
IS THE SUPREME COURT'S DISCOURAGEMENT OF ARTICLE 32 PETITIONS CONSTITUTIONALLY SOUND?

Nigel C. Thomas, B.A. LL.B., SVKM's Pravin Gandhi College of Law

ABSTRACT

The Supreme Court's decision in *Rutvij Bhagat Singh Wakhare v. State of Maharashtra* is the latest instance of a recurring practice. The Court declined to entertain a writ petition under Article 32. It held that the petitioner had failed to establish a violation of any fundamental right and redirected him to the jurisdictional High Court under Article 226 instead. This practice has been evident since CJI Bobde's 2020 remarks and was repeated more recently in Hemant Soren's petition. It sits uneasily against settled law. Article 32 has consistently been affirmed as part of the Constitution's basic structure. This is most notable in *Fertilizer Corporation Kamgar Union*, and in the unanimous seven-judge holding in *L. Chandra Kumar*, which held that this jurisdiction can never be ousted or excluded. This paper examines whether the Court's discouragement of direct Article 32 petitions is constitutionally sound. It traces the roots of this practice to *Kanubhai Brahmabhatt* and *Paul Manickam*, and tests these against *Romesh Thappar's* holding that Articles 32 and 226 are concurrent, and not sequential, remedies. It concludes by proposing a chamber-based screening mechanism, modelled on Germany's Bundesverfassungsgericht, to reconcile docket pressure with the guaranteed nature of the remedy.

1. What is article 32?

Article 32 of the Indian Constitution reads thus,

“(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”¹

The second word, in the first clause, lays down that this Article confers a right. It is also important to remember that this right, is basic and inalienable as it is fundamental in nature by being set out in Part III of this Constitution. The status of its basic nature may stem from a harmonious reading of 2 cases in particular.

i. Fertilizer Corpn. Kamgar Union v. Union of India,²

The case was particularly prominent as it was delivered in 1980, and had considered the facets of the Basic Structure Case laid down in 1973.³ There were 2 broad, concurring opinions formed by the bench, 3 on one side and 2 on the other. CJI. Chandrachud doctored the majority opinion for himself, J. Fazal Ali and J. Koshal while the concurring opinion was doctored by J. Krishna Iyer for himself and J. Bhagwati. There was however no debate upon the fact that Article

¹ INDIA CONST. art. 32.

² Fertilizer Corpn. Kamgar Union v. Union of India, (1981) 1 SCC 568

³ Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225

32 was an essential part of basic structure.

“The jurisdiction conferred on the Supreme Court by article 32 is an important and integral part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing effective remedy for their enforcement, if and when they are violated. Right without a remedy is a legal conundrum of a most grotesque kind while the draft article 25, which corresponds to article 32, was being discussed in the constituent assembly, Dr. Ambedkar made a meaningful observation by saying:

If I was asked to name any particular article in this constitution, as the most important – an article without which this constitution would be a nullity – I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it, and I am glad that this house has realised its importance.

But though the right guaranteed by article 32 is one of the highly cherished rights conferred by the Constitution, the purpose for which the right can be enforced is stated in the very article which confers that right. The violation of a fundamental right is the sine qua non of the exercise of the right conferred by Article 32.”

J. Krishna Iyer’s opinion is often cited as it is instructive on matters of *locus standi*, which is not central to the subject matter of this paper. However, in the introductory paragraph of his opinion J. Krishna Iyer lays down his concurrence with the findings of the Chief Justice pertaining to the points of Law.

“The learned chief justice has considered with care. Some of the profound questions covered in the course of the arguments, and it may be supererogation to tread the same territory. The general factual presentation and legal conclusions of the learned chief justice have our concurrence.”

ii. L. Chandra Kumar v. Union of India & Ors.⁴

This case arose as a challenge to the controversial provisions inserted by the polarising 42nd Amendment. Articles 323-A and 323-B sought to allow the

⁴ L. Chandra Kumar v. Union of India & Ors, (1997) 3 SCC 261

creation of tribunals and bar the jurisdiction of all courts, except the Supreme Court, upon matters that were subjected to be challenged in these tribunals. A 5-judge bench of the Supreme Court in *S.P. Sampath Kumar v. Union of India*⁵ in 1987 had held these provisions to be good on the basis of the “*theory of alternative institutional mechanisms*”. A division bench in *L. Chandra Kumar v. Union of India (1995)*⁶ thought it necessary to refer this case for reconsideration to a larger bench.

Consequently, a 7-judge bench led by Chief Justice Ahmadi delivered a consolidated opinion that while reaffirming Article 32 as an integral part of basic structure, struck down parts of 323-A and 323-B to the extent that High Courts and the Supreme court would have the power of judicial review over the Tribunals as Judicial Review by the Higher Judiciary was an essential feature of basic structure.

“The constitutional safeguards, which ensure the independence of the judges of the superior judiciary, are not available to the judges of this subordinate judiciary or to those who man tribunal created by ordinary legislations. Consequently, judges of the latter category can never be considered full and effective substitute for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test constitutional validity of legislations can never be ousted or excluded.

We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdiction is also part of the basic structure of the constitution. This is because a situation where the High Courts are divested of all other judicial functions, apart from that of constitutional interpretation, is equally to be

⁵ S.P. Sampath Kumar v. Union of India, (1987) 1 SCC 124

⁶ L. Chandra Kumar v. Union of India, (1995) 1 SCC 400

avoided.”

The essential findings of this section are these;

- i. Article 32 is a Fundamental Right,
- ii. It's scope to include Judicial Review is also considered to be a facet of basic structure and,
- iii. The Article is inalienable in nature as it forms part of the basic structure of the Constitution.

2. The Conundrum. Why is the Supreme Court Discouraging Article 32 writ petitions?

In recent times it has been observed that the Supreme Court has discouraged Article 32 Petitions on the grounds of excessive backlog and an alternative writ remedy under Article 226⁷, which confers the power of issuing writs upon High Courts.

In the recent case of *Rutvij Bhagat Singh Wakhare v. State of Maharashtra*,⁸ A division-bench of the Supreme Court speaking through J. Sanjay Karol held,

“The jurisdiction conferred under Article 32 is undoubtedly wide. At the same time, it is an extraordinary remedy which must be exercised sparingly and only in exceptional circumstances, particularly when it is necessary to secure the ends of justice or to prevent the infringement of fundamental rights.”

Further,

“The existence of an alternative statutory remedy does not, by itself, bar the exercise of jurisdiction. However, as a matter of judicial principle and orderly procedure, an aggrieved party is expected, in the ordinary course, to firstly approach the High Court.”

In this case the court upon going into the merits of maintainability held that the

⁷ INDIA CONST. art. 226.

⁸ *Rutvij Bhagat Singh Wakhare v. State of Maharashtra*, 2026 SCC OnLine SC 1384

petitioner's case didn't constitute the violation of a Part III right. They also granted verdicts on certain aspects relating to clubbing of FIRs, which isn't pertinent to the subject matter of this paper.

In the past, remarks of CJI. S. A. Bobde sparked a large public debate on the topic. In a Habeas Corpus hearing concerning the detention of Journalist Siddique Kappan,⁹ His Lordship stated the following,

*"We are trying to cut down the Article 32 jurisdiction. We do not appreciate this"*¹⁰

CJI. Bobde is not alone in this view. A similar view was adopted in Hemant Soren's writ petition, this time by J. Sanjiv Khanna, his lordship observed the following,

*"First, courts are open to everybody. Second, high courts are constitutional courts. If we permit one person to come here, we will have to allow everyone,"*¹¹

The Writ Petition in Soren's case was filed since Mr. Soren was a sitting Chief Minister who was arrested on the 31st January 2024, and there needed to be an expeditious hearing since the post he occupied was constitutional in nature. However, the Supreme Court felt the alternative remedy was sufficient and Mr. Soren's lawyers had filed a Writ Petition before the Hon'ble Jharkhand High Court the day prior to filing in the Supreme Court. The following was recorded in the order of the Supreme Court dated 2nd February 2024,

"We are not inclined to entertain the present writ petition, under Article 32 of the Constitution of India and leave it open to the petitioner – Shri Hemant Soren to approach the jurisdictional High Court under Article 226 of the Constitution of India.

We are informed that the petitioner – Shri Hemant Soren has already preferred a Writ

⁹ Trivedi, D. (2020). *Supreme Court's contrasting views on petitions under article 32 raise the hackles of experts*. [online] Frontline - The Hindu. Available at: <https://frontline.thehindu.com/the-nation/article-32-and-the-supreme-court-contrasting-views-on-it-raises-legal-experts-hackles/article33213187.ece> [Accessed 1 Sept. 2026].

¹⁰ LIVELAW NEWS NETWORK (2020). *'We are trying to cut down article 32 jurisdiction': Chief justice of India*. [online] Livelaw.in. Available at: <https://www.livelaw.in/top-stories/we-are-trying-to-cut-down-article-32-jurisdiction-chief-justice-of-india-165977> [Accessed 1 Sept. 2026].

¹¹ Das, A. (2024). *Supreme Court refuses to entertain Hemant Soren's petition against ED arrest*. [online] Livelaw.in. Available at: <https://www.livelaw.in/top-stories/supreme-court-former-jharkhand-chief-minister-hemant-soren-arrest-enforcement-directorate-money-laundering-case-248291> [Accessed 1 Sept. 2026].

Petition under Article 226 of the Constitution of India before the High Court of Jharkhand, which petition is pending.”¹²

3. Is this justified?

The views of The Hon’ble CJI and the Puisne Judges have some merit. The Supreme Court, being the Apex Court of the land, is already functioning at maximum capacity and to entertain every petition filed before them, would be a humongous task.

There are 2 cases in particular that would help shed light on why judges draw this view.

The first being a Division-Bench judgement from 1987, in *Kanubhai Brahmabhatt v. State of Gujarat*.¹³ J. Thakkar speaking for the bench elucidated the judgement through an illustration,

“Suppose there is only one National Hospital established, especially for performing open-heart surgery which cannot be performed elsewhere in any of the 18 Regional Hospitals. What will happen to the patients needing such surgery, if the National Hospital which alone is specially equipped for this type of surgery, throws its doors wide open, also for patients suffering from other ailments who can be treated by any and every one of the eighteen Regional Hospitals? More particularly when the patient already admitted for such surgery by the National Hospital are already lying unattended to, on its floors, and in its corridors, for an unconscionably long time? Showing sympathy for a patient with other than a heart problem who can also be treated equally effectively, and perhaps more quickly, may well constitute cruelty to the heart patients who can be treated only by the National Hospital established, especially and exclusively for the treatment of such patients. Will it not be more merciful to all concerned (by being firm enough) to tell those suffering from other than heart problems to go to Regional Hospitals, instead of insisting on being treated at the National Hospital, which also can of course treat them, but only at the cost of neglecting the heart patients who have nowhere else to go? More so as the patient going to the Regional Hospital may well benefit much more by securing more personalised and urgent attention thereat. On the other hand, not to do so, may well amount to being

¹² Shri. Hemant Soren v. Union of India, ORDER on 02/02/2024 in Writ Petition(s) (Criminal) No. 48/2024

¹³ *Kanubhai Brahmabhatt v. State of Gujarat*, (1989) Supp 2 SCC 310

engaged in trying to relieve the distress of those whose distress can be removed by anyone else at the cost of refusing to treat those who cannot be treated by anyone else.”

Furthermore, His Lordship made another observation, basis this illustration that brings Article 136 into the forefront,

“If this court takes upon itself to do everything which even the High Court can do, this court will not be able to do what this court alone can do under article 136 of the Constitution of India, and other provisions conferring exclusive jurisdiction on this court. There is no reason to assume that the concerned High Court will not do justice. Or that this court alone can do justice. If this court entertains writ petitions at the instance of parties who approached this court directly instead of approaching the concerned High Court in the first instance, tens of thousands of writ petitions would in course of time being instituted in this court directly.”

The end of this sentence carried a superscript numeral “1”. This referred to a footnote that read as follows,

“more than 9000 are already pending now”

This number is instructive and is also the ground for differentiating this judgement.

Firstly, As of today (September 2026), according to the National Judicial Data Grid, only about 3000 Writ Petitions (both Civil and Criminal) remain pending before the Supreme Court compared to the 9000 back in 1987. This is important to note as technology and infrastructure development have reduced the burden of pendency upon our courts. In the year, 1987, when J. Thakkar was laying down the law, in the aforementioned judgement, he had before him tens of thousands of pages to go through, testimony to be corroborated, bare acts and commentaries to be read. All these factors need to be taken into consideration before reading in the ratio of a judgement and applying it to facts in the present day.

Secondly, it must be kept in mind that the 80’s saw the Supreme Court institutionalise Public Interest Litigations (PILs) under Article 32.¹⁴ Starting with the case of *Mumbai*

¹⁴ Gauri, V. (2009). *Public Interest Litigation in India Overreaching or Underachieving?* [online] Available at: <https://openknowledge.worldbank.org/server/api/core/bitstreams/2d298c9b-dcdf-54fe-9003->

*Kamgar Sabha v. Abdulbhai Faizullabhai*¹⁵ in 1976, followed thereafter by *S.P. Gupta*¹⁶ in 1981 and reaching its pinnacle with *M.C. Mehta v. Union of India*¹⁷ in 1987. PIL cases played a role in the explosive number of Article 32 petitions that were instituted before the Supreme Court. It may have been considered prudent at the time, for a citizen to exercise the Article 226 jurisdiction before approaching the Supreme Court, therefore legitimising J. Thakkar's view.

Finally, the 124th Law Commission of India Report, highlighted that severe pendency had plagued the High Courts as well.¹⁸ The report noted a total pendency of 14,82,400 cases across all High Courts in India. This pendency stemmed firstly from 69 judicial vacancies in the 18 High Courts of the time. Additionally, it was also noted how High Court's weren't periodically reviewing and revising their bench strength, therefore, exacerbating the situation. To a common citizen at the time approaching the Supreme Court would've made more sense as the underlying assumption was that the apex court would hear them as it were a matter of right; which wouldn't be the case in a High Court.

The second case that is often cited to purport the view of redirection to High Courts, is a view adopted from another Division-Bench of the Supreme Court, in 2003, now speaking through Dr. J. Arijit Pasayat in *Union of India v. Paul Manickam*,¹⁹

"Another aspect which has been highlighted is that many unscrupulous petitioners are approaching this Court under Article 32 of the Constitution challenging the order of detention directly without first approaching the High Courts concerned. It is appropriate that the High Court concerned under whose jurisdiction the order of detention has been passed by the State Government or Union Territory should be approached first. In order to invoke the jurisdiction under Article 32 of the Constitution to approach this Court directly, it has to be shown by the petitioner as to why the High Court has not been approached, could not be approached or it is futile to approach the High Court. Unless satisfactory reasons are indicated in this regard, filing of petition

2cad29f156a7/content [Accessed 3 Sept. 2026].

¹⁵ *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*, (1976) 3 SCC 832

¹⁶ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87

¹⁷ *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

¹⁸ Law Commission of India, 124th Report, *The High Court Arrears – A Fresh Look*, Available at: <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080816.pdf>

¹⁹ *Union of India v. Paul Manickam*, (2003) 8 SCC 342

in such matters directly under Article 32 of the Constitution is to be discouraged.”

However, the precedential value of this judgement, in admission of Writ Petitions needs serious scrutiny for two reasons in particular,

Firstly, the challenge in Paul Manickam’s case was a Special Leave Petition under Article 136²⁰ to challenge a High Court order quashing a Preventive Detention Order. The scope of Article 32 was not something challenged or an issue arising from the facts of that case at all, and;

Secondly, even if the argument of an alternative remedy’s existence is accepted, the power to issue writs is a matter of concurrent jurisdiction. Article 226 is an empowering provision. It gives High Courts the power to issue writs in matters concerning the rights enshrined in Part III, that is, High Courts are empowered in an equal manner as the Supreme Court to confer writs in matters where they are necessary. This was also a *per-curiam* holding found by CJI. Harilal Kania and his 5 learned colleagues in *Romesh Thappar v. State of Madras*²¹ all the way back in 1950,

“It is not possible to accept the preliminary objection raised on behalf of the respondents that as a matter of orderly procedure, the petitioner should have first resorted to the High Court which under article 226 of the Constitution has concurrent jurisdiction to deal with the matter. Article 32 does not merely confer power on the Supreme Court as article 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by part three or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among articles, 131 to 139, which define that jurisdiction. Article 32 provides a “guaranteed” remedy for the enforcement of those rights, and this remedial right is itself, made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights.”

Therefore, it is important to remember that 226 cannot be placed on the same footing

²⁰ INDIA CONST. art. 136

²¹ *Romesh Thappar v. State of Madras* (1950) SCC 436

as Article 32 in so far as its characterisation is concerned as a right. This distinction is fundamental in nature.

4. Principle or Practice.

The central issue is one based on Principle versus Practice. It was brought out best by J. Pardiwala in the case of *Rajendra Bihari Lal & Anr. v. State of Uttar Pradesh & Ors.*²²,

“90. This Court, as the highest constitutional court, has been conferred with the powers as enshrined under Part III of the Constitution to provide remedies against the violation of fundamental rights. The very fact that the right to constitutional remedies has itself been enshrined as a fundamental right is a clear affirmation that this Court is the ultimate guarantor of their enforcement. Once the Constitution has cast such a responsibility upon it, this Court need not direct a petitioner to pursue an alternative remedy, when the grievance stems from the alleged violation of a fundamental right.

91. At the same time, although, as a matter of orderly procedure and judicial discipline, an aggrieved party is expected, in the ordinary course, to first approach the High Court, yet where facts disclose a palpable violation of the fundamental rights necessitating urgent intervention, it is incumbent upon this Court, in exercise of its writ jurisdiction, to step in and secure justice. In such circumstances, the existence of an alternative remedy cannot dilute the constitutional mandate entrusted to this Court. That is why it is said that “Let justice be done, though the Heavens may fall”.”

Therefore, a violation of Article 32 cannot exist in a traditional sense. This is because Clause 1 of the Article reads as follows,

“The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.”

On a bare reading of this clause, it can be made out that, if there were to be a violation of one’s fundamental rights under Part III; and the Supreme Court was per-say ‘immovable’ then their right under this article would be violated. Therefore, this right

²² *Rajendra Bihari Lal & Anr. v. State of Uttar Pradesh & Ors*, 2025 SCC OnLine SC 2265

has a special nature, as the constituents of what ‘immovable’ means aren’t determined. For now, all we know, is that Article 32 can’t be violated by individuals.

If there exists a possibility of a violation it would arise;

One, by curbing access to the Supreme Court on a ground such as an emergency or an event to that effect

OR

By the dismissal of a Petition where even a *prima facie* perusal of the facts show that a fundamental right has been impeded. This second instance, however, is a subject to judicial determination.

5. What can be done about it?

For the time being, there are a few work arounds to this problem of redirection. As the Supreme Court ought not to ordinarily dismiss such petitions *in limine*.

1. The Supreme Court may lay down guidelines, where a challenge under Article 32 must be entertained. These guidelines must be broad enough to cover the essential freedoms guaranteed to all individuals, in a manner such that a violation of them becomes a matter of utmost importance.
2. The problem of pendency is a real concern. However, the Writ Docket of the Supreme Court forms a minute part of its pending workload. As of 2nd September, 2026; 26,976 Civil SLPs are pending in the Supreme Court, 18,600 Civil Appeals, 8448 Criminal SLPs.²³ In total (including Transfer Petitions, Review Petitions, Contempt Proceedings, Criminal Appeals, etc.) there are over 94,500 pending cases in the Supreme Court. It is relevant to recall that the jurisdiction of SLPs under Article 136 is discretionary in nature while a remedy under Article 32 would be a matter of right.

The immense workload of the court in its discretionary matters should not be the

²³ National Judicial Data Grid [Accessed 2 Sept. 2026], https://scdg.sci.gov.in/scnjdg/?p=home/index&app_token=4b8863e016e6c1f63a8cf568bd00d4f8042a75e693d7a5b62bd8d5cb2d44e011

basis for defeating an individual's right. A solution to this problem can be found in clause 3 of Article 32. Clause 3 makes it the state's prerogative to confer "*other court's*" with the power of administering writs. Therefore, it is within the purview of parliament to have a judicial mechanism that is capable of issuing writs for the betterment of civil liberties.

3. With recent developments in technology and an increasing bench strength at the Supreme Court,²⁴ Article 32 petitions can be fast tracked by having dedicated single judge benches, and division benches to hear matters that pertain to individual civil liberties being curbed. These benches wouldn't yield the powers of significant constitutional interpretation and would have a mandate over matters of individual citizens and not body corporates. Their powers could include but not be limited to issuing directions and injunctions, in addition to referring matters of constitutional interpretation to larger benches. The functioning of these benches would help relieve the judiciary from dealing with a mixed bag of matters.

It could be closely modelled like the German Bundesverfassungsgericht, which serves as Germany's Supreme Constitutional Court. Its duties include providing binding interpretations of the Basic Law (The Constitution) and ensuring that fundamental rights are upheld. The Court has a chamber system where the entire strength of 16 isn't summoned together. Most cases are dealt within a Chamber of 3, and cases that require larger bench references are accordingly referred to the larger bench, that is, the Senate.²⁵

An Indian Application of this could be followed by having fast track benches for infringements of civil liberties codified in Part III.

6. Where does this leave Article 32?

Article 32 was conceived, in Ambedkar's words, as the "very soul" of the Constitution. Judicial record bears this out: from Chandrachud CJ's characterisation in *Fertilizer*

²⁴ Press Information Bureau (2026). *Cabinet approves increase in the judge strength of the Supreme Court of India by four to 37 from 33*. [online] Pib.gov.in. Available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2258131®=3&lang=1> [Accessed 4 Sept. 2026].

²⁵ Bundesverfassungsgericht Website - https://www.bundesverfassungsgericht.de/EN/ConstitutionalComplaint/Reachingadecision/reachingadecision_artikel.html?nn=69016

Corporation Kamgar Union to the unanimous 7-judge holding in *L. Chandra Kumar* that this jurisdiction can “never be ousted or excluded,”

The Supreme Court has consistently affirmed Article 32 as part of the Constitution’s basic structure. The routine redirection of petitioners to High Courts under Article 226, resting on a discretionary 1987 ruling in *Kanubhai Brahmbhatt* sits uneasily against that doctrine. *Paul Manickam* does not supply the missing authority, and *Romesh Thappar* affirms the contrary: that Articles 32 and 226 are concurrent, not sequential, remedies.

However, this is not to say the Court’s underlying concern is illegitimate. Docket pressure on the Supreme Court is real, and the impulse to conserve capacity for matters of genuine constitutional significance is a reasonable one. A solution needs to be thought out, such as the chamber model outlined in this paper. It offers a way to relieve that pressure without compromising a constitutional guarantee of a remedy upon the impediment of a fundamental right. It would also help in theory bridge the gap between principle and practice. Until a mechanism is adopted, the tension between doctrine and practice identified here remains unresolved.