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THE ART OF JUDICIAL ADJUDICATION: A JUDGE'S CRAFT

- Raja Faisal Zahoor¹ & Shahber Ayaz²

ABSTRACT

This paper seeks to explore the important aspect of modern constitutional theory namely constitutional interpretation. The task of interpreting an instrument as dynamic as the constitution assumes great importance in a democracy. The constitutional courts are entrusted with the critical task of expounding the provisions of the constitution and further while carrying out this essential function, they are duty bound to ensure and preserve the rights and liberties of the citizens without disturbing the very fundamental principles which form the foundational base of the constitution.

INTRODUCTION

“The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.”

- Chief Justice Dickson³

¹ Raja Faisal Zahoor {LL.M (Const. Law), PGDRD}, Advocate, High Court of J&K and Ladakh.

² Shahber Ayaz (K.C.S), Judicial Officer.

³ Hunter v. Southam Inc., (1984) 2 SCR 145 (Chief Justice Dickson of the Canadian Supreme Court)

Constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of the normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the appearance of the state and its aspirations throughout history. It determines the state's fundamental political views. It lays the foundation for its social values.

In the words of **Jeffrey Goldsworthy**, the provisions of national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that judges must decide. In addition, they sometimes seem inadequate to deal appropriately with developments that threaten principles the constitution was intended to safeguard, developments that its founders either failed or were unable to anticipate.

Constitution is basic law of the land. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens. A constitution is the legal and moral framework setting out these powers and their limitations. This framework must represent the will of the people, and should therefore have been arrived at through consensus. There are three main organs of government namely legislature, executive and judiciary. All three are assigned different functions and one cannot encroach upon each other's functions. In case government arbitrarily uses its powers limitations can be imposed upon the same for which Judiciary has a vital role to play by practicing constitutionalism.

The Supreme Court in **S.R.Bomai vs. Union of India**⁴ held that,

Constitutional Adjudication is like no other decision making. There is a moral dimension to every major constitutional case, the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities and because of the good sense of the judges when interpreting it. It is that most informed freedom of action of the judges that helps to preserve and protect our basic document of governance.

METHODS TO CONSTITUTIONAL INTERPRETATION

- Textualism (Fidelity to text and Fidelity to Original Intent)
- Purposive Interpretation (Non-Textualism)

⁴ AIR 1994 SC 1918.

TEXTUALISM (TEXTUAL INTERPRETATION)

In the words of Chief Justice Marshall,⁵

“Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provisions to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.”

In its early years, the Supreme Court of India adopted a textualist approach, focusing on the plain meaning of the words used in the Constitution. **A.K.Gopalan Vs State of Madras**⁶ was one of the early decisions in which the court was called upon to interpret the fundamental rights under Part III.

In **A.K. Gopalan**, the Supreme Court gave a narrow and literal interpretation to Article 21 of the Indian Constitution and refused to infuse the concept of “procedure established by law” with the principles of natural justice and adopted the black letter approach.

In the words of **Fali S. Nariman**, the decision in **A.K.Gopalan’s** Case considerably inhibited judicial protection of human rights in the first two decades of the working of the constitution. It took the Supreme Court more than 25 years to free itself from the shackles of **Gopalan**.

The judicial uncertainty on the interpretation of the term “compensation” as contained in the erstwhile Article 31 of the Constitution of India marked another episode of textualist interpretation by the Supreme Court. In 1954,⁷ the Supreme Court held that compensation payable must be a just equivalent of what the owner is deprived of. It rejected the plea that compensation was not used in a rigid sense implying equivalence in value but referred to what the legislature might think was a proper indemnity for the loss sustained by the owner. It was held that the basic requirement was of full indemnification of the expropriated owner and within this limit, the legislature had free play to determine what principles will guide the determination of the amount payable. This

⁵ *Sturges v. Crowninshield*, 4 L Ed 529 (1819)

⁶ AIR 1950 SC 27.

⁷ *State of W.B. v. Bela Banerjee*, AIR 1954 SC 170.

decision led to the Constitution (Fourth Amendment) Act, 1955 whereby the issue of compensation was put beyond the scope of judicial review.

In **P. Vajravelu Mudaliar**,⁸ despite the aforementioned amendment, it was held that the provision for compensation, the laying down of principles for determining compensation, or the laying down of compensation was a necessary condition for making laws relating to acquisition. Although the adequacy of compensation was excluded, the law laid down for determining compensation would be struck down if found to be irrelevant with reference to the value of the property or if the compensation it provided for was illusory.

Subsequently, in another case, it was held that the observations in *P. Vajravelu Mudaliar* were *obiter dicta* and not binding.⁹ In *Shantilal*, the Supreme Court held that the compensation could not be challenged on the ground that the just equivalent of what the owner had been deprived of was not provided for. Ironically, within a year, the Supreme Court did a judicial somersault and held that compensation must be a just equivalent.¹⁰

Another area where the Supreme Court had used textualist interpretation was in the interpretation of the word “law” under Article 13(2) *vis-à-vis* the Parliament’s power to amend the Constitution under Article 368. The Constitution was indeed silent on whether this word under Article 13(2) includes a constitutional amendment or not.

In 1951, the Supreme Court made a distinction between ordinary legislative power and the Constituent power of the Parliament. The Constitution (First Amendment) Act, 1951 was challenged but it was held that the word “law” in Article 13(2) would not include an amendment to the Constitution which was made in exercise of the constituent power of the Parliament. It was held that Article 368 empowered Parliament to amend the Constitution without any exception.¹¹

This view was later upheld by the Supreme Court in 1965 by holding that a constitutional amendment could even take away or abridge fundamental rights.¹² However, it must be noted that two years later, in 1967, the Supreme Court, *vide* a bench of 11 judges, took a diametrically opposite

⁸ *P. Vajravelu Mudaliar v. Collector (LA)*, AIR 1965 SC 1017.

⁹ *State of Gujarat v. Shantilal Mangaldas*, (1969) 1 SCC 509 : AIR 1969 SC 634.

¹⁰ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564.

¹¹ *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

¹² *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

view and held that the power under Article 368 could not abridge or take away any of the fundamental rights in Part III of the Indian Constitution.¹³

PURPOSIVE INTERPRETATION

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.

*M. Nagaraj v. Union of India*¹⁴

The word “purpose” in the interpretation of legal texts is not new to common law tradition.¹⁵ It often appears alongside or instead of the word “intent.” In contrast, the phrase “purposive interpretation” (or “purposive construction”) is relatively new, apparently surfacing in common law traditions at the end of the 1960s and beginning of the 1970s. It appeared simultaneously in American, English, Canadian, Australian, and New Zealand common law.

In the words of Aharon Barak, purposive interpretation demonstrates its sensitivity to the uniqueness of a constitution in the balance it strikes between subjective purpose i.e., the intent of the authors of the Constitution, and objective purpose i.e., the intent of the system.

Barak cites an example of Canadian Court by illustrating a case *R. v. Big M Drug Mart Ltd.*, which used the doctrine of purposive interpretation to observe that the meaning of a right or freedom under the Charter of Rights and Freedoms must be ascertained by an analysis of the purpose of such a guarantee.

¹³ C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.

¹⁴ (2006) 8 SCC 212

¹⁵ Aharon Barak, Purposive Interpretation In Law, Page No. 85.

Purposive interpretation can thus be a perfect tool of interpretation for an expansive interpretation of rights owing to the felt necessities of time but at the same time without deviating from the core principles that shape a constitution.

Purposive interpretation is based on three components: language, purpose, and discretion. Language determines the range of semantic possibilities within which the interpreter acts as he or she chooses the legal meaning of the text from different possibilities, explicit or implied.

The purposive component is essential in the interpretation of a legal text. It implies “the values, goals, interests, policies, and aims that the text is designed to actualize”. Finally, Barak recognizes the indispensability of interpretive discretion in determining the ultimate purpose of the norm: “It is the choice that purposive interpretation gives the judge from among a few interpretive possibilities, all of which are legal”, in order “to formulate the purpose at the core of the text”.

Arvind Datar recites that restricted reading of the constitution is a thing of the past. Post Maneka Gandhi, all judges have been using the purposive tool to interpret the constitution. In ***Maneka Gandhiv. Union of India***¹⁶ it was held by the majority that the procedure contemplated by Article 21 must be “right and just and fair and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. Right to life enshrined in Article 21 means right to have something more than survival and not mere existence or animal existence. It includes all those aspects of life which go to make a man's life meaningful, complete and worth living.

JUDICIARY AND PURPOSIVE INTERPRETATION

Purposive interpretation was employed as the mischief rule, i.e., to be used by the courts to understand the intent of the Parliament when the statute to be interpreted was meant to remedy certain mischief. The judgment of the nine-judge bench on right to privacy is an example that can illustrate the tussle of the Supreme Court with literal and purposive interpretation when deciding on the status of right to privacy as in the Constitution of India.

In India, Supreme Court had in the case of **Tirath Singh V. Bachittar Singh**, (1955 AIR 830) approved and adopted the purposive rule of approach.

¹⁶ AIR 1978 SC 597

In the words of Arvind Datar “**Kesvananda Bharti**¹⁷ is a classic example of Aharon Barak’s notion of purposive interpretation with respect to the balance it strikes between subjective purpose (intention of the authors of the constitution) and objective purpose (the intent of the system).

In **Navtej Johar & Ors. v. Union of India**¹⁸, the Supreme Court declared Section 377 of the Indian Penal Code to be unconstitutional as far as it penalizes consensual sexual relationships between same-sex adults. The judgment has, in effect, decriminalized homosexuality in India; by reading down provisions of an archaic law introduced in 1860, and upheld the constitutional rights of all citizens, irrespective of their gender identity or sexual orientation.

Most importantly it was also ruled that the Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

In **Joseph Shine v. Union of India**¹⁹, the Supreme Court held Section 497 of IPC and Section 198 (2) of Cr.P.C to be violative of Articles 14, 15(1) and 21 and therefore unconstitutional. The Supreme Court struck down Section 497, IPC that criminalised adultery for man in case of absence of consent but not for woman. This archaic law was struck down as it was held to be discriminatory, arbitrary and violative of a woman's dignity and agency.

Justice Chandrachud further ordains that the right to sexual autonomy and privacy have been granted the stature of a constitutional right.... a provision of law must not be read viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. The true purpose of affirmative action is to uplift and empower then in socio-economic spheres.

Hadiya Case²⁰, a non-Muslim woman converted to Islam and married a Muslim man. Earlier the Kerala High Court, had annulled Hadiya's marriage on imaginary apprehensions, the Court converted a simple matter of annulment of an illegal marriage into alleged Islamic propaganda and Love Jihad on basis of apprehensions crediting the political propaganda. On 8 March 2018, Hadiya's marriage was restored by the Supreme Court; by doing so the court delivered homilies to

¹⁷ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

¹⁸ (2018) 10 SCC 1

¹⁹ (2018) 7 SCC 192

²⁰ Shafin Jahan v. Asokan CRIMINAL APPEAL NO.366 OF 2018(Arising out of S.L.P.(Crl.) No.5777/2017)

the fundamental right to choose a religion and marriage partner as already discussed in Vahini's Case.

In **Shakti Vahini v. Union of India**²¹, the court held that 'Right to Choose Life Partner Is a Fundamental Right, Consent of Family, Community is not essential for Marriage between two Adults'. The Court also struck down social limitations against marital unions through khap panchayats and held that if it is prohibited in law, law shall take note of it when the courts are approached and no one has the authority to take law into own hands. Thus, Judiciary demonstrated the manner in which it can act as a catalyst for transformative Constitutionalism.

State Of Maharashtra & Anr v. Indian Hotel & Restaurants Assn. & others etc,²² the case was before Supreme Court against ban on dance bars by Government of Maharashtra in the name of social morality. The then Chief Justice of India Altamas Kabir and Justice SS Nijjar sympathetically commented on the plight of the dancers: "Depriving a person of their right to dance and earn a livelihood violated the fundamental right to freedom of speech and expression and most importantly, violated Article 21, the right to life, which includes the right to livelihood. The courts cannot endorse such blatant injustice towards women who are at the lowest rung of the dance bar industry... Even a bar dancer has to satisfy her hunger, provide for her family and meet her day-to-day expenses." The Supreme Court also struck down a condition by which dance bars could not be within the radius of one km from an educational institution or a religious place as unreasonable.

National Legal Service Auth vs. Union of India & Ors,²³ the Supreme Court of India allowed a petition on behalf of the country's transgender community and held that the right to express one's identity in a non-binary gender was an essential part of freedom of expression. It directed the government to give legal recognition to the third gender, such that individuals would be able to identify themselves as male, female or third gender. It also ordered the government to take necessary steps to remove the social stigma, promote transgender-specific health programs, and grant them equal legal protection.

²¹ (2018) 7 SCC 192

²² CIVIL APPEAL NO.5504 OF 2013

²³ Writ Petition (CIVIL) NO.400 OF 2012

CONCLUSION

Prima facie and as a general rule the interpretation of the constitution is based on the status of the judge as an interpreter of the constitution. A judge who interprets the constitution is a partner to the authors of the constitution. The authors establish the text; the judge determines its meaning. The authors formulate a will that they wish to realize; the judge locates this will within the larger picture of the constitution's role in modern life. The judge must ensure the continuity of the constitution. He must strike a balance between the will of the authors of the constitution and the fundamental values of those living under it.