India has followed a policy of making laws whenever a problem is spotted, rather than enforcing existing laws to solve problems. The result is a society that is never sure of where it stands, legally.

Does the law need to tell you what you are permitted to do? Or rather, must you only do what the law explicitly permits you to do? As a matter of Indian law, the answer would be: “No”. Our constitutional framework does not entail telling people what they are permitted to, and to assume that all else is prohibited. In fact, unless something is prohibited, one should assume that all else is permitted.

However, social reality is one of unpredictable fear and concern. Most Indians who do not wish to take a chance would ask their lawyers in dread: “Where is it written that I can do this?”

The Indian Constitution guarantees various freedoms. Indeed, these freedoms are not absolute. They may be fettered by laws that impose “reasonable restrictions”. The objectives for which reasonable restrictions may be imposed are spelt out - for example, grounds such as national security, public order, decency and morality, contempt of courts, incitement to offences and defamation. Although such grounds are themselves limited, they can be vague and subjective. Therefore, laws that impose restrictions on freedoms are capable of being challenged in high courts and the Supreme Court as being unconstitutional.

In one such case, the Supreme Court has quite clearly said that courts are not to act upon the principle that everything is to be taken as prohibited unless it is expressly permitted. On the contrary, the court has said, the principle to be applied is that everything is to be understood as permissible until it is shown to be prohibited by law.

Yet, why do Indians crave for specificity from the law on what they might legitimately do? Over the decades, the Indian Republic has followed a policy of making laws whenever a problem is spotted, rather than enforcing existing laws to deal with the problem. Examples of our system following the principle of “show me a problem and I will write you a law” are aplenty. For instance, when the Satyam fraud was discovered, company law got re-written for the entire society, instead of existing laws being stringently enforced. It’s a lot like when college adolescents are attracted to each other and their institutions impose prohibitions of all sorts on them, rather than deal with the issues that give rise to the situation.

Even the judiciary, when public interest litigants ask them to legislate, trip up and contribute to the approach of legislating solutions. A classic example is the Supreme Court ban on sun-control films being used on vehicle windows. The judges were somehow convinced that banning tinted windows in vehicles would help curb the occurrence of crimes inside them.
The net result is that Indian society has been seasoned as one that is never sure of where it stands with the law. It is the lack of clarity about whether one is legitimately entitled to complain that makes our society fearful of challenging laws. It’s a society that develops respectful awe (read “fear”) for the law-makers rather than for the law. It might even become a society that would not want to assert freedoms -- the people keener not to end up on the wrong side of the law, than to enjoy and cherish freedoms.

Anton Chekhov, a Russian writer who lived between 1860 and 1904, (before the Soviet revolution) wrote a story called ‘A Man in a Case’, which quite explains the concept. A character in the story, Byelikov, was a confused soul who would have full clarity only with government circulars in which things would be specifically forbidden. For anything else, that allowed subjective liberty, like opening a drama club or a reading room or a tea shop, he would say: “It is all right, of course; it is all very nice, but I hope it won’t lead to anything!”

In the story, those who put his body in a case and bury him, say: “We returned from the cemetery in good humour. But not more than a week had passed before life went on as in the past, as gloomy, oppressive, and senseless -- a life not forbidden by government prohibition, but not fully permitted, either: it was no better.”