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The 'Human Factor': The Role of Interpretative Technique in the Evolution of Constitutional Due Process

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This study compares the due process jurisprudence of the US and Indian Constitutions, arguing that the main factor in the evolution of due process is the interpretative techniques chosen by judges, (regardless of the characteristics of each Constitution itself). The argument presented is that a non-textual approach coupled with a focus on the principles of natural justice ultimately leads to a wider conception of due process. This thesis is also reinforced through this paper's ability to compare landmark Supreme Court cases and chart the evolution of due process in three historical phases. Thus, this paper concludes that constitutional due process is a highly malleable concept, which is not reliant upon the text of constitutional provisions.

Introduction

The Constitutions of the United States of America (US) and India, which were written more than one hundred fifty years apart, differ wildly in many respects from each other. The Indian Constitution is the world's longest constitutional document featuring a dizzying level of detail – especially in comparison to the short and general nature of the US Constitution. Despite these differences, the Indian Constitution shares many traits with its US counterpart, perhaps more so than with other Constitutions created in the post-colonial wave in the mid-20th century.[2] The Indian Constitution is widely regarded as an example of a successful and democratic post-colonial Constitution, enabling the world's most populous federation to achieve, in the words of Jawaharlal Nehru: 'national unity and democracy'.[3] This can be said to demonstrate that the Indian Constitution closely resembles the first wave of 'revolutionary'[4] constitutions and their model of liberal democracy. Notably, the US Constitution belongs to this group, and these revolutionary constitutions share a focus on division of power and representative government.

[1] The author wishes to thank Dr Nimer Sultany and Dr Mayur Suresh for their guidance and feedback, as well as Kaja Vassbotten, BSc, for her invaluable assistance.

[2] Hanna Lerner, 'The Indian Founding, a Comparative Perspective', in *The Oxford Handbook of the Indian Constitution* (Choudhry S, Khosla M, Mehta P Eds, OUP 2016) 57.

[3] ibid 58.

[4] ibid 57.

All constitutions, whatever their democratic ideals (*vel non*), share certain characteristics of *generality*, *fundamentality* and *permanency*.[5] But to what extent do these characteristics hold up under scrutiny? This paper aims to compare landmark Supreme Court cases in India and the US in order to demonstrate that judicial interpretation has altered constitutional due process rights to such an extent that the constitutional texts are nearly irrelevant to the modern-day rights that they accord.
In particular, this paper argues that the transformation of due process rights under the constitutional frameworks of the US and India have occurred in a similar fashion despite their dissimilar starting points. It is posited that this is best explained by the creation of an environment in which a certain degree of judicial creativity in constitutional interpretation is encouraged.

The goal of this paper is not simply to show that the meaning of constitutions changes with precedent, which is hardly a radical idea, but rather to demonstrate that the ultimate rights and processes are not dependent upon the text and nature of constitutions. Instead, they depend upon the techniques of judicial interpretation employed in discerning these rights and processes. Through a historical comparison of due process jurisprudence in both jurisdictions, the paper concludes that: (1) The current due process doctrine is not reflective of the original constitutional provisions and the original intent of the framers, insofar as this intent can be clearly ascertained. (2) This holds true regardless of the nature and character of the relevant Constitution. In fact, the widely different Indian and US Constitutions exhibit the same pattern of change in due process jurisprudence over time. (3) The combination of a non-textual approach with a focus on the principles of natural justice creates a 'wide' due process, encompassing a multitude of rights, which are not always clearly defined. It is also, to a certain extent, a normative tool in the court's belt. This holds especially true in recent years, where due process in India and the US has developed into substantive due process. Finally, the paper also proposes that this is not an ideal situation, as it renders due process more subject to the individual judicial preference of judges than would otherwise be the case.

1. Methodology

In aiming to show that judicial interpretation has radically altered due process rights, this paper will employ what has been characterised by Ran Hirschl as 'the prototypical cases principle'.[6] This consists of comparing legal concepts, systems or characteristics by selecting cases that are deemed to be the most representative of the objects of comparison. This paper takes applies this approach by going through seminal case law in the Supreme Courts of the US and India addressing with the scope and character of

[5] M Elliott and R Thomas, *Public Law* (2nd edn OUP 2014) 9.
[6] R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 52(1) The American Journal of Comparative Law 125, 142.

due process rights, carefully selecting cases in which authoritative and representative interpretations were given.

Prior to delving into this inquiry, it is worth noting that the danger in employing this method is oversimplifying a complex reality in the hunt for systematic comparison. In an attempt to remedy this, this paper also draws upon secondary sources on both the US and Indian legal systems. This theoretical grounding is meant to compliment the comparative approach taken.

The paper then divides the cases into three phases, in which the judicial approach and results differs: First, the textualism and originalism phase is explored. In this phase, the prevalent techniques of judicial interpretation were those of textualism and originalism. Most judges took the view that constitutional provisions should be interpreted narrowly with strict regard to their text, and/or with adherence to the original intent of the constitutional framers. Second, the structuralism and ethical interpretation phase, in which the interpretation of constitutional due process rights begins to change character. This change in prevalent techniques of interpretation meant that judges increasingly interpreted the constitutional provisions with regard to the overall structure of the constitutions (structuralism). This approach was also coupled with ethical interpretation – interpretive techniques with a regard for moral considerations. This method, by its very nature, is substantive. Third, the modern due process phase, in which the interpretative technique chosen varies. The analysis of this phase demonstrates that the judicial interpretation employed in both cases was highly engaged with the substantive content of the law, and that the resulting conceptions of due process contains a normative component that bears little resemblance to the original constitutional provisions in both cases. It is important to note that these periods are not clear-cut periods in which all judges employed the same interpretation, but rather theoretical approximations aimed at enabling coherent analysis. Countless dissents and judgments in all three periods demonstrate this.

2. Constitutional Interpretation and Technique

In his study of the Indian constitution, Chintan Chandrachud lists six approaches to constitutional interpretation. These are: (1) The historical/originalist; (2) the textual; (3) the prudential; (4) the doctrinal; (5) the structural; and (6) the ethical approach.[7] Chandrachud argues that the evolution of the Indian Constitution can be divided into three phases, which are the textualist phase, the structure-dominated eclecticism phase, and what he terms the 'Panchayati eclecticism' phase.[8] His central thesis is that constitutional interpretation is a main factor for constitutional change, is something that this paper agrees with. Furthermore, Chandrachud's division of the evolution of

[7] C Chandrachud, 'Constitutional Interpretation', in *The Oxford Handbook to the Indian Constitution* (Choudhry S, Khosla M, Mehta P Eds., OUP 2016) 75.
[8] ibid 77; 80; 86.

constitutional interpretation in India has been borrowed here, in a modified sense, and applied to the US history of constitutional interpretation as well. This in an attempt to demonstrate that such evolution is not unique to India, and that it is applicable regardless of the nature of the Constitution being interpreted.

In assessing the judgments, it is important to keep in mind that judges rarely employ only one technique. Most judgments will contain elements of many (if not all) approaches. Lastly, this paper acknowledges the fact that in both jurisdictions analysed, the phases are not representative of all cases involving constitutional interpretation within that period – they are simply theoretical approximations, employed to aid in establishing a broad understanding of constitutional interpretation as the mechanism for constitutional change.

3. On the Nature of the Constitutions

This paper's underlying assumption is that the notion that the due process incorporated in the US Constitution, through Amendments 5 and 14, was relatively narrow at first. The analysis given by Raoul Berger in his work '*Government by Judiciary: The Transformation of the Fourteenth Amendment*', in which he argues that the 14th Amendment (and by extension, the older Fifth Amendment) was simply a procedural safeguard to be used against courts,[9] is a convincing one, affirmed by early 14th Amendment judgments, such as *Hurtado v People of California*. It is therefore employed here as the starting point for our comparison.

As for the Indian 'procedure established by law', Article 21 of that Constitution, in its original scope was also fairly narrow. The debate amongst the Indian framers as to whether the US conception of due process should be incorporated or dismissed in favour of a narrower approach is concrete evidence of their original intention. Kania CJ's judgment in *AK Gopalan* makes the original conception of procedure established by law very clear, as he explicitly contrasts it with the US due process.[10] The basis of this comparison is made clear by Kania CJ's statement in *AK Gopalan*, to the effect that the Indian and the US Constitutions differ fundamentally, and that this should guide the approach of judges when interpreting them.[11] The crux of his argument was that the US Constitution was intended to be the 'basement', upon which should be added 'walls and windows, wings and gables, pillar and porches to make a rambling structure which is not yet finished',[12] whereas the Indian Constitution provided '(…) in minute details the legislative powers of the Parliament and the State Legislatures

[9] R Berger, *Government by Judiciary, the Transformation of the Fourteenth Amendment* (2nd edn Liberty Fund Inc, Indianapolis 1997) 221-244.
[10] *AK Gopalan v The State of Madras* 1950 SCR 88, 104 onwards, per Kania CJ.
[11] ibid.
[12] ibid, Kania CJ citing Munro *The Government of the United States* (5th edn) 53.

(…) (and the same level of detail as regards) the judiciary, finance, trade, commerce and services'.[13]

In contrast to Kania CJ's opinion, this study shows a relatively similar evolution in interpretation in the two jurisdictions (though obviously not based on the same amount of years – the US Constitution being 161 years older than its Indian counterpart), in which the common denominator are the changes in interpretative technique employed, and not the level of detail in the document or the difficulty of amendment. While it has for a long time been accepted by most that judicial interpretation plays a significant role in US Constitutional evolution,[14] it is still common both to perceive constitutional law as something relatively fixed, and, importantly, as something that is generally not a victim of the ideology or morals of individual judges.[15] This paper contests that view as it regards due process, and by extension it will be true for similar constitutional rights and privileges, though that is outside the scope of this paper.

Nonetheless, Professor Sunstein introduces his work on the evolution of the US Constitution by discussing the stark difference of opinion between James Madison and Thomas Jefferson. Recalling that Madison was of the opinion that the Constitution should be of a firm and relatively unchanging character – and branding this the prevailing perception of constitutional reality in US society – he contrasts this with Jefferson's view that the Constitution should change with each generation. 'The dead have no rights', [16] Jefferson wrote, making clear his view on constitutional entrenchment.

Professor Sunstein maintains that, while Madison's view is the formally applied view, the US constitutional text having been amended very rarely, Jefferson's view is the constitutional reality due to social practices and interpretations.[17] Though Sunstein's main focus is upon other factors than judicial interpretation, he concedes that it plays a certain part in the continuing evolution of the Constitution – what he terms 'Jefferson's revenge'.[18] The anecdote above also serves to remind jurists that the founders of constitutions rarely agree on every important aspect of a constitution, be it the substantive content or the tradition in which it should be interpreted. This undoubtedly complicates the process of adopting a well-researched and justifiable originalist position. Here, it is worth emphasising that what Kania CJ saw as an undisputable fact of the US Constitution in 1950 – that creative interpretation is

[13] ibid.

[14] D A Strauss, 'Common law constitutionalism', (1996) 63 U Chi L Rev 877.

[15] C R Sunstein, *A Constitution of Many Minds* (Princeton, Princeton University Press 2009) 2.

[16] Letter, Thomas Jefferson to Samuel Kercheval (12 June 1816).
<http://teachingamericanhistory.org/library/index.asp?document=459>, accessed 3 April 2018.

[17] Sunstein (n 15) 3.

[18] ibid.

integral to US constitutional practice and thought - has not always been so, and is decidedly not seen as such by the many originalist and textualist jurists in modern US society. A prominent example is the late Associate Justice of the Supreme Court of the United States Antonin Scalia.[19] This comparison of the views of prominent judges in India and the US on the nature of the US Constitution highlights the weakness of such an argument. In dispelling the theory that the particular and undisputable nature of a Constitution is the main reason for its evolution, an altogether more human factor must be accounted for, namely the interpretative techniques employed by the judges themselves.

4. The Relevant Constitutional Provisions

At this stage it becomes pertinent to present the objects of comparison – the Due Process Provisions of, respectively, the Indian and the US Constitutions. These are Article 21 of the Indian Constitution and the 14th Amendment in Section 1 of the US Constitution, and these provisions share certain similarities as regards content and choice of words. It is worth nothing the difference between 'procedure established by law' and 'due process of law'.

The Indian Constitution

The key constitutional provision for this paper is Article 21 of the Indian Constitution, which reads 'No person shall be deprived of his life or personal liberty except according to a *procedure established by law*'.[20] Together with 24 other articles, it forms Part III of the Constitution, of which several articles are mentioned throughout this paper. Part III of the Indian Constitution comprises the fundamental rights and civil liberties accorded by the Constitution, comprising such rights and liberties as the right to equality, freedom of religion and the various constitutional remedies for the enforcement of fundamental rights. Here it is crucial to look at *Maneka Gandhi v Union of India* (detailed in Section 4 of this paper) as this demonstrates the interrelationship of these rights as a coherent bill of rights.

The United States Constitution

The due process provisions of the US Constitution are the Fifth Amendment and the 14th Amendment, Section 1. With regard to the meaning of due process within these amendments, it is the same. As famously stated by Justice Frankfurter in *Malinski v. New York*, 'the Due Process Clause of the Fourteenth Amendment has the same meaning (as the Fifth Amendment). To suppose that "due process of law" meant one

[19] See his judgments in *Bush v. Gore* 531 U.S. 98 (2000); *District of Columbia v. Heller* 554 U.S. 570 (2008); and *Crawford v. Washington* 541 U.S. 36 (2004) for notable examples.
[20] Emphasis added.

thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection'. [21] This view has been confirmed in several Supreme Court judgments.[22] The key difference between the two is that the Fifth Amendment applies only to federal law, whereas the 14th Amendment applies only to state law. It is the latter of these with which this paper is concerned, as the case law that lends itself best to this comparative study discusses the 14th Amendment, though the evolution of due process necessarily affects the Amendments equally. The text of the 14th Amendment, Section 1 reads:

> All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without *due process of law*;[23] nor deny to any person within its jurisdiction the equal protection of the laws.

5. *Phase 1 – Textualism and Originalism*

Despite the fact that the landmark cases of *Ak Gopalan v State of Madras*, and *Hurtado v People of California* were decided in altogether different centuries, there is a strong justification for placing them in the same phase of constitutional evolution, and indeed for comparing them. Namely, they were both decided shortly after the entry into force of the constitutional provisions they interpret. The considerable difference between the original conceptions of due process and legal procedure as explicitly acknowledged by the court in *AK Gopalan* will also serve to strengthen this paper's thesis. The main analysis will be done by comparing this case to the approach taken by the US Supreme Court in *Hurtado v People of California*.

AK Gopalan v State of Madras

The case of *AK Gopalan* was brought in the same year as the Indian Constitution came into force, in 1950. The appellant was communist politician AK Gopalan, who challenged his detention under the Preventive Detention Act 1950 (PDA 1950). He did so on the grounds that it, inter alia, was contradictory to Article 21 of the Constitution, because the procedure prescribed by the PDA 1950 was in breach of natural justice principles such as objectivity and legal certainty, impartiality of the tribunal and the

[21] 324 U.S. 415, per Frankfurter J.

[22] *Adamson v. California,* 332 U.S. 46, 66 (1947); *Carroll v. Greenwich Ins. Co. Of N. Y.*, 199 U.S. 401, 410 (1905).

[23] Emphasis added.

right to an orderly procedure.[24] The argument made by counsel for the appellant during the inception of the Indian Constitution lays the groundwork for this paper's comparison. This is namely that the 'procedure established by law' implies principles of natural justice akin to the various conceptions of US due process. The court concluded in a 4-1 majority that this interpretation was incorrect. Taking a largely textual approach, the court held that procedure established by law meant simply law as enacted by the legislative assembly not violating rules of procedure.[25]

AK Gopalan presents a decent case study of the original procedure established by law, as it holds copious amounts of constitutional interpretation regarding procedure established by law made at the birth of the Constitution. In addition, the justices of the court made numerous comparative references to the US and Japanese Constitutions, and to UK constitutional law cases and practice. These will be discussed below when analysing the justice's approach to deciding the case.[26] It is clear that the approach in *AK Gopalan* is textualist, as the judgment provides a narrow interpretation of due process. The judgment of Chief Justice Kania in *AK Gopalan* is clearly marked by an unwillingness to treat the Constitution as something different from a succession of words and sentences from which its true meaning is to be understood. This is further supported by an understanding of original intent not too far from the textual interpretation. A closer look at the judicial reasoning may provide us with a better understanding of the textualism employed and the consequently narrow scope of the constitutional right.

In *AK Gopalan*, Kania CJ begins his analysis of Article 21 by dismissing that its jurisprudential counterparts in the American case are the Fifth and 14th Amendments. This was the argument advanced by Senior Advocate Nambiar, counsel for the appellant.[27] Nambair had advanced this case in two ways: first he distinguished the Indian and US Constitutions based on their different character; and, second, he elaborated upon the wording of the provisions employing a textualist interpretation, which has the consequence of giving Article 21 a strict, narrow meaning, drawn almost exclusively from the narrow and brief wording of Article 21.

He begins his analysis of Article 21 in this way, referring to the arguments of Nambiar that the principles of natural justice should be read into Article 21: 'In my opinion, this

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[24] These are some principles of natural justice, all mentioned in the case being analysed. A longer elaboration into the philosophy of natural justice is probably outside the scope of this article.

[25] *AK Gopalan* (n 10) 109.

[26] For a deliberation into the appropriateness and usefulness of comparative law in US constitutional adjudication in general, see Ruth Bader Ginsburg, 'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication', International Academy of Comparative Law (American University, 30 July 2010). <https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10> accessed 25 February 2019.

[27] *AK Gopalan* (n 10) 104.

line of approach is not proper and indeed is misleading'.[28] Thereafter, Kania CJ held that the US and Indian Constitutions must be read differently. This was justified on the basis that the US Constitution is vague and contains little detail and must therefore be considered only as 'a starting point'.[29] However, the Indian Constitution, opines Kania CJ, 'provides in minute details the legislative powers of the Parliament and the State legislatures'[30] and all other aspects of governance on state and federal level. It is therefore to be interpreted as providing the full picture, and not allowing for judicial creativity. In other words, if the authors of the Indian Constitution had wanted the principles of natural justice to be included in Article 21, it is fair to assume that they would have said so in no uncertain terms. In this reasoning the textualist and originalist position converges, and both are employed to the same effect.

What is most interesting about this piece of judicial reasoning for our purposes, is that Kania CJ appears to be a judge in the textualist tradition only as regards the Indian Constitution. He accepts that the US Constitution warrants a different approach, and consequently that it allows for more judicial freedom in constitutional interpretation. As the interpretative techniques of Indian judges change over time, it seems obvious that the Indian Constitution did not contain fewer details in 1976 than it did in 1950. The difference then, must be the attitude, and consequently the techniques, of the judges. What then, was the approach taken in the US case of *Hurtado v. People of California* in 1884? This approach is analysed in the following section.

Hurtado v. People of California

The case of *Hurtado v. People of California* concerned an appeal against a death sentence given to the defendant, Mr Hurtado, which was decided in 1884. This case went to the US Supreme Court because the defendant was not indicted by a grand jury. Instead, he was charged by way of an information by the prosecutor, which Hurtado claimed to be a breach of an essential aspect of due process.

The majority judgment builds upon a mainly textualist argument. The Court distinguish the wording in the Fifth Amendment, which includes the original due process clause, from the wording in the 14th Amendment. Eventually arriving upon what is, historically, a rather limited form of procedural due process.

Mr Justice Matthews takes the reader through a deliberation into the history and origins of English due process. Citing liberally from old English jurists,[31] and US cases interpreting, inter alia, the Magna Carta,[32] Matthews presents a two-fold approach to constitutional interpretation: first, he holds that the meaning of the Constitution may

[28] ibid.

[29] ibid.

[30] ibid.

[31] *Hurtado v. People of California* 110 U.S. 516, 523 (1884).

[32] ibid 522.

evolve with societal change; and second, he ascribes a decisive meaning to the particular text of the 14th Amendment. This approach is of a somewhat contradictory character, as it combines a willingness to interpret the Constitution in light of 'advancement of legal science and the progress of society',[33] and an unwillingness to depart from the wording of the provision. In according a precise meaning to the Due Process Clause of the 14th Amendment based upon the omission of the phrase '(…) on a presentment or indictment of a Grand Jury (…)',[34] Matthews deviates significantly from his previous conclusion that constitutional principles necessarily must evolve with society. In the spirit of analytical consistency, Justice Matthews could have held that indictment by grand jury was not a due process requirement simply because it was not currently 'the law of the land', but by anchoring his analysis on the exact wording of the almost 80 years older Fifth Amendment, he reverts back to an analysis in which his two components do not mix well.

Adopting a clearly textualist technique of interpretation, Matthews writes '(…) [I]f in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect'.[35] Deciding that the institution of the grand jury was not a requirement for procedural due process to be satisfied, the Court was mainly focused upon the inclusion of the phrase '(…) on a presentment or indictment of a Grand Jury (…)'[36] and the - in the Courts' view, deliberate - exclusion of this in the 14th Amendment. By interpreting the 14th Amendment due process in such a way, the Court formulated a less stringent version of procedural due process at the state level than existed at the federal level.

There is ample historical evidence suggesting that due process, considered identical in the Fifth and 14th Amendments, was thought to be nothing but procedural, offering protection only against an unfair trial. The debates during the 39th US Congress concerning the 14th Amendment (prior to its adoption) make it clear that the framers of the Amendment viewed due process only as a procedural limitation. John A. Bingham argued that the meaning of the phrase *due process of law* was that 'the courts have settled that long ago, and the gentleman can go and read their decisions'.[37] Perhaps the most persuasive source of the original meaning of due process, still applied at the time of *Hurtado v. People of California*, is the statement by Alexander Hamilton himself in the New York Assembly in 1787:

[33] ibid 521, quoting *Rowan v. the State* 30 Wis. 129 (1871).
[34] US Constitution, Fifth Amendment.
[35] *Hurtado* (n 31) 535.
[36] US Constitution, Fifth Amendment.
[37] Globe 1089 cited in Berger (n 9) 230.

> The Words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature[38]

Given the historical evidence of the established limitations of due process as a procedural tool, the approach and conclusion of the Court in *Hurtado v People of California* is established in consonance with the original meaning of due process. evidence shown above.

However, from a comparative point of view, the US due process offers a rather robust form of constitutional protection. It will be seen below that the concept of due process embodied in *Hurtado* and contemporary US cases was regarded as a massive constitutional shift when later introduced in India. The analysis of *AK Gopalan* and its 'pure form',[39] limited 'procedure established by law', thus demonstrating that the starting point of Indian constitutional law was that the procedural US due process could *never* be interpreted as part of the Constitution. The vastly dissimilar nature of the Constitutions, as stated by Kania CJ in *AK Gopalan*[40] appears not to have been of particular importance to later judges. Instead, some 28 years later, with *Maneka Gandhi* introducing procedural due process to the Indian Constitution for the first time, what this paper terms the structuralism and ethical interpretation phase came about in India. Likewise, what had been consistently disapproved of from 1787 and until 1905 – substantive due process – became constitutional reality with *Lochner v New York*.[41]

6. Phase 2 – Structuralism and Ethical Interpretation

As demonstrated, the phase directly following the creation of these Constitutions or constitutional provisions was marked by an adherence to textual interpretation. With the passage of time, the framing of the Constitution becomes a historical event, yet the question remains what is the effect of this upon interpretation? By analysing the landmark cases of *Maneka Gandhi v Union of India* and *Lochner v New York*, this paper demonstrates that judges increasingly relied upon structural and ethical techniques of interpretation, thus creating more expansive due process rights that were not present – or indeed thought possible – in the constitutional provisions before this time. As with all three phases described in this study, there are deviations and inconsistencies.[42]

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[38] The Papers of Alexander Hamilton 35 (H C Syrett and J E Cooke eds 1962).

[39] A Chandrachud, 'Due Process', in *The Oxford Handbook to the Indian Constitution* (Choudhry S, Khosla M, Mehta P Eds, OUP 2016) 782.

[40] *AK Gopalan* (n 10) 104.

[41] 198 US 45 (1905).

[42] For a good example of a textualist and originalist approach in this period, see the case of *United States v. Butler* 297 U.S. 1, 62 (1936).

Maneka Gandhi v Union of India

The case of *Maneka Gandhi*, decided 28 years later, stands in sharp contrast to *Gopalan*. The majority of the bench in this case employed a combination of doctrinal, ethical and structural interpretative techniques to reverse *Gopalan*, reading procedural due process, loosely based on the principles of natural justice, into the Indian Constitution. The judgments of Bhagwati J, Chandrachud J and Beg CJ demonstrate a shift in interpretation that resulted in profound constitutional change.

Bhagwati J states 'The fundamental rights in Part III of the Constitution represent the basic values cherished by the people of this country since the Vedic times'.[43] These are bold words for a judge who is about to introduce a rather novel concept into a Constitution. He goes on to analyse the interrelationship between constitutional rights in Part III of the Constitution, concluding that Part III must be read as a coherent bill of rights.[44] This forms the basis for his argument that the Article 21 procedure established by law must be a requirement in all cases regarding Part III rights, and furthermore, that procedure established by law has taken on the meaning of 'right and just and fair, and not arbitrary, fanciful and oppressive'.[45]

The first conclusion, regarding the interrelationship of rights, is achieved by employing a doctrinal and structural approach to interpretation. The *Bank Nationalisation Case*[46] is cited, in which the Supreme Court first observed that Part III rights did not exist in 'water-tight compartments'.[47] The consequence of this interrelationship of rights is that cases brought under, for example, Article 19, now must satisfy the natural justice principles found in Article 21 as well as Article 14, which demands equality before the law. In other words, Part III of the Constitution is to be read as a Bill of Rights, and its content is a factor in all rights under the Constitution. How then, did the court manage to alter Article 21 so radically?

The new meaning of procedure established by law, was reached by employing both structural and, to a certain extent, ethical interpretation of the Constitution. The reasoning of Baghwati J for the majority rests on two parts: (1) that the overall function of Part III of the Constitution as a 'bill of rights' ties the requirements of different provisions together; and (2) that, resulting from the Courts' interpretation of Article 21, a natural justice-infused due process requirement is a requirement to be fulfilled in all cases regarding Part III fundamental rights. These two points of law have important, far-reaching implications by themselves, but read together they represent a constitutional shift towards an all-pervasive presence of natural justice principles

[43] *Maneka Gandhi v Union of India* 1978 SCR (2) 621, 671, per Baghwati J.
[44] ibid 673.
[45] ibid 677.
[46] *Rustom Cavasjee Cooper v Union of India* 1970 AIR 564.
[47] Durga Das Basu, *Constitutional Law of India* (8th edn, New Dehli, LexisNexis Butterworths Wadwha Nagpur 2009) 134.

that the framers of the Constitution reportedly were anxious to exclude from the Constitution. This is shown by the Constituent Assembly debates and events surrounding its framing. The most of notable of these is that of Benegal Narsing Rau, a 'key architect of the constitution',[48] with Justice Felix Frankfurter in 1947. Here, Frankfurter reportedly advised against including US due process in the new Constitution, in order to avoid a situation such as the one created in the *Lochner-era*.[49] From a comparative viewpoint, this situation is of a somewhat ironic character, as the case in which a comparable interpretative shift occurred is exactly *Lochner v New York*.

Lochner v. New York

The case of *Lochner v. New York* is a good representation of the period between the end of the 19th century to 1937, (unsurprisingly, it is commonly referred to as the 'Lochner era'). Cushman describes the *Lochner* ruling as 'a museum piece',[50] which 'expresses with accuracy the dominant judicial doctrine of that period (the *Lochner* era), with its reliance upon the concept of 'liberty of contract'(…)'.[51] Why the dominant judicial doctrine of the *Lochner* era represented such a shift in due process law will be evident from the facts of the case, and its focus on substantive law issues.

The case was concerned with the application of a piece of labour in New York, prohibiting bakers to work more than 60 hours per week, or more than 10 hours per day unless to make the last day of the week correspondingly shorter.[52] The law was struck down by a 6-3 majority, and held to be in violation of the due process Clause in the 14th Amendment of the Constitution. Strikingly, the case does not concern procedural issues at all. This presents a rather radical shift, as it will be remembered that constitutional orthodoxy at that time was that due process was unequivocally a procedural issue. *Lochner* was concerned with the constitutionality of prohibiting employer-employee contracts in excess of 60 hours per week – the *substance* of a state law that was, presumably, enacted in accordance with due process. With this as the foundation of the opinion, could the result be anything but a radical change in the meaning of the due process clause? Justice Peckham, on behalf of the majority, proceeded to render a judgment in which the primary concern was the relationship between police powers and due process:

> [T]he question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable,

[48] A Chandrachud (n 39) 777.
[49] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford, Clarendon Press 1966) 103.
[50] R F Cushman, *Leading Constitutional Cases* (15th edn, New Jersey, Prentice-Hall Inc 1977) 183.
[51] ibid.
[52] New York Bakeshop Act 1895.

> unnecessary, and arbitrary interference with the right of the individual to his personal liberty (…).[53]

The two central points to be taken from the judgement above, are that personal liberty as protected by the 14th Amendment is to be construed in a broad sense, including the liberty of contract;[54] and that legislative encroachment upon this personal liberty must satisfy a test of reasonableness, necessity and arbitrariness. The language of natural justice is clearly present in his analysis.

Similarly, in his analysis of *Lochner*, Strauss defends the judgment by asking whether freedom of contract could be seen as a part of personal liberty in the 14th Amendment.[55] Strauss posits that the right to sell one's labour has its roots in the anti-slavery movement and what he terms 'Jacksonian opposition to "class-legislation"',[56] hence giving the freedom of contract stronger constitutional roots than is otherwise assumed, taking away some of *Lochner's* brand as a 'fabrication of a business-oriented Supreme Court in the early Twentieth-century'.[57] However, this defence takes for granted that *Lochner* conceptualised due process correctly, as a substantive limitation upon police powers. This paper largely agrees with the dissenting opinion given of Justice Holmes. Holmes states in the opening of his dissent, that laws encroaching upon personal liberties are a common occurrence. He further concludes that the Constitution is not to be based upon an economic theory.[58] *Lochner* appears, in hindsight, to rest on an interpretation of due process as a limitation upon police power that is so broad as to prohibit legislative change built upon any political view or ideology but the one supported by the Court in *Lochner*. This was a key argument put forward by Holmes in his dissent.[59]

Therefore, it is fair to say that the relationship between *Lochner* and *Maneka Gandhi* is found in their respective judgments. Principles of natural justice are introduced where none originally were present, and the interpretative techniques are structural or ethical, relying on inference as to the nature or character of the provisions and constitutions, rather than analysis of concrete provisions or sentences within these. Just as Baghwati J writes that Article 21's procedure established by law requires legislation and executive action to be 'right and just and fair (…)',[60] Justice Peckham states that the exercise of police powers must be 'fair, reasonable and appropriate (…)'.[61] In sum, the

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[53] *Lochner* (n 41) 56, per Peckham J.
[54] ibid.
[55] D A Strauss, 'Why was Lochner Wrong?' (2003) 70(1) The University of Chicago Law Review 381.
[56] ibid.
[57] ibid.
[58] *Lochner* (n 41) 75, per Holmes J dissenting.
[59] ibid.
[60] *Maneka Gandhi* (n 43) 635.
[61] *Lochner* (n 41) 56, per Peckham J.

common denominator (in cases where there is an absence of fact) is that the constitutional change above, is – in the shift in techniques employed by the judges.

7. Phase 3 – Modern 'Due Process'

Last, it is crucial to analyse what has come to be known as 'modern due process'. The two previous phases provide a basis for arguing that constitutions of a dissimilar nature are capable of experiencing similar interpretative evolution over time. The cases chosen to represent the modern period offer confirmation of this hypothesis. The cases chosen are the Indian case of *Mithu, Etc, Etc v State of Punjab*[62] and the US case of *Lawrence v Texas*.[63]

Mithu, Etc, Etc v State of Punjab Etc, Etc

The majority in *Mithu, Etc, Etc v State of Punjab Etc, Etc*, a bench of five judges, held that the mandatory death sentence for murder while under the sentence of life imprisonment was unconstitutional. Delivering the majority opinion, Chief Justice Chandrachud found this unconstitutional on the grounds that: (1) it was arbitrary;[64] (2) it was unreasonable;[65] (3) it was unjust; and (4) it deprived the judiciary of its discretion in regarding relevant circumstances, such as age, sex, provocation and motive.[66] This reasoning blends the procedural and substantive aspects of due process. The heart of the matter is not just the fact that the procedure requiring mandatory death sentence is arbitrary, but more importantly it also touches upon substance. The central holding is one of procedure, but when Justice Chinnappa Reddy pronounced that 'so final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable',[67] it is undeniable that the substance of law is a decisive factor in the ratio as well. What can be seen from *Mithu* is that, having developed its due process jurisprudence in *Maneka* and subsequent cases, the court is now comfortable with wielding due process power of a normative character. This development is, however, since *Maneka*, in a more modest form than what can be seen below in *Lawrence v. Texas.*

Lawrence v. Texas

Lawrence v Texas was a Supreme Court case that debated the constitutionality of the Texas Homosexual Conduct Act, (hereinafter referred to as the 'Act'). It was challenged on the basis that it infringed rights under both the 14th Amendment's Equal

[62] 1983 SCR (2) 690.
[63] 156 L. Ed. 2d 508 (2003).
[64] *Mithu* (n 62) 704.
[65] ibid 701.
[66] ibid 702.
[67] ibid 707.

Protection Clause and Due Process Clause.[68] It represents a late development in a series of cases protecting sexual autonomy through application of a constitutional right to privacy,[69] most notably the cases of *Griswold v. Connecticut*[70] and *Roe v. Wade*.[71] According to the analysis of Lund and McGinnis, substantive due process has evolved further from the *Lochner* era and the New Deal era, to be employed as an instrument of social change. Lund and McGinnis terms this 'liberation jurisprudence'.[72]

Prior to delving into this, it is crucial to distinguish what is being criticised, for in my opinion the outcome of *Lawrence* is one that must be supported.[73] What is criticised here is the method by which the Court arrived at its conclusion, and the treatment of 14th Amendment jurisprudence, (and not the outcome).

The judgment in *Lawrence* is notable for its rejection of the *Glucksberg* test that was created by the Supreme Court in the case of *Washington v Glucksberg*,[74] only 6 years prior to *Lawrence*. The *Glucksberg* test, formulating what was considered the authoritative test for substantive due process, consisted of two main requirements: (1) that the nature of the fundamental right is carefully described; and (2) that this fundamental right is, by way of 'objective evidence', found to be 'deeply rooted in [the] nation's history and tradition'.[75] Without venturing into whether this test is an ideal way to approach substantive due process, it is clearly more analytically rigorous than the *Lawrence* approach. Importantly, it represents an approach in which it is easier to predict the scope of constitutional rights. The opening paragraph of Kennedy J sets the tone for his opinion:

> Liberty protects the person from unwarranted government into a dwelling or other private place. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[76]

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[68] *Lawrence* (n 63) 2476.
[69] N Lund and J O McGinnis, 'Lawrence v. Texas and Judicial Hubris' (2004) 102 Michigan Law Review 1555, 1571.
[70] 381 US 479 (1965).
[71] 410 US 113 (1973).
[72] Lund and McGinnis (n 69) 1570.
[73] I am of the view that legalisation of all aspects of private life for LGBT+ persons, including the right to engage in sexual activity, can only be to the betterment of society.
[74] 521 US 702 (1997).
[75] Quoted in Lund and McGinnis (n 69) 1579.
[76] *Lawrence* (n 63) 2475.

Throughout the opinion, there is little concrete legal analysis. More worryingly, there is a striking lack of consideration for the established legal doctrines it rejects. There is no mention of the test created in *Glucksberg*, as was pointed out by Justice Scalia in his dissent.[77] Disregarding a recent test for violations of due process is of course not necessarily a breach of stare decisis in itself. The doctrine of stare decisis has been acknowledged as 'a principle of policy and not a mechanical formula of adherence to the latest decision'. [78] However, disregarding such a significant test without considering it in the judgment is, for lack of a better term, poor judgment (in both senses). In choosing not to apply the *Glucksberg* test, the Court subjected the Act to a lower standard of review than previously seen. While the *Glucksberg* test requires the court to find that the conduct prohibited is a fundamental right, the court in *Lawrence* does not consider this. As Justice Scalia remarks in his dissent, it is merely stated that the 'petitioners' conduct (is) 'an exercise of their liberty'.[79] The strange result of this analysis (or lack thereof) is that what Scalia describes as 'the central legal conclusion' of *Bowers v. Hardwick*[80] that 'homosexual sodomy' is not a fundamental right,[81] is untouched.[82] In addition to being somewhat confusing, this has the apparent effect of lowering the threshold for using substantive due process to disapply legislation.

It appears then, that the effect of *Lawrence* as regards doctrine is that substantive due process is a broader concept than ever before. Typically, *Lochner* is referred to as the period in time where substantive due process was at its most unhinged. It is arguable that *Lawrence* does, in fact, represent a form of due process that is even more so. In *Lochner*, it was also argued that the right protected (liberty of contract) was a fundamental right embodied in the Constitution. This was achieved partly through an ideological and highly selective view of what constituted such a right, but the Court did make an attempt at justifying their decision through legal analysis. In *Lawrence,* the only justification hinted at is that the conduct of the petitioners is an exercise of liberty, and that this liberty is protected under the Constitution's Due Process clause.[83] In sum, in *Lawrence* has, disregarding existing tests and criteria, created a form of due process jurisprudence in which the only requirement seems to be that some form of liberty is being restrained.

8. Conclusion

Overall, the evolution of due process jurisprudence in the jurisdictions surveyed displays there are a few particularly noticeable features. The current due process is not

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[77] ibid 2489, per Scalia J dissenting.

[78] *Payne v. Tennessee*, 501 US 808, 828 (1991), quoting *Helvering v. Hallock,* 309 US 106, 119 (1940).

[79] *Lawrence* (n 63) 2488, per Scalia J dissenting.

[80] 478 US 186 (1986).

[81] ibid 191.

[82] *Lawrence* (n 63) 2488.

[83] ibid 2478.

particularly reflective of the original constitutional provision and the framers' original intent, insofar as it can be ascertained.[84] Even though the US Constitution seem somewhat more amenable to change, it can be argued that the Indian Supreme Court has been just as successful in transmogrifying the detailed Indian Constitution in a much shorter period of time. Last, the combination of a non-textual approach to interpretation, coupled with a focus on the principles of natural justice, creates a 'wide' conception of due process that, at least to a certain extent, has evolved into a normative tool in the court's belt.

As in *Lawrence*, this may turn out to have a positive societal impact, but a negative influence on legal doctrine and predictability. If one is to believe Justices O'Connor, Kennedy and Souter when they announced that '[l]iberty finds no refuge in a jurisprudence of doubt',[85] then *Lawrence* is not exclusively a welcome development. If legal doctrine is sufficiently malleable, what is stopping the next bench of judges from reversing *Lawrence*? A weakening of stare decisis necessarily entails a weakening of the rule of law. Having charted the evolution of due process jurisprudence over three historical periods, the two Constitutions exhibit a similar pattern of development. This is despite very dissimilar starting points and traditions, as emphasised by Kania CJ in *AK Gopalan*. These findings are significant, as they serve to raise important questions about the permanence of constitutional rights and liberties in general. Thus, in my opinion, the findings of this study ought to serve as a warning that in some cases, judges, especially in the Supreme Courts of India and the United States hold a great deal of discretion in determining how rights are to be invoked and claimed.

[84] This analysis holds regardless of the nature of the Constitution itself
[85] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833, 844 (1992).