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Emerging Perspectives in Constitutional Interpretation: A Shift from Originalism to Purposive Interpretation

DEVANSH SHARMA¹

ABSTRACT

In this Article, my purpose is to explain the evolutionary change in Constitutional Interpretation from originalism to purposive form of interpretation (in the Indian context). To explain such change, I will be looking at two landmark Supreme Court judgements- namely Ak Gopalan and Maneka Gandhi. The article will help the reader understand, how the Indian judiciary has taken a halt from its initial form of interpretation which was based on the intent of the Constitutional makers. And has preferred an approach which signifies the intent of the Constitution itself.

In the first part of the article, I will deal with the historical origin of the term 'procedure established by law'. Here I will examine the reasons which prompted the Constituent Assembly to choose 'procedure established by law' over the American 'due process' clause. The second part of my article will engage with the case of Ak Gopalan v. State of Madras. In this part I will help the reader understand, how the court applied a narrow and originalist interpretation to Article 21 of the Constitution. The third part of the article will deal with the newer 'purposive' form of interpretation adopted by the Indian judiciary in Constitutional interpretation. In this part, first I will begin by explaining the object/purpose of purposive interpretation. Second, how the SC applied the principles of purposive interpretation in the Maneka Gandhi case. Third, how the Indian judiciary since the Maneka Gandhi case has preferred a purposive approach to interpret the Indian Constitution, in its criminal justice system.

Keywords: *Constitutional interpretation, purposive interpretation, originalist interpretation, Maneka Gandhi, AK Gopalan.*

I. INTRODUCTION

A. Choosing 'Procedure Established by law' over 'Due Process'

The Advisory committee on minorities rights led by Sardar Vallabh Bhai Patel, submitted its

¹ Author is a student at BML Munjal University, India, India.

interim report to the Constituent Assembly on 23rd April 1947.² The report engaged with a cluster of Fundamental Rights. Clause 9 of the report dealt with the right to personal liberty of an individual. It read as follows:

“No person shall be deprived of his or her liberty, without due process of law, nor shall any person be denied equality before the law within the territories of the Union”.

However, when the drafting committee submitted the final draft of the Constitution to the Constituent Assembly in February 1948, two notable amendments were made in clause 9 (Article 15 of the Draft Constitution). *First*, the term ‘liberty’ under Article 15 (presently Article 21) was qualified by the term ‘personal’. *Second*, ‘due process of law’ was substituted by ‘procedure established by law’. Although both the amendments were significant, but in the context of constitutional interpretation, substitution of ‘due process of law’ by ‘procedure established by law’ assumes heightened importance, particularly in the Indian context. To reiterate, in this article, my attempt is to highlight the evolutionary change in the constitutional interpretation of the term ‘procedure established by law’ by the Supreme Court of India through some landmark cases.

To start with, it is necessary to underline the reasons put forth by the members of the Drafting Committee of the Indian Constitution in respect of substituting ‘due process of law’ with ‘procedure established by law’. The *first* reason for choosing ‘Procedure established by law’ over ‘Due process of law’ was because it was believed that the scope of ‘procedure established by law’ is more specific and finds its place in Article 31 of the Japanese Constitution.³ This stance of the Constituent Assembly was reiterated by Justice Fazl Ali in the *Ak Gopalan case*⁴. He stated that- *“It seems plain that the constituent assembly did not adopt this expression on account of the very elastic meaning given to it but preferred to use the words ‘according to procedure established by law’ which occur in the Japanese constitution 1946”*⁵. The *second* prominent reason for such substitution was the communal violence purporting due to partition.⁶ The individuals in favour of the ‘procedure established by law’ argued that, if the latter is not embedded in the Constitution, (considering the violence which the country was facing) it would allow the mischief makers and the criminals to avoid jails and punishment.⁷ The *third* reason

² Constituent Assembly debates on 29 April 1947 - *Indian kanoon, Constituent Assembly Debates On 29 April 1947*. Available at: <https://indiankanoon.org/doc/747690/> (Accessed: April 15, 2023).

³ Constituent Assembly debates on 29 April 1947 - *Indian kanoon Constituent Assembly Debates On 6 December 1948 Part II*. Available at: <https://indiankanoon.org/doc/1230011/> (Accessed: April 15, 2023).

⁴ Ibid. [1]

⁵ Ibid. [1], para 116

⁶ Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, SSRN (March 10, 2023, 5:56 PM) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302815

⁷ Shivangi Gangwar, *‘Due Process’ v. ‘Procedure Established by Law’ Framing and working the Indian*

was, to limit the power of judiciary. It was stated that the term ‘due process of law’ would leave larger ambit for judicial review and protecting individual liberty. B.N Rao, who was the Advisor to the Constituent Assembly stated that, 40% of the litigation in US had been on the due process clause. And according to him, what is ‘due process’ was left at the discretion of the judiciary to decide.⁸ Thus, he believed that because of the failure of ‘due process’ clause in the US, incorporating the said clause would not have been suitable decision on the part of the Constitutional makers.

The initial interpretation of the term ‘procedure established by law’ was fairly limited to *first*, the socio-political context of India, *second*, in limiting the power of judiciary and *third*, the mere transplanted of Japanese law into the Indian law. Now we will look how the Supreme court of India, interpreted the above term for the first time in the year 1950.

II. AK GOPALAN - ADHERING TO ORIGINALIST INTERPRETATION

*AK Gopalan vs State of Madras*⁹ was the first case in which the Supreme Court of India was called upon to determine the scope of Article 21 of the Indian Constitution. In this case, an order of detention was served to the petitioner under section 3(1) of the Preventive Detention Act 1950. The said government order was affirmed by the Governor of Madras on the grounds that it was necessary to prevent the petitioner from acting in any manner prejudicial to the state interest. The petitioner challenged the legality of the order by filing a writ petition under Article 32 of the Indian Constitution. In the petition he contended that the government order violates his fundamental rights under Articles 13, 19 and 21.

The court while adjudicating upon the personal liberty of an individual, gave an ‘*originalist interpretation*’ to Article 21 of the Constitution. It stated that ‘*law*’ under Article 21 means a law passed by the legislature, and the term ‘procedure established by law’ does not have to be in concurrence with the principles of natural justice. In the words of Patanjali Sastri J., ‘*law under Article 21 is a state made or positive law*’¹⁰. *Second*, the court in this case held that the scope and object of Articles 19 and 21 are different, and they function independent of each other. In other words, it stated that Articles 19 and 21 are mutually exclusive of each other¹¹. Elaborating on the same, Justice Kania stated the following- - *first*, Article 19 is applicable only

Constitution, Manupatra (March 10, 2023, 5:48 PM)
http://docs.manupatra.in/newslines/articles/Upload/04244C3D-E95A-4B0B-882F-6E6202ED3E73.3-b_constitution.pdf

⁸ Mr. A.H. Hawaldar, *EVOLUTION OF DUE PROCESS IN INDIA*, Bharati Law Review, (March 10, 2023, 6:48 PM), <http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf>

⁹ Ibid. [1]

¹⁰Ibid. [1], para 171,

¹¹Ibid. [8], at 25

to Indian citizens, whereas Article 21 is applicable to all persons. *Second*, that the restriction on the law-making power of the state is well prescribed in Article 19, whereas there is no such embargo on the power of the state under Article 21. *Third*, that Article 19 at its core dealt with substantive rights whereas Article 21 dealt with procedural rights¹². Substituting the term ‘due process of law’ with ‘procedure established by law’ clearly showed the intent of the constitution makers to include ‘any’ sort of procedure laid down by the legislature.¹³

III. RISE OF PURPOSIVE INTERPRETATION

A. The rule of Purposive interpretation

A textual approach to interpretation helps us to understand the will and intention of the constitutional makers at the time of its making. But it fails to answer the following question: ‘can a text formulated 75 years ago cater to the needs of the present generation? This quandary is clarified by Aahron Barak, who is one of the pioneers of purposive interpretation. According to him, the object of purposive interpretation is to strike a balance between the subjective and objective purpose of the law. He states that the subjective purpose of law is the intent of the Constitutional makers, whereas the objective purpose is the intent of the Constitutional system.¹⁴

The importance of this approach is to uphold the idea that the Constitution is a living document and not a ‘frozen’ one, limited by its past. Such an idea was reiterated by the Supreme court of India in the case of *State of W.B v. Anwar Ali Sarkar*.¹⁵ While concurring, Vivian Bose J stated: “*The provisions of the Constitution are not just dull lifeless words static and hidebound as in some mummified manuscripts, but living flames intended to give life intended to give life to great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present*”¹⁶. Another role of purposive interpretation is to ensure that the purpose of the constitutional text is fully achieved.¹⁷ In India, such purpose of the Constitutional text is enshrined in its preamble. Therefore, the court in the case of *S. Krishnan v. State of Madras*¹⁸, while upholding the idea of purposive interpretation held that whenever there is an ambiguity or doubt about the application of any fundamental rights, the court should ponder upon the

¹²Ibid. [1], para 17

¹³ Raushan, Comparative Analysis of Due Process of Law: USA & India, IJHSSI (March 07, 2023, 4:48 PM) [https://www.ijhssi.org/papers/vol10\(4\)/Ser-2/I1004024959.pdf](https://www.ijhssi.org/papers/vol10(4)/Ser-2/I1004024959.pdf)

¹⁴ Arvind P. Datar and Rahul Unnikrishnan, *INTERPRETATION OF CONSTITUTIONS*, JSTOR (March 10, 2023, 6:42 PM), <https://www.jstor.org/stable/10.2307/26748049>

¹⁵ Anwar Ali Sarkar v. State of UP, AIR 1952 SC 75 (India)

¹⁶ Ibid, para 53

¹⁷ Dr. Chanjana Elsa Philip & Mr. Sreenidhi K.R., *Constitutional Interpretation: A Study in Complexity*, SSRN (March 10, 2023, 7:48 PM) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4307506

¹⁸ S. Krishnan v. State of Madras, AIR 1951 SC 301

Preamble of the Constitution to find its answer.

B. Increasing Dominance of the Purposive Interpretation in the Indian context

1) The Maneka Gandhi case

In *Maneka Gandhi vs Union of India*¹⁹ the court gave a new life to Article 21 by adopting a purposive stance to constitutional interpretation. Out differently, as compared to the plain and textual meaning in the Gopalan case, the SC adopted a purposive and liberal interpretation in Maneka Gandhi case. The facts of the case were, that the petitioner's passport was impounded on 1st June 1976, "in public interest" by an order dated 2nd July 1977. After the Government of India denied "in the interests of general public" to furnish her with the reasons for its decision, she filed a writ petition under Article 32 of the Constitution contesting the order on the grounds that it violated Articles 14, 19 and 21 of the Constitution. The respondent in the counter affidavit stated that the petitioner's passport was impounded because her presence was likely to be required in connection with the proceedings before a Commission of Inquiry, which was then functioning.

In the light of the Maneka Gandhi case, the dissent of Justice Fazl Ali in the Gopalan case becomes of significant importance, for the following reasons. *First*, in his dissenting opinion he stated that, the word 'law' under Article 21 is not limited to the state made or positive law. Rather it included the principles of natural justice within its ambit.²⁰ *Second*, in the context of Article 19, 21 and 22. While adjudicating upon the scope of preventive detention under Article 22, he stated that Article 22 in its functioning does not exclude the operation of the other two articles.²¹ Thus, the court in Maneka Gandhi overruled the interpretation of the term 'procedure established by law' given by the majority in the Gopalan case. To the contrary it upheld the dissenting opinion of Justice Fazal Ali. It stated that, a law passed by the parliament should pass the 'test of reasonableness and fairness' in order to be a valid 'law' under Article 21.²² In this case the 'procedure' under the Passports Act was considered to be arbitrary and oppressive. More importantly, the court in this case held that fundamental rights are not mutually exclusive of each other. And thus, a law made under Article 21 must also full fill the requirements made under Article 19.²³ The above stance taken by the court upholds the idea that, if a law violates

¹⁹ Ibid. [2]

²⁰ Ibid. [1], para 130

²¹ Ibid. [1], para 132

²² Virendra Kumar, *BASIC STRUCTURE OF THE INDIAN CONSTITUTION: DOCTRINE OF CONSTITUTIONALLY CONTROLLED GOVERNANCE [From Kesavananda Bharati to I.R. Coelho]*, JSTOR (March 10, 2023, 6:44 PM), <https://www.jstor.org/stable/43952120>

²³ Ibid. [2], para 5

the right to free speech of an individual, it can simultaneously violate the liberty of such individual. Therefore, both Articles 19 and 21 are not restricted in watertight compartments under the Indian Constitution²⁴.

The Maneka Gandhi case is significant because it upholds the objective purpose of law as nuanced by Barak in the Indian Constitution. It achieves such goal by giving a wider interpretation to Article 21, thus including a variety of rights under its ambit.

2) Post Maneka Gandhi Approach

After the Maneka Gandhi case, the court at various instances has given wider interpretation to the Constitutional text. For instance, the court in the case of *State of Maharashtra v. Chandrabhan*²⁵ held that the subsistence amount of rs 1, under Rule 151(1)(ii)(b) of the Bombay Civil Services Act, to a civil servant whose matter was pending trial before the court was unreasonable and violative of Article 21 and 14 of the Constitution. Like the Maneka Gandhi case, the court in this case applied the principles of natural justice and struck down the proviso under the said rule. It stated that such an allowance of rs 1 is ludicrous, as even a civil servant who is on suspension requires a minimal level of subsistence amount to take care of his family. In the case of *I.R Coelho v. State of Tamil Nadu*²⁶, the court gave a wide and purposive interpretation to Article 19(1)(a) of the Constitution. It stated that, although the right to freedom of press has been nowhere specifically guaranteed under Article 19(1)(a), but it has been surely read as a part of it²⁷. Interestingly, the court in the case of *Francis Coralie v. Delhi*²⁸, held that the term ‘life’ under Article 21 of the Constitution means something more than mere animal like existence. It includes all those rights which are necessary to live life with human dignity. In the case of *Sunil Batra v. Delhi Administration*²⁹, the court held that although, the Indian Constitution does not have a ‘due process’ clause. But after Maneka Gandhi case, it is clear, the term ‘procedure established by law’, includes the counterparts of the American ‘due process’ clause which takes into account the principles of natural justice as a qualification to a state made law.

3) Criminal law system- Post Maneka Gandhi

The criminal justice system in India has been has taken a vital shift after the decision in Maneka Gandhi case. The courts have come up with new forms of interpretations to protect the rights of

²⁴ K.S. Puttaswamy and Another vs. Union of India and Others, (2017) 10 SCC 1, para 291

²⁵ State of Maharashtra v. Chandrabhan, (1983) 3 SCC 387 (India)

²⁶ I.R Coleho v. State of TN, (2007) 2 SCC 1 (India)

²⁷ Ibid, para 106

²⁸ Francis Coralie v Delhi, AIR 1981 SC 746 (India)

²⁹ Sunil Batra v. Delhi Administration, AIR 1798 SC 1675 (India)

the undertrials, administration in jail system and protection against police torture.

In the case of *Prem Shankar Shukla v. Delhi Administration*³⁰, the petitioner was a prisoner lodged in Tihar Jail. He sent a telegram stating that handcuffs were forced on him despite courts order. The contention of the petitioner was that, as an under-trial prisoner he and other prisoner like him had been handcuffed routinely while going from prison to the court. Such an act was humiliating, inhumane and vulgar for the petitioner and other co-accused. The court in this case held that, the rule which requires an undertrial accused of a non-bailable offence to be routinely handcuffed goes against Article 21 of the Constitution. Also, in the case of *Arvinder Singh Bagga v. State of UP*³¹, the court gave a wide interpretation to the term 'torture' and held that it includes both mental as well psychological torture. In the case of *Sunil Batra*³², the petitioner was kept in solitary confinement on the charges of murder and robbery. The court in this case held that a 'law' should be just and fair. Moreover, the said law should not be arbitrary in nature. If all these requirements are not met, it would be considered that the procedure under Article 21 of the Constitution has not been followed.

IV. CONCLUSION

The idea of Fundamental rights is to protect the interest of citizens from the arbitrary powers/acts of the state. Such purpose cannot be achieved by giving a narrow and literal interpretation to the Constitutional text. Therefore, the transformative approach from originalism to purposive interpretation gives the judiciary power to understand the Constitutional intent, as opposite from understanding the will of its makers. Thus, restrictive reading of the Constitution is a thing of the past. Taking the Constitution as a 'living document' becomes essential to cater to the needs of the present generation, which the makers of the Constitution might not have been able to assess at the time of its making.

³⁰ Prem Shankar Shukla v. Delhi Administration, AIR 1980 SC 1535 (India)

³¹ Arvinder Singh Bagga v. State of UP, AIR 1995 SC 117, para 4

³² Ibid. [29]