



## A VIEW ON THE ROLE OF "LIVING ORIGINALISM" WITHIN INDIAN CONSTITUTIONAL INTERPRETATION

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### ABSTRACT

*Originalism, with its roots in American constitutional thought, is a judicial philosophy which gives priority to the original intent of those who enacted constitutional provisions when dealing with constitutional interpretation. In India, this concept seems to have been rejected as a result of the emergence of judicial activism and public interest litigation law. Many believe that the United States Supreme Court uses originalism to promote conservative agendas. Despite this, the Indian legal community should consider if there is scope for a type of Originalism (or "Living Originalism") within Indian constitutional interpretation. This essay neither defends nor opposes specific theories of constitutional interpretation, but examines whether this largely American school of thought can be applied in India and contributes to greater internal consistency of constitutional law.*

**KEYWORDS:** Originalism, Constitutional Interpretation, Indian Constitution, Moral Interpretation, Living Originalism

### INTRODUCTION

#### **Living Originalism Philosophy:**

The Constitution is a country's supreme law. Numerous protections and liberties for individuals are guaranteed. These liberties and protections are guaranteed by the Constitution, but it is never clear whether they will remain constant or if they will evolve over time. The recent ruling by the Supreme Court in *Thomas E. Dobbs v. Jackson Women's Health Organisation* has reignited this debate.

"Living Originalism" by Jack Balkin is a compelling work of contemporary interpretive theory. Balkin argues that originalism and the living Constitution are incompatible and proposes a compromise he calls "Living Originalism," which combines the best aspects of both approaches. Some have argued that originalists must begin to read the Constitution

morally, as opposed to relying solely on abstract notions of historical context and original intent. Scholars generally agree that the Constitution's guiding principles are more than just objects that must be preserved; they represent the ideals we must endeavour to attain. Many have viewed this as an opportunity to forego judicial restraint and textualism in favour of the more practical model of living constitutionalism.

Critics of originalist thinkers have argued that the lack of consistency in interpreting constitutional texts is a major issue. In *District of Columbia v. Heller*, a majority opinion given by Justice Antonin Scalia, a prominent originalist, ruled (by a 5-4 majority) that handguns can be classified as arms and that Congress cannot restrict individuals' access to them. Scalia justified this decision by referring to the original intent of the framers – to protect individuals from tyranny – and extending the right to bear



arms to an individual level. This decision has been heavily critiqued by many on the liberal side for its alleged misinterpretation of historical context, and for furthering preconceived biases without acknowledging them..

### ISSUES WITH US ORIGINALISM

Originalists' inconsistent constitutional reading is a common criticism. Probably the most well-known case in this category is *Heller v. District of Columbia*, where the majority ruled in favour of the defendant. The majority opinion was written by Justice Antonin Scalia, arguably the most renowned originalist theorist of the 21st century. In this context, the Supreme Court of the United States had to determine whether the Second Amendment guarantees the right to keep and bear arms. This amendment guarantees the right of the people to keep and bear arms so that "a well-regulated militia, essential to the security of a free state, shall not be violated." Scalia, J. presented from the Bench that based on original intent, individuals must be permitted to possess firearms for protection from a tyrannical federal government; thus departing from prior decisions, 5-4 voted that handguns can be accessed by citizens without infringement from Congress.

In *Thomas E. Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court issued a ruling in favour of originalism. **Roe v. Wade** and **Planned Parenthood of Southeastern Pennsylvania v. Casey** were both reversed because the Supreme Court determined in its most recent decision that the Constitution does not guarantee a woman's right to an abortion. Justice Samuel Alito wrote for the majority in *Washington v. Glucksberg* that a fundamental right must be deeply rooted in American tradition and "implicit in the concept of ordered liberty." While the majority argued that *Roe v. Wade* and *Casey* exacerbated the contentiousness of the issue, the minority argued that it would result in the denial of rights such as same-sex marriage and access to contraceptives, which were only

recently recognised by American law. The minority further criticized the view for relegating women to second-class citizenship, calling to mind Chief Justice Charles Evans Hughes' quote about dissents being appeals to a better future day where mistakes can be corrected.

The Constitution's framers didn't anticipate many rights that US courts have recognised. These rights involve the freedom to purchase and use contraceptives, as well as protection from uninvited sterilisation (1927, at the height of the eugenics movement). (which were forbidden in the late 1800s and later safeguarded by the court in 1965); non-white Americans' right to marry white Americans (prohibited since slavery times and only safeguarded as a fundamental right to marry in 1967); and consenting adults' right to sexual intimacy and same-sex intimacy. (only vindicated by the court in 2015). A legal precedent that has been in place for 50 years has been overturned and upheld by the Supreme Court. The full spectrum of personal liberties and freedoms has been disrupted by this decision, which has weakened several crucial rights. In this case, it is believed that the adage "it is better for the law to be settled than to be settled correctly" (Brandeis, J.42) is appropriate.

### AN EVOLVED METHOD OF ORIGINALISM": LIVING ORIGINALISM

Balkin argued that "living originalism" was an ideal compromise between "originalism" and "living constitutionalism," the opposite of originalism. David Strauss, who is widely regarded as the most prominent opponent of originalism, argued that the greatest flaw of this legal approach is its inability to address the infamous "Jeffersonian conundrum," which asserts that the earth belongs to the living and not the dead. Strauss considers this to be the original sin of this method of thinking. Using a moral interpretation of the Constitution, living originalism attempts to address this issue. People frequently argue that when the



Constitution's text is ambiguous, the original intent of those who wrote it should be given more weight. Does this imply that the current circumstance should not be considered at all?

Balkin's idea of "living originalism" can be supported by the "faith and redemption" theory, as it recognises that the Constitution is flawed and needs to be interpreted in a way that reinstates our confidence in its ideals and goals. This means that the framers' intentions cannot be understood separately from the aspirations and objectives that inspired the Constitution's establishment.

This opinion has been subject to severe criticism - predominantly from left-wingers - for its disregard for historical context and potential for illogical conclusions when using a rigid originalist thinking. Originalism has garnered much controversy due to its potential biasness without any acknowledgement of such preconceived notions.

In the early days of the Indian Republic, the Supreme Court adopted an interpretation style similar to that of the Privy Council, which was India's highest authority before independence. One example is *A.K. Gopalan v. State of Madras*, which involved the phrase "procedure established by law" in regard to the constitutional right to life. Kania, J. ruled in favor of a textualist interpretation that did not allow for judicial review of parliamentary legislation; this result could have also been reached if an originalist method was chosen instead.

The founding fathers' intention for this phrase when used in the US Constitution was to prevent legal obstacles from hindering social justice legislation during the 1900s and New Deal time period.

The Supreme Court's initial constitutional rulings often saw a textualist interpretation applied; though some later rulings and legal experts oppose this approach, it held a definite consistency in judicial philosophy. *Rajasthan v Union of India* is an important case that supports this process, as it permitted only

limited court intervention upon use of Article 356(1) with a more textualist stance upheld.

In modern times, with the development of Public Interest Litigation (PIL) jurisprudence, it would be almost sacrilegious to advocate for a more textual approach to constitutional interpretation. During the 1970s-1990s, when the Supreme Court was at its most liberal, a number of decisions veered away from textualism and towards structure-based judicial activism. One such landmark case was *C. Golak Nath v. State of Punjab*, in which the Supreme Court limited the amending powers of Parliament and declared that no constitutional amendment could withstand judicial scrutiny if it violates the fundamental rights outlined in Part III. The famous *Kesavananda Bharati Sripadagalvaru v. State of Kerala* case, which introduced the basic structure doctrine, overturned *Golak Nath*. *Kesavananda Bharati* demonstrated a clear departure from the traditional textualist thinking that was prevalent in the early days of the Supreme Court. Nonetheless, it cannot be regarded as a champion of judicial liberalism because it overruled the more audacious and liberal view expressed in *Golak Nath*.

In recent years, the concept of judicial liberalism has entered the national consciousness, and people have responded in two distinct ways, which will be discussed in the section that follows.

#### THE RESPONSE TO THE CURRENT TRENDS

The methods of originalism and textualism have been criticised for being inflexible and placing the law above fairness and justice. However, some legal scholars have recently shifted their criticism to judicial activism, which they perceive as exceeding the court's authority. Also criticised is the lack of consistency in the Indian judiciary's approach. Both extremes accuse the court of increasing its authority and legislating from the bench.



So, what is the answer to this quandary? Due to the nature of the Indian Constitution, a strict originalist approach may not be feasible, while an excessively liberal approach risks exceeding the Constitution's limits and interfering with legislation and policymaking. A balanced approach could be the answer to the court's interpretive difficulties. India should investigate the merits of living originalism and moral interpretation of the Constitution at this time.

#### LIVING ORIGINALISM IN INDIA: THE MORAL APPROACH TO OUR CONSTITUTIONAL ISSUES

A living originalist's strategy must be centred on the Constitutional Experiment and the original intent of the Framers. In this case, unlike in American constitutionalism, the intent of the Indian framers is well-documented and debated, making this concept of interpretation more likely to be successful in India. In other words, there is significantly less room for interpretation in the Indian Constitution compared to the Constitution of the United States.

#### THE MORAL READING OF THE INDIAN CONSTITUTION

Living originalism emphasises morally conscious constitutional interpretation. This is especially pertinent to the Indian Constitution, which has been the subject of numerous moral interpretations by the courts. The concept of morally interpreting the Constitution is not new and has been investigated by numerous philosophers, including Ronald Dworkin. The Indian Supreme Court examined the moral implications of Indian secularism in **S.R. Bommai v. Union of India**. The Court augmented the basic structure doctrine established in the Kesavananda Bharati case by including "secularism" as a fundamental aspect of the Constitution's basic structure. This expansion is viewed as a reflection of the moral

character of constitutionalism, which permits such interpretations.

The Constitution of India is currently understood and interpreted as a living document, however that was not always the case. Early cases such as **A.K. Gopalan v. State of Madras** showed that the Constitution was being interpreted according to the framers' intent, with Article 21 being held as not requiring Indian courts to apply a due process of law standard. In this case, Mukherjea J., concluded that "law" in Article 21 was used in reference to State-made law and not in an abstract sense. However, 28 years later *Maneka Gandhi v. Union of India* saw Article 21 being reinterpreted to mean a procedure "which is just, fair and reasonable", according to Krishna Iyer and Bhagwati J.'s concurring judgements. This same interpretive change can be seen when the Supreme Court reversed their previous decisions on the issue of "right to privacy", from **Kharak Singh v. State of U.P** and **M.P Sharma v Satish Chandra** to **K.S Puttaswamy v Union of India** and Supreme Court Advocates-on-Record Assn v Union of India ; cementing privacy as a fundamental right in 2017, based on their stance that interpretation must reflect changing needs through time - something which is covered by **Kesavananda Bharati v State of Kerala** which states that Constitutions must be elastic, ever-growing with society's needs rather than static or immutable; they cannot be put into a straitjacket with each generation bound by what came before them - they are living organisms, connotations taking shape and color as situations develop over time!

Dworkin argued that this interpretation of the Constitution was more consistent with the moral principles on which it was founded than with the literal text. While analysing Dworkin's lecture on the Bommai case, Professor Baxi noted that Indian readers of Dworkin find it difficult to comprehend why certain Constitutional provisions are relegated to the realm of constitutional detail rather than that of constitutional principle. Dworkin's analysis of the



Bomma case once again emphasises the significance of considering the moral implications of the Indian Constitution.

#### THE CONUNDRUM OF INDIAN CONSTITUTIONAL MORALITY

In recent years, the Indian Supreme Court has demonstrated a willingness to address complex constitutional morality issues, and it appears that civil liberties and a moralistic approach to the Constitution are gaining importance. This trend is evident in the landmark case of *Navej Singh Johar v. Union of India*, in which the Supreme Court struck down Section 377 of the Indian Penal Code and decriminalised homosexuality, relying heavily on the concept of constitutional morality. Particularly, Justice Chandrachud's opinion emphasises that constitutional morality cannot be achieved without fraternity and respect for the dignity of the individual.

Dr. B.R. Ambedkar, the father of the Indian Constitution, did not believe India was ready for this concept. However, proponents of constitutional morality argue that India has developed sufficiently democratically to incorporate it.

However, not everyone supports this approach. K.K. Venugopal, the Attorney General of India, has criticised the concept of constitutional morality and accused the Supreme Court of judicial overreach. Many originalists concur with Venugopal, arguing that the courts are exceeding the Constitution's text and original intent.

#### IS CONSTITUTIONAL MORALITY CONTRADICTIONARY TO LIVING ORIGINALISM?

The living originalist philosophy places a greater emphasis on the constitutional experiment rather than relying on the original intent of the Constitution's framers. Although living originalists are against judicial activism, they recognise that adhering strictly to the text of the Constitution might not be the best way to achieve the Constitution's overarching

objectives. The question of whether or not constitutional morality can be compatible with living originalism is brought up.

The modern view on constitutional morality is more open to comparative constitutional analysis, which is a key difference between the two schools of thought. The Indian Supreme Court frequently cites rulings from the United States and other commonwealth nations. Strict originalists are opposed to comparative analysis and maintain that interpretation should be based solely on the Constitution and its original intent when it was written.

There is no evidence that a comparative analysis is necessary for a moral interpretation of the Constitution, so living originalism may also fall within this category. However, comparative analysis has been the cornerstone of Indian law for a very long time, and the notion of constitutional morality is only a fairly recent development. As a consequence of this, it is not entirely clear whether or not a comparative analysis is required by constitutional morality. According to the author's argument, this difference is not insurmountable, and the idea of constitutional morality can serve as a stepping stone towards the philosophy of living originalism.

#### CONCLUSION

In spite of the concerns expressed by the Attorney General regarding the morality of the Constitution, many members of the legal community are of the opinion that the judiciary has expanded its power through the use of this instrument far beyond what is constitutionally permissible. The other line of reasoning is that these powers are essential in order to put an end to the historical pattern of power abuse that has taken place in this country by the executive branch. Both of these arguments have their merits and their drawbacks.

This author would like to argue that the concept of "living originalism," which is faithful to the ideals and spirit enshrined in the Constitution,



offers a middle ground solution. The Indian Constitution is one of a kind due to the fact that it introduced democracy and freedom to a nation that had never been fully democratic in its history or culture prior to the adoption of the constitution. Having said that, over the course of the past seven decades, the Indian Constitution has developed into one of the most revered documents in the country. The original intention of the Constitution must be preserved at all costs, and living originalism might be able to offer some assistance in this endeavour.

Numerous philosophers have argued for a moral interpretation of the Constitution; however, fidelity to the law must be balanced with the subjectivity of morality. Although living originalism is not the silver bullet that is necessary to fix India's constitutional issues, it may be the best compromise between judicial activism and restraint.

place behind closed doors and was not open to the public.

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