
Transcultural
Journal of Humanities & Social Sciences
Print ISSN 4239-2636 Online ISSN 4247-2636
An Online Academic Journal of
Interdisciplinary & transcultural topics in Humanities & social sciences
TJHSS
Designed by Abeer Azmy& Omnia Raafat
BUC Press House
BUC
Volume 3 Issue (4)
October 2022

Transcultural Journal for Humanities and Social Sciences (TJHSS) is a journal committed to disseminate a new range of interdisciplinary and transcultural topics in Humanities and social sciences. It is an open access, peer reviewed and refereed journal, published by Badr University in Cairo, BUC, to provide original and updated knowledge platform of international scholars interested in multi-inter disciplinary researches in all languages and from the widest range of world cultures. It's an online academic journal that offers print on demand services.

TJHSS Aims and Objectives:
To promote interdisciplinary studies in the fields of Languages, Humanities and Social Sciences and provide a reliable academically trusted and approved venue of publishing Language and culture research.

- **Print ISSN** **2636-4239**
- **Online ISSN** **2636-4247**

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'Poetic Justice'? Reading Law and Literature

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Abstract

Law and literature are generally thought of as two mutually independent pursuits whose paths do not often cross. Though their functions on the human person are antithetical- literature enables human creative expressions while law restricts unfettered human behavior- their value to human flourishing cannot be discredited. The exercise of reading/interpretation is common to both domains, albeit in varying senses and degrees. The primary aim of this paper is to attempt a 'reading' of law through a legal text from the literary vantage point. This act of 'reading' shall remain sensitive to the functional differences between the two pursuits as regards their instrumental goals in society. The legal text under analysis is the Supreme Court of India's 2017 judgment in *Justice Puttaswamy v. Union of India* on the constitutional protection to privacy. The judgment, which presented a comprehensive study of the legal and constitutional implications of privacy, declared that the right to privacy is a fundamental right protected under the Constitution of India. In analyzing the judgment, the paper also seeks to illustrate the dynamics of legal reasoning and the interpretive modes that form the background of judicial opinions.

Keywords: Law, Literature, Interpretation, Jurisprudence, Privacy

Introduction

In a most cursory understanding, law and literature are two disparate pursuits with distinct teleological trajectories. Reading, though the sense that it implies in the two domains is different, can sometimes be a crucial point of convergence between them. Literature has amply banked on law and legal themes for centuries (themes of justice and revenge in a pre-legal setting), with those often lending the literary works their due narrative tautness. Today, literary and cinematic productions based on legal themes (movies and TV shows of the 'legal drama' genre, for instance) become massive hits garnering wide popular appeal. However, 'reading' of law offers a serious methodological conundrum to the practitioners of literature. Analyzing the text of the Supreme Court of India's 2017 judgment in *Justice Puttaswamy v. Union of India*, this paper attempts to explore the implications of the exercise of 'reading' law in the context of the intricate possibilities that reading, an act primarily meant for literature, signifies for the legal realm.

Though law and literature are considered to be mutually exclusive realms, they are expected to accomplish similar ends in society. Both the pursuits are guided by the motive of enabling peace, harmony, and human flourishing in a society despite their modi operandi being absolutely different. How should the 'reading' of law be different from that of literature? How does interpretation differ in the legal and literary realm? Do they, at any point, converge in terms of the strategies of reading or interpretation? The emergence of schools of thought such as Critical Legal Studies in the late 1970s has made the engagement between the two fields more pronounced. Many exponents of the Critical Legal Studies movement have held that literary theory can inform and expand the meaning and scope of legal texts as the movement sought to embrace "an interdisciplinary approach, drawing on politics, philosophy, literary criticism, psychoanalysis, linguistics, and semiotics to explain its critique of law" (Wacks 114).

So much like the literary theorists and philosophers who have been grappling with the idea of interpretation in their respective realms for centuries, legal practitioners also deem

interpretation foundational to their theory and practice. It would almost be improbable that any other domain has yet systematized the interpretive exercise to the extent that the field of legal practice has. Though philosophers of law and literary theorists were both interested in understanding how the vastly disparate fields were complementary to each other, the engagement between them became conspicuous only with the emergence of schools of thought such as the Critical Legal Studies.

Interpretation: Legal and Literary

Jurists and legal philosophers, Ronald Dworkin and Richard Posner, and literary theorist, Stanley Fish have been scrupulous in examining how the idea of interpretation operates in law and literature. Ronald Dworkin puts forth his notions of legal interpretation to align with the concept of interpretation in literature or what may be called "aesthetic" interpretation (183). He proposes to expand the scope of legal interpretation by incorporating the conceptions of interpretation in the literary realm. That the meaning of law, available to us through legal texts, is either always already embedded in the text to be enforced strictly or that it is purely inventive, interpreted as per the desires and biases of the legal practitioner, were the two possibilities that the idea of legal interpretation normatively signified. Dworkin's idea of legal interpretation hinges on divesting it from these normative extremes. His idea of interpretation marks a shift from the positivist conception that laws can be wholly derived from the existing legal principles or from the view of the legal nihilist that laws express the will and subjective preferences of the law-making authority. These oppositional and extreme views are inadequate for Dworkin to conceive the notion of interpretation in the domain of law (Dworkin 180; Fish 87).

Stanley Fish maintains that the extreme positions that Dworkin rejects with regard to legal interpretation are also pertinent to interpretation in the literary scene (87). Literary critics are also divided when it comes to deciding if interpretation should strictly be constrained by what is in the text or if it is purely guided by the socio-political conditioning and prejudices of the reader. A more foundational question here would be as to what is the text that is to be interpreted- if it is strictly the written text that one holds in their hands or a composite of the written material along with the social, political, and psychological structure that enables the production and consumption of the text. The difference in the conception of what constitutes the text for interpretation seems to affect the idea of interpretation that the contesting positions suggest. This is true of the legal as well as the literary text.

The Critical Legal Studies movement has unprecedentedly made the dialogue between law and literature possible. Richard Posner has been keen to understand the interaction between these two supposedly diverse realms. Reading texts and their interpretation is a common exercise for both these fields. For Posner, though the relationship between law and literature is manifold, the interpretive scheme that furthers the two projects is very different. Posner has a very categorized and schematized understanding of the reading process that the texts of the two different domains demand. Though he considers all possible ways of engagement and advocates a mutually supplementing relationship between the two, the reading/interpretation that the fields practice, he thinks, should essentially be different. The reading of literary texts and the reading of legal texts such as constitutions, statutes, or judicial opinions should be different. Posner observes that, while multiple readings create a sort of equilibrium for a literary text, it ends up in disequilibrium in the case of legal texts (*Law and Literature* 313). Ambiguity in the meaning of legal texts could complicate the legal interpretation process leading to judicial decisions. The reading of legal texts must, therefore, be directed at finding the intention of the creator of law, while a literary text demands a more

freewheeling reading. Posner demarcates the two types of reading as "intentional" and "new critical," which law and literature respectively call for ("Law and Literature: A Relation Reargued" 1361). The meaning of the legal texts is based on the context of their creation, while the meaning of the literary texts is context-free. It is this possibility of unrestrained interpretation that renders the works of literature literary. An interpretation of a difficult legal text such as a statute, which can seemingly produce multiple interpretations, would perhaps warrant serial attempts to find the intention of its original legislation. The two methods of reading are mutually exclusive, and using one instead of the other would not always bode well for both disciplines. However, with these contradicting notions of interpretation/reading that have been separately advocated for literary and legal texts in the background, I would like to analyze a selected legal text for the receptivity of the text to the two opposing modes of interpretation.

Reading *Justice Puttaswamy v. Union of India*: Literary and Legal

In the following sections, the paper attempts to 'read' the historic *Justice Puttaswamy (Retd.) v. Union of India* (2017) verdict of the Supreme Court of India regarding constitutional protection to privacy at two levels. At the first level, the judgment is read as a 'literary' text, and the implications of such a reading on the given legal text are examined. At the next level, the judgment is read as a legal text to understand the legal and jurisprudential concerns that the text contains. The broad scheme of action here is to understand the nature of law and legal texts by reading the judgment of the Supreme Court of India on the constitutional protection of privacy in *Justice Puttaswamy (Retd.) v. Union of India*. The judgment, running into 547 pages, is an exhaustive document on the legal and constitutional dimensions of privacy. In sheer terms of the extensive socio-historical and legal study of privacy that it has carried out, the judgment calls for academic engagements from diverse perspectives. However, I shall restrict myself to the 'reading' of the judgment and not venture into discussions on privacy which is beyond the scope of the proposed study. What follows has loosely been divided into two sections; one which attempts to find the points of intersection between judicial opinion and literature and the other which endeavors to make a broader examination of the pertinent aspects of the judgment to broaden our understanding of law and jurisprudence. A few excerpts from the judgment relevant to this line of inquiry have also been selected and analyzed in the following paragraphs.

It is Posner's pragmatic vision of jurisprudence (as majorly described in his *The Problems of Jurisprudence*) that largely forms the background for the framework of the analytic study undertaken here. Besides being an important legal document, a judicial opinion is more receptive to a literary reading, unlike statutory or constitutional legal texts. I shall attempt to illustrate the dynamics of legal reasoning and interpretive modes forming the background of the judicial opinion. Common laws in themselves lay bare a model of judicial reasoning in how the judges interpret the statutory and constitutional laws. My attempt here, therefore, also intends to elucidate the intricacies of the multiple levels of the reading process contained therein.

While constitutional and statutory provisions are normally written in a clinical and matter-of-fact style, judicial opinions tend to be more literary. Though judicial opinions (which in the later course become Common laws) as well as statutory or constitutional prose are directed to more or less the same stakeholders and are expected to bring about similar effects in a society, the former enjoy greater flexibility in their language and style. With a marked departure from the dispassionate language of law in general, judges seem to don the garb of literary artists while writing judicial opinions. The literary, however, does not

diminish the political or legal dimensions of the text. Despite that, do the judicial opinions merit reading as literary prose and warrant, at the least, linguistic or aesthetic criticism, if not literary criticism per se?

The rhetoric and style of the judicial opinion rendered by the Supreme Court of India regarding the constitutional protection to privacy are quintessential in many ways. It is important to emphasize that the persuasive rhetoric or the literary style of the judgment only serves to bolster the legal and political implications of the text. The following excerpt from the text is illustrative:

> Urban ghettos replace the tranquility of self-sufficient and rural livelihoods. The need to protect the privacy of the being is no less when development and technological change continuously threaten to place the person into public gaze and portend to submerge the individual into a seamless web of inter-connected lives. (34)

However, the style of writing that borders on the poetic generates a profound meaning on the state of humanity in the wake of the intrusion of technology into their lives. It seems apparent that there has been a deliberate attempt on the part of the writer-judge as regards the choice of words and style. To say the least, it is not automatic writing or writing in a trance. The glossy style of the prose, however, really does not denude the meaning of the text. Though the prose can qualify to be read as literature in a very limited sense, attempting a literary criticism of court judgments might not prove to be a promising enterprise. A reader response or deconstructive criticism of the judicial opinions, for that matter, appears to be too fanciful a project as the text is written on a very limited imperative, unlike literary pieces which might have implications beyond the context in which they are written.

As akin to literary texts such as poems or fictional prose, the judicial opinion under consideration is also rich in the use of metaphorical language. The following extract is noteworthy: “India has no iron curtain. Our society prospers in the shadow of its drapes which let in sunshine and reflect a multitude of hues based on language, religion, culture and ideologies” (221). The lines rendered poetical by employing metaphors, imageries and allusions elevate/relegate the judge to the status of a literary artist. “Iron curtain” has been a metaphor for a barrier to understanding and information exchange since its usage by British Prime Minister Winston Churchill in 1946 to refer to the line of demarcation between Western Europe and communist countries of Eastern Europe during the Cold War period. The metaphor then alludes to a historical episode that one must be wary of lest it should recur. Though policymaking falls under the executive division of the state, the statements set themselves up as guiding principles to the policymakers of the nation. Though the imagery of sunshine seeping in through the drapes has the potential to cast a poetic spell on the readers, its semantic function is to envision the concept of privacy that would be ideal for the nation. The “iron curtain”/drapes binary animates the conceptual differences between the different notions of what constitutes privacy.

The use of metaphors and persuasive rhetoric has been common in judicial opinions for at least a few centuries. A UK court decision that dates back to as early as 1765, which has been referred to in the present judgment, reads:

> No man can set his foot upon my ground without my license, but he is liable to an action, though be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. (131)

The biblical allusion made in the following lines buttresses the case for constitutional protection to individual privacy:

> While emphasizing individual autonomy and the dangers of individual privacy being eroded by new developments that "will make it possible to be heard in the street what is whispered in the closet," the Court had obvious concerns about adopting a broad definition of privacy since the right of privacy "is not explicit in the Constitution." (43)

The extensive use of metaphors in judicial prose might be the outcome of the analogical reasoning that forms the backdrop of most judicial decisions.

The point of the analysis carried out here is to illustrate the literary nature of the judicial opinions rather than to advocate it as a worthwhile practice. One compelling question here is whether the literary aspects of the text would diminish the objective or determinate nature of the court judgments. The foundational difference between the functional ambits of the judiciary and legislature is that the role of the legislature is confined to framing laws for general situations, while it is upon the judiciary to review or modify them for particular instances. Therefore, a certain minimal subjectivity is intrinsic to common laws. The function of judicial opinions is to substantiate the judicial decisions or dissents and not to serve as literary masterpieces.

I shall now examine the judgment to understand the dynamics of law and jurisprudence in greater detail. The challenge before the nine-judge Bench of the Supreme Court of India was to determine whether privacy is a constitutionally protected fundamental right despite earlier adjudications implying that it is not. Settling a long-drawn legal battle, it became incumbent on this Bench to decide if the judgments in *M P Sharma v. Satish Chandra, District Magistrate, Delhi and Kharak Singh v. State of Uttar Pradesh* (from now on "*M P Sharma"* and *"Kharak Singh"*) were still valid and whether the Constitution protects the right to privacy as a fundamental right. The Bench held that the decisions in *M P Sharma* and *Kharak Singh* that invalidates the constitutional protection to privacy stand over-ruled and unanimously declared that the right to privacy is protected as an intrinsic part of the right to life and liberty under Article 21 guaranteed by Part III of the Constitution.

The primary idea that we have to grapple with here is that of constitutional interpretation. How far does a constitution permit interpretation? Does it outright defy the kind of analysis we made on judicial opinions? How shall a judge read/interpret the constitution? The judgment itself convincingly addresses these questions:

> The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features. (263)

The assertion that constitutional doctrines can be subjected to varied interpretations implies that legality cannot remain a static entity. It has to be evolving with time to accommodate newer realities and constantly adapt itself to confront newer challenges. Consensus for some time does not lend permanent truth value to any legal provision. The emergence of multiple litigations on the same legal question will result in a constant disruption of the existing consensus and the simultaneous creation of new ones. Therefore, the challenge before the judges is to pose the new realities to the earlier legal provisions. With regard to interpreting the constitution, Hans A. Linde proposes that the function of a judge is "construing the living meaning of past political decisions" (255). Oliver Wendell Holmes' conception of the role of the judge as that of an "interstitial legislator" who decides the particular cases by adapting the constitutional and statutory provisions to the specificities of the case under consideration

suggests the essentially evolutionary nature of legality (as qtd. in Posner, *The Problems of Jurisprudence* 222). The above statements of the Bench also echo Posner's view on constitutional interpretation that "the framers gave us a compass, not a blueprint" (*The Problems of Jurisprudence* 141).

Along with constitutional and legislative interpretations, judicial precedents on the subject under consideration are also seriously taken into account while formulating judicial decisions. Stare decisis, the doctrine that stipulates following precedents in judicial decision-making, has been an essential principle for adjudicating cases since the Eighteenth Century English Common Laws. In arriving at its present position, the Court has scrupulously examined numerous previous litigations on fundamental rights of the Constitution. The judgment under consideration itself makes a case for stare decisis:

> A comprehensive analysis of precedent has been necessary because it indicates the manner in which the debate on the existence of a constitutional right to privacy has progressed. The content of the constitutional right to privacy and its limitations have proceeded on a case-to-case basis, each precedent seeking to build upon and follow the previous formulations. (87)

The judgment then proceeds to make a thorough analysis of previous judgments, including international verdicts, on the constitutionality of the protection to individual privacy. In the Indian context, though there were earlier decisions validating constitutional protection to privacy, they were pronounced by benches smaller than those in *M P Sharma* and *Kharak Singh*. Thus, it became exigent for the Court to form a larger Bench. Addressing this technicality, the judgment says: "Faced with this predicament and having due regard to the far-reaching questions of importance involving interpretation of the Constitution, it was felt that institutional integrity and judicial discipline would require a reference to a larger Bench" (6). Since the existing provisions on privacy were founded on *M P Sharma* and *Kharak Singh,* and the petitioners submitted before the Court that these decisions were based on *A K Gopalan v. State of Madras* which was later held not to be good law by an eleven-judge Bench in *Rustom Cavasji Cooper v. Union of India*, the Court ventured to thoroughly reexamine *M P Sharma* and *Kharak Singh* in the present judgment.

The examination of the Gopalan doctrine elucidates the wide-ranging possibilities of constitutional interpretation by having a majority opinion and a dissent. The majority judgment in Gopalan maintained that the relationship between Articles 19 and 21 is one of mutual exclusion. The seven freedoms protected by Article 19 did not fall under the ambit of life and personal liberty of Article 21. Chief Justice Kania, for the majority, held:

> "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression "personal liberty" the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between Articles 19 and 21. The contents and subject-matters of Articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. (18)

Justice Fazl Ali dissented and observed that fundamental rights enshrined in Articles 19 and 21 are not mutually exclusive but entail a mutually reliant relationship.

> In my opinion, it cannot be said that Articles 19, 20 ,21 and 22 do not to some extend overlap each other. The case of a person who is convicted of an offence will come

> under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d) …
>
> It seems clear that the addition of the word "personal" before "liberty" in Article 21 cannot change the meaning of the words used in Article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place…" (19)

The separate judicial opinions illustrate how Constitution allows multiple interpretations and how the judgments correct one another. The conflicting judicial opinions demonstrate how the word "personal" has been differently construed by different judges.

The judgment also provides an excellent model of judicial reasoning based on precedents. How do the precedents derive the authority that they have in the litigation of cases? The legal formalist relies heavily on precedents to understand the principles they embody and apply them to the case under scrutiny. For the legal formalist, precedents tend to make the judicial process more objective and determinate as they serve as ready-made decisions to adjudicate cases of similar backgrounds. Precedents themselves might not have any intrinsic truth value, but it is the hierarchical structure of the judiciary that renders them authoritative. For instance, in this particular case, the necessity to constitute a larger Bench arises from the hierarchical structure of the judicial system wherein a smaller Bench cannot revise the decisions of a larger Bench. The formalist position suffers a severe setback when the precedents are deified to relegate the world of facts of the particular case to the background. A formalist preoccupation with precedents might sometimes end up in a non-dispensation of the due substantive justice. What seems important here, for the judge, is to clearly differentiate between precedent as an overpowering authority and precedent as a guiding reference. Though the Bench, in this case, has been going back and forth through precedents, it has only resulted in asserting the individuality of the particular case and not losing it in a sea of precedents. The court itself has also overruled the precedents in *M P Sharma* and *Kharak Singh* in this particular judgment. An earlier Bench on the same case had stated on blindly committing to judicial precedents:

> If the observations made in *M P Sharma* and *Kharak Singh* are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. (7)

Stepping away from the hard and fast legal formalism or Edward Coke's "artificial reason" theory, the Bench seems to put forth a legal realist approach (as qtd. in Posner, *The Problems of Jurisprudence* 10). It attempts to refashion the precedents and the provisions of the constitution in light of the current realities. An intensely self-reflexive excerpt from the judgment is indicative of the legal realist position:

> Now, would this Court in interpreting the Constitution freeze the content of constitutional guarantees and provisions to what the founding fathers perceived? The constitution was drafted and adopted in a historical context. The vision of the founding fathers was enriched by histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. No generation, including the present, can have a monopoly over solutions or the

> confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine. (111-112)

Endorsing a legal realist approach in jurisprudence, the Supreme Court of India reflects a progressive position that actively resists the legal status quo in the pursuit of justice. The above excerpt is a brilliantly convincing commentary on the inevitability of the legal structures to adapt and accommodate to the realities of the time rather than remaining as passive and uncritical enforcers of the written law.

The reference to international lawsuits in the judgment, apart from serving as legal precedents, opens a different set of questions. The judgment has brought in and analyzed numerous international rulings regarding privacy. The judgment also contains extensive references to English Common Law and American Constitutional amendments to bolster the judicial positions. The jury has observed:

> In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary and, perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party. (91)

This view hints at the flexibility of law and posits how the law of a nation cannot be immune to different conceptions of legality from beyond borders. If we superimpose the notion of the substantive justice discussed with regard to precedents with the dependence on international laws, it might appear problematic. Having argued that even individual cases need to be considered by paying sufficient attention to individual realities, the case for dependence on laws made for societies that might not have any historical, cultural, or social similarities with those of ours might appear to be loosely grounded. It opens questions about the universality of laws. How can there be a universal consensus regarding laws considering the diversity of belief systems, cultural ethos, and social norms that different societies have for themselves? Can there be universal truths and non-truths? The conflict is not as intractable as it is made out to be. Though there may be vast differences between cultures and societies, and there may be mutually exclusive domains in these various cultures, the aspiration for justice is inherent to any human community. It is on this common aspiration by being human beings of flesh, blood, and an inviolable self that compliance with international law has been mooted. It is this view that resonates when the judgment says: “Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime” (130).

Conclusion

The Supreme Court of India’s judgment in *Justice Puttaswamy (Retd) v. Union of India* that served as the legal document for analysis in this paper also forms an erudite legal thesis on privacy, well substantiated by examinations of major scholarly views on the subject across centuries. This paper is the result of an impulse to read law by someone whose primary training is in reading and critiquing literature. The reading process undertaken here, as suggested at the outset, branches out in two important ways; first, I was prompted to read law as literature which is a limited exercise, and then to read law to engage with the legal and jurisprudential concerns that the text entails. Though the notion or the act of ‘reading’ means differently in the domains of law and literature, it could serve to weaken the supposed impermeability between the two domains and leave greater possibilities for the domains to inform one another.

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