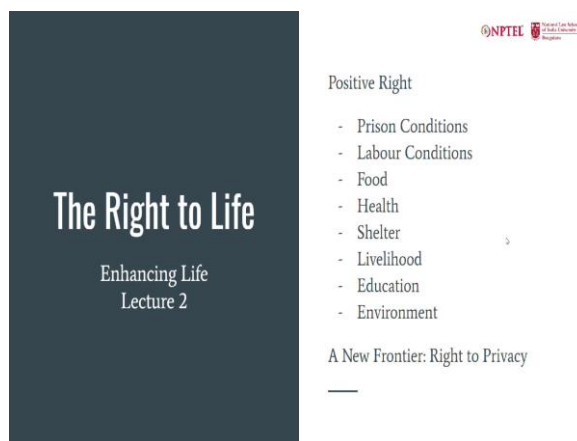


Constitutional Studies
Professor Sudhir Krishnaswamy
National Law School of India University
Lecture 16
Positive Life

Hey there, welcome back to week 7 of the constitutional studies course. In lecture 1 of this course we focused on the right to life especially, the deprivation of the right to life, we looked at issues like the death penalty, euthanasia, abortion, and suicide. In this second lecture, we are going to turn to the positive dimensions of the right to life, looking beyond the question of deprivation, looking at the right to life as affirming a fuller life in weight along various dimensions.

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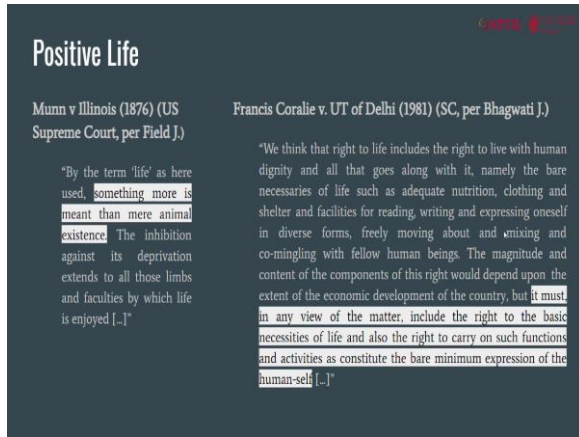


In this lecture, we will cover the cases around prison conditions, labour conditions, around which the broader argument for a positive right to life, the enhanced life conditions emerged, we then look at some critical cases around food, health, shelter and livelihood, which have had significant impact on the law and policy of this country in the last three decades. We will close with two newer rights around education, which is now article 21A is amended into the Constitution and the right of environment, which gets closely tied up with discussions around developed.

We will conclude this lecture and this week with the focus on the new frontiers around the right to life, which is the right privacy and you will see that, this new dimension of the right

to life promises like the positive dimension of the right to life which emerged in the 70s and the 80s to take us into new spaces in the 21st century.

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So, let us get started with how ~~the e~~ positive dimensions to the right life emerged that would need us to go back into the late 70s and the early 80s just to move things along, I am going to begin with an important case of the 80s dealing with prison conditions called *Francis Coralie* ~~this the~~ *versus* union territory of Delhi.

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In this case, a person was detained on drug charges and placed in prison under pretty difficult conditions and Frances Coralie petitioned the court that not only with prison manual conditions not being satisfied, but then even if we were satisfied that the conditions in the prison was so appalling that the court needed to intervene.

The court relied on a very early decision of the US Supreme Court in 1876 in a case called *M~~un~~n versus Illinois* I am not going to go into great detail about what happened in *M~~un~~n v Illinois*, except to point out a key phrase that gets repeated over and over again in the Indian debates around the right to life by the term life, as here used something more is meant than mere animal existence the inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. So, when a constitution says no person shall be deprived of the right to life, we need ~~out-not~~ construe the term life as meaning simply life or death.

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It can extend to all other faculties or other facets of life, that are meaningful for a life well lived. This kind of expansion of the concept of life is what we see occurring ~~in-the~~ *Francis*

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~~Coralie case and Francis Coralie~~ and I have just ~~read~~-highlighted portion to emphasize how this argument developed.

The court concluded that not only does the right to life include the right to the basic necessities of life but the right to life also included the right to carry on such functions and activities as constitute the bare minimum expression of the human self, what might this mean in a prison?

This might mean an access to reading material and magazines, newspapers; this might mean an access to writing material; the ability to express yourself; this might mean an access to community spaces in a prison; as well as an access to the outdoors for basic conditions of life. ~~That one~~ might assume that the deprivation of civil liberty that imprisonment is about might exclude all of these.

But, the court and Justice Bhagwati in particular ~~was concluded that no~~concluded that, while imprisonment certainly meant the deprivation of the basic liberty to move about and society at large, it did not mean that you could be ~~confined to make the point strong~~ you could be confined like an animal. So, that was the early move up in the court to develop a concept of life that went beyond cases which raised issues relating to the deprivation of life.

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Positive Life

Bandhua Mukti Morcha v. Union of India (1984), (per Bhagwati J.)

"It is the fundamental right of everyone in this country [...] to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of workers [...], opportunities and facilities for children to develop in a health manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief [...]"

Justice PN. Bhagwati

So, let us move along and see where we go next, once again is Justice Bhagwati but, in a very different background this time dealing with bonded labour and the conditions of work once again, the issue was related to contract labour, that was employed in various aquarries

almost in bonded labour conditions that, the court was concerned about and it came before the court petition.

Justice Bhagwati did well to combine and an expansion of the right to life by looking at several Directive Principles in the constitution ~~he looked at Directive Principles~~ that dealt with the health and strength of workers, ~~looked at~~ Directive Principles that dealt with the protection of children and the provision of educational facilities to children, as well as Directive Principles that emphasize humane conditions of work. ~~W- and what J~~ Justice Bhagwati concluded was that, these cases that of near bonded labour were cases that offended these conditions and the failure of the state to ensure that these basic minimum conditions were met was a violation of the right to life.

Remember, once again that in no circumstance was it alleged that someone had been put to death by the conditions of work the court is emphasizing that life the deprivation of life is not merely the deprivation of life by putting man to death but the deprivation of the basic humane conditions of life on which a reasonable life can be built.

So, the first case that we looked at was a case relating the prison conditions in the second case, we looked at labour conditions. So, now we understand that, the right to life in the Indian constitution certainly covers these two background conditions.

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Food

Prevention of hunger and starvation

PUCJ v. Union of India (WP 196 of 2001, SC)

"What is of utmost importance is to see that food is provided to aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases they or members of their family do not have sufficient funds to provide to them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity."

भारत का राजपत्र
The Gazette of India

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MINISTRY OF LAW AND JUSTICE
Legislation Department

THE NATIONAL FOOD SECURITY ACT, 2013
No. 143 of 2013 (Enacted on 13th September 2013)

The court has ~~later~~ late into the 1990s and in the early part of the 21st century been particularly concerned and strong about the protection or the creation of a right to food in

some of the early cases ~~like included~~ *PUCL versus Union of India*, which was writ petition 196 of 2001. Broadly, the case is broadly known as the right to food case and has ~~very~~ many dimensions and continue over a long period of time and several orders were issued.

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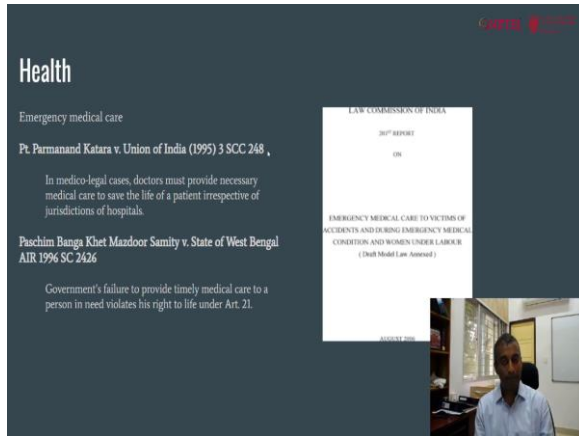
But before we get into the quotation and trying to understand what the court was saying about the right to life, please understand that in this case, the court intervened to provide midday meals to children in schools, the court intervened to ensure that famine and starvation relief was provided in various parts of India, both in normal times and in cases of disasters.

The court intervened to ensure that adequate supplementation of nutrition was provided to pregnant women and young mothers and so on and so forth. ~~So the as~~ well as articulating a basic minimum entitlement of food that should be legally protected, so sort of freedom from hunger as the integral to the protection of the right to life.

In the quotation, what you pick up is that the court is clear that the provisioning of food to the aged, to the infant, to the disabled, to the destitute men and women who are in danger of stag starvation is integral to the right to life and an argument by the state that it does not have either the green or the ability to distribute this food is not accepted by the court, the court is clear that whatever else the state must do, it must provide for this basic freedom from hunger.

As many of you are no doubt aware this case wound its way to the courts across two decades and then, in 2013 a National Food Security Act was enacted, which crystallized many of the court decisions into concrete entitlements that were to be delivered by the state. The implementation of the National Food Security Act has been modest to reasonable depending on the state that we look at but today, Indian citizens have an entitlement to basic food arising out of the litigation in court and the interpretation of Article 21.

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Going beyond food, the court has been very concerned about health care as you can tell in politics around the world the access to health care becomes a critical ingredient of a good life or reasonable life. The Indian courts have approached the question of healthcare in two ways. First, with respect to the provisioning of emergency medical care. In these cases, as in *Parmanand Katara*, the hesitation was of private sector providers initially to accept cases where there were accidents and where there was a need for emergency health care on took for two reasons.

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First, that several legal complications might occur by providing immediate and urgent medical health care, which the private hospitals did not want to take on. The second was that the parties might not have the capacity to pay, once the health care was provided emergency health care was provided, who would pick up the tab in the absence of a National Medical Insurance or a National Health Insurance, these bills could remain unpaid.

While the court did not address the question of insurance very carefully and the payment of bills, the court was very clear that whatever medico legal complications might arise of emergency health care must be done over event, no private hospital could be allowed to deny emergency healthcare even if legal complications arise the courts and the police should not entangle the providers of emergency health care in these kinds of issues.

So, this issue was settled and *Parmanand Katara* much else has been done on this question and you will see the 201st report of the Law of Commission of India, which was prepared in August 2006 argued for the enactment of a Good Samaritan Law, which allows for

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emergency medical assistance either by those who are bystanders or by medical professionals and these laws have now taken shape.

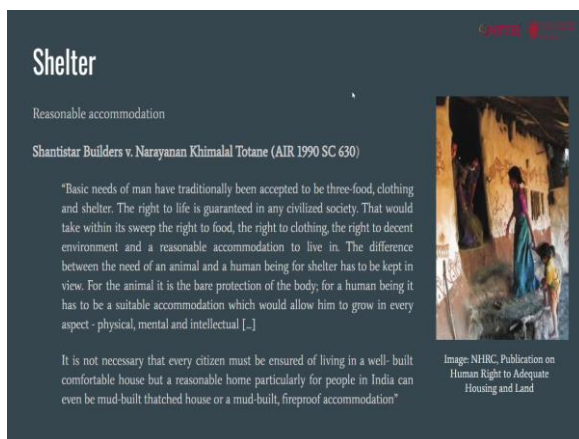
The second dimension of healthcare is non emergency healthcare and here litigation has been less successful, though in isolated cases like a *Paschim Banga Khet Mazdoor Samity case*, the court was willing to consider access to timely medical care as being an essential part of Article 21 the court has not paid enough attention to the institutional architecture by which health care is provided.

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We have not seen sustained litigation either on the institutional architecture of the public health system or on a public insurance system that would ensure that all citizens would be entitled to basic levels of health care across the country. The executive branch of government has made far more progress in the courts in this matter and the creation of broad schemes of medical insurance like Ayushman Bharat and far more efficient and effective state level schemes, which have wide applicability have resulted in a rapid expansion of levels of health care across the Indian population.

So, health was another issue where the court by embracing access to health care as a part of the right to health in the earliest stages in the 1990s, the court has brought that agenda to the fore of public discourse and has led to sustained legislative and executive action.

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Shelter

Reasonable accommodation

Shantistar Builders v. Narayanan Khimalal Totane (AIR 1990 SC 630)

"Basic needs of man have traditionally been accepted to be three-food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual [...]"

It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built, fireproof accommodation"

Image: NHRC, Publication on Human Right to Adequate Housing and Land

So, we have covered food and health and you might ask what would come next I am not surprisingly, the next critical question has become shelter. Now, it might be that you might,

one might argue that, the right to life must include the right to of home the court has not gone that far the initial cases that came before the court was of deprivation of the ability to either live on in the streets or in unauthorized residential settlements slums or similar such structures.

In the early cases, the court was willing to accept that the right to life would protect one against the deprivation even where, you do not have adequate legal title to the land or to the home that you occupy. However, subsequent cases have diluted that position in several ways. And today, what we might be able to say is that we have a right to shelter, reasonable accommodation and the protection against deprivation. But, we do not have an affirmative right to a certain defines specified quality of housing, let us see what the court has to say in (())(17:36) builders in 1990.

The court affirms that the basic needs of man traditionally been accepted to be food, clothing and shelter the right to life it reminds us in any civilized society should include the right to food, the right to clothing, and the right to a decent environment and reasonable accommodation this it appears floors from the distinction between an animal existence and a human civilized existence and that suitable accommodation is essential for our physical, mental and intellectual well being.

Even if the state is unable to provide well built comfortable homes, the court concludes, it must be able to provide us provide every person in India, a reasonable accommodation that would certainly that one might have legal title and entitlement to as well as what sustains us to have a meaningful life. This is very a very broad proposition not disagreeable but much would, much of the doubts would arise from the details.

And the Indian courts have not been very effective as specifying what exactly the right to housing entails and the court and that is pretty much where we are even at this point, while the executive government has developed several schemes along providing affordable housing, as well as constructing houses for the poor and the deprived the question of housing in India's urban centres especially overcrowded urban centres, remains a crushing and urgent question that deserves the attention to court.

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Livelihood

Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545

"[...] If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live [...]"

The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21"

Image: Neethi Seetham / AFP

Is there a judicially enforceable obligation of the State to secure livelihood for its Citizens?

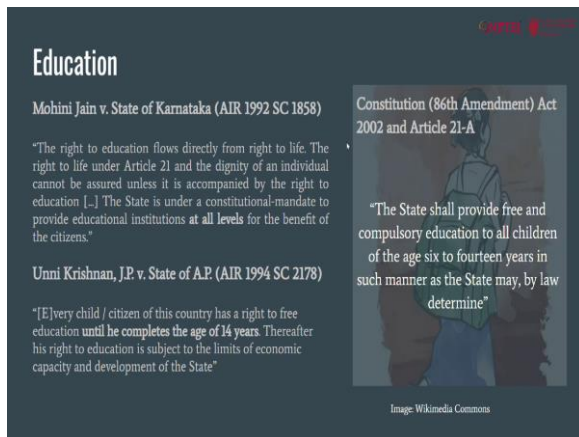
So, even if you had housing and you had food and you had some protection of health care, do we have a right to livelihood? Do we have the right to work in other words? And this came up in a very early case called *Olga Tellis versus Bombay Municipal Corporation* in 1985 this is a curious case where the Bombay Municipal Corporation wanted to evict pavement dwellers who were residing on the pavement in Mumbai as we have seen as many of us have seen either individually, personally or in the movies we know that many Indian cities have slums both on the pavements and off the main roads of cities.

The question was whether the Bombay Municipal Corporation could evict these slum dwellers without providing them an alternative accommodation and the court went into this in some detail what is striking about the courts rationale and its reasoning was that while no one has a fundamental right to live on the pavement or on any piece of land, access to livelihood, which emergence from living close to places of work is a very important part of the protection under Article 21.

Even if pavement dwellers were removed from the pavements and placed say 10, 15 or 20 kilometres away from their current places of residence, it would mean that, they had no protection source of livelihood, would ultimately render them destitute. So, the court was very sympathetic to the idea that, we have a right to livelihood and that we should that, the court will not allow the Bombay Municipal Corporation to deprive the right to livelihood of pavement dwellers in this case. If you have crossed concerns of livelihood, what must closely follow, there are concerns around education.

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The early education cases both *Mohini Jain and Unni Krishnan* in 1992 and 1994 were cases that dealt with higher education, often students who sought to secure admissions in medical colleges or engineering colleges would litigate the matter and the court often found that it espoused language more broadly protecting a right to education not just the right to higher education.

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In fact, it is the right to primary and secondary education and high school education that is protected by the right to life in a substantive way and higher education may well not be a fundamental right of all citizens. So, what did the court do? The court made it clear that educational institutions at all levels, primary, secondary, high school as well as higher education institutions must recognize that citizens have a right to education a constitutional right.

And that, the state has a mandate to provide these educational opportunities this body of litigation eventually led to the 86th Amendment Act in 2002 and the insertion of Article 21A. Now, this article was already a Directive Principles of state policy and so its introduction into the constitution is a fundamental right, may or may not in a very significant way, change the texture of constitutional argument in any event let us read the article.

The state shall provide free and compulsory education to all children of the age 6 to 14 years in such manner, as the state may by law determine and the state has determined by law, the Right to Education Act, what is the nature of education to be provided for this age group 6 to 14 years.

So the Right to Education Act itself had a fair bit of litigation, where the court went into the boundaries of what is it is not protected but the right to education but for an introductory course like this, I am not going to go into all of those details. But, for those of you who are interested, you might want to focus on the section 12 mandate in the Right to Education Act, which imposes some obligations on private actors, private schools as a part of the right to education.

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Many of you would be familiar with a serial litigant in the Supreme Court on environmental matters – ~~MC Mehta~~, ~~MC Mehta~~, –MC Mehta as a lawyer filed several cases before the Supreme Court on a range of matters, vehicular pollution in New Delhi, the Taj Mahal case, the Ganga pollution case, the BS river the Oleum gas ~~leak-leak~~ case and so on.

And what MC Mehta and this was he was ahead of his time making these arguments in the late 70s and the 80s and right through till now was arguing that we all have the right to a pollution free environment ~~in our~~ under Article 21. The court though initially tentative in embracing such a broad right, has eventually come to accept that indeed such a right exists. In the Vellore citizen's forum case the court went further and recognized the principle of “sustainable development”, development that does not compromise the ability of future generations to meet their needs. Such a concept of intergenerational equity, whatever else you might say, was not anticipated by the framers of the Constitution when they drafted article 21.

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The court ~~is~~ also imported two important principles of environmental law, the first the “precautionary principle.” So, when the full dimensions of a development intervention are not known, the court must balance the risks in favour of caution and second, that whatever else may happen by a particular intervention a polluter must pay for any damage that they caused to the environment and these two principles have been embraced by the Supreme Court though more detailed versions of these are available in the environmental statutes.

The vellore citizens welfare forum is an important case but I suppose that, as all of us are now staring at the prospect of dramatic climate change, and global warming, we must confront the possibility that there can be a serious body of litigation that seeks to protect the world from these unimaginable consequences arising out of global warming, some of you may be familiar that in Europe and elsewhere, some early litigation by young school children have yielded a quite remarkable results and maybe India must brace for such an approach to spur the government to tackle the questions of climate change with the urgency that they deserve. All of that would be article 21 litigation should it occur.

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The New Frontier: Privacy and Dignity

In the early cases of police surveillance and home visits the Supreme Court did not clearly articulate a right to privacy that barred surveillance.

In the 1990s the court began to address privacy concerns in the forced interrogation cases (Selvi) and with the UID Aadhaar challenges (Puttaswamy I and II) the court has reformulated the right to Privacy to include:

- Decisional Autonomy
- Informational Autonomy
- Right to be left alone
- Guarded by a new proportionality test



So, this broad survey of the various dimensions of the right to life the positive dimensions of the right to life, brings us to conclude with the where is the right to life litigation going. You would remember that in lecture 1, I presented a broad historical outline and slide one, about how the right to life first focused on the on the phrase procedures established by law subsequently has focused on the on the phrase right to life, life as being more than just a deprivation of life but, it is positive dimensions.

In recent years the court has now developed a new doctrine of the right to life and we might do well to pay some attention to it, as it appears that, this is going to be the future of the right to life litigation, much of the right to live litigation that we will confront. In the very early cases in the 60s and 70s 1960s and 70s our police surveillance and home visits were challenged and these cases went all the way to the Supreme Court and but, the Supreme Court did not articulate a strong right to privacy, you know, a right to privacy that prevented police surveillance of individuals without a warrant and also visits to people's homes.

So, the court articulated a version of it but, not a very strong version of the right to truth but in the 1990s the court seems to have changed its mind and started to develop a right to privacy in the forced interrogation cases these were mostly cases that dealt with truth serum, and other forms of medico legal interrogation that the court felt was a breach of the privacy of the individual who was subjected to these criminal interrogation techniques.

But, when it came to the *UID the Aadhaar cases*, the court has embraced this challenge squarely and input to the Swami one and two has the court has reformulated a right to privacy. Now, what do we mean by the right to privacy? The right to privacy at the minimal level simply means the right to be left alone, just leave me alone, no state interference, I get to do what I want to do, it might in a right to be left alone formula, it might mean that it is a freedom from surveillance.

But, the court was much further in these cases and it goes much further because, in the Aadhaar cases, the court thinks that this is an affront to our dignity protection, that the dignity of human beings requires the protection of their privacy and in these new technological arenas, these infringement of privacy can become very severe and have outsized implications.

So, what kinds of protections the right to privacy protects my right to make decisions, both about my body as well as about my personal life. So, gender sexuality, as well as maybe issues related to abortion or as well as my rights to express myself in various ways may all be covered and my right to make life decisions about marriage, education, work are all protected by the dignity and privacy of individuals.

The second kind of autonomy would be an autonomy about information, that is information related to me, information about me, may all need to be protected by the state and by private actors in ways that ensure that my dignity and privacy are protected. Certainly, the right to be left alone which is arguably the lowest threshold of the right to privacy at dignity.

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So all of these dimensions, new dimensions, and there are more, I am not going to sketch all of the potential dimensions of the right to privacy and dignity. But, all of these dimensions are now guarded or there are a fenced off by a new proportionality test, where the court will always ask a few questions about any state intervention into one's privacy and dignity first, it will ask is this even necessary, why are we even doing this making this intervention, is the Aadhaar UID serving any significant public purpose?

Second, the court will ask, is the intervention or the interference with your right to privacy or dignity necessary in a democratic society, can it be justified, is it a valid purpose and it will ask can this be more narrowly tailored, can you do this in some other way, can you achieve the outcome that you seek to achieve using some other technique, which does not offend the privacy and dignity of individuals.

Now, the proportionality test and I am describing it in a very general sense as in a non legal sense, if I may and is often described as a three step or a four step test depending on the jurisdiction that one might focus on but, it appears that privacy and dignity along with the proportionality test can tackle a whole range of cases that we dealt with, in prior to put a Swami one and two, using a different doctrinal framework.

It also seems that the new the range of new cases coming up before the Supreme Court may well be phrased in this way and this might become the new dimension of the right to life in the Indian Constitution. So, let me stop here and summarize briefly, summarize what we have done in lecture 1 and 2 for week 7.

We have focused on the right to life, we initially began with deprivations of the right to life, in the second lecture, we focused on positive dimensions of the right to life, we have concluded by taking a brief look at how privacy and dignity may well become the most important facet of the right to life that will be protected by the Supreme Court.

That covers this week's lectures on the right to life vacate I will come back to the right to liberty and then, to the right to equality till then, have a great week. Bye.