India, A.I.R. 1997 S.C. 568, ¶ 16.

52 A.I.R. 1963 S.C. 1295.

53 *Id.* at 1303, ¶ 20.

54 The Republic of India is a signatory to this international instrument and it has been further ratified by the Indian Parliament.

55 Art. 51(c) of the Constitution of India states as follows: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and".

56 *See* Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461, ¶ 151 as per Sikri, C.J. *Cf. Additional District Magistrate, Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207, ¶ 180 (H.R. Khanna, J., dissenting). In light of Article 141 of the Constitution of India, municipal law here can be interpreted to mean the law laid down in *Kharak Singh*, A.I.R. 1963 S.C. 1295.

In the recent case of *Sharda v. Dharmpal,*[57] a three-judge bench of the Supreme Court dealt with the Right to Privacy. In the instant case the previous decisions were interpreted accurately by the Supreme Court;[58] however the Apex Court, incredibly, overlooked the doctrine of *stare decisis* and followed the later decisions.

It is submitted that a 'case-by-case development' of the Right to Privacy as envisioned by Mathew, J. was a case-by-case development in accordance with the principle of *stare decisis.*[59] Moreover, once the Apex Court lays down the law, reconsideration of that law on new grounds is not open to the court unless it refers the matter to a larger bench.[60] Therefore, for the 'fundamental Right to Privacy' to truly become the law of the land either a seven-judge bench of the Supreme Court is to be constituted in favour of establishing the Right to Privacy or the recommendation of Article 21-B[61] of the National Commission to Review the Working of the Constitution[62] needs to be adopted by the Parliament to bring about a constitutional amendment[63].

57 A.I.R. 2003 S.C. 3450.

58 *Id.*, ¶ 55-57.

59 K.K. Mathew, J. was part of a three-judge bench in John Martin *v.* State of W.B., A.I.R. 1975 S.C. 775, ¶ 3, wherein in the context of A. K. Gopalan *v.* State of Madras, [1950] S.C.R. 88 it was stated that: "*we do not think that these observations made by two out of six learned Judges can be regarded as laying down the law on the point.*" Therefore a logical extension to the *Kharak Singh case*, A.I.R. 1963 S.C. 1295 would render the minority opinion of K. Subba Rao, J. redundant. (italics supplied)

60 D.K. Yadav *v.* J.M.A. Industries Ltd., (1993) 3 S.C.C. 259. *See also* N.K. Jayakumar, *supra* note, at 342.

61 "Art. 21-B. - (1) Every person has a right to respect his private and family life, his home and his correspondence.
(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred in clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others."

62 1, NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REPORT 62 (2002).

63 The law laid down by the Supreme Court can be whittled down by a subsequent legislative amendment: Sakal Deep Sahai Srivastava v. Union of India, A.I.R. 1974 S.C. 338, 341 at ; Baliram Waman Hiray *v.* Justice B. Lentin, A.I.R. 1988 S.C. 2267.

UNDERSTANDING CONSTITUTIONAL SECULARISM IN 'FARAWAY PLACES': SOME REMARKS ON GARY JACOBSOHN'S *THE WHEEL OF LAW**

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§ The Promise and the Peril of Comparative Constitutional Studies

As is generally well-known, the tasks of comparison are neither easy nor ever fully done. *What to compare and how* and *why* remain difficult questions in the larger sphere of comparative law. The rather nascent tradition of doing comparative constitutional studies (COCOS) revives these concerns in some new ways.

COCOS shares with the spheres of comparative law generally, concerns about historical method (the choice of telling stories– doing microhistory or metahistory), ways of periodization, and the unit of comparison (that is whether one focuses on the history of ideas or mentalities, or of political and social action, or further the making of institutional and popular cultures[1].) It also shares more generally the problem of hegemonic intent resulting often in imposition of law, carrying large potential side-effects. Further, the virtue of eternal reflexive vigilance is difficult to cultivate even for the best of comparativists, given the fact they, as also for the lesser comparative beings, remain encased within traditions of sensibility shaped by religion, culture, and language. The moderation of the hegemonic intent in fashioning comparative narratives is never an easy task and the discourse concerning the universal and the particular does not provide any safe harbour for comparativist odyssey.

COCOS confront in addition different orders of difficulty. In the *first* place, the term 'constitution' signifies three different 'things.' I have named this elsewhere I terms of the three 'Cs': C1 standing for the constitutional texts, C2 for both the orders of official (constitutional 'law') and citizen interpretations (constitutional insurgencies); and C3 signifying 'constitutionalism' standing for distinct theories/ideologies, which shape as well as remain shaped by C1 and C2, which also shape these[2]. Even within-

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* Gary Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context, 2003, Oxford University Press, New Delhi.

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1 See, Upendra Baxi, 'The Craft of Disinterested History: *Jury Trials and Plea Bargaining: A True History* by Mike McConville and Chester L. Mirsky' *Kings College Law Journal* 17:1, 155-165 (2006.)

2 See, Upendra Baxi 'Constitutionalism as a Site for State Formative Practices' *Cardozo Law Review* 21, 1183-1210 (2000.)