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# SITUATING THE INDIAN CONSTITUTION IN THE ORIGINALISM VS LIVING CONSTITUTIONALISM DEBATE

**Abhishek Saha***

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**ABSTRACT**

*Originalism and Living Constitutionalism, albeit polar opposite concepts, are considered the two most important approaches where constitutional interpretation is concerned. While tracing the trajectory of the Indian Constitution, there is a noticeable shift from originalism to the more pragmatic living constitutionalism. However, despite the Indian judiciary recognising and emphasising the need to interpret the constitution according to the changing circumstances and values, there are issues plaguing the adoption of the living constitutionalism ideal. This paper attempts to situate the Indian Constitution in the "great debate" between originalism and living constitutionalism. The paper argues that by adopting a more "rights advancing approach" and attaching morality to living constitutionalism, the true essence of the approach has been lost. Therefore, there is a need to shift to already existing living originalism, i.e. a compromise, so as to preserve the constitutional identity.*

**Keywords:** *Originalism, Living Constitutionalism, Constitutional Interpretation, Indian Judiciary.*

## 1. INTRODUCTION

The Constitution of India, 1950 was more than a manuscript, because in post-colonial India, it was regarded as the embodiment of social change – a metamorphosis of the uneven social strata. In this context, one of the crucial questions that was subject to deliberations and discussions amongst the framers of the Constitution was *vis-à-vis* the

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interpretative tool employed for interpreting the text of the Constitution.[1]

It is often unclear and ambiguous as to how the provisions of the Constitution must be interpreted. One view of constitutional interpretation is originalism, while the other is living constitutionalism. The tussle between originalism on the one hand, and living constitutionalism on the other, is perhaps one of the most controversial debates.[2] In the Indian context, it can be seen that post the commencement of the Indian Constitution, the judiciary was extremely restricted in its interpretation of the constitutional provisions, opting for a more textual and originalist approach.[3] However, the recent millennium has been characterised by expansive and liberal interpretation of the provisions of the Constitution.[4] This is because the judiciary has recognised the Indian Constitution to be a living constitution that evolves according to society's changes, and thereby it has given primacy to living constitutionalism as a method of constitutional interpretation.

While emphasising on living constitutionalism, there is little to no confusion *vis-à-vis* where the changes take place, as evidently most of the changes are associated with understanding the fundamental rights.[5] However, several issues have arisen in the manner in which the judiciary has interpreted living constitutionalism. The author in this paper attempts to understand and critically assess how the Indian Courts have applied living constitutionalism. Under Part II, the meaning and tussle between the two interpretative tools, originalism and living constitutionalism, is examined to contextualise the discussions in the subsequent parts.

Under Part III, the author situates the Indian Constitution within the originalism v. living constitutionalism debate and showcases how the judiciary shifted from a more textualist approach to recognising the living spirit of the Constitution. In the same vein, the problems associated with the judicial interpretation of living constitutionalism in India are discussed. Part IV discusses how "living originalism" can be used to solve the conundrum

1 Sujit Choudhry, "Living Originalism in India? "Our Law and Comparative Constitutional Law", 25(1) *YALW Journal of Law and Humanities* 1 (2013).

2 Kermit R., "Originalism and the Living Constitution: Reconciliation", 7 *American Con. Soc. for L. & Pol.* 1 (2007).

3 Chintan Chandrachud, "The four phases of constitutional interpretation", *The Hindu*, January 27, 2020, *available at:* https://www.thehindu.com/opinion/lead/the-four-phases-of-constitutional-interpretation/article30653706.ece (last visited on March 4, 2022).

4 Meera Emmanuel, "Constitution Day 2019: Transformative Constitutionalism and the Indian Supreme Court", *Bar and Bench*, November 26, 2019, *available at:* https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism (last visited on March 4, 2022).

5 Sudhanva S. Bedekar, "The Problem with India's Living Constitution", NLSIR, December 10, 2020, *available at:* https://nlsir.com/the-problem-with-indias-living-constitution (last visited March 4, 2022).

arising from living constitutionalism and how the same is already in action in India. Part V offers concluding remarks.

## 2. THE GREAT DEBATE: ORIGINALISM V. LIVING CONSTITUTIONALISM

At the centre of constitutional interpretation lies the great debate between living constitutionalism and originalism, the two most commonly used theories of constitutional interpretation.[6] The substantive focus of this great debate between originalism and living constitutionalism is to answer the normative question – Which one of the two is the best theory for constitutional interpretation.[7] While this debate assumes great significance *vis-à-vis* constitutional interpretation, the substantive issues surrounding the two approaches are often overshadowed by confusion regarding the meaning of the term "originalism" and "living constitutionalism".[8]

The originalists propound that the meaning attached to the constitution is fixed and binding upon the constitutional actors like the judiciary.[9] Originalism and even "textualism" are associated with Justice Antonin Scalia, who argued that the constitution only has a static meaning.[10] Justice Scalia notes that the essence of the theory of originalism lies in the ability to decipher and emphasise the original meaning attached to the constitutional text.[11] Justice Scalia's theory of originalism can be best illustrated through his dissenting opinion in *Alexia Morrison* v. *Theodore Olson*.[12] The majority in the case had upheld that an independent counsel fell under the Executive Branch, with the President exercising no control over their

6 J. Swindle, "Originalism vs. "Living Document", *Swindlee Law*, October 29, 2017, *available at:* https://www.swindleelaw.com/2017/10/originalism-living-constitution-heritage/ (last visited on March 4, 2022).

7 Lawrence B. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate", 113(6) *Northwestern University Law Review* 1243, 1244 (2019).

8 *Id.*, 1245.

9 *Id.*, 1244; Steven G. Calabresi, "On Originalism in Constitutional Interpretation", *Constitution Centre*, *available at:* https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation (last visited on March 4, 2022).

10 Antonin Scalia, "Originalism: The Lesser Evil", 57 *University of Cincinnati Law Review* 849 (1989); William Baude, "Originalism as a Constraint on Judges", 84 *University of Chicago Law Review 2213* (2018); Aaron B., "Neil Gorsuch, Antonin Scalia and originalism, explained", *Washington Post*, February 1, 2017, *available at:* https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/ (last visited on March 4, 2022).

11 Mary Wood, "Scalia Defends Originalism as Best Methodology for Judging Law", *Virginia Edu*, April 20, 2010, *available at:* https://www.law.virginia.edu/news/2010_spr/scalia.htm (last visited on March 4, 2022).

12 *Alexia Morrison, Independent Counsel v. Theodore Olson & Ors.,* 487 U.S. 654 (1988) (United States Supreme Court).

working.[13] However, Justice Scalia read originalism along with textualism to formulate his dissenting opinion.[14] Following the text especially with regards to the 2nd Article of the Constitution of the United States it mentions "*The executive power shall be vested in a President of the United States*", Justice Scalia used originalism to state that the framers of the U.S. Constitution "*intended*" that all federal power would be vested in the President and, therefore, the President exercised control over the independent counsel as well.[15]

Hence, originalism in the present form is associated with making, interpreting and enforcing the law in accordance with the original meaning of the constitutional provisions.[16] Originalist scholars contend that originalism is the best method for constitutional interpretation and construction, as it binds the constitutional actors, i.e. mainly the judges, and limits their ability to interpret the law according to the changing times.[17]

Living Constitutionalism is a more pragmatic approach that is associated with modern jurisprudence.[18] Living constitutionalist scholars contend that the constitutional text should not be taken merely on its original wordings, without any possibility of change.[19] The living constitution approach states that the constitutional text must be interpreted and constructed per the changes in the society,[20] as such change is natural because the constitutional provisions have a broad scope, with uncertain and unclear limitations.[21]

The decision of the Apex Court of the United States to add the right regarding privacy within the scope and interpretation of the American Constitution in *Griswold & Buxton* v. *Connecticut* is an example of living constitutionalism in constitutional interpretation.[22] While the decision in *Griswold & Buxton* v. *Connecticut* embodies the ideal of living constitutionalism, Justice Anthony Kennedy's opinion in *Obergefell* v. *Hodges, Director,*

13 *Id.*, 693, 697.

14 *Id.*, 697-699.

15 *Id.*, 697, 698.

16 S*upra* note 6.

17 Neil M. Gorsuch, "Justice Neil Gorsuch: Why Originalism is the best approach to the Constitution", *TIME*, September 6, 2019, *available at:* https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ (last visited on March 4, 2022).

18 Adom Getachew, "Living Constitutions", *Dissent Magazine*, 2020, *available at:* https://www.dissentmagazine.org/article/living-constitutions (last visited March 4, 2022).

19 Ethan J. Leib, "The Perpetual Anxiety of Living Constitutionalism", 24 *Const. Comment* 353 (2007).

20 James E. Fleming, "Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution", 92 *Boston University Law Review* 1171 (2012).

21 C. TerBeek, "The Search for an Anchor: Living Constitutionalism from the Progressives to Trump", 46(3) *Law & Social Inquiry* 860 (2021).

22 *Estelle T. Griswold & C. Lee Buxton v. Connecticut*, 85 S.Ct. 1678 (1963) (United States Supreme Court).

*Ohio Department of Health*, encapsulates the essence of the living constitutionalism ideal.[23] In his majority opinion, Justice Kennedy held that heterosexual, as well as homosexual marriage, is a fundamental right protected under the XIV Amendment.[24] In arriving at this opinion, Justice Kennedy used living constitutionalism to assert that, since the new generations have newer and changing dimensions of freedom, marriage, which is associated with continuity and change, must be understood pragmatically.[25] Hence, the living constitutionalism ideal is that the constitutional law should adapt in response to the society's growth and values.[26]

Keeping the aforementioned discussion in background, the next Part attempts to analyse the interpretative method adopted by the Indian Constitution and the shortcomings of the same.

## 3. THE VICISSITUDES IN THE INDIAN APPROACH

While the Indian Constitution has always been regarded as a "living document", the approach followed by the Apex Court *vis-à-vis* the applicability of originalism and living constitutionalism has never been static. In this context, Part 1 traces the evolution of the Indian Constitution, from the phases of hardened originalism to the living constitutionalism ideal. Part 2 brings out the issues with the current living constitutionalism ideal that the Indian judiciary has adopted.

## 4. THE SHIFT FROM ORIGINALISM TO THE LIVING CONSTITUTIONALISM IDEAL

The decade following the commencement of the Indian Constitution the concept of originalism still guided the apex court. However it was only through the application of the principle of "living originalism", the judiciary endeavoured to adopt the true essence of originalism in their quest for the interpretation of constitutional provisions.[27] The 1950s interpretation of the Article 19, 21 and 22 in the *A.K. Gopalan* v. *State of Madras* ('A.K.

23 *Obergefell & Ors. v. Hodges, Director, Ohio Department of Health, & Ors.*, 135 S.Ct. 2584 (2015) (Unites States Supreme Court).

24 *Id.*, 2605, 2605.

25 *Id.*, 2595, 2596.

26 *Supra* note 7, 1244.

27 Arvind P. Datar & R. Unnikrishnan, "Interpretation of Constitutions", 29(2) *National Law School of India Review* 136 (2017).

Gopalan')[28] the judges have used a more structured approach to say that this 3 provisions are overlapping in nature. Even in the M.S.M Sharma case, Justice Ranjan laid down the seeds of textualism to make the conclusion that if the intention of the framers to put parliamentary privileges under Article 19(3) it would have been clearly mentioned in the provision itself.[29]

The majority opinion in *Sankari Prasad Deo* v. *Union of India*[30] is the perfect illustration of the pure originalist approach adopted by the Indian judiciary. Justice Sastri through the majority conclusion gave the statement that the living nature of the constitution if was originally envisaged by the makers of the Constitution, then the same would have been clear from the language of Article 13(2) and Article 368.[31] Justice Sastri's majority opinion clearly encapsulates what Justice Scalia calls "objective intent" and is thereby a purely originalist approach.[32]

However with the changing aspects of the Indian Constitution especially with the manner in which the interpretation of the right to life has been done the idea of living constitutionalism has been added into the Indian constitution.[33] While initially, the Constitution was silent on the issues of free legal aid, clean environment, right to livelihood and shelter, with the changing dynamics of the society, Article 21 was broadened to accommodate these issues.[34] The legalisation of passive euthanasia and living wills has been momentous in bringing forth the living constitutionalism ideal to the centre by making the Constitution wider in scope and flexible to accommodate the pragmatic changes in society's demands and values.[35]

However with the changing aspects of the Indian Constitution especially with the manner in which the interpretation of the right to life has been done the idea of living constitutionalism has been added into the Indian constitution. The Indian judiciary, in line with these international best practices, has read environmental justice into the fundamental rights by recognising the public trust doctrine, the principles of exemplary damages and

28 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

29 *M S M Sharma v. Krishna Sinha*, AIR 1959, SC 395.

30 *Ibid*.

31 *Shankari Prasad Singh Deo v. Union of India*, 1952 SCR 89.

32 Pratap Bhanu Mehta, et al., The Oxford Handbook of the Indian Constitution 78 (OUP, 2016).

33 Jayanta Boruah, "Living Tree Doctrine: Role of Indian Judiciary against Constitutional Silence in India", 5(1) *Rajiv Gandhi National University of Law Student Law Review* 50, 57 (2019).

34 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

35 E. W Osborne, Culture, Development, and Government: Reservations in India, (2001).

polluter pays, etc.[36] This shift embodies the living constitutionalism ideal, wherein the judiciary recognised the focus on environmental justice as integral to the development of the society and used the same in constitutional interpretation and construction.

While the shift from originalism to the living constitutionalism ideal can be seen in the sphere of human rights,[37] child rights,[38] public interest litigation,[39] perhaps the greatest embodiment of the approach is in the sphere of gender justice.[40] The Apex Court's decision to hold the practice of *triple talaq* unconstitutional and discriminatory against the fundamental rights of women is a reflection of living constitutionalism.[41] Furthermore, the Supreme Court's application of "living constitutionalism" as an alternative tool of constitutional interpretation to broaden the scope of Article 17 led to women being granted the right to enter the Sabarimala Temple.[42] The living constitutionalism doctrine was used to widen the scope of discrimination, to hold that discrimination against menstruating women is discrimination on the basis of "social status" because menstruation is a natural process.[43]

Hence, the shift from originalism to the living constitutionalism ideal was gradual, visionary, and, above all, aimed at making the Constitution of India an instrument of societal change. Moreover, when these judgements that uphold the living spirit of the Constitution are perused, it can be stated that the same was done to advance the citizens' rights. Therefore, it can be stated that the shift to the living constitutionalism ideal was primarily aimed at the progressive realisation of the rights, which cannot be accounted for in the theory of originalism.

36 *Ratlam Municipality v. Vardhichand*, (1980) 4 SCC 162.

37 *A.D.M. Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521.

38 *Bandhua Mukti Morcha v. Union of India & Ors*., 1991 SCC (L&S) 1107; *C. Maislamani Mudalia & Ors. v. Idol of Sri Swaminathaswami Swaminathswami Thirukoil & Ors.*, (1996) 8 SCC 525.

39 *Supra* note 33, 56

40 *Id*., 60.

41 *Shayara Bano v. Union of India & Ors.,* 2017 SCC OnLine SC 963; Maneka Guruswamy, "On triple talaq, Supreme Court must uphold constitutional values, not religious ones", *Scroll*, June 1, 2017, *available at:* https://scroll.in/article/839259/on-triple-talaq-supreme-court-must-uphold-constitutional-values-not-religious-ones (last visited on March 4, 2022).

42 *Indian Young Lawyers Association & Ors. (Sabarimala Temple, In Re) v. State of Kerala & Ors*., 2018 SCC OnLine SC 1690.

43 *Id*.; Rahul Ranjan, "Transformative Constitutionalism and the Sabarimala Judgement", *LiveLaw*, June 1, 2019, *available at:* https://www.livelaw.in/lawschool/articles/trans-formative-constitutionalism-and-the-sabarimala-judgment-145396 (last visited on March 4, 2021).

## 5. THE ISSUES WITH THE CURRENT LIVING CONSTITUTIONALISM IDEAL

It is clear from the aforementioned discussion that the Apex Court has interpreted the Indian Constitution to be a "living document" that is constantly evolving as per the changes in the society. Furthermore, most of these changes have occurred in understanding the text of Part III of the Constitution. However, certain issues are plaguing the internalisation of the living constitutionalism ideal.

*First*, the Apex Court, while interpreting the Indian Constitution in the context of living constitutionalism, has attached a sense of morality to the progressive realisation of the rights. Hence, whenever living constitutionalism is applied as an aid in constitutional interpretation, it has been done for the advancement of rights for the Indian citizens. For instance, in the Navtej Johar Judgement, the Supreme Court held that in order to recognise the constitutional rights, the Courts must take note of constitutional morality so that they can accord protection to these constitutional rights.[44] It is imperative to note that in Navtej Johar, the Apex Court has stressed upon the "increased protection of fundamental rights",[45] and in the same vein, by applying the living constitutionalism theory, the judiciary has taken the liberty in identifying the direction in which the change in the society is happening.

Akin to Navtej Johar, in *Kapila Hingorani* [46] and *Kalpana Mehta* cases,[47] the Supreme Court has ruled that constitutional interpretation and construction are subject to changes. The Court has ruled that given the organic nature of the Constitution and its ever-expanding domain, it can never be construed as narrowly.[48] Hence, the judiciary needs to have a progressive outlook towards constitutional interpretation.[49]

Another logical corollary of the application of living constitutionalism is the emphasis on the liberal interpretation of the constitutional provisions.[50] Justice Chandrachud in *K.S. Puttaswamy* case. Gave the conclusion that constitutional interpretation is not "frozen" and limited to its original understanding, given that the Constitution has been continuously evolving.[51] Moreover, in *State of West Bengal & Ors.* v. *Committee for Protection of*

44 *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC1.
45 *Ibid.*
46 *Kapila Hingorani v. State of Bihar*, (2005) 2 SCC 262.
47 *Kalpana Mehta & Ors. v. Union of India & Ors.*, (2018) 7 SCC 1.
48 *Ibid.*
49 *Ibid.*
50 *Supra* note 5.
51 *K.S. Puttaswamy & Anr. v. Union of India & Ors.*, (2017) 10 SCC 1.

*Democratic Rights, West Bengal & Ors.*, it was held that liberal and broad interpretation and construction of the constitutional provisions so as to adapt to the changes in the polity.[52]

A perusal of the aforementioned judicial pronouncements indicates that the judiciary has interpreted living constitutionalism to be rights advancing, and therefore, a sense of morality has been attached to the same. It is imperative to note that living constitutionalism does not mean that the constitutional provisions must constantly advance rights.[53]

Living constitutionalist scholars contend that the constitutional interpretation must align with the society's changing needs and demands.[54] They do not propagate the attachment of any type of morality in constitutional interpretation, and the attachment of the same is against the tenets of living constitutionalism.[55] This is because, in the future, there may be a shift from this "rights advancing" liberal ideal to an approach that does accord the same primacy to these rights. In such a case, owing to the morality attached to living constitutionalism, there will be difficulty adapting to the constitutional texts' changing meaning. Hence, the usage of living constitutionalism and its morality to advance the rights of the Indian citizens may take away the very essence of living constitutionalism and thereby pose an issue.

*Secondly*, the basic structure doctrine cannot co-exist with the ideals of living constitutionalism. In Kesavananda Bharati, the Court reached the conclusion that the Parliament does not have an unrestricted power of amendment due to the presence of the basic structure doctrine.[56] Post, this judgement, the developed basic structure doctrine was expanded to include Articles 14, 19 and 21,[57] the right to free and fair elections,[58] parliamentary democracy[59] and even egalitarian equality.[60] However, in the NJAC case, Justice Lokur, while recognising living constitutionalism, held that the same could not be

52 *State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors.,* (2010) 3 SCC 571.

53 Sudarshan Satalkar, "Living Originalism and Moral Interpretation: Is it the Answer to Long-Standing Questions in the Indian Constitutional Sphere?", *SCC Online*, February 4, 2022, *available at:* https://www.scconline.com/blog/post/2022/02/04/living-originalism-and-moral-interpretation/ (last visited on March 4, 2022).

54 *Ibid.*

55 Bedekar, *supra* note 5.

56 *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.*, AIR 1973 SC 1461.

57 *Minerva Mills Ltd. & Ors. v. Union of India & Ors.*, AIR 1980 SC 1789.

58 *Kihoto Hollohan v. Zachillhu & Ors.*, 1992 SCR (1) 686.

59 *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626.

60 *M. Nagaraj & Ors. v. Union of India & Ors.*, (2006) 8 SCC 212.

used by the Parliament *vis-à-vis* the amendment of the Indian Constitution.[61] According to Justice Lokur, if the Parliament has the unrestrained power to use living constitutionalism to amend the Indian Constitution, then the same would lead to highly problematic consequences.[62]

While the nexus between the basic structure doctrine and living constitutionalism may be difficult to comprehend, they influence each other.[63] A look at the basic structure jurisprudence reveals that almost the whole of Part III is a part of the basic structure, and it is in the context of the interpretation of Part III living constitutionalism has been used. Therefore, in line with the NJAC case, if the Parliament cannot radically amend Part III, i.e. restrict the scope of fundamental rights, then living constitutionalism can only be used to widen its scope. Furthermore, it is only the judiciary that, by virtue of living constitutionalism, can determine how the jurisprudence *vis-à-vis* fundamental rights is progressing. However, this is not in accordance with the tenets of living constitutionalism.[64] Hence, the basic structure doctrine poses a problem to living constitutionalism, especially with the judiciary's morality and rights advancement approach while interpreting the Constitution as a "living document".

## 6. LIVING ORIGINALISM IN INDIA: AN EXISTENT SOLUTION

Given India's egalitarian and democratic setup, sole reliance upon either originalism or living constitutionalism for constitutional interpretation will not yield effective results. Hence, an approach that offers a "middle path", must be followed. This is Living Originalism.

Living Originalism is a "compromise" between originalism and living constitutionalism, as it constitutes the desirable parts of these interpretative theories.[65] Living Originalism involves understanding and analysing the present situation while keeping focus in the future scenarios in the context of the past principles.[66] Hence, the present thresholds are reviewed in consonance with the justifications of the past principles.[67] The Indian Constitution also reflects the assimilation of the ideals of "living originalism" by furnishing

61 *Supreme Court Advocates-on-Record-Association & Anr. v. Union of India*, (2016) 4 SCC 1.

62 *Ibid.*

63 Bedekar, *supra* note 5.

64 *Ibid.*

65 Jack M. Balkin, Living Originalism 42-45 (HUP, 2011).

66 *Ibid.*

67 *Ibid.*

the constitutional differences or indicating the overlap of the constitutional grounds.[68]

Therefore, in order to demonstrate the "living originalism" in action, in the Indian context, two examples are taken. *First* is the A.K. Gopalan case, wherein the Apex Court gave a restricted and literal meaning to Article 21 and the "procedure established by law", which did not align with its American counterpart.[69] However, with the Supreme Court's judgment in Maneka Gandhi, the phrase "procedure established by law" was liberally interpreted, thereby changing the jurisprudence surrounding Article 21.[70] The judgement in Maneka Gandhi embodies living originalism, as the Article 21 interpretation, which resulted in a social revolution, resulted from recognising that the comparative constitutional materials of the past were not in furtherance of the constitutional ideals.

*Second* is the example of the decriminalisation of same-sex activities, as the judgement in *Naz Foundation* v. *Govt. (NCT of Delhi) & Ors.* ('Naz Foundation') and its subsequent successors reflects how comparative constitutional standards are integral to constitutional interpretation, thereby showcasing the presence of living originalism in India. The High Court of Delhi in Naz Foundation held Section 377 of the Indian Constitution to be unconstitutional, and it primarily based its opinion on the comparative jurisprudence available from other countries like U.S., Nepal and South Africa.[71] While the Naz Foundation was subsequently overruled,[72] the matter came up before the consideration of the Apex Court in 2018 in Navtej Johar.

The Apex Court in Navtej Johar reaffirmed Naz Foundation, and in doing so, it referred to the speech made by the former Prime Minister, J.L. Nehru in the Constituent Assembly *vis-à-vis* the "Objective Resolution".[73] The Court ruled that the Constituent Assembly stressed upon inclusivity and had intended for the Constitution to not only safeguard the rights of the present and the past generations but also to protect the interests of the generations to come.[74]

Hence, these examples showcase how the Indian Constitution has already ingrained living originalism, which is triadic in nature, as it safeguards the past, present

68 Shikha Dhiman, "Originalism vis-à-vis Living Constitution in India: An Analytical Study", *Thesis Paper*, Chapter 7 (2019).

69 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

70 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

71 *Naz Foundation v. Government (NCT of Delhi) & Ors.*, (2016) 4 SCC (Cri) 745.

72 *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*, (2013) 4 SCC (Cri) 1.

73 *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC1.

74 *Ibid.*

and future. Therefore, while living originalism is not a perfect solution to the perils of living constitutionalism and the unique structure of the Indian constitutional regime, it is a compromise between judicial restraint and activism.

Furthermore, given that the Indian constitutional regime has already showcased living originalism in action, it must be given significance while interpreting the constitutional text, as it preserves the Constitution's identity.[75]

## 7. CONCLUSION

It has been seventy-two years since the Constitution of India came into force. Ever since the commencement of the Indian Constitution, it has never been interpreted as a "frozen document". While the trajectory of constitutional law in India showcases that the judiciary, in its initial years, did try to apply a more static approach in terms of using textualism and structuralism, yet over the course of these seventy-two years, the Constitution has been interpreted as a living document, both in letter and spirit.

Through the course of this paper, it has been argued that despite upholding the living constitutionalism ideal *vis-à-vis* the Indian Constitution, the judiciary, attaching morality to the same, is a cause of concern. In a similar vein, the lack of coherence between the historical basic structure doctrine, and the living constitutionalism ideal, has opened the doors for potential concerns in the future.

It is imperative to note that the framers of the Constitution were not only concerned about the present but also about India's future.[76] Therefore, a coherence between these two schools of constitutional interpretation, say in the form of living originalism, is the need of the hour. Furthermore, given that living originalism is not a perfect solution but a compromise, certain jurisprudential changes may resolve this conundrum *vis-à-vis* India's living constitutionalism. *Firstly*, the morality attached to the idea of living constitution needs to be detached. *Secondly*, gradual and radical changes, in the basic structure doctrine, in the form of limiting it only to "extreme amendments", is needed so that living constitutionalism and the basic structure doctrine can co-exist. However, the aforementioned changes can only be implemented through a change in the approach undertaken by the judiciary while interpreting Part III of the Constitution. Therefore, to preserve the sanctity and identity of the Constitution, the judiciary's outlook *vis-à-vis* these two schools of interpretation must undergo a gradual shift.

75 *Supra* note 68.

76 *Supra* note 65, 738.