RE-IMAGINING CONSTITUTIONAL INTERPRETATION IN INDIA

Jayasankaran Nambiar A.K.[*]

Abstract

As a document of governance for a multi-cultural, multi-lingual and pluralistic nation, the Indian Constitution has not received a consistent interpretation. In the years immediately following the enactment of the Constitution, the Indian courts adhered to a strictly textual interpretation of the Constitution, taking note of the constitutional scheme that envisaged a functional separation of powers, qualified by a system of checks and balances, where the role of the judiciary was merely to interpret the written text. In later years, however, there was a move away from textualism on account of political events that the judiciary perceived would be a threat to the rule of law. The Supreme Court then formulated the basic structure doctrine by which implied limitations were read into the scope and extent of the parliament's amending power under the Constitution. This effectively rendered the Constitution inflexible and rigid, while at the same time conferring on the court a larger role in governance than was originally intended. The structure of the judiciary in India, together with the institutional limitations encountered in its working, does not equip it for a foray into the realms of policy making. On the contrary, it must focus on its interpretive role and adopt a theory of interpretation that adheres to the written text of the Constitution, if it is to honour the Constitution's commitment to democracy.

I Introduction

NO STUDY of India's constitutional history can overlook the judgment of its Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru* v. *State of Kerala,*[1] popularly known as the 'Fundamental Rights Case'. It is widely seen as the case that brought an end to a bitter conflict between the executive and the judiciary in India and firmly entrenched democracy as the basis of governance in independent India. A critique of the said judgment is, therefore, likely to be viewed as heretical by many in India's legal fraternity.

In his recent book,[2] Mark Tushnet argues that, irrespective of the interpretive school they profess to belong to, judges decide cases based on their ideological preferences although they always rationalise their decisions as dictated by the law. Judges, according to him, have no difficulty reaching a finding that is based on their initial impression of the issue that is being adjudicated. He maintains that while such initial impressions may arise for various reasons such as their political ideologies or personal life experiences, so long as they are prepared to do hard work, they can always find ways to reach the conclusion of their preference. Taking note of the American experience, he argues for

---

* Judge, High Court of Kerala, India.

1 [1973] 4 SCC 225.

2 Mark Tushnet, Taking Back the Constitution: Activist Judges and the Next Age of American Law (Yale University Press 2020).

popular constitutionalism to replace judicial supremacy so that other branches of government too have an equal role in constitutional interpretation. Theoretically, popular constitutionalism means that the legislature and the executive should be equal partners with the judiciary in interpreting the Constitution. It also implies anti-elitism in that the judges are the unelected elite, while the executive and the legislature are the people's representatives. If a choice has to be made between the ideological preferences of unelected judges and those of the elected representatives of people, a commitment to democracy would necessitate choosing the latter.

What Tushnet states in the context of American constitutionalism is to a large extent true in the Indian sub-continent as well where, in the years after the decision of the Supreme Court in *Kesavananda*,[3] there has been a perceptible shift in the balance of governing power in favour of the judiciary, owing to its formulation of the nebulous doctrine of 'basic structure' to read in implied limitations to the parliament's power to amend the constitution. Through the said judgment, which does not exhaustively enumerate the features of the Constitution that are to be seen as basic and therefore unamendable, the judiciary has effectively arrogated to itself the power to dictate the circumstances and the manner in which the power to amend the Constitution can be exercised by the Parliament. By reading in fetters to the amending power, and making those features of the Constitution unamendable, as appear to it to be basic, it has virtually usurped the primacy accorded to Parliament in matters of constitutional fate. Today, the judiciary in India, which is an unelected body that is not accountable to the legislature or to the executive, and much less to the people of India who are sovereign, determines the fate of the Constitution even as it finds, queerly, democracy to be a basic feature of that Constitution. The changed scenario in the country, where under the constitution has been deprived of its inherent flexibility by an activist but apolitical judiciary, renders the prospect of a return to popular constitutionalism worth exploring. This is more so because the country has witnessed many an instance of non-resolution of important issues of current relevance owing to judicial delays, which is suggestive of the fact that the judiciary in India, as a democratic institution, is ill-equipped to take on a larger role in the governance of the country. The judiciary needs to hark back to a weaker system of judicial review of constituent state action, and adhere to a theory of onstitutional interpretation that would enable it to remain activist in its role as the guardian of the Constitution while at the same time allowing the other branches of government a free rein in their respective domains. A restoration of power back to the people who are sovereign, or to the delegate chosen by them, appears to be the way out of the conundrum that the country presently finds itself in.

3 *Supra* note 1.

In the next part, it is demonstrated through a reference to the constituent assembly debates and the structure of the Indian Constitution, that in its original *avatar*, it envisaged the creation of a democratic republic informed by the principle of parliamentary supremacy and a scheme of separation of powers designed to check concentration of powers in any particular branch or institution. The empowerment of the sovereign people was to be effected incrementally and through political deliberations and the inherent flexibility of the constitution was ensured through the grant of an amending power to the parliament. This provides the backdrop for the analysis, in Part III, of the political events that led to the decision of the Supreme Court in *Kesavananda* and the formulation of the basic structure doctrine by which implied limitations were read into the scope and extent of the Parliament's amending power under the Constitution. It is argued that by restricting the Parliament's power to amend the Constitution, the court has effectively rendered the Constitution inflexible and rigid, while at the same time arrogated to itself a larger role in governance than was originally intended. The structure of the judiciary in India, together with the institutional limitations encountered in its working, does not equip it for a foray into the realms of policy making or to ascertain the needs of the people. On the contrary, it must focus on its interpretive role and strive to attain a consistency thereof by adopting a theory of interpretation that adheres to the written text of the constitution. In Part IV, there is an analysis of some of the predominant theories of constitutional interpretation that are in vogue today, to demonstrate that in a country where the higher courts are polycentric in nature and do not sit as a single body while adjudicating issues of constitutional importance, the inherent flexibility offered by the legal system to judges to decide matters based on their ideological preferences, makes it imperative to identify a theory of constitutional interpretation that adheres to the written text of the Constitution while at the same time leaving its silences to be filled through political deliberation. The concluding part suggests a roll back of the basic structure doctrine and a reversion to *status quo ante* in the matter of judicial review of constituent state action, so as to restore the commitment to a democratic form of government and to avert what can be perceived as an inevitable hurtle towards juristocracy.

II A transformative constitution

The Indian Constitution was formally adopted in November 1949 and brought into force with effect from January 26, 1950. Its enactment and adoption was the result of over two and a half years of deliberations by a constituent assembly that was established following negotiations between Indian leaders and members of the 1946 British Cabinet Mission to India. The Constituent Assembly, although comprised of enlightened citizens of the country, did not represent the people of India in general since they were chosen from among the elected members of the provincial assemblies, and the provincial elections were not truly representative on account of the qualifications of education, property and tax imposed under the Government of India Act, 1935, by which various

sections of the people were excluded from franchise.[4] Thus, unlike in the case of most post war constitutions, where the legitimacy of the document that assumed the status of *suprema lex* stemmed from the fact that it was the creation of a body duly authorised by the people of the country for the purpose, in India there was no such body constituted, pursuant to a referendum or an election based on universal adult suffrage, which could legitimately claim to be a representative body of the people of India, or the constituent power in relation to their future constitution.

The preamble to the Indian Constitution declares the resolve of the people of India to constitute India into a Sovereign, Socialist, Secular Democratic Republic and to secure to all its citizens, Justice- social, economic and political, Liberty - of thought, expression, belief, faith and worship, Equality - of status and of opportunity, and to promote among them all, Fraternity- assuring the dignity of the individual and the unity and integrity of the nation. As a democratic republic, governance of the people is to be by the rule of law in accordance with democratic principles where the people of India are to be seen as sovereign. It was accordingly that the parliamentary system of governance was opted for under the Constitution where the people through universal adult suffrage elect the legislature and, unlike in the United States, the executive is chosen by, and is accountable to, the legislature. The judiciary remains an unelected but independent body.

A reading of the Constituent Assembly debates, and in particular the deliberations of the assembly on the subject of appropriate form of government, and the attendant principle of separation of powers,[5] clearly reveals that the assembly was well aware of the options available before it, and the choice of the parliamentary system of governance was premised on the familiarity with the said system of governance employed by the British to govern the Indian people. It was a decision taken to cater to the immediate need for governance of people who had just been liberated from colonial rule, and the appeal of a tried and tested system of governance seemed irresistible at the time. The parliamentary system would also have ensured the desired co-ordination between the legislature and the executive as observed by Harold Laski[6] in the following words:

> The co-ordination between the executive and the legislature is best achieved by making the executive a committee of the legislature. Thereby, the executive can only stay in office as long as it retains the confidence of the legislature. The presence of the executive in the legislature allows it to explain its policy in the one way that ensures adequate attention and organized criticism. It prevents a legislature, which has no direct interest

4 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon P. 1966).

5 Constituent Assembly Debates, Vol.VII, (10 Dec1948).

6 Harold J. Laski, *A Grammar of Politics* (London: George Allen and Unwin Ltd., Fourth eds., 1938).

> in administration, from drifting into capricious statutes. It arrests that executive degeneration that is bound to set in when the policy of a ministry is not its own. It secures an essential co-ordination between bodies whose creative interplay is the condition of effective government.

As for the principle of separation of powers, the Constitution envisages not only a functional separation of powers between the legislative, executive and judicial branches but also provides for separate functions for, and a system of checks and balances by, other independent functionaries such as the Election Commission and the Comptroller and Auditor General.[7] This scheme, which does not stop at a simple trifurcation of powers, accords with the discussions in the Constituent Assembly where the importance of a harmonious functioning of the different branches of government was emphasized. By segregating the powers and functions of the institutions, the Constitution ensures a structure where the institutions function as per their institutional strengths. Further, through the system of checks and balances, a degree of latitude is provided to each branch for interference into the tasks and functions performed by the other branch. The scheme is designed to check concentration of power in a particular branch or institution.[8]

The functional specialization of the judicial branch is with regard to the interpretation of the constitution as well as the laws made by the legislatures. The expertise required for that is gained through years of practice of the legal craft and the separation principle does well to insist on non-interference by the other branches with the functioning of the judicial branch. Axiomatically, the principle also recognises that the judicial branch is not functionally competent to deliberate or decide on matters that are alien to the craft in which its members are trained. Unlike the executive that is accountable to the legislature, and the legislature that is accountable to the people who they represent, the judges are not in any sense accountable except to the constitutional mandate. It is only through their independence, and adherence to constitutional accountability and limits in the exercise of their powers, that the decisions of judges gain constitutional legitimacy.[9]

The written text of the Constitution, as also its conspicuous silences, reveals its inherent scheme of incremental empowerment of the citizenry. In an interesting article,[10] Hannah Lerner discusses the challenges that faced the framers of our constitution while trying to forge a common national identity in the face of unparalleled social and cultural diversity. In the light of deep disagreements within the constituent assembly over the vision of the state, the framers refrained from making unequivocal choices and

---

7 Ruma Pal, 'Separation of Powers', in Sujith Choudhary, Madhav Khosla, Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (2016).

8 *Ashwani Kumar* v. *Union on India* [2020] 13SCC 585.

9 *Ibid.*

acknowledged that the gaps between rival perspectives were unbridgeable and addressed their difficulties by adopting an incrementalist approach based on creative use of constitutional language. Constitutional incrementalism allowed the constituent assembly to circumvent politically explosive conflicts by shifting the burden of resolving contentious debates to the new political institutions it created. The inclusion of incrementalist arrangements in the constitution was meant to afford the political system greater flexibility for future decisions about controversial questions, such as the unification of personal law or India's national language. Deferral was therefore used as an incrementalist strategy in constitutional drafting. The Constituent Assembly debates reveal that there was considerable emphasis on pragmatism while drafting the Constitution. It was understood that there were certain issues on which a definite stand could not be taken at the time and prudence demanded that such issues be tackled gradually and with the advance of time.

The above view finds resonance with the view taken by some in the context of the American Constitution that silences and abeyances exist not only on account of linguistic indeterminacy or an inability to predict the future, but are often the result of a tacit agreement to keep certain contentious political questions in a state of irresolution. Constitutional ambiguity, through silence, is seen as an acceptable strategy for resolving conflict. It is argued that Constitutions must establish a structure of government but they must leave room for time and experience and, in that sense, what is explicit in the constitutional text rests on implied understandings; what is stated rests on what is unstated. Constitutions can work only if they maintain their ambiguous meaning and they must necessarily be subject to continuous re-interpretation.[11]

The idea that the constitutional text was to be seen as a work in progress is also discernible from the structural arrangement of the constitution that separates the chapters on Fundamental Rights and the Directive Principles of State Policy and makes the latter merely a go-to guide for future legislation and not as comprising rights that are enforceable by courts. The provision[12] for securing a Uniform Civil Code (UCC) for the Indian people is a case in point. The debates of the constituent assembly reveal that while there were some members who actively pushed for the implementation of a uniform civil code, to obviate the difficulties posed by various customary and religious practices that were in vogue in our country, majority of the members were opposed to the idea.[13] For the latter, a UCC would have deprived the religious minorities of their religious freedoms that the Constitution sought to protect. As it was apparent that it

10 Hannah Lerner, "The Indian Founding: A Comparative Perspective" in Sujit Choudhry *et al* eds, *The Oxford Handbook of the Indian Constitution* (2016).

11 Martin Loughlin, 'The Silences of the Constitution' 16 *ICON* 922 (2018).

12 The Constitution of India 1950, art 44.

13 Constituent Assembly Debates, Vol. VII, (Nov. 23, 1948).

was not possible to immediately implement a UCC in India, the subject was included as a directive principle of state policy that, though not enforceable by any court, was nevertheless to be seen as fundamental in the governance of the country, and one that the State had a duty to apply in the making of its laws. Even in the case of enforceable fundamental rights, the events that played out in the early years of working the constitution in the context of property rights reveal that it was not possible for the state to guarantee such rights, to the full extent envisaged under the constitution, immediately after adopting the Constitution,[14] and the only practical way of guaranteeing civil rights and liberties was to empower the citizenry incrementally. The above feature of the Constitution also suggests that the Constitution has essentially been, and continues to be, a socio-political document, as opposed to a strictly legal one, for the concepts and values enshrined there under are to be refined based on the lessons learnt while actually working the document. The framers believed that issues that stood unresolved at the time of enacting the constitution, could be resolved through political dialogue at a later point in time when, pursuant to the working of the new constitution, there would be in place a parliament comprising of representatives of the people elected on the principles of universal adult suffrage.

The flexibility of the Constitution to adapt to future societal changes was ensured through the insertion therein of a provision for amendment of the Constitution and giving that power to the Parliament of the day. The said power was limited only to the extent expressly provided in the constitutional text and where no such limitation was expressed, the power of amendment was to be exercised based on political dialogue that ascertained the needs in society.

III The interpretive journey: Executive angst to judicial supremacy

While in the years immediately following the enactment of the constitution, the Indian courts adhered to a strictly textual interpretation of the constitution, taking note of the constitutional scheme that envisaged a functional separation of powers, qualified by a system of checks and balances, where under the role of the judiciary was strictly interpretive in that it had the final say only as regards the meaning to be accorded to the words of the written text and the concepts and values discernible therefrom, a move away from textualism was witnessed in later years on account of political events that the judiciary perceived would be a threat to the rule of law. Those political events, in fact trace their roots to the period covering the months immediately after the adoption of the Constitution when the lofty ideals enshrined in the Constitution began to pose hurdles to the advancement of the socialist agenda of the Congress Party under Prime Minister Jawaharlal Nehru. Primary among those was the fundamental right to property that was guaranteed under article 31 of the Constitution that mandated that no person

14 Tripurdaman Singh, *Sixteen Stormy Days: The Story of the First Amendment of the Constitution of India* (Penguin 2020).

could be deprived of his property save by authority of law and, further, that no such property could be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law that provided for an amount to be paid for such acquisition or requisition. For a government that was in pursuit of a socialist agenda through implementation of land reforms for an equitable re-distribution of lands that were hitherto in the hands of the wealthy landlords, the above constitutional guarantee had to be done away with and for that, the constitution had to be suitably amended. But therein lay the problem.

Part III of the Indian Constitution, spanning articles 12 to 35, enumerates certain rights that are deemed fundamental to the people of India and guarantees their protection by the State. Article13 (2) of the Constitution mandates that the State shall not make any law that takes away or abridges the rights conferred under the said Part, and any law made in contravention of the said clause shall, to the extent of contravention, be void. The apparent tenor of this clause is to clarify that the fundamental rights enumerated under Part III of the Constitution are to be seen as entrenched provisions therein, which cannot be taken away or abridged through a legislative exercise. Axiomatically, this means that none of the fundamental rights under Part III can be taken away or abridged through an amendment of the Constitution, which also is a legislative exercise.

The Indian Constitution contains a specific provision (article 368) that provides for its amendment. The Constituent Assembly debates reveal that the choice of a suitable amendment procedure was essentially between a tough one that required consensus of various bodies and an easy one that could be amended by an ordinary law of Parliament. The framers felt that since the Constituent Assembly itself was comprised of members who had been indirectly elected, and who had to act in haste, it would not be prudent to place their decisions on a high pedestal beyond the amending power of Parliament whose members would be directly elected by universal suffrage.[15] It was thus that in the Constitution that was eventually adopted, a balance was struck and the residual right to amend the Constitution was left to the Parliament of the day.

Four successive cases decided by the Supreme Court reveal the manner in which the government of the day succeeded in overcoming the constitutional prohibition against the taking away or infringement of fundamental rights, of which the right to property was one. In *Shankari Prasad,*[16] which considered a challenge to the first amendment to the Constitution, the court accepted the power of Parliament to amend the Constitution and to abrogate fundamental rights. It relied on the distinction between constitutional law and ordinary legislation and the logic that an exercise of constituent power was

15 Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (2017).

16 *Shankari Prasad Singh* v *Union of India*, AIR [1951] SC 458.

not itself subject to challenge. In *Sajjan Singh*[17] (1965) while the majority judges accepted the power of Parliament to amend the Constitution, the minority expressed doubts about the untrammelled powers of Parliament to amend the Constitution. Interestingly, Mudholkar's J., judgment in *Sajjan Singh* mentions for the first time, the possibility that there may be certain basic features of the Constitution with which parliament may not interfere through the exercise of power under article 368. The change in thinking of the bench was apparently prompted by the political changes that had occurred in between that saw as many as 17 constitutional amendments enacted in a relatively short time. Later, when the issue came to be considered in *Golaknath,*[18] Indira Gandhi was the Prime Minister but perceived as a weak ruler whereas Chief Justice Subba Rao was seen as one who did not share the restrained view of the judiciary. The majority judgment in *Golaknath* held that the prohibition in article 13(2) would extend to constitutional amendments, thereby rendering Parliament powerless to violate any of the fundamental rights in the exercise of its amending power. The *Golaknath* judgment triggered an assault on courts by Indira Gandhi who by then had renewed her mandate in the fifth general elections of 1971. Her government enacted the 24th Amendment that sought to overturn the *Golaknath* judgment. The Kerala Land Reforms Act, 1970 was also included in the Ninth Schedule leading to a challenge to the said amendment in *Kesavananda* (1973). The court in *Kesavananda* reversed *Golaknath* to hold that Parliament could amend all parts of the Constitution, but then clarified that the said power would not extend to amending the basic structure of the Constitution.[19] It clarified that while the fundamental rights under Part III of the Constitution formed part of that basic structure, there were other features also that were part of the basic structure which too could not be amended by the Parliament through the exercise of its amending power under article 368. It is this last finding that goes against the written text of the Constitution and today makes the Constitution an inflexible and unduly rigid one.

Any serious reader of the mammoth judgment in *Kesavananda* cannot fail to notice the apprehension of misuse perceived by the judges on the bench while rendering their individual opinions. Probably on account of the arguments advanced before them by the lawyers who appeared in that case, the judges, without exception, appear to have been swayed by the possibility of misuse of the amending power by future governments of the country. The petitioners had placed considerable reliance on an article written by Dieter Conrad, chronicling the usurpation of vast powers by the Nazi regime under the Weimar Constitution, to suggest that a similar abuse of power could not be ruled out in India. It is therefore that, after overruling that part of *Golaknath* that held that constitutional amendments could not infringe or take away the fundamental rights

17 *Sajjan Singh* v. *State of Rajasthan* AIR [1965] SC 845.

18 *IC Golaknath* v. *State of Punjab*, AIR [1967] SC 1643.

19 Thiruvengadam, *supra* note 14.

conferred under Part III, since they fell within the ambit of 'law' under article13, the court went further to hold that the amending power could not be exercised to destroy the basic structure of the Constitution. There is no uniformity in the views expressed by the different judges as to what constitutes the basic structure of the Constitution. What they do agree upon, however, is that the fundamental rights under Part III of the Constitution constitute a part of that basic structure, and it was on this last finding that the challenge to the impugned amendments was finally decided and those provisions in the amending Acts, that breached the fundamental rights, held unconstitutional. In other words, the challenge to the impugned constitutional amendments was decided based on the extent to which they breached the fundamental rights under Part III of the Constitution and in finding as they did, that certain provisions of the amending statutes were unconstitutional, the court was essentially saying that the amending power of the parliament did not extend to infringing or taking away the fundamental rights under Part III of the Constitution. What is of particular significance though is that this was what was decided in *Golaknath* as well albeit through a different line of reasoning and hence, there was no reason, save perhaps the perceived fear of future misuse of the amending power, for the court to hold that there were other features in the Constitution that formed integral parts of its indestructible basic structure. What *Golaknath* decided through a process of interpretation of the written text of the Constitution, was reiterated and expanded in *Kesavananda* through an apparent reliance on structuralism.

The supremacy in the matter of constitutional interpretation that, in a sense, was arrogated to itself by the Supreme Court in *Kesavananda* can perhaps be justified if the court is seen as one deciding questions of law involving the interpretation of the Constitution in a timely manner and through consistent adherence to any particular theory of interpretation. Since that does not happen in India, the question that one has to ask is firstly, whether judicial review of constituent state action must take the strong form and secondly, whether it would be desirable for the judiciary to adhere to a consistent theory of constitutional interpretation while exercising its power of judicial review? The peculiar structure of its legal system, coupled with the delays that plague the said system, make it undesirable for the judiciary in India to opt for the strong form of judicial review and assume the power to dictate the manner and the circumstances in which the Parliament can amend the Constitution. Its institutional competence does not equip it for a foray into the realms of policy making or to ascertain the needs of the people. On the contrary, it must focus on its interpretive role and identify a theory of constitutional interpretation that adheres to the written text of the Constitution, which will inform it in the exercise of its power of judicial review.

As in other democratic republics, judicial review is often seen as an undemocratic exercise of power by the courts in India. Judges not being elected by the people, their action of overruling the will of the legislature is often seen as bordering on the

illegitimate. Judicial review has, however, been seen as a necessary counter-majoritarian safeguard against excessive or unconstitutional state action, be it legislative or executive. As Alexander Bickel points out,[20] judges on account of their training and institutional customs have the advantage of considering the effect of state action on values enshrined in the constitution and in that sense perform not only a checking function but also a legitimating one. The court not only strikes down a legislative action as unconstitutional but also proceeds to validate it as within constitutionally granted powers and as not violating constitutional limitations. The court represents the national will against local particularism but it does not represent it, as the legislature does, through electoral responsibility. That being said, courts have to observe some restraint in the exercise of their power of judicial review. As Barry Friedman points out[21], judges in the discharge of their duties are often influenced by political forces such as their personal ideology that, in turn, is shaped by such factors as race, gender or prior occupation. They can also be influenced by public opinion for they too read newspapers, watch television, and come into contact with popular opinion regularly. They also have ample incentive to pay attention to public reception of their work and, consequently, may feel they stand trial in the court of public opinion. Echoing the said view, Larry D Kramer, while justifying the interpretive role of courts on the principle of separation of powers qualifies it with a caveat that whatever its legal justification, judicial review has political consequences that may be important and may rub people the wrong way.[22] According to him, there is in any system that allows judicial review, even one that embraces supremacy, an equilibrium point beyond which the court cannot go without undermining its institutional authority and capacity to act. However, so long as the citizenry accept that it is the courts that must interpret the constitution, judges can get away with not showing deference to other branches while deciding constitutional issues.

The distinction between judicial review of ordinary legislation and judicial review of constitutional amendments in relation to implied limitations on the exercise of the review power is brought out by Rosalind Dixon and David Landau,[23] who argued that in well functioning democracies, constitutional amendments are frequently used by legislative or popular majorities for pro-democratic constitutional ends. Ordinary judicial review is a counter-majoritarian act, but at least democratic majorities retain the ability to override judicial decision-making through constitutional amendment. The doctrine of unconstitutional constitutional amendment cuts off this safety valve by allowing

---

20 Alexander M. Bickel, *Least Dangerous Branch: Supreme Court at the Bar of Politics* (2nd edn.,1986).

21 Barry Friedman, 'The Politics of Judicial Review' 84 *Tex. L. Rev.* 257 (2005) .

22 Larry D Kramer, 'Judicial Supremacy and the End of Judicial Restraint' (2012) 100 *Cal. L. Rev.* 621-34.

23 Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine ofUnconstitutional Constitutional Amendments' 13 *International Journal of Constitutional Law* 606-638 (2015).

courts to review attempts to use the amendment process as override. Constitutional provisions and principles are quite often open-textured in nature and thus open to multiple different reasonable interpretations, and the key downside to a doctrine of substantive unconstitutional constitutional amendment is that it gives courts a more or less unreviewable power to determine the meaning of open textured constitutional provisions, the scope of which are open to reasonable disagreement. It gives judges something like a super-strong judicial review which goes directly against recent trends in constitutional theory and design towards 'weakening' the finality of judicial review. They argue, therefore, that it would be desirable that the doctrine of unconstitutional constitutional amendments be a limited, rather than a broad one.

In the context of the Indian Constitution, and the system of judicial review envisaged thereunder, Granville Austin notes that the members of the constituent assembly believed that judicial review was an essential power for the courts of a free India, and an India with a federal Constitution. They believed that in some areas of the social revolution, the legislative branch of the government had to be supreme; for in these areas, they could not bring themselves to trust the judges, whose function was to be limited to interpreting the law as written. Assembly members would have agreed, however, that but for these exceptions it was the duty of the judiciary to keep the government current with the times and not allow it to become archaic or out of time with the needs of the day.[24] Re-iterating the point more than six decades later Chauhan[25] notes that the constitution makers of India adopted the middle course between the American system of judicial supremacy and the British principle of parliamentary sovereignty, by empowering the judiciary with the power of judicial review and the Parliament with the sovereign power of amending the Constitution with certain restrictions. He opines therefore that the parliament and the supreme court should act within the specific sphere determined by the constitution and should not interfere with each other's jurisdiction for maintaining the constitutional balance between the three organs of government.

One would think that the judiciary in India is better suited to play the role of an interpreter of the written text of the Constitution and should avoid a larger role through assumption of powers that are better exercised by the legislative bodies. The legislature serves as an ideal venue for the people to express their interests and expectations through their elected representatives. The voicing of such interests and expectations serves as a barometer that reads changes in societal attitudes and provides the necessary cue to the legislature to enact new laws or amend existing ones. The function of the judiciary, which is an apolitical body, must ideally be one of consistent interpretation

24 Austin, *supra* note 4.

25 DC Chauhan, 'Parliamentary Sovereignty v Judicial Supremacy in India' 74 *Indian J. Pol. Sci.* 99-106 (2013).

of the laws and ensuring their conformity with the Constitution. While exercising the power of judicial review of constituent state action, such as constitutional amendments, it might be prudent for the courts to identify and protect a narrow set of constitutional principles fundamental to democracy and strike down only an amendment that destroys those principles. The advantage of such an approach is that it protects a broad sphere for constitutional amendments at the instance of the people and their elected representatives, and ensures that the unconstitutional constitutional amendments doctrine will be used only in the most extraordinary cases. While formulating the basic structure doctrine in *Kesavananda*, however, the Indian Supreme Court opted for a broader approach and thereby reduced the sphere of constitutional amendments at the instance of the Parliament.

In the exercise of its powers of judicial review, the courts can achieve consistency through adherence to an appropriate theory of constitutional interpretation. In the last seven decades and more of working their constitution, however, Indian judges have not tied themselves down to any particular philosophies and have manifested flexibility in their interpretive approaches. Chintan Chandrachud holds that although there has been very little self-reflection from the bench about interpretive methodology, decided cases indicate a shift from textualism in the early years of adoption of the Constitution to structuralism in the years beginning with *Kesavananda* when the Supreme Court propounded the basic structure doctrine to introduce implied limits to the power of the Parliament to amend our Constitution. He also notes "unlike in the United States where the move away from textualism was justified by the difficulty of formal amendment, in India, the ease of formal amendment prompted the shift towards interpretive approaches that profess fidelity to the structure of the constitution".[26] This view resonates with that of Sudhir Krishnaswamy, who justifies the basic structure doctrine by arguing that the court's use of structural interpretation upholds the integrity of the constitutional document and can be the basis for imposing limits on the amending power. He adds that implied limitations, which may be inferred from other provisions of the Constitution, can offer a sound constitutional basis for the basic structure doctrine, and that an interpretation of the constitutional provisions generates emergent basic features, which operate as implied limitations on the power-conferring provisions of the Constitution.[27]

IV The search for a theory: what's out there?

The framers of the Indian Constitution having borrowed concepts from various other constitutions of the time such as those of the United States, Ireland and Japan and

26 Chintan Chandrachud, 'Constitutional Interpretation', in (eds.) Sujit Choudhary and Ors, *The Oxford Handbook of The Indian Constitution* (Oxford University Press, 2016).

27 Sudhir Kirshnaswamy, Democracy and Constitutionalism in India - A Study of the Basic Structure Doctrine (2009).

also opted for the parliamentary system of government that prevailed in Great Britain, it was but natural for its courts to take cue from the interpretative methods followed by the courts in those countries while interpreting its own document. If one were to undertake a survey of the various theories of constitutional interpretation in vogue, originalism would be a convenient place start for it does state what is most obvious – that the Constitution refers to the written text and that the text means exactly what it says; that the meaning the text had at the time of its initial adoption is what is to be seen as authoritative and legitimate. Justice Antonin Scalia, who was probably its most vociferous advocate in recent times put it rather succinctly when he opined that in a society governed by laws and not men, what the laws say is what the laws mean. A tweaking of the written text will be justified only when it is clear to the reader that there is a mistake in transcription and that is not what the legislature intended. Judges should not decide what is or is not absurd. There may be absurd statutes but that is what one gets from legislative compromise.[28] The view is akin to the formalist approach adopted by some judges that sees the judge's role as that of a scientist who tries to logically and mechanically bring out the meaning of the text as intended by the framers of the Constitution. They adopt the literal construction approach as against the purposive interpretation adopted by natural lawyers. For judges brought up in this tradition, the fact of an evolving societal tradition is not to be gathered from evidence of public opinion polls, views of interest groups and the positions adopted by various professional associations but from the laws and the application of laws that the people have approved.[29]

A modified form of originalism, which departs from that followed by original intent or original meaning adherents, involves finding the meaning of the text based on the prevailing meaning of the words used therein even if such meaning may not accord with the original intent of the framers of the constitution. Dworkin, for instance, liked to see an interpretation of a piece of literature as attempting to show which way of reading the text revealed it as the best work of art. He refers to this as aesthetic hypothesis. According to him, anyone who interprets a work of art relies on beliefs of a theoretical character about identity and other formal properties of art, as well as on more explicitly normative beliefs about what is good in art. Both sorts of beliefs figure in the judgment that one way of reading a text makes it a better text than another way. Since people's views about what makes art good art are inherently subjective, the aesthetic hypothesis cannot recognise objectivity in interpretation.[30]

---

28 Antonin Scalia, 'A Dialogue on Statutory and Constitutional Interpretation' 80 *George Washington L. Rev.* 1610 (2012).

29 R. Randell Kelso,'Styles of Constitutional Interpretation and the Four Main approaches to Constitutional Interpretation in American Legal History' 29 *Val. U. L. Rev.*121(1994).

30 Ronald Dworkin, 'Law as Interpretation' in *The Politics of Interpretation,Critical Inquiry 9* (1982).

While Originalism, with its textualist obsession, may have lost its appeal in countries with older constitutions, the theory may still hold promise in countries like India where the Constitution is relatively young and the literal meaning of the words used in the written text still accords with it's understanding and usage in contemporary society.[31] It is important to bear in mind that reliance on any particular label may be misleading for, even in the case of originalism, contrary to what many think, it is not a single, coherent, unified theory of constitutional interpretation but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label. In fact there are a collection of rapidly evolving theories, constantly reshaping themselves in profound ways in response to devastating critiques, and not infrequently splintering further into multiple, mutually exclusive iterations. Today, there are countless variations of originalism, and the differences among them are sometimes so stark that it is difficult to treat them as one coherent interpretive methodology. Over the years, in the context of the American constitution, originalism has meant adherence to original intention of the framers, to original meaning determined by referring to the understanding of the drafters, those who voted in state ratification conventions, general public and so on. Thereafter, the theory shifted to a jurisprudence of objective textual meaning referable to the time when the Constitution was adopted. Thus, in modern times, some of the theories that profess to belong to the genus of originalism are barely recognizable by the adherents to original originalists.[32]

On the other end of the spectrum lies the non-textual approach to interpretation that sees the constitutional text as incomplete or unfinished. It is then seen as the duty of the various organs of governance to read into the 'silences' of the constitutional text depending on the particular conception of the constitution that one has. When the Constitution is seen as a bargain struck by political parties at a particular time in history and containing a framework for continuing political negotiation, it is the legislature that is best suited to eliminate the silences through political judgment. If, on the other hand, the Constitution is seen as a legal document containing an order of values, then the silences are to be filled by the judiciary. If the conception is one that sees the Constitution as a facilitator of an evolving administrative order, the executive is seen as best placed to respond to contemporary rules and legislatures and courts simply lack the capacity to exercise effective oversight.[33] Furthermore, while interpreting the silences of a Constitution, as above, a distinction is sometimes drawn between 'door-closing' silences and 'door-opening' silences. In the former, the sequence of events leading to the enactment of the provision in the constitutional text is analysed to see whether the exclusion of other components of a right/value mentioned therein was deliberate. If so, the silence as regards the other components is seen as a door closing

31 David A. Strauss, *The Living Constitution* (Oxford University Press 2010).

32 Thomas B Colby and Peter J Smith, 'Living Originalism' (2009) 59 *Duke L. J.* 239.

33 *Martin supra* note 11.

one that shuts out any attempt to expand the scope of the right/value. In the case of door-opening silences, on finding that there was no deliberate exclusion of a wider scope being given to the right/value in the future, the doors are seen as open to giving a broader construction to the right/value expressed in the text.[34]

An important aspect of the non-textual approach that permits a reading into the silences of the Constitution is that it provides ample scope for a judge to read his own personal philosophy or political ideology into the silences. The legitimacy of such action is itself suspect in a constitution that is founded on democratic principles for it virtually permits an informal amendment to the constitution by unelected judges who are not accountable to the people as the legislature is. While, therefore, the non-textual approach may be justifiable under the American Constitution, the provisions of which expressly state that the enumeration of specific rights does not preclude the recognition of other rights, its legitimacy in the context of the Indian Constitution is suspect since it does not have a similar provision thereunder.

'Controlled Activism' is an approach to constitutional interpretation that attempts to avoid the possibility of strategic, outcome determinative manipulations of the constitutional text that either "originalism" or "non-textual" approaches facilitate. This approach suggests a strict adherence to the constitutional text when the words are unambiguous *ie.,* one goes simply by what the text says. When there is an ambiguity, however, the meaning to be given to the words has to be within the range of possibilities that come within the linguistic reaches of the text. A meaning that can be derived beyond that has to be excluded. The method is therefore referred to as "exclusionary textualism", and it avoids looking into history, original intent or original meaning and looks only to the undisputed meaning given to the words at the time of its interpretation. Although it may be possible for judges' to still read in a meaning that they prefer, the said meaning would nevertheless be within the range of possibilities warranted by the linguistic reach of the text and further, controlled by the context in which the text is placed in the constitutional document.[35] The written text may also play a significant role as a focal point of reference for those resorting to a strictly non-textual process of interpretation. The text gives a clue as regards those provisions that ought not to be infringed, such as entrenched fundamental rights, or the institutional framework, such as the separation of powers envisaged under the Constitution, that should act as a guide to the development of law by indicating the body that is more suited to make the law under the prevailing circumstances.[36]

---

34 Laurence H Tribe, 'Soundings and Silences', 115 *Michigen L. Rev. OnLine* 26 (2016).

35 Martin H. Reddish and Matthew B. Arnould, 'Judicial Review, Constitutional Interpretation and the Democratic Dilemma: Proposing a Controlled Activism Alternative', 64 *Fla L. Rev.* (2012).

36 Andrew B Coan, 'The Irrelevance of Writtenness in Constitutional Interpretation' 158 *U. Pa L. Rev*. 1025 (2010).

A closely allied theory attributes a meaning to the written text, based not only on the range of linguistic possibilities for the word in question but also in the context of the original history and structure of the constitution and in the light of the values discernible from the constitutional text. In other words, the historical, structural or values approaches are not applied in isolation from one another or from the constitutional text, but together so as to find a meaning to an ambiguous phrase in the written text.[37] The meaning of the ambiguous word is determined by looking at the range of meanings thrown up based on insights from the various sources *viz.,* the text, history, structure and values and identifying the one most appropriate to the context.

Then there is intratextualism that involves reading a contested word or phrase that appears in the constitution in the light of another passage in the Constitution featuring the same or a very similar word or phrase. Rather than focus on particular clauses in a text, intratextualism focuses on at least two clauses and highlights the link between them. Intratextualism is often seen as a cluster of three different kinds of constitutional claims *viz.,* (i) using the Constitution as a dictionary – tells us what the constitution could mean (ii) using the Constitution as a concordance and recognizing a pattern in the use of words and phrases – tells us what the constitution should mean and (iii) using the Constitution as a rulebook where two or more similarly phrased constitutional commands be read in *parimateria* – tells us what the Constitution must mean. The greatest virtue of intratextualism is that it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses. It also has a certain undeniable aesthetic attraction, appealing to ideals of symmetry and harmony.[38] The drawback of the said approach, in the context of the Indian Constitution that has seen frequent amendments, is that it fails to take into account the possibility of the same word being used in different contexts within the same document say, for instance, when a word 'xxxx' is used in one sense in the original text and used in another sense when inserted through an amendment of another provision, many years later. In such instances, the intratextualist approach does not offer much assistance in ascertaining the meaning of the contested word.

Unlike in the United States, the Indian Supreme Court is a polycentric court with many individual courts under one roof, and the bench strength being the prime determinant of the differential weightage accorded to its judgments. Polycentric courts can function effectively only if they follow the discipline that informs the development of common law where numerous decision makers play it by the ear and mutually adjust their decisions to their expectations of what will pass muster with the community of decision makers, and do all this without the use of any common blueprint. The

37 William A. Kaplin, 'The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future' 42 *Rutgers L.Rev.* 982 (1990).

38 Akhil Reed Amar, 'Intratextualism' 112 *Harv. L. Rev* 747 (1999).

polycentric method pre-supposes that the knowledge required to make decisions is not contained in any one person but is scattered across many persons, each of whom has only a limited knowledge of the subject. The limited knowledge of each of these persons is then harnessed by mutual adjustment in a succession of cases between decision makers engaged in real-time decision-making. The tacit knowledge about the community, to which the value decision of the judge must appeal, is gleaned by the judge from the knowledge he has of the ways in which an apprentice is trained in the craft of legal practice. Thus the common law tradition restricts a judge from embracing any random value of his choice and guides him to adopt a value that will pass muster with the community of persons affected by his decision. In that process, he will also have to make his decision coherent with the existing precedents on the same issue.[39] While it could be argued that uniformity in interpretative outcomes can be ensured through an academic disciplining of its judges, the legal fraternity in India would see such expectations as utopian. That apart, the sheer volume of litigation in the country, without anything more, will suffice to demonstrate the impracticability of the common law incremental approach to constitutionalism in India. To require its judges to make their decisions coherent with the existing precedents on the issue would amount to asking them to do the impossible since the per judge case load in the country is extraordinarily high and even a 'Hercules' – the superhuman judge conceived by Dworkin[40] – would find the task of sifting through the volume of existing precedents on the issue, daunting.

One would imagine that in the ultimate analysis, and to guide it in the exercise of a weaker form of judicial review, a modified textual approach by the courts would offer the best fit for interpreting the Indian Constitution. The Constitution being a relatively young one, original intent or original meaning will still offer valuable clues as to the meaning of the text. The Constitution, however, has to be interpreted in a manner that takes note of changes in societal attitudes and preferences over time and this can be done by giving to the words in the written text a meaning that falls within its linguistic reaches in the context of the original history and structure of the constitution and in the light of the values discernible from the constitutional text. In fact, this was the approach taken by the Supreme Court in the years leading up to *Kesavananda*. But for it going that extra mile through formulating the basic structure doctrine, identifying features outside of Part III of the Constitution as unamendable by Parliament, and thereby usurping to itself the discretion left to the Parliament under the Constitution, the legitimacy of its activism would have been unquestionable.

---

39 Shivprasad Swaminathan, 'What the Centipede Knows: Poly centricity and Theory for Common Lawyers' 1 *Oxford Journal of Legal Studies*(2020).

40 Ronald Dworkin, *Law's Empire* (1998).

There is a view that the wide powers exercised by the judiciary in India are in furtherance of the principles of good governance that all civilised societies must further.[41] While there may be some substance in that view, what is important is that the objective of good governance is attained through legitimate means. Good governance cannot be at the cost of violating the principle of separation of powers that informs the Indian Constitution and has been recognised as one of its basic features. In its interpretive role, the judiciary may still adopt a procedure that retains a commitment to the written text while ensuring good governance. However, it must remind itself that as an institution, it does not have control over either the purse or the sword. If it issues orders and directions that cannot be implemented, it can have disastrous consequences on its reputation as a pillar of governance, and lower its esteem in the eyes of the people. While it may be comforting to believe that its orders and judgments do help educate government officials about their obligations, statutory or otherwise, there is no material that suggests that this is in fact the case.

V The road ahead: Re-imagining constitutional interpretation

The search for a theory of constitutional interpretation that should inform the court's exercise of judicial review of constituent state action cannot ignore the fact that the legitimacy of the Constitution, especially with regard to the claim that representatives of the people drafted it, still remains under a cloud. If the constituent assembly that drafted the Constitution was not made up of persons who could truly be seen as representing the cross section of Indian society of the time, then one cannot really see the Constitution as one that was given to themselves by 'The People of India'.[42] A legitimate Constitution in the latter sense would require a constituent assembly to be constituted pursuant to a national referendum, or an election based on universal adult suffrage, which would then hold deliberations and draft a new constitution for the nation. This has been the experience of other nations such as South Africa, Columbia and Kenya to name a few, all of whom drafted new constitutions to replace the earlier ones. Such an exercise, however, apart from requiring a national level consensus, would also pose significant logistical problems akin to those that are faced in India during the quinquennial national elections and hence, would in all likelihood take time to materialise.

Alternatively, and towards restoring the constitutional commitment to democracy, it might be worthwhile to consider appealing to a larger bench of the Supreme Court to reverse its majority judgment in *Kesavananda*. This may have seemed well nigh impossible a decade ago when the strength of judges in the Supreme Court was considerably lesser than it is today. To overturn the judgment in *Kesavananda* that was rendered by a bench of thirteen judges in 1973 would require a bench of not less than fifteen judges

41 Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court 8 *Wash. U. Global Stud. L. Rev.* (2009).

42 The Preamble to the Constitution of India, 1950.

(as odd numbers would avoid a stalemate). The Supreme Court now has 33 judges and it would not be impossible to constitute such a bench now. Critics of judicial activism have over the years begun to doubt the wisdom of empowering the highest court in the country to an extent where it effectively dictates governance thereof. It is necessary to cut at the root of the problem by removing the basis for the disproportionate empowerment of the judiciary namely, its decision in *Kesavananda.* For the superstitiously inclined, or fans of Paulo Coelho looking for signs that suggest that such reversal is overdue, the news of the demise, in 2020, of His Holiness Kesavananda Bharathi, the litigant whose name has been engraved in the country's judicial history through that judgment, might seem semiotic and provide food for thought. Reversal of the *Kesavananda* judgment would restore the *status quo ante* and take the country back to the *Golaknath* judgment, which located the eternal protection to the guarantee of fundamental rights under the constitution within its written text. A re-instatement of the decision in *Golaknath* would herald a return to textualism that has proven to be a legitimate mode of constitutional interpretation in India, and one that adheres to the scheme of its Constitution.

As a document of governance, the Constitution contains a scheme where under the polity is informed by the principle of separation of powers and the residual power is conferred on the legislative bodies. The primacy accorded to the legislative bodies can also be inferred from the preference shown for, and the consequent adoption of the parliamentary system of government for the governance of the people. Together with the emphasis on democracy as the means of governance, the Constitution must be seen as a socio-political document, in the working and amendment of which the representatives of the people must have a definite say. It is only when actions of the legislative or executive bodies transgress constitutionally prescribed limits that the judiciary must step in to restore the status quo ante. While doing so, it would be prudent for the courts to read in a meaning to the text that falls within the linguistic reaches of the words used. The preferred meaning must also be one that takes into account the historical events leading to the framing of the Constitution as also the inherent structure of the Constitution and the values discernible therefrom. In other words, if the written text is capable of several permissible interpretations based on the possible contextual meanings that the words used in the text may have, the actions of the legislative and executive bodies must be upheld so long as they do not breach the textual provisions as so widely interpreted, including through a reference to the historical and structural context of the provision. Although it is clear from the scheme presented through article 132 (the appellate jurisdiction of the Supreme Court in matters involving a substantial question of law as to the interpretation of the Constitution), article 145 (prescription as regards the minimum number of judges that must sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution) and article147 (that clarifies the ambit of the phrase 'substantial

question of law as to the interpretation of the Constitution) of the constitutional text that substantial questions of law involving the interpretation of the Constitution are to be resolved by the Supreme Court, the exercise undertaken by the court in such instances has to be one of interpretation of the Constitution and not an amendment thereof. Accordingly, the silences under the Constitution must not be filled through judicial creativity but through political deliberation keeping in mind the fact that the framers of the Constitution had deliberately maintained the silences in the text so that they could be filled democratically by the representatives of the people while going about the incremental empowering of the citizenry. In other words, while interpreting the Constitution, the courts cannot ignore the scheme envisaged by the framers thereof because the said scheme, and the silences it deals with, forms an integral part of the Constitution itself.

This is not to suggest that political deliberations must ignore the judicial pronouncements on important issues. Rather, the legislative and executive bodies must realise that the separation of powers envisaged under the constitutional scheme is one of functional specialisation where each branch of governance is seen as institutionally competent in its own sphere of expertise. Judicial pronouncements on important and contemporary issues must accordingly be given due weightage by parliament while deciding to bring about constitutional amendments that do not take away or abridge fundamental rights. That a collaborative scheme of consultation is envisaged under the Constitution is evident from a reading of article 143 therein that empowers the President of India to consult the Supreme Court on questions of law or fact of public importance.

On its part, the judiciary must also realise that the inherent polycentricism of its courts, with only judicial discipline and the doctrine of precedents serving as means to ensure consistency, will more often than not stand in the way of achieving uniformity in the matter of constitutional interpretation. The constitution cannot be interpreted variously by the different courts, each resorting to a different theory of interpretation to justify its finding as regards the meaning of any word or concept in the constitution. In a multi-lingual, multi-cultural and multi-religious pluralistic society, such judicial forays could wreak havoc through the uncertainty that it would entail. Even assuming *arguendo* that such aberrations can be corrected by a bench of higher strength through adherence to the doctrine of precedents, experience has shown that it takes many years before such aberrations are actually corrected and that, in the interregnum, the aberrant view has established itself as a precedent in its own right. The humungous case load in the courts, together with inevitable judicial delays, make it almost impossible for the courts in India to correct judicial aberrations within reasonable time. The constraints under which the courts in India function do not afford its judges the luxury of reviewing judgments *ex post facto*. The better approach would be to put in place a system that avoids the aberration altogether. It is therefore essential that the judiciary commits

itself to a singular approach to constitutional interpretation, preferably the wider textual approach discussed above, so that it adheres to both, the scheme and content of the constitutional text while simultaneously ensuring a consistency to the exercise of judicial review.

VI Conclusion

A study of the historical events that led to the framing of the Indian Constitution, including the debates that took place in the constituent assembly, clearly reveals that the drafting exercise was undertaken in a haste and by a set of people, undoubtedly eminent in their own right, but who were nevertheless not true representatives of the collective body referred to as 'The People of India'. The framers were aware of their inherent limitations and accordingly drafted the Constitution based on the consensus then arrived at with regard to the principles of governance that ought to guide a nation that had just freed itself of colonial rule. The Constitution was structured in a manner designed to perpetuate a scheme of incremental empowerment of the citizenry, with certain rights being immediately guaranteed and others over a period of time. The adoption of the Parliamentary system of government meant that the incremental empowerment of the citizenry was to be effected through political deliberations and the newly identified rights were to be guaranteed to the people through suitable amendments to the Constitution effected by the Parliament. It was for this purpose that the parliament was specifically empowered under the constitution to effect amendments thereto. The power so conferred was limited only by the provision that mandated that no law enacted by Parliament could take away or abridge the rights conferred by Part III of the Constitution – the fundamental rights. The common thread that runs through Part III, that serves to connect all the rights enumerated therein, is the fact that they are all individual rights protected against majority override. In other words, the essential feature of Part III is its anti-majoritarian nature and it is therefore that the rights under this Part are zealously safeguarded against laws made by a parliament that, in a democratic nation, operates on the principle of majority rule.

In this article, while it is argued that the formulation of the basic structure doctrine was not necessary to quell the perceived fear of the judiciary, and that the decision of the majority in *Golaknath* that preceded it was sufficient to reign in any overzealous parliament, the focus has mainly been on the effects the majority decision in *Kesavananda* had on the interpretive methods used by Indian courts while interpreting the Constitution. It is argued that through the formulation of the basic structure doctrine, the Supreme Court has not only limited the power of the parliament to amend the constitution but has simultaneously arrogated to itself a significant part of the said power. This is because, post *Kesavananda*, while the parliament cannot amend the Constitution in a manner designed to deprive it of its basic features, the basic features are what the Supreme Court says they are. Thus, far from its originally designed role

of an authoritative interpreter of the Constitution, the Supreme Court is now the sole authority to determine the circumstances and the manner in which the constitution can be amended. In interpretive parlance, this essentially amounts to a shift away from textualism into the realm of non-textualism where the meaning of the Constitution is drawn from concepts alien to the written text and its functional trajectory determined by an unelected body of judges who are generally perceived as unsuited for such an exercise in a democratic republic. This may prove counter productive in the long run.

There are many who see the shift in the balance of power in favour of the judiciary as a reinforcement of the rule of law in a country that has witnessed many an instance of executive and legislative excesses in the past. One would think, however, that the excesses of any one or more branches of government cannot justify an irreversible empowerment of another and that a restoration of the balance of powers envisaged under our original constitutional scheme is essential to maintain our commitment to democracy. In a democracy, the people are the sovereign and their representatives must be accorded primacy in determining its constitutional fate, especially as regards the form and structure that the country's constitution must embrace in future. A vigilant and activist judiciary must certainly guard against executive and legislative excesses but it must do so in a manner authorised by the Constitution. It can do so through the exercise of a weak from of judicial review that is informed by an imaginative and purposive interpretation of the constitutional text by drawing, *inter alia*, upon its history, structure and stated values. While historical, structural and value inputs may guide the judiciary in interpreting the Constitution, the interpretive exercise cannot ignore the written text and must remain committed to it. It is therefore that this article suggests a return to textualism, albeit in a modified form, as the preferred modus of constitutional interpretation, where the chosen meaning of the written text is one that falls within the linguistic reaches of the word and, simultaneously, fits well with the historical, structural and value context of the Constitution. It is believed that if such a theory of constitutional interpretation guides the exercise of judicial review in India, the country would ensure that its efforts at working a democratic Constitution do not place it on a path to juristocracy.