INTERPRETATION OF CONSTITUTIONS: A DOCTRINAL STUDY

—Arvind P. Datar & Rahul Unnikrishnan[1]

Hans Kelsen perceives a 'Constitution' as an idea of the highest order that determines the whole legal and political order of a country- a template for legal distribution of political power amongst its constituent units. This means that the Constitution determines the genesis of statutes, determination of the organs and the procedure of legislation. The idea that the basic rule of the Constitution forms the foundation of all orders of the State and is thereby required to be as firm and unchangeable as possible, invariably leads to the view that it is necessary to differentiate between constitutional norms and statutory norms.[2]

When the text of the Constitution is unambiguous, its sounds can be easily interpreted. However, when the Constitution is silent on any right, immunity, privilege or any form of distribution of power, it becomes an exercise to interpret the 'sound of the silence'. Laurence H. Tribe has eloquently dealt with silences of Constitutions in the undernoted article.[3]

Craig Ducat argues that the various modes of constitutional interpretation are concerned not only with addressing how the practice of judicial review is to be harmonized with democratic institutions, but also with the procedure that standard courts should use to determine whether a given legislative, executive, administrative or judicial action contravenes the Constitution. According to Ducat, constitutional interpretation is carried on through several alternative modes of judicial review that address the logical interconnection among the following three elements: the justification for the power to review, the standard of constitutionality to be applied by the courts, and the method by which judges support the conclusion that a given governmental action does or does not violate

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[1] Advocates, Madras High Court. An abridged version of this essay was presented by Mr. Datar at the National Judicial Academy on 4 February, 2017. The authors acknowledge the contribution of Sarangan Rajeshkumar, a IV year student of National Law School of India University, Bangalore.

[2] Lars Vinx, The Guardian Of The Constitution: Hans Kelsen And Carl Schmitt On The Limits Of Constitutional Law, 28 (Cambridge University Press, 2015).

[3] Laurence H. Tribe, *Soundings and Silences,* 115 Michigan Law Review, Vol. 115 (2016), http://michiganlawreview.org/wpcontent/uploads/2016/11/115Mich.L.Rev_Online26_Tribe.pdf.

the Constitution.[4] In most Constitutions, the concept of judicial review forms a great silence. Further, constitutional interpretation is different from statutory or common law interpretation because of the general and open-ended nature of the language used in Constitutions. Furthermore, the text of Constitutions is of an ancient origin and it concerns topics that are central to a country's basic political structures and values.[5] These factors have helped develop a distinct set of constitutional interpretative techniques that require in-depth study and careful analysis. This distinction between constitutional interpretation and statutory interpretation was further highlighted by Chief Justice Dickson of the Canadian Supreme Court in the following words-

> "*The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.*"[6]

I. THEORIES OF CONSTITUTIONAL INTERPRETATION

A. Textualism

The "textualist" theory or the "plain meaning" theory of interpretation is, according to Robert Post, not a theory at all; it is nothing but a description of what happens when the meaning of the constitutional text is not problematic.[7] This approach was championed by Justice Scalia of the Supreme Court of the United States and Judge Easterbrooke of the United States Court of Appeal for the Seventh Circuit.[8] Both Justice Scalia and Judge Easterbrooke emphasize the need to imagine a 'reasonable reader' whose mission is to find out "what

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4 Craig R. Ducat, Constitutional Interpretation, 80 (Thomson West, 2004).

5 Kent Greenawalt, Statutory and Common Law Interpretation, 293 (Oxford University Press, 2013).

6 *Hunter* v. *Southam Inc.*, 1984 SCC OnLine Can SC 36 : (1984) 2 SCR 145.

7 Robert C. Post, *Theories of Constitutional Interpretation*, 30 Faculty Scholarship Series 13, 14 (1990).

8 Caleb Nelson, *What is Textualism,* 91(2) Virginia Law Review 347, 347-418 (2005).

Congress meant by what it said".[9] In short, textualists advocate that interpretation should focus upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.[10] Kent Greenawalt observes that there are two underlying claims that are contained here: the true nature of a statute or constitution is contained exclusively in its language, and the actual mental states of legislators are irrelevant.[11]

The textualists' dislike for legislative history is well-known.[12] Max Radin, an erstwhile legal realist, severely criticizes the idea of using legislative intent in statutory and constitutional interpretation.[13] The arguments put forth by Max Radin were based on common sense and pure logic. He borrowed ideas from the book *Logic* written by W.E. Johnson to challenge the assumption that hundreds of legislators may share a common legislative intent. He wrote:

> "*The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed. In an extreme case, it might be that we could learn all that was in the mind of the drafts- man, or of a committee of half a dozen men who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or five hundred approvers? Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behaviour of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply. It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.*"[14]

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[9] *Ibid* at 354.

[10] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, 144 (Princeton University Press, 1997).

[11] Greenawalt, *supra* note 5, at 44.

[12] John F. Manning, *Textualism as a Non-Delegation Doctrine,* 97(3) COLUMBIA LAW REVIEW 673 (1997).

[13] Max Radin, *Statutory Interpretation*, 43(6) HARVARD LAW REVIEW 863 (1930).

[14] *Id*, at 869 (Radin uses W.E. Johnson's theories, especially on his differentiation of 'determinables' and 'determinates', to observe that the situation described in a statute is generally a

On a semantic level, while agreeing with Max Radin, we believe that there is certainly some merit in saying that a legislature has no intention in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had different ideas and beliefs. However, this does not mean that other theories of interpretation are fallacious. Certainly, the textualist theory of interpretation is the one with the least scope for imagination, thereby curtailing judicial discretion. One should also keep in mind the fact that a constitution is always a 'living document'.

B. Originalism[15]

Originalism is the view that the Constitution should be interpreted according to its original meaning.[16] This school of thought came to the fore with the arguments of Herbert Wechsler on neutral principles to guide constitutional interpretation.[17] In his article in the *Harvard Law Review*, Wechsler argues that the courts should practice constraint on adjudication i.e., the grounds for decisions must be neutral and general. Criticising the decision in *Brown* v. *Board of Education*,[18] Wechsler observed that courts must choose principles which they are willing to apply neutrally to all cases that may fairly be said to fall within them, which, in his opinion, were essential if the Supreme Court was not to be a naked power organ.

In 1971, Judge Robert Bork, then a professor at Yale Law School, argued that the neutral principles as postulated by Wechsler should be derived from the Constitution itself.[19] Articulating further, Bork, in his seminal book *The Tempting of America*, observes that when a judge finds his principle in the Constitution as originally understood, the problem of the neutral derivation of principle is solved and he/she need not make unguided value judgments of his own. This was considered as a safeguard against political judging.[20]

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determinable; that is to say, it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that determinable. Further, a determinable of this sort can be made more nearly determinate by reducing the number of possible individualizations, and it becomes quite determinate when it is so expressed that there is only one).

15 Also known as 'interpretivism'/'preservativism'.

16 John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 1 (Harvard University Press, 2013).

17 Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism,* 36(1) Law and Society Review 113, 113-118 (2002)*;* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73(1) Harvard Law Review, 1-35 (1959).

18 *Brown* v. *Board of Education*, 1954 SCC OnLine US SC 44 : 98 L Ed 873 : 347 US 483 (1954) (in this case the Supreme Court declared state laws establishing separate public schools for black and white students to be unconstitutional).

19 Harry H. Wellington, Interpreting the Constitution, 44 (Yale University Press, 1990).

20 Robert H. Bork, The Tempting of America: The Political Seduction of Law, 146 (Touchstone, 1990).

Jeffrey Goldsworthy identifies eight propositions about the nature of Constitutions and the rule of law that support the originalist school of interpretation.[21] They are:

1. A Constitution necessarily has a meaning prior to judicial interpretation of it;
2. To change the meaning of a law is to change the law;
3. The original meaning of a Constitution is its "utterance meaning," which must be distinguished from its original literal meaning and its originally intended meaning;
4. Constitutional amending formulas bind judges as well as other officials and preclude change through judicial interpretation;
5. Change to the constitution through interpretation undermines the Constitution, the rule of law, the principle of democracy, and the principle of federalism;
6. Judges are duty-bound to determine and clarify the pre-existing meaning of the Constitution but can supplement that meaning when it is not sufficiently determinate to resolve the problem at hand.
7. Although judges cannot deliberately change the Constitution, constitutional law can and does legitimately evolve over time; and
8. Consistent application of any constitutional theory, including originalism, might lead to grave injustice in a particular case and if it does, judges might be morally bound to disobey the Constitution, but this has nothing to do with the true meaning of the Constitution.

However, it must be stated that originalists have faced serious objections from academicians. The main criticisms are that the original understanding is unknowable, the Constitution must change as society changes and that there is no real reason for the living to be governed by the dead.[22] In our opinion, the originalist theory of interpretation should be read in a restricted manner. An originalist interpretation of distribution of powers and other 'basic structures' of a Constitution helps the Constitution survive but an originalist interpretation of the rights of individuals which results in a narrow interpretation of rights cannot be justified in any manner whatsoever.

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[21] Jeffrey Goldsworthy, *The Case for Originalism*, The Challenge of Originalism: Theories of Constitutional Interpretation, 42, 42-69 (Grant Huscroft & Bradley W. Miller eds, Cambridge University Press, 2011). (According to Goldsworthy, utterance meaning is the full meaning of an utterance, implied as well as expressed, and it depends on what the speaker's meaning appears to be, given evidence that is readily available to his or her intended audience, including the sentence meaning of the utterance and other clues such as its context).

[22] Bork, *supra* note 20, at 161.

C. Doctrinalism

The Doctrinalist approach involves resolving contemporary constitutional controversies by interpreting past precedents. The focus of this school of thought is the idea that the principle underlying a past decision provides the standard for interpreting the Constitution in future cases. Mark Graber provides a simple example to demonstrate this thought: if constitutional decision-makers have declared that the Constitution protects the right to burn the flag of the United States (U.S.), then the same principle should unequivocally compel constitutional decision-makers to declare that the Constitution protects the right to burn a map of the United States or the state flag of Texas. He also quotes Justice Oliver Wendell Holmes, who emphasised how precedential reasoning allowed the law to develop and grow over time as judges applied, extended and adjusted legal principles when new cases arose. Further, constitutional precedents may be established by judges, presidents or legislators.[23] Needless to say, these can also be overruled or altered if they are found to be erroneous or do not meet the felt necessities of the time.

D. Structuralism

Structuralists use the overall constitutional arrangement of offices, powers, and relationships or rather "the meaning of the Constitution as a whole", to solve hard cases. The U.S. Constitution's leading structural principles are federalism, separation of powers and democracy[24] even though none are stated explicitly in the constitutional text.[25] Charles Black, the main proponent of structuralism, maintains that structuralism provides an "inference from the structures and relationships created by the constitution in all its parts or in some principal part" rather than an "exegesis of a particular textual passage".[26] In doing so, a structuralist refuses to answer questions concerning the origin of law, the legislative intent or the consequences and concerns himself only with the relationship that exists among legal texts. The structuralist sees laws only as signs that in turn refer to other signs.[27] In doing so, the structuralist sets aside any arguments made to justify the existence of laws or to criticize them.

In this way, structuralist thinking flattens out legal norms, principles and laws into a single system that works in perfect synchrony and is internally consistent

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[23] Mark A. Graber, A New Introduction to American Constitutionalism, 80 (Oxford University Press, 2013).

[24] Sotirios A. Barber & James E. Fleming, Constitutional Interpretation: The Basic Questions, 117 (Oxford University Press, 2007).

[25] Graber, *supra* note 23, at 81.

[26] Graber, *supra* note 23, at 81.

[27] David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21(2) New England Law Review (1985).

in its object. All parts of the system are assumed to be consistent with each other in the meanings accorded to each of them by the legal language.

The structuralist also firmly believes in the law's ability to provide answers to any legal issues that may arise and searches within the system to identify language that is capable of being mutated to accommodate situations while continuing to retain the legal character that it is endowed with. The system itself is merely a diagram that is made up of different connectors that take the shape of legal concepts, which connect laws that exist in different forms (statutes, rules, precedents, etc.). It is these relationships that are presented to us in permutations of 'rights', 'duties', 'liabilities', 'powers' and so on.

E. Prudentialism

Prudentialists determine constitutional meanings by examining the costs and benefits of different policies.[28] Justice Robert Jackson famously said, "*if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact"*.[29] Taking a different view, Justice Scalia held that a judicial decision granting *habeas corpus* to alleged terrorists detained at Guantanamo Bay would almost certainly cause more Americans to be killed.[30]

The prudentialist has the unique distinction of being able to appeal to the public sense of conscience as opposed to a textualist, who is seen as an unfeeling and stoic individual. Moreover, a prudentialist also lies in stark contrast to an originalist who looks back upon legislative history to interpret laws. A prudentialist instead, focuses on the present rather than the past since the latter is in the opposite direction of progress. Although one might argue with the prudentialist that laws have been framed keeping in mind their future implications, the rebuttal for this argument would be that there is considerable complexity in applying them to today's society and consequently, it is necessary to look for new solutions to the problem at hand. The primary motivation of prudentialist legal reasoning is to arrive at conclusions that do not appear to be senseless to society at large. The strength of prudentialism lies in its emotional appeal. It imparts a human touch to legal interpretation making it easily understandable for those who have viewed law as an unapproachable enterprise. It achieves this by stating its object to be the balancing of costs and benefits of a particular rule rather than strict adherence to legislative intent or even to the text of the law.[31]

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[28] Graber, s*upra* note 23, at 83.

[29] *Terminiello* v. *City of Chicago*, 1949 SCC OnLine US SC 59 : 93 L Ed 1131 : 337 US 1 (1949).

[30] *Boumediene* v. *Bush*, 2008 SCC OnLine US SC 46 : 171 L Ed 2d 41 : 553 US 723 (2008).

[31] Jack M. Balkin, *Constitutional Grammar*, Yale Law School Faculty Repository (1994) http://digitalcommons.law.yale.edu/fss_papers/269.

F. Purposive Interpretation

Aharon Barak, a former President of the Supreme Court of Israel, is the main proponent of the doctrine of purposive interpretation. He observed that purposive interpretation demonstrates its sensitivity to the uniqueness of a Constitution in the balance it strikes between subjective purpose i.e., the intent of the authors of the Constitution, and objective purpose i.e., the intent of the system.[32] Barak cites the Canadian Supreme Court[33] which used the doctrine of purposive interpretation to observe that the meaning of a right or freedom under the Charter of Rights and Freedoms must be ascertained by an analysis of the purpose of such a guarantee. Purposive interpretation can thus be a perfect tool of interpretation for an expansive interpretation of rights owing to the felt necessities of time but at the same time without deviating from the core principles that shape a Constitution.

According to Barak, the subjective purpose of a Constitution is the goals, interests, values, aims, policies and function that the founders of the Constitution sought to actualize. If credible historical information about it exists, then the judges can easily identify them.[34] On the other hand, the objective purpose of a Constitution is the interests, goals, values, aims, policies and function that the constitutional text is designed to actualize in a democracy. The focus of his argument is that a democratic legal system's values and principles shape the objective purpose of its Constitution. He says that the constitutional text tightly binds its objective purpose in two ways: *first*, the essence of a Constitution's objective purpose may arise from its language; and *secondly*, one cannot use the Constitution to achieve a purpose that its language cannot bear.[35]

II. CONSTITUTIONAL INTERPRETATION- THE INDIAN PERSPECTIVE

Unlike in the U.S., it is difficult, if not impossible, to discern the doctrinaire studies on different schools of constitutional interpretation in India. The U.S. Constitution is substantially silent on many issues or 'sounds', as we call it, or the same have been often provided in general terms. For instance, the expression 'due process' has been the subject matter of extensive judicial comment. Similarly, as David Derham puts it, the U.S. constitution is 'silent' on many other issues like 'trade and commerce'.[36] He further argues that, and rightly so, the Australian and Indian Constitutions were drafted with great particularity and that the courts

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[32] Aharon Barak, Purposive Interpretation in Law, 371 Princeton University Press, 2005).
[33] *R.* v. *Big M Drug Mart Ltd.*, 1985 SCC OnLine Can SC 16 : (1985) 1 SCR 295.
[34] Barak, s*upra* note 32, at 375.
[35] Barak, *supra* note 32, at 377.
[36] David P. Derham, *Some Constitutional Problems arising under Part XIII of the Indian Constitution,* 1 Journal of Indian Law Institute, 523, 562 (1959).

should avoid reasoning with statesman-like speculations. He was very critical about the interpretation of Part XIII[37] of the Indian Constitution. He said-

> "*Part XIII is an example of such particularity and, it is suggested, the courts have been permitted by that Part to behave like mere lawyers and have not been required to assume the larger role except in the traditional interstitial way.*"[38]

Further, it is often a forgotten fact that the Indian Constitution is substantially based on the Government of India Act, 1935.[39] It is the longest Constitution and several provisions have been set out in great detail. Also, unlike the U.S. Constitution, the Indian Constitution is much younger and scope for it being silent in several cases is substantially lesser. Nevertheless, our Constitution has been the subject matter of several important issues, and the judiciary has interpreted its text in the literal sense, based on its original intent, or, based on purposive theory. Indeed, the Supreme Court has gone beyond the expected norms and introduced concepts like, *inter alia,* 'compensatory tax', the 'basic structure' theory, reading arbitrariness into Article 14 and evolving multiple facets of the right to equality and right to life. A brief examination of the manner in which the Supreme Court has interpreted the Constitution shows that different methods of interpretation have been adopted at different times.

A. Textualist Interpretation

In *A.K. Gopalan*,[40] the Supreme Court gave a narrow and literal interpretation to Article 21 of the Indian Constitution and refused to infuse the concept of "procedure established by law" with the principles of natural justice. The judicial uncertainty on the interpretation of the term "compensation" as contained in the erstwhile Article 31[41] of the Constitution of India marked another episode of textualist interpretation by the Supreme Court. In 1954, the Supreme Court held that

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37 Articles 301-307, Constitution of India (Trade, Commerce and Intercourse within the Territory of India).

38 Derham, *supra* note 36, at 562.

39 *M.P.V. Sundararamier & Co.* v. *State of A.P.*, AIR 1958 SC 468 (Venkatarama Aiyar, J. observed that the provisions of the Constitution must be read in the light of Government of India Act, 1935).

40 *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27 (This case was overruled in *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248 : AIR 1978 SC 597 wherein it was held that the procedure contemplated in Article 21 of the Indian Constitution must answer the test of principles of natural justice); *See M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.

41 Article 31(2), Part III, Constitution of India (This article stated that no property, movable or immovable, including any interest in, or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of possession of such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determines and given).

compensation payable must be a just equivalent of what the owner is deprived of. It rejected the plea that compensation was not used in a rigid sense implying equivalence in value but referred to what the legislature might think was a proper indemnity for the loss sustained by the owner. It was held that the basic requirement was of full indemnification of the expropriated owner and within this limit, the legislature had free play to determine what principles will guide the determination of the amount payable.[42] This decision led to the Constitution (Fourth Amendment) Act, 1955 whereby the issue of compensation was put beyond the scope of judicial review.

In *P. Vajravelu Mudaliar,*[43] despite the aforementioned amendment, it was held that the provision for compensation, the laying down of principles for determining compensation, or the laying down of compensation was a necessary condition for making laws relating to acquisition. Although the adequacy of compensation was excluded, the law laid down for determining compensation would be struck down if found to be irrelevant with reference to the value of the property or if the compensation it provided for was illusory.[44] Subsequently, in another case, it was held that the observations in *P. Vajravelu Mudaliar* were *obiter dicta* and not binding.[45] In *Shantilal,* the Supreme Court held that the compensation could not be challenged on the ground that the just equivalent of what the owner had been deprived of was not provided for. Ironically, within a year, the Supreme Court did a judicial somersault[46] and held that compensation must be a just equivalent.[47]

Another area where the Supreme Court had used textualist interpretation was in the interpretation of the word "law" under Article 13(2) *vis-à-vis* the Parliament's power to amend the Constitution under Article 368. The Constitution was indeed silent on whether this word under Article 13(2) includes a constitutional amendment or not. In 1951, the Supreme Court made a distinction between ordinary legislative power and the Constituent power of the Parliament. The Constitution (First Amendment) Act, 1951 was challenged but it was held that the word "law" in Article 13(2) would not include an amendment to the Constitution which was made in exercise of the constituent power of the Parliament. It was held that Article 368 empowered Parliament to amend the Constitution without any exception.[48] This view was later upheld by the Supreme Court in 1965 by holding that a constitutional amendment could even take away or abridge fundamental rights.[49] However, it must be noted that two years later, in 1967, the Supreme Court, *vide* a bench of 11 judges, took a diametrically opposite view and

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42 *State of W.B.* v. *Bela Banerjee,* AIR 1954 SC 170.
43 *P. Vajravelu Mudaliar* v. *Collector (LA)*, AIR 1965 SC 1017.
44 *See Union of India* v. *Metal Corpn. of India Ltd.*, AIR 1967 SC 637.
45 *State of Gujarat* v. *Shantilal Mangaldas*, (1969) 1 SCC 509 : AIR 1969 SC 634.
46 Arvind P. Datar, Commentary on the Constitution of India, 498 (2006).
47 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 : AIR 1970 SC 564.
48 *Sankari Prasad Singh Deo* v. *Union of India*, AIR 1951 SC 458.
49 *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845.

held that the power under Article 368 could not abridge or take away any of the fundamental rights in Part III of the Indian Constitution.[50]

B. Purposive Interpretation

Often, we tend to forget the existence of dissenting opinions tendered by non-conformist judges. Justice Vivian Bose, who could be called as a 'chronic dissenter', had, on multiple occasions, tried to give an expansive meaning to Part III of the Constitution. As early as in 1952, in *Anwar Ali Sarkar*,[51] he observed in a dissenting view-

> "*...the provisions of the Constitution are not mathematical formulae which have their essence in mere form. They constitute a framework of Government written for men of fundamentally differing opinions and written as much for the future as the present. ... They are not just dull lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present.*"

Equally fascinating is his another dissenting view in *S. Krishnan*.[52] He held-

> "*... I hold it, therefore, to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on fundamental rights, to resolve it in favour of the freedoms which have been so solemnly stressed. Read the magnificent sweep of the Preamble. ... They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject.*"

The early 1970s saw a major shift in the approach of the Supreme Court; it started giving expansive meaning to Part III, which view was based on a certain set of 'silent' features of the Indian Constitution. In *Kesavananda Bharati*,[53] the Supreme Court held that the Parliament's power to amend the Constitution included within itself the power to add, alter or repeal the various Articles of the Constitution but it did not include the power to abrogate the Constitution or alter

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[50] *C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643.

[51] *State of W.B.* v. *Anwar Ali Sarkar*, AIR 1952 SC 75.

[52] *S. Krishnan* v. *State of Madras*, AIR 1951 SC 301 (In this case, the legality of the Preventive Detention (Amendment) Act, 1951 was questioned).

[53] *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.

its *basic structure*. As rightly pointed out by Fali Nariman, the basic structure theory had evolved from the great silence in our Constitution. He says, "*after all, the Constitution did provide that it could be amended but surely it did not say that it could be abrogated, or that its basic features could be thrown to the winds*."[54] *Kesavananda Bharati* is a classic example of Aharon Barak's notion of purposive interpretation with respect to the balance it strikes between subjective purpose (the intent of the authors of the Constitution) and objective purpose (the intent of the system).

This suit was later worn by the Supreme Court in multiple occasions. In *Maneka Gandhi,*[55] it was held that the procedure contemplated under Article 21 must answer the test of reasonableness and that such a procedure should also be in conformation with the principles of natural justice. In *Mohinder Singh Gill,*[56] the Supreme Court interpreted Article 324 in the widest manner possible and conforming with constitutional ideals, it held that Article 324 is geared to the accomplishment of free and fair elections expeditiously. Other examples are, *inter alia, Ramana Dayaram Shetty*,[57] *Royappa*,[58] *Hussainara Khatoon*[59] and *Minerva Mills*.[60]

C. Wrapping the roll: is there 'a' theory of constitutional interpretation?

The above discussions shed light on an important distinction between how judges interpret constitutions in the U.S. and India. In the U.S., it is evident that each judge possesses his own school/ideology and thus becomes an unparalleled advocate of his/her school of interpretative thought. Such an exercise is not seen in India where, as has already been discussed, it is impossible to discern ideologies *vis-à-vis* interpretation of the Constitution. Restricted reading of the Indian Constitution is a thing of the past. Post *Maneka Gandhi,* all judges have been using the purposive tool to interpret the Constitution. After years of uncertainty on the role of Constituent Assembly Debates as a tool to interpret Constitution,[61] the Supreme Court finally held in *S.R. Chaudhuri*[62] that debates in the Constituent Assembly may be relied upon as an aid to interpret

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[54] Fali S. Nariman, *The Silences in our Constitutional Law*, The Supreme Court Cases, J-15, J-23 (2006).

[55] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

[56] *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405 : AIR 1978 SC 851.

[57] *Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489.

[58] *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : AIR 1974 SC 555.

[59] *Hussainara Khatoon (4)* v. *State of Bihar*, (1980) 1 SCC 98.

[60] *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625.

[61] *See A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27; *State of Travancore-Cochin* v. *Bombay Co. Ltd.*, AIR 1952 SC 366; *C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643; *Har Sharan Verma* v. *Tribhuvan Narain Singh*, (1971) 1 SCC 616; *Union of India* v. *Harbhajan Singh Dhillon*, (1971) 2 SCC 779; *State of Mysore* v. *R.V. Bidap*, (1974) 3 SCC 337 : AIR 1973 SC 2555.

[62] *S.R. Chaudhuri* v. *State of Punjab*, (2001) 7 SCC 126.

a Constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. This is indeed useful when the words used in constitutional provisions are vague. Alternatively, if the constitutional provisions are unambiguous yet their interpretation results in a smudged version of justice, Barak's purposive theory of interpretation should be used by the judges to cleanse those smudges. In our opinion, purposive interpretation is the key tool of interpretation which will stand the test of time.