Guest Post: Against Natural Rights—Why the Supreme Court should NOT declare the right to intimacy as a natural right

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Gautam Bhatia July 17, 2018

(This is the third and final guest post by **Professor Tarunabh Khaitan**

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As the Supreme Court prepares to defang the provision of the Indian Penal Code that criminalises 'carnal intercourse against the order of nature', it might be tempted to rely on its recently-revived 'natural rights' jurisprudence in order to do so. It is not hard to imagine that some of the judges might be tempted to hold that the 'right to intimacy' is an inherent and irrevocable 'natural right' (or, simply, declare it to be a facet of the right to privacy, which in turn has been held to be a natural right—I do not doubt that intimacy is a facet of privacy, or that privacy is indeed a fundamental right—my only complaint is against their *characterisation* as natural rights).

The rhetorical implications of such a move could be significant—the Court would be saying that the 'natural order', far from condemning homosexuals, requires their protection. Unlike the two previous posts on these hearings (available here and here), which urged the Court to be expansive in its holdings, I will argue in this post that the Supreme Court should **not** rely upon the language of natural rights in its judgment in this case. In fact, it would do well to retreat from the expansive embrace of natural rights in *Puttaswamy* to the extent it is possible for a smaller bench to do so.

Let us begin with *Golaknath*, that famous precursor to *Kesavananda Bharati*, where the Supreme Court held by a majority in 1967 that fundamental rights in the Constitution were unamendable:

> "fundamental rights … are embodied in Part III of the Constitution and they may be classified thus : (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property, and (vii) right to constitutional remedies. … 'Fundamental rights' are the modern name for what have been traditionally known as 'natural rights'. … Our Constitution, in addition to the well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such rights." [Paragraph 22, Justice Subbarao]

Even as Justice Subbarao equated fundamental rights with natural rights, he noted that although the right to property counted as a natural right, the rights of disadvantaged minorities against discrimination did not (although the more general right to equality did). This is the nub of the problem with the natural rights discourse—it has traditionally had a libertarian orientation which robustly protects the right to property (including, arguably, intellectual property) and the right to life of a foetus, but becomes faint-hearted when it comes to the enforcement of socially transformative rights like the right against discrimination or the right to employment. And it has had an intellectual history in recent Western thought that has been hostile to LGBTQ rights.

In *Kesavananda Bharati*, the Court spoke in multiple voices on all sorts of questions, including on the place of natural rights in the Constitution. The rightly-overruled judgment of the Supreme Court in *ADM, Jabalpur* conducts a superficial exegesis of what the majority actually held in *Kesavananda* with regard to natural rights, claiming that 7 judges on the *Kesavananda* bench rejected the natural rights thesis [at para 548]. This reading of *Kesavananda* is confirmed in another Emergency-era case called *Bhanudas Gawde* [para 41-2]. I must confess to not having checked myself whether this reading of the meandering and complicated judgment in *Kesavananda* is correct, ie whether a majority in that case did indeed hold that natural rights jurisprudence has no place in Indian law.

At least according to Justice Khanna, however, whose judgment came to be seen as the opinion of the Court in *Kesavananda:*

> "It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the Constitution or the laws made by it. But independently of the Constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced." [para 1509]

This must be seen as the correct position on natural rights in *Kesavananda*. Any other reading of the case would suggest that there are two independent, if overlapping, limits on the power of amendment—the basic structure of the constitution *and* some pre-constitutional, irrevocable, natural rights. Such a reading would entail that *Kesavananda* merely *added* a new ground for reviewing amendments to *Golaknath.* We know, however, that the Court in *Kesavananda* expressly overruled *Golaknath*. Thus, the only reading of *Kesavananda*'s position on natural rights that is compatible with the basic structure doctrine as the *sole* ground for limiting the amending power is the one articulated in Justice Khanna's judgment.

Recent cases, however, have resurrected the natural rights discourse. In *Basantibai Khetan*, the Bombay High Court held in 1983 that the right to property was a natural right [para 19]. In *NALSA*, a 2-judge bench of the Supreme Court held that "Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the

status of the citizen of a free country." [para 62]. Perhaps most crucially, in *Puttaswamy*, several judges on the 9-judge bench of the Supreme Court—some selectively citing passages from *Kesavananda Bharati*—declared the right to privacy to be an inherent, inalienable natural right [Chandrachud J, para 40-46, 119; Justice Bobde, para 12, 16; Nariman, para 92]. Justice Chelameswar was the only judge on the *Puttaswamy* bench who did not join the natural rights bandwagon.

Whatever individual judges in *Kesavananda* might have said, if my argument above that Justice Khanna's position on natural rights is the most coherent reading of the case on this point is correct, Indian courts are permitted to note that an express or implied fundamental right embodies or recognises some natural right (as the courts in *Khetan* and *NALSA* do), but are not permitted to directly enforce or recognise any natural rights without the mediation of the constitutional framework. To the extent that *Puttaswamy* does this, it would be bad in law (caveat: I believe that *Puttaswamy* rightly held that the right to privacy is an implied right that flows from other fundamental rights, my only challenge is to any additional justification for the ruling supplied by relying on privacy as a natural right).

Apart from being potentially in breach of *stare decisis*, the resurrection of the natural rights discourse in *Puttaswamy* is unfortunate and unnecessary. It is unnecessary because everything the Court needs doctrinally and normatively is already available in the constitutional provisions and values, its historical ethos, and its basic structure. These constitutional resources are sufficient to hold that habeas corpus cannot be suspended, that transgender persons have a fundamental right to equality, non-discrimination and liberty, and that the right to privacy is a fundamental, irrevocable, constitutional right. Seeking additional support from a dubious notion of natural rights does no good, and has the potential to do harm.

The resurgence of the natural rights jurisprudence—rooted in a conservative Christian ethos—is unfortunate because of its traditionally regressive role in promoting libertarian values, including its hostility to the right to abortion, homosexuality and material redistribution. It will be particularly galling for the Court to use a philosophical concept that whose main intellectual proponent, John Finnis, advocated for the continued criminalization of homosexual conduct.

Apart from its conservative roots, the natural rights discourse is too amorphous to be entirely safe in the hands of the courts. True, the basic structure doctrine is also amorphous, but our constitutional text and history place limits on what a court can find as part of the basic structure of our Constitution. The natural rights discourse places no such limit—what is to prevent a court from saying that my interest in a copyright or in hate speech is my natural right?

Lastly, LGBTQ activists have long challenged ideas of ‘naturalness’, a notion that has typically reflected values and mores of the powerful sections in a society. As noted queer theorist Judith Butler wrote in *Gender Trouble*, her “dogged effort to ‘denaturalize’ gender” emerged “from a strong desire … to uproot the pervasive assumptions about natural or presumptive heterosexuality that are informed by ordinary and academic discourses on sexuality.” It is hardly surprising that Butler sees *de*naturalization of gender and sexuality as a precondition for true liberation. The concept of a preordained natural order is, after all, status-quoist in its essence. Its naturalness is only evident to those who benefit from things as they are.

The petitioners have asked the Court to recognise their *constitutional* rights. The Court will do them a disfavour to insist that their rights are not just constitutional, but also somehow *natural.* The natural order of things has seemed unfair from the vantage point of those on its margins. Arguments invoking the natural order have a habit of getting in the way of things as they should be. Ours is a transformative rather than an acquiescent constitutional heritage. It is a tradition informed by voices from the margins of society, and not just its natural core. *That* is the tradition we need to invoke as we extend the ethos of inclusiveness to a long-excluded minority, rather than rely on an at-best elusive, at-worst reactionary, notion of natural rights.

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