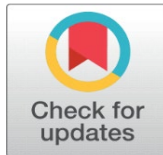
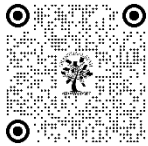


LIVING CONSTITUTIONALISM' AND THE ROLE OF INDIAN JUDICIARY

Dr. Vandana Mahalwar



DOI

10.29121/shodhkosh.v4.i2.2023.2403

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Copyright: © 2023 The Author(s). This work is licensed under a [Creative Commons Attribution 4.0 International License](#).

With the license CC-BY, authors retain the copyright, allowing anyone to download, reuse, re-print, modify, distribute, and/or copy their contribution. The work must be properly attributed to its author.



ABSTRACT

Living Constitutionalism emerged as a popular theory of constitutional construction and interpretation. Living constitutionalism emerged as a reaction against Originalism. Originalism means that the text of the constitution has a set meaning and that constitutional actors should be bound by it. Originalists say that the text of any Constitution is fixed at the time it is drafted, hence, its interpretation should follow the original intention of the framers. While, the theory of Living Constitutionalism provides that constitution needs to be interpreted in consonance of the current socio-economic circumstances in a society. In the Constitution of India, the Indian Judiciary has played a crucial role by constructing its provisions in the interest of people of the nation. This article discusses the role of Indian judiciary in making the Constitution of India, a living document. It also discusses how the Indian judiciary has exhibited the demoprudence by expanding the ambit of Article 21 of the Constitution.

Keywords: Living Constitutionalism, Originalism, Article 21, Role of Judiciary, Constitution of India

1. INTRODUCTION

The process of change are in themselves integral part of the social system, and the very nature of the system, if it persists in being what it is, must be in continual change.¹ The complexities of the modern state, operating as a full-fledged *welfare state*, have increased concerns about each organ's interference in response to evolving political and social dynamics.² This contingency can be tackled smoothly and efficaciously by the state organs solely depending on the constitutional interpretation.³ The Constitution of India is a document that breathes life, gives meaning to substantial changes in the society and turns its text into one that adopts and adapts.⁴ The use of this prefixed word, living, adds more depth to the constitution, making it even more expansive.⁵ As the times change and evolve, adjustments must be made to our faculties, which derive their judgment and power from the *grundnorm*, in order to align with the current way of living. The existing or existed pattern of doctrines might at times fail to address the constantly changing society. Hence, there is need to keep the structure intact, while the context of the constitution needs to be changing basically and substantially⁶. In this juncture constitution takes the adjective of 'living' when it is *structurally* living and at the same time *functionally* also living when it confers individual rights.⁷

¹ Warner, *Changing society* 18(the Corporation in the Emergent American Society, 1962)

² Ziyad Motala and Cyril Ramaphosa, *Constitutional Law – Analysis and Cases* 28 (Oxford University Press, UK, 2002)

³ Ibid.

⁴ Scott Dodson, "A Darwinist view of the living constitution" 61 *Vand. L. Rev.* 1320 (2008).

⁵ Jack M. Balkin, "Roots of the Living Constitution" 92 *B.U. L. Rev.* 1129 (2012)

⁶ Warner, *Changing society* 18(the Corporation in the Emergent American Society, 1962)

⁷ Ziyad Motala and Cyril Ramaphosa, *Constitutional Law – Analysis and Cases* 28 (Oxford University Press, UK, 2002)

2. 'LIVING CONSTITUTIONALISM' AS A CONCEPT

The importance of combining these two words together was first acknowledged by esteemed law professor David A. Strauss, who believed it was necessary for the constitution to be able to adjust, embrace, and present itself in various ways to meet the needs of its recognized people and countries with a constitutional government. His concept was an enlightening one which he made the people realise to ponder and give a profound thought over. In his book "The Living Constitution", David A. Strauss explained how customs and precedents limit the government's power, making the constitution a living document. Strauss emphasizes the benefits of interpreting the constitution through common law rather than relying solely on the original intent of the framers:⁸

- I. It is more workable, unlike the originalism the judges need not be historians, tracing back what the history says on a particular provision. Instead the judges can do their job of interpretation and adjudication.
- II. It is more justifiable as the judgments coming out of the judges would be totally based on fairness and good policy. This means that common law interpretation of the constitution is practical and addresses the issues of being undesirable as a normative concept, rather than simply describing the practice.⁹ This evolutionary process of the interpretation using precedent and tradition with fairness and good policy has made the constitution alive¹⁰ and meet the exigencies of the contemporary society.¹¹

The concept of *living constitution* was thus raised as a controversial sphere from the case of *Plessy v. Fergusson*¹² which allowed state sponsored segregation where the doctrine of 'separate but equal' was invoked, wherein the amendment 14 of the constitution was stating a racially demarcated but equal treatment to the citizens. In this instance, Plessy sat in an all white train car and was arrested for breaking the rule. It was determined that the law was being enforced due to established customs and traditions. Plessy claimed that this rule unfairly targeted people of colour. However, court held that the law aimed to grant citizenship to former slaves and was not based on racial inequality. The law was deemed to fall within the jurisdiction of state police powers. This was later upheld by a liberating yet controversial case of *Brown v. Board of education*¹³, that further followed a line of precedents endorsing it.¹⁴ The cases that pre-existed were *McCabe v. Atchison*¹⁵, where it was held that if a person is denied a privilege which another is enjoying under the same situations, the person denied would be entitled the same as under the equal protection clause. Many cases have transformed the history of American constitution adapting and transforming, cases such as *Roe v. Wade*¹⁶ and *McCulloch v. Maryland*, *United States v. E.C. Knight Co.*, *Goesaert v. Cleary*, *Carter v. Carter coal co.* and many others. In *Brown's* case, the plaintiff's daughter had to walk a long distance to her racially segregated school and was denied admission to the nearby all-white school. The argument was made that the quality of education, the teachers, and the school facilities were invaluable and could not be measured. The court upheld the judgement made in the case of *Plessy* and the judges ruled in favor of the plaintiffs, believing that it would have been harmful for the innocent Negro children at the school to experience discrimination. Despite not all judges agreeing on the relief sought by the counsels regarding teaching quality and infrastructure, they still sided with the plaintiffs. This particular case symbolized a major milestone for the Civil Rights movement¹⁷ in the United States.¹⁸ The courts successfully interpreted the Constitution of the United States by considering the candid custom-law-based Living feature.¹⁹

⁸ Id., at p. 43

⁹ Rebecca L. Brown, "Assisted Living For the Constitution", 59 *Drake L. Rev.* 985 (2010-2011)

¹⁰ *ibid*

¹¹ James E. Fleming, "Living Originalism and Living Constitutionalism As Moral Reading Of the American Constitution", 92 *B.U.L. Rev.* 1171 (2012)

¹² *Plessy v. Fergusson*, 163 U.S. 537 (1896)

¹³ *Brown v. Board of education*, 347 U.S. 483 1954.

¹⁴ David A. Strauss, "Do we want a living constitution" 59 *Drake L. Rev.* 978 (2010).

¹⁵ *McCabe v. Atchison*, 235 U.S. 151 (1914).

¹⁶ *Roe v. Wade* 410 U.S. 113 (1973).

¹⁷ James E. Fleming, "Fidelity to our Living Constitution" 50 *Tulsa L. Rev.* 450 (2015)

¹⁸ Frederick Schauer, "An Essay on Constitutional Language" 877 *Faculty Publications* 797 (1982).

¹⁹ Bruce Ackerman, "The Living Constitution" 120 *Harv. L. Rev.* 1750 (2007)

3. LIVING CONSTITUTIONALISM IN DISAGREEMENT WITH ORIGINALISM

The word 'Originalism' was coined by the eminent constitution scholar Paul Brest in the year 1980²⁰. His writings solely focus on critiquing the idea of interpreting the overall intent of the ratifiers and framers without jeopardizing the stability of the constitutional framework to accommodate evolving conditions, a concept that has been widely acknowledged and debated among various scholars and jurists. This term reflects judicial self-control and supports the original meaning of the language used in the constitution when it was written and ratified by the drafters and ratifiers.

The term has been used constantly since 1930s with different terms affixed with it like original meaning, understanding, intentions etc by Judges like Justice Powell, Harlan, Raoul Berger, Robert Bork²¹, William Rehnquist, Attorney General Edwin Meese and Antonin Scalia. Originalism could not have one concrete meaning and had to be a reasonable, correct meaning excluding doubtful views. Jefferson Powell mentioned in his article that failing to interpret the text according to originalism would go against the framers' original intent and not truly adhere to the Originalism stance.²² It was a very unique and profound thought that had laid its effect well around jurists, scholars and Judges.²³ Originalism can be of many types being; original intentions by the framers, the ratifiers and adopters which are individuals, state and corporate bodies who could access the intent of "We the people" better than anyone else considering the importance of text and constitutional sovereignty, original public meaning given by Justice Scalia, the new originalism and the contemporary ones being original method originalism and original applications. The original intent is when the interpretation of a text deviates from the expected application in future scenarios. Original methods would mean the methods appointed by the framers/ratifiers to guide the constitutional observation. In Skyscraper Originalism, Balkin pointed out that amendment is an effective method for altering the text of the judiciary, as discussed in Framework where he emphasized that starting from constitutional construction and considering principles and values is crucial for determining the true meaning.²⁴ Balkin criticised Originalism saying it is difficult to access the true intent of the framers, there was a translation problem and he believed that "the dead hand of the past should not control the future".²⁵

4. ROLE OF JUDICIARY IN MAKING CONSTITUTION A 'LIVING DOCUMENT'

It is always difficult to apply the original intent of the constitution's founders to today's social, cultural, and political issues. The framers were clearly aware about the world of their era, but not about the current world.²⁶ At this moment, the statement by Thomas Jefferson holds much pertinence, wherein he said that "the earth belongs...to living and therefore the dead hand of the past should not control the living".²⁷ The judges interpret the constitution in different ways. This is termed to be judicial activism and the opposite of that would definitely be indolence on part of the judiciary. These methods like originalism which include the framers and adopters intent, textualism, constructionism, adhering to his pragmatic sense, to the doctrines, precedents etc form the conduct of the judges exercising their powers by in a manner building the law, which is sort of like legislating from time to time. Judges, as the guardians of the constitution, must both uphold its original intent and apply strict construction in order to make it a living document. Constitutional interpretation must be made as per present-day norms and conditions, along with its original meaning. The idea of interpretative supremacy can challenge the claim of interpretative equivalence used by them to secure justice, as well as to uphold the constitutional system through mechanisms like judicial review. This measure operates by maintaining independence from political influence and reflecting the collective wishes of the people.²⁸ "The role of judges is one that causes academics unease. For approximately half a century, academics have worried about the role that judges play in our democracy, and have struggled over how to reconcile judicial review and majoritarian government"²⁹.

5. LIVING CONSTITUTION: A NEED OF TRANSFORMING SOCIETY

²⁰ Paul Brest, "The Misconceived quest for the Original Understanding" 60 *B.U.L. Rev.* 204 (1980). (Paul Brest is an eminent American scholar and an influential theorist and was the former dean of Stanford University. He is famously known to have coined the term Originalism and has widely used and advocated it as well).

²¹ Robert Bork, "Neutral Principles and some first amendment problems" 47 *Ind. L.J.* 1 (1971).

²² Lawrence B. Solum, "What is originalism? The Evolution of Contemporary Originalist Theory" *Georgetown University Law center* 9 (2011).

²³ H. Jefferson Powell, "The original Understanding of Original intent" 98 *Harv. L. Rev.* 885 (1985).

²⁴ Jack M. Balkin, "Framework originalism and the Living Constitution" 103 *Northwestern University Law Rev.* 550 (2009).

²⁵ James E. Fleming, "Living originalism and living constitutionalism as moral readings of the American Constitution" 92 *B.U.L. Rev.* 1173 (2012).

²⁶ *Id.*, at p. 16

²⁷ *Id.*, at pp. 24-25

²⁸ Goodwin Liu Pamela, S. Karlan Christopher, et. al., *Keeping faith with the constitution* 24 (American Constitution society for law and politics, Washington D.C., 2009)

²⁹ Barry Friedman, Scott B. Smith, "The Sedimentary Constitution" 147 *U. Penn. L. Rev.* 85 (1998).

Living constitutionalists have identified two meanings of the word: interpretation and construction, such as harmonious interpretation or the golden rule, depending on the level of generality required in the situation. The new Originalists and non-Originalists tend to approach each other in disputes as the Originalism concept has evolved with diverse interpretations. The new Originalists still adhere to basic originalism while non-Originalists rely on history, precedents, and structure to interpret ambiguous texts.³⁰ According to Thomas Colby and Peter J. Smith's article, the new originalism is seen as weak when compared to living constitutionalism:³¹

"their claims that originalism has a unique ability to produce determinate and fixed constitutional meaning, and thus that only originalism properly treats the Constitution as law and properly constrains judges from reading their own values into the Constitution, stumble when one considers the rapid evolution and dizzying array of versions of originalism; because each version has the potential to produce a different constitutional "meaning," the constitutional meaning that a committed originalist judge would find turns out to be anything but fixed. As originalism evolves, the constitutional meanings that it produces evolve along with it. Today's originalists not only reach results markedly different from those originalists reached thirty years ago, but also produce widely divergent results amongst themselves. Judges committed to the originalist enterprise thus have significant discretion to choose the version of originalism that is most likely to dictate results consistent with their own preferences. As such, originalism suffers from the very flaws that its proponents have identified in its alternatives."

6. CONSTITUTION OF INDIA: WHETHER A LIVING CONSTITUTION?

The Constitution of India is not merely a political document, but it can also be characterized as a social document³². It was called as a social document as it enshrines the features of social philosophy of being basic and circumstantial.³³ The truism is that the former remains constant while the latter is subjected to change.³⁴ Ever since the independence the changes happened to Indian polity vast so drastic and in all these mutation the Indian constitution remained to cater the changing needs. The wisdom of the three state organs gave our constitution a dynamic quality known as 'living', as described by Prof. Upendra Baxi as 'different multiplicities', and emphasized by the *demosprudence* of the Supreme Court.³⁵

The Indian Supreme Court following the principle of *demosprudence* exhibited to the world as "marker of the emergence of a dialogic adjudicative leadership between the voices of human and social suffering."³⁶ The Indian judiciary has the opportunity to interpret and create new human rights norms that are not explicitly stated in our constitution through collaboration between engaged citizens and proactive judges.³⁷ Living constitutionalists believe the judiciary should adjust the constitution to fit modern situations, while originalists view it as a justification for judges to act on their personal preferences. Interpretations of the constitution based on original meaning, understanding, and intent have clashed with the intended interpretations of the constitution.³⁸

To note, public interest litigation being of the interest of the public at large was a pioneering effort at the beginning of judicial activism in 1980s when Justice P. N. Bhagwati turned a complaining post card into public interest litigation. During the end of emergency rule of 1975-77 when the constitutionally guaranteed fundamental rights remained suspended, the Court had used its right of judicial review and paving a way for Public Interest Litigations the Court successfully warranted that the unconditional fundamental rights as enumerated in the Part III of the Indian Constitution were not violated. The Court tried to legitimize the writing of judicial laws by arguing that the Union of India approved the formulation of guidelines through the Solicitor General. In the past, numerous instances have occurred in the realm of PILs and environmental law where the judiciary has overstepped its boundaries and intruded into the jurisdiction of other branches or critical areas.

The Indian Supreme Court used *demosprudence* as "marker of the emergence of a dialogic adjudicative leadership between the voices of human and social suffering".³⁹ The Indian judicial system has the ability to acknowledge and

³⁰ Peter J. Smith, "How Different are Originalism and Non-Originalism?" 62 *Hastings law Journal* 21 (2011).

³¹ Thomas B. Colby, Peter J. Smith, "Living Originalism" 59 *Duke L.J.* 240 (2010)

³² Mamta Rao, *Constitutional Law* (Eastern book Company, Delhi, 2013)

³³ *Ibid.*

³⁴ *Kesavananda Bharthi v. State of Kerala* AIR 1973 SC 1461

³⁵ Upendra Baxi, "Demosprudence Versus Jurisprudence", 8 *Macquarie Law Journal* 14 (2014)

³⁶ *ibid*

³⁷ *ibid*

³⁸ Zoya Hasan, E. Sridharan, et.al. (eds.), *Indias Living Constitution ideas, practices, controversies* (Permanent Black, New Delhi, 2006)

³⁹ *ibid*

establish new human rights norms and standards through the collaborative efforts of engaged citizens and proactive judges, even if they are not specifically mentioned in the original constitutional text.⁴⁰

If we discuss the *demosprudence* exhibited by judiciary under Article 21, the concept of 'life' in Article 21 was narrowly interpreted for many years, and even the framers did not imagine its broader implications. It was in the *Francis case*⁴¹ the court held that "the fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person." The expansive interpretation of Article 21 has widened its scope to encompass various human rights⁴² such as the right to privacy⁴³, right to development,⁴⁴ right to gender justice, right to fresh water and air⁴⁵, right to protection against environmental degradation,⁴⁶ right to food and clothing⁴⁷, right to shelter,⁴⁸ right to health⁴⁹ and right to education.⁵⁰

Article 21 is considered the most organic provision of the Constitution of India.⁵¹ During the discussion on this Article, the framers of the constitution were mindful of the changes that occurred in the Fifth and Fourteenth Amendments of the US Constitution. At present, Article 21 has embedded into it various unenumerated rights far from the thought of the framers of our constitution⁵² owing to the changes in international human rights paradigm and globalisation. The Indian judiciary balanced this shifting paradigm with constitutional values through a liberal interpretation. The words of J. Bagwati in his celebrated case *Francis Coralie Mullin v. Administrator Union Territory of Delhi*,⁵³ "This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take into account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges applies with greater force in relation to a fundamental enacted by the Constitution."

The judiciary's transformation into an activist's court has been a gradual process⁵⁴ and it can be visibly observed through the classic case of *Maneka Gandhi v. Union of India*⁵⁵ which changed the notion of the term's "life", "personal liberty" and "procedure established by law" by the court's liberal interpretation. When constitutional interpreters face unexpected crises in modern times, they delve into the more controversial aspect of interpretation, that is, the political interpretation of the constitution.⁵⁶ Clearly, when judges interpret the constitution in line with the country's current situation, they may feel compelled to incorporate political elements into their interpretation, turning the constitution into a political document.⁵⁷

7. CONCLUSION

Examining the concept of the 'living constitution' reveals a necessity for constitutional adjustment, as society's evolving needs naturally require it. Only a constitution that is organic and alive is capable of adapting to the changes in society.⁵⁸ According to Professor Baxi, people are now aware that Court has the constitutional authority to intervene on behalf of those suffering from repression, lawlessness on the part of the government, and administrative deviance. This includes: women in protective custody; children in juvenile institutions; bonded and migrant labourers; unorganised labourers; untouchables and scheduled tribes; landless agricultural labourers who are exploited by faulty machinery; women who are bought and sold; slum-dwellers and pavement dwellers; relatives of people who have been the victims of extrajudicial executions; these and many other groups now swarm to the Supreme Court in search of justice.

⁴⁰ *ibid*

⁴¹ (1981) 1 SCC 608

⁴² J. Venkatram Narasimha Reddy, "Article 21 - Has the Supreme Court Gone Too far" 289 *A.I.R. Journal* (2001)

⁴³ *Kharak Singh v. U.P.* AIR 1963 SC 1295; *Govind v. M.P.* AIR 1975 SC 1378; *Neera Mathur v. LIC* AIR 1992 SC 392; *R. Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *Malak Singh v. State of Punjab & Haryana* AIR 1981 SC 760

⁴⁴ *Municipal Council, Ratlam v. Vardhichand* AIR 1980 SC 1622; *Banwasi Sewa Ashram v. State of UP* AIR 1987 SC 374

⁴⁵ *M.C. Mehta v. U.O.I* AIR 1988 SC 1037; *M.C. Mehta v. U.O.I* AIR (1999) 6 SCC 9; *A.P. Pollution Control Board v. Prof. M.V. Nayadu* AIR 1999 SC 812

⁴⁶ *M/S A.R.C. Cements Ltd v. U.P.* (1993) Supp. (1) SCC 57; *Tarun Bharat Sangh v. India* (1993) Supp (1) 4

⁴⁷ *M/S Shantistar Builders v. Narayan K Totame* (1990) 1 SCC 520

⁴⁸ *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180

⁴⁹ *CERC v. U.O.I* AIR 1995 SC 927; *Vincent v. U.O.I* AIR 1987 SC 990

⁵⁰ *Mohini Jain v. Karnataka* AIR 1992 SC; *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 217

⁵¹ *Rajneesh Kapoor v. Union of India*, AIR 2007 MP 204

⁵² *Unnikrishnan v. State of Andhra Pradesh* AIR 1993 SC 2178

⁵³ (1981) 1 SCC 608

⁵⁴ S.P. Sathe, *Judicial Activism in India*, 4 (Oxford University Press, UK, 2nd edn, 2003)

⁵⁵ AIR 1978 SC 597

⁵⁶ Ziyad Motala and Cyril Ramaphosa, *Constitutional Law – Analysis and Cases* 28 (Oxford University Press, UK, 2002)

⁵⁷ *ibid*

⁵⁸ *Rajneesh Kapoor v. U.O.I* AIR 2007 MP 204

The answer is no, because it requires a number of factors, including attorneys, civil society organisations, political and social mobilisation, and lawsuit campaigns. As Balkin said the concept held by Strauss through common law interpretation merely represents the leaves of the tree called 'living constitution'. The exact roots lies in the various factors. the fact is that we live in a new society under an old constitution, but the charm of this old document is that it has in it in-built provisions of growth. This in built needs to be promptly identified by the constitutional interpreters without compromising any principles embodied in it.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.