



CONSTITUTIONAL SILENCE: A COMPLETE ANALYSIS OF THE LIVING TREE

Dr. Aman Mishra

Kamlesh Singh

ABSTRACT The Constitution of India, acknowledged as the lengthiest written constitution worldwide, cannot be characterized as 'comprehensive' or 'complete' due to perpetual elements left unaddressed, overlooked, or undetermined. The article initially underscores the significance of constitutional silences within the national political sphere. It explores the issues arising from these gaps in constitutional texts, illustrating instances where courts have played a role in shaping constitutional culture by filling certain voids while deliberately leaving room for future determination, exemplified by the Doctrine of Basic Structure. The article scrutinizes the normative implications of these silences, presenting arguments from scholars like Martin Loughlin, Laurence Claus, Gabor Halmai, Benjamin Constant, and Mohd Fadel. The authors briefly examine the criticism faced by those who interpret constitutional silences excessively. In conclusion, it is asserted that there remains considerable unexplored territory in the unspoken aspects of constitutional texts, holding the potential to significantly influence the future trajectory of constitutional jurisprudence.

KEYWORDS : Constitutional Silence; The Basic structure doctrine; Article-21; The Doctrine of Invisible Constitution

INTRODUCTION

The Indian constitution, renowned as the longest written constitution globally, comprehensively addresses fundamental rights, state governance, and institutions like the Union Public Service Commission across its original 395 articles and eight schedules spanning 251 printed pages in the official version. However, some argue that the length and complexity of the Indian constitution may hinder its effectiveness and accessibility to the general public. Additionally, critics contend that frequent amendments and judicial interpretations can sometimes lead to confusion and inconsistency in its application. While seemingly exhaustive, constitutions, by nature, cannot cover every constitutional aspect thoroughly. Laurence Claus, in "Enumeration and the Silences of Constitutional Federalism," illustrates that silences persist even after exhaustive enumeration attempts by the framers. Claus argues that these silences can create gaps in constitutional interpretation, leaving room for ambiguity and differing opinions. This highlights the inherent challenge of creating a constitution that addresses all possible scenarios and ensures consistent application throughout its lifespan. According to Benjamin Constant, constitutions, though necessitated by political circumstances, are evolutionary processes, implying that omissions and silences are deliberate, guided by the principle of doing "only what is absolutely necessary." Martin Loughlin, in "The Silences of Constitutions," delves into the functional and inevitable aspects of constitutional silences, asserting that these gaps contribute to the longevity and effectiveness of constitutions. He aligns with Constant's perspective, emphasizing the inclusion of only essential elements in the main texts of constitutions.

Contrary to some scholars, there is an opposing perspective that a constitution marked by significant silence may lead to a lack of guidance. Mohammad Fadel, in "The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence," contends that a constitution's verbosity does not necessarily foster a constitutional culture that values and interprets constitutional silence. Fadel illustrates the Egyptian scenario, highlighting how Constitutional Courts, by rigidly and instantly filling every gap, can create outcomes vastly different from the original intent, leading to the demise of the Egyptian constitution.

Similarly, Gabor Halmai, in "Silence of Transitional Constitutions: The 'Invisible Constitution,'" examines the evolution of the "doctrine of the invisible Constitution" in Hungary. Comparable to how our courts expanded the scope of Article 21, Hungary's Constitutional Courts utilized this doctrine to introduce liberal concepts on matters like abortions, the death penalty, and freedom of speech. They achieved this by extending the scope to texts not explicitly present in the constitution.

Taking inspiration from such precedents, this article will first delve into the normative implications of constitutional silences. Secondly, it will argue that the silences within our constitution are as impactful as its written texts. An example is the emergence of the basic structure

theory in India, derived from the profound silence in the constitution, which only stated that it could be amended without explicitly addressing its potential abrogation or the disregard of its fundamental features.

Living Tree Doctrine : A Vis-Via Approach To The Indian Constitution

The British North American Act established a living tree in the Canadian Constitution that is capable of being changed, as noted by Viscount Sankey in the *Edwards v. Canada (Attorney General)* (1930) A.C. 124, 1929 decision, also referred to as the *Persons* decision. This developing and maturing within its inherent bounds. And this became recognised as the Doctrine of Forward-thinking Translation. This provision allowed for a certain interpretation of the Constitution that will not only be understood in relation to the changing requirements of the larger society, but also the scope of the framers' goals, whose intellectualities were perhaps indicative. With a scant understanding of the requirements at the time the Constitution was really introduced coming into effect

It is obvious that as human civilization evolves over time, new challenges and concerns will inevitably arise along the way. However, as the world community continues to integrate more as a result of globalisation, it will become increasingly important to expand the scope of national constitutions in order to implement recently established international commitments. Because of this, every country's constitution must be interpreted broadly to incorporate any recent changes to the country's legal system. Otherwise, the Grundnorm may become outdated, which would render a nation's whole system of norms invalid. India is not an exclusion from this rule.

Though the Doctrine of Living Tree received very little attention in India, the framers of the Indian Constitution were cognizant of the need to create a flexible document that could adapt to future changes in circumstances, which is why they included Article 368, which gives the legislatures of the nation the authority to amend the Constitution as needed, provided that the requirements outlined in that Article are met. This article allowed for two different kinds of amendments: the first required a simple majority of the Parliament in order to modify the Constitution, while the second required a half-majority of the State Legislature in addition to the Parliament. And as of January 2019, 103 amendments have been made to the Constitution of India,⁵ which signifies the extent of flexibility of the Constitution

In addition, by adding new ideas and proposing modifications, the Indian judiciary has expanded the reach of the Constitution and provided a wide interpretation of it. The Supreme Court of India has been able to decide several matters before the Court by giving the Constitution's different clauses the broadest meaning feasible since it has been entrusted with the position of Custodian of the Constitution.

The Normative Implication of Constitutional Silence

Martin Loughlin contends that constitutional frameworks should

incorporate spaces for silence, asserting that disallowing silences could undermine the transparency, adaptability, and indeterminacy crucial for the success of constitutionalism. Constitutional silences, according to Loughlin, foster more deliberation and compromises compared to a rigid and comprehensive constitutional approach. On the contrary, McHarg holds the view that constitutional silence might have adverse effects, particularly during crises. The ambiguity arising from silences could potentially jeopardize the stability that Loughlin and Fadel argue they uphold. The embrace or rejection of silence carries political implications, and it remains unclear whether these effects are constant and inherent or contingent on cultural factors.

In the realm of constitutional frameworks, the question arises: Are silences essential for evolution and longevity? Some scholars argue that it is not silence that paves the way for liberal constitutionalism; rather, it is liberal constitutionalism that fosters tolerance toward silence. Gabor Halmi's example of Hungary serves as a normative argument for accepting silences. He illustrates how Hungary's shift towards constitutional nationalism and the rejection of judicial activism were linked to the demise of the 'invisible constitution,' rooted in interpreting constitutional silences. The replacement of Hungary's old constitution with the Fundamental Law in 2011, based on nationalist principles and opposing judicial activism, marked the end of a legal culture that once valued silence, leading to a disregard for constitutional principles.

In India, the case of *Bhanumati v. State of U.P.* involved the rejection of the argument that the 'no-confidence motion' clause in Section 28 of the U.P. (Panchayat Laws) 1961 Act conflicted with Part IX of the Indian Constitution. Justice A K Ganguly emphasized that the Seventy-third Amendment on decentralization should not be interpreted to disregard the 'no-confidence motion' clause concerning the Chairperson merely based on silence on that aspect.

Laurence Claus, in "Enumeration and the Silences of Constitutional Federalism," argued that the lack of clarity or silence around enumerated powers, coupled with subsequent court empowerment, could lead to the establishment of an implied rights doctrine. This, he contends, allows protections for various rights and freedoms, even when the constitution lacks explicit provisions for them. Instances include the expansion of Article 21 to encompass rights like the Right to Food, Right to Sleep, and Right to Privacy. Similarly, the question of whether Article 19 provides an exhaustive list of restrictions on freedom of expression has received limited attention in scholarly literature. A recent case, *Kaushal Kishor v. State of U.P.* (2020), is examining whether speech can be limited by invoking fundamental rights beyond Article 19, leaving the interpretation of constitutional silences on the relationships between fundamental rights to be determined by the Supreme Court. In conclusion, the acceptance or rejection of constitutional silences carries normative implications.

Significance of Listening Constitutional Silence

1. 'to be' or 'to not to be'

When scrutinizing the constitutionality of laws, a crucial question emerges: should our judges confine themselves to determining whether such laws align with the written constitution's norms, or should they extend their exploration beyond the constitutional text to reflect principles of liberty and justice? This issue becomes particularly relevant when grappling with the interpretation of what Justice Jackson termed the "great silences" of the constitution. The challenge lies in deciphering constitutional silence and juxtaposing constitutional declarations in one context with the absence of declarations in another.

For example, during the constitution-making process, the deliberations on establishing a powerful president or a strong government, as viewed by Dr. Rajendra Prasad, who served as the President of the Constituent Assembly, are not explicitly reflected in the constitution. However, the constitution did not envision a president reduced to a mere cipher or figurehead, as evident from the silences regarding presidential powers.

It appears that drafters halt the writing process when they are confident that the political culture will manage in times of need. Another explanation, according to Loughlin, Fadel, and McHarg, is a strategic or political advantage in uncertainty. For instance, in the context of secession, McHarg suggests that formal laws may exacerbate tension, and it may be strategic to leave the text silent on secession to foster active discussion. Silence can also facilitate political compromises,

avoiding controversial issues that could jeopardize the constitution-making process or serving as a deferral tactic to postpone addressing less advanced issues.

Silence within a constitution may be deliberate, an oversight, or a circumstantial or evolutionary silence that has developed over time. The drafters might have considered an issue settled or omitted it from the constitution, deeming it unnecessary to explicitly state.

An illustration is the Supreme Court's ruling in *Indira Nehru Gandhi v. Raj Narain*, where the court held that judicial review and free and fair elections are basic features of the constitution, inferred from the constitution's silence rather than explicit articulation. Similarly, in interpreting whether the silence in Article 106 prohibits pensions for former Members of Parliament, the Supreme Court, in *Lok Prahari v. Union of India*, observed that the express provisions for some constitutional functionaries should not be construed as forbidding payment to other constitutional functionaries.

2. Decision of Not to Decide

Invisibility, as Susan Sontag notes, doesn't necessarily imply the absence of written content but rather refers to something not readily apparent to an ordinary observer. Sontag suggests that even looking at something seemingly "empty" involves a form of seeing, an act of perception shaped by one's expectations. Silence, she argues, is inherently a mode of expression. The Forty-fourth constitutional amendment in 1978 introduced a proviso to Article 74(1), specifying that although the President was obligated to act on the advice of the Council of Ministers, he could request reconsideration of such advice. However, once the advice had been reconsidered and resubmitted, the President had to act in accordance with that advice. Notably, there was no stipulation regarding the timeframe for the President to take such action.

President Giani Zail Singh exploited this constitutional gap when dealing with the contentious Post Office Bill, 1987. Despite the bill's passage in both Houses of Parliament, public outcry against its provision allowing the government to intercept all mail communications led President Singh to refrain from approving the bill during his tenure. He explicitly expressed his hope that his successor would also withhold approval. This manoeuvring was made possible by capitalizing on one of the deliberate silences in the constitution regarding the timing of the President's assent to a bill passed by Parliament. Another example of leveraging constitutional silences is evident in the actions of former President A.P.J. Kalam. Although the Constitution mandates a Presidential address at the beginning of each session, it does not specify who is responsible for its preparation. In 2005, President Kalam chose to begin the address with a Tamil poem critiquing parliamentarians and their previous methods of operation. Unable to modify the speech, he creatively used one of the constitutional silences to convey his intended message through verse.

In the case of *Jindal Stainless Ltd. v. State of Haryana*, addressing the question of whether the State needed Presidential approval to levy a tax under List II of Schedule VII of the Constitution, the court held that in the absence of an explicit clause requiring such assent, such a condition could not be inferred into the provision. The court invoked the "door closing silence" doctrine, treating the silence as equivalent to an expression of the intention that Presidential assent was unnecessary, emphasizing the preservation of federalism as a fundamental aspect of the constitution's basic structure.

3. Listening to Silence too Much

Professor John Ely strongly criticized the trajectory taken by the United States Supreme Court in abortion cases, asserting that the court deviates from its "obligation to trace its propositions to the charter from which it derives its authority." He particularly contested rulings based on a right to "privacy," arguing that such a right cannot be derived from the constitutional text through acts of construction or interpretation. Ely emphasized that a neutral and enduring principle can be admirable only if it aligns with values identified as unique in the constitution; otherwise, the court lacks authority to impose it as a constitutional principle.

A parallel jurisprudential development occurred in India concerning the right to privacy and abortion rights, with Indian Courts expanding Article 21. Despite his critique of the Kesavananda decision, Durga Das Basu noted in his commentary that the Court assumed the responsibility of distinguishing between the Constitution's essential

and non-essential features, a role not explicitly or indirectly granted by Article 368.

In a recent case, *State (NCT of Delhi) v. Union of India*, the Court refused to interpret the proviso to sub-clause (4) of Article 239AA based on the principle of constitutional silence or implications. The Court, while acknowledging the importance of interpreting within the boundaries of constitutional silences, cautioned against rendering express provisions obsolete in the process.

CONCLUSION

In essence, silence is not just a theoretical concept but a phenomenon that provides practical benefits in the interpretation of the constitution and the evolution of national political life. This is evident in cases such as *Manoj Narula v. Union of India*, where the court acknowledged the use of the silence principle to fill gaps in the interest of the broader public good. By recognizing the significance of silence in legal interpretation, the court demonstrated its understanding of the dynamic nature of the constitution and its ability to adapt to changing societal needs. This approach highlights the importance of considering not only what is explicitly stated in the constitution, but also what is left unsaid, in order to ensure a fair and just application of constitutional principles. The expansion of the locus standi concept to include public interest litigation and the court's establishment of guidelines for procedural safeguards, such as those for the rights of arrestees or women employees in the workplace, represents further extensions of this doctrine. These extensions demonstrate the judiciary's commitment to protecting the rights and interests of marginalized groups and promoting social justice. By interpreting the constitution in a dynamic manner, the court is able to address evolving societal needs and ensure a more inclusive and equitable legal system. Silences in constitutional provisions are purposefully included to allow for flexibility and adaptability rather than being the product of language ambiguity or an incapacity to foresee the future. With this strategy, the judiciary may close these gaps and offer advice on how constitutional values should be implemented in novel and evolving situations. Furthermore, a more just and equitable society benefits from the court's readiness to acknowledge and correct previous injustices through its interpretation of constitutional rights.

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