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Is ‘Originalism’ a Sinking Ship?

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Abstract

This article seeks to reason, identify and enquire about the notion of originalism and the mechanics behind it. It begins with an introduction about constitutional interpretation and the delicate nature of the exercise. Thereafter, the author will delve into Originalism and will analyze the various contours associated to it; such as its historical and political relevance. This will be done by questioning the premise of originalism itself with due emphasis on the academic objections which have been raised overtime. To get a comprehensive account of the key concepts involved, the author will refer to American Constitutional law jurisprudence and the role of SCOTUS (The Supreme Court of the United States) from time to time. The article will also take a peek at the Indian Supreme Court and its approach towards Originalism. Is originalism a practice of a bygone era or is it a mitochondrion of wisdom needing its due reverence; is a question which forms the backdrop of this paper. The author has attempted to approach the question with an investigative outlook and has tilted his inquiry against originalism. In order to provide a wholesome and scrupulous analysis, the author has taken recourse to the various journal articles, books, case laws, legal commentaries and other web resources to the best of his ability, knowledge and understanding.

Introduction

“The generality of law falters before the specifics of life”

-Aristotle

The legislative draftsman is entrusted with a cumbersome task; an endeavor where so much has to be said, indicated, implied and meant; a venture where language is the weapon and precision is the skill. Even if one has the utmost dexterity and imagination it is practically impossible to draft a perfect piece of legislation which takes into account each and every possible outcome, scenarios, contingencies and thereby leaves no room for loose ends.[2] An attempt to be too specific can make things look unnecessarily convoluted and may even defeat the intent behind drafting.[3] It is because of this peculiarity of law that we need judicial

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[2]Andrew Morrison Stumpff, The Law is a Fractal: The Attempt to Anticipate Everything, 44 LOY. U. CHI. L.J. 649 (2013).

[3] *Id*. at 670.

interpretation to navigate our way. The aforementioned quotation by Aristotle sums up almost the entire philosophy behind the need and the importance of 'interpretation' in law.

Whenever the subject of interpretation is touched in law, the question of constitutional interpretation always occupies the hot-bed. It is because of the nature of the constitution and the cardinal entity it contains. The author agrees with Justice Brian Dickson (The former Chief Justice of Canadian Supreme Court) in the case of Hunter vs. Southam Inc., when he differentiates between the gravity involved in the interpretation of the constitution vs. interpreting a statute:[4]

> ***"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and is easily repealed. A constitution, by contrast, is drafted with an eye to the future."***[5]

Arvind Datar also takes the same view citing the general nature of the constitutional texts and the room for a very wide range of possibilities.[6] Since everything cannot be written down in the text of constitution, it is obvious that one may encounter aspects where the constitution does not say anything.[7] Therefore, constitutional interpretation can be defined as a eurhythmics exercise aiming to find a beat in the constitutional silence.[8]

The *modus operandi* and the dominant approaches towards constitutional interpretation is a whole another domain and a constitutional dialogue in itself. In the present article however, I shall elaborate on Originalism as a tool/approach towards interpretation of the constitution and the philosophy/ debate surrounding it. Ever since the idea of living-tree constitutionalism has been on the rise, 'Originalism' as an approach to constitutional interpretation happens to be sidelined. This is not a comparison and a quest to find out the better of the two approaches; rather it is a reflection, an introspection on the seemingly lost charm of originalism.

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[4] Hunter v. Southam Inc., 1984 SCC online Can SC 36.
[5] Hunter v. Southam Inc., 1984 SCC online Can SC 36.
[6] Arvind Datar & Rahul Unnikrishnan, Interpretation of Constitutions: A Doctrinal Study, 29 NLSI Rev. 137 (2017).
[7] *Id*. at 136.
[8] *Id*. at 136.

Originalism In Theory And Some Pertinent Questions

Originalism is an interpretative approach where the constitution is supposed to be interpreted in the light of the "***original intent of the framers***".[9] For an originalist, the intent and the idea of the makers is of the paramount importance.[10] Naturally one might be tempted to ask that; How does an originalist seek answers to the question which arise out of the constitution? How do they go about and decipher an issue involving the constitution? i.e. to say How does one gather the 'intent'?

Originalists, place reliance on the historical materials before them in order to understand the intention of the makers.[11] The materials may include the debates of the constitutional assembly, notes (if any) by the founding members who attended the conventions and any other material which will give guidance with regards to the intention and genesis of the same, extrinsic aids etc.[12]

To gain the best possible perspective on originalism one must dive a little into the American Constitutional Law and the politics surrounding it. The idea has its roots set in the framing of the American Constitution and it can never be understood as an isolated phenomenon devoid of its due historical context.[13]

It has been more than two hundred years since the American constitution has been into existence, it was drafted way back when none of us were even born. Prima facie, one may ask the question; why is it even important to look at what the makers thought and versioned?[14] With the passage of time, the situations also change. For example, one may point out that many of the makers of the American Constitution were in fact slaveholders.[15] But slavery was subsequently abolished and is considered one of the most inhuman acts now. So, is it really that important to uncover the intention of a bunch/ group of privileged whites who made the American Constitution?[16] The conditions in which the constitution was drafted no longer exist.[17] Therefore, the next question which flows is that, why should we even bother to care

[9] Steven Calabresi, On Originalism in Constitutional Interpretation, National Constitution Center (Feb 17, 2021), https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation.
[10] *Id.*
[11] Johnathan O' Niel, Originalism in American Law and Politics: A Constitutional History 2 (2005).
[12] *Id.*
[13] *Id.*
[14] Ilan Wurman, A Debt Against the Living: Introduction to Originalism 2-3 (2017).
[15] *Id.*
[16] *Id.*
[17] *Id.*

then? Why to burden ourselves with a baggage of the past?[18]

Interestingly this paradox was encountered (barring the slavery part), even by the draftsmen of the American Constitution i.e. America's founding fathers, because it all began with the American Declaration of Independence. This concern can be found in the often quoted and widely cited letter of Thomas Jefferson to James Madison in the year 1789. He argued that a previous generation should in no way be allowed to bind the upcoming generations.[19] His phrase '*the hand of dead*' has been widely used by the scholars who critic originalism.[20] He indicated his willingness to conceptualize the constitution as a living text. In the same letter he wrote: *"The earth belongs to the living, and not to the dead . . ."*.[21] It seems that Thomas Jefferson made a case for independence of the posterity from its antecedents and he is said to have insisted on a constitution which can breathe.[22]

James Madison had a different view to this, in his reply letter to Jefferson he wrote about the creation of a debt which rests on the shoulders of those living. To quote the exact line of what Madison wrote in his reply:

> ***"If the earth be the gift of nature to the living, their title can extend to the earth in its natural state only. The improvements made by the dead form a debt against the living, who take the benefit of them."***[23]

He insists that on the adherence to the will of the people who had made their present look like as it looks today. From this '*creation of a debt*' and the dictum to reasonably obey the framers will, the philosophy of an Originalist interpretation is born.[24]

Percieving the Holy Intent and Nostalgia for Time Travel

The previous section highlighted the various aids used by the originalists in deciphering and unravelling the real intent of the framers, with regards to a particular issue. But is it even possible to find the original understanding of each and every constitutional issue we face today? Isn't there something outlandish with

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[18] *Id.*
[19] *Letter Sent by* Thomas Jefferson & addressed to James Madison (September 6, 1789).
[20] *Supra*, 13.
[21] *Letter Sent by* Thomas Jefferson & addressed to James Madison (September 6, 1789).
[22] *Supra*, 13.
[23] *Letter Sent by* James Madison & addressed to Thomas Jefferso*n* (February 4, 1790).
[24] *Supra*, 13.

the methodology of Originalism?

For Example, when Justice Scalia, a leading proponent of originalism was asked a question that whether he wanted to know the opinion of James Madison on the ban of video games?[25] This was a question asked by Justice Alito in a hearing over the ban of video games. Justice Scalia quipped back by replying in the negative but he said he was certainly interested in knowing the views/ thoughts of James Madison when it comes to violence.[26] So, does it mean that one must always go back in time, (somewhat more than 200 years ago) to unravel the thoughts of say Jefferson, Adams, Madison etc., and how they would have perceived an issue or an ancillary aspect connected to it? The author does not find himself in consonance with this 'time travel' position of the Originalists. This 'time machine' approach has been mocked by students at the Harvard Law. In a rather satirical article they ask what John Adams would have thought about Child Porn and Jefferson's views on defamation via fake twitter accounts![27]

Another pertinent issue with respect to gathering the original intent has been brilliantly pointed out by Frank Cross in his book '*The Failed Promise of Originalism*'. He argues that it is not easy to cherry pick one framer over the other, the understanding on a particular issue will differ from one to another.[28] How do we decide which framer's view will give us the most appropriate interpretation?[29] What if some framers were silent on an issue they thought about differently; *or* something which was conveyed but could not be documented; *or* what if something of grave historical relevance was lost?[30] The author agrees with Mr. Frank when he says there is no certain way of concluding the intention of a Framer from the eighteenth century about a present question involving constitutional interpretation.

The next section addresses the point regarding the popularity of Originalism. How did this approach find itself in the main stream and how did it take its present form? is a question which is worth exploring in this context.

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[25] Adam Liptak, Justices Debate Video Game Ban, The New York Times (Feb 17, 2021).https://www.nytimes.com/2010/11/03/us/03scotus.html.
[26] *Id.*
[27] Howell Wells, Scalia's time machine fails; jurist forced to call Constitution "living document", The Harvard Law Record (Feb 17, 2021) http://hlrecord.org/scalias-time-machine-fails-jurist-forced-to-call-constitution-living-document/.
[28] Frank Cross, The Failed Promise of Originalism, 26 (2013).
[29] *Id.*
[30] *Id.*

Argumentum ad Populum and Originalism as a Political Weapon

Despite the prevailing academic criticisms of Originalism, it enjoys a considerable mass appeal with the American public. Prof. Jamal Greene of the Columbia Law School states that most of the American citizens tend to like the judiciary's approach of Originalism.[31] He says that the mass appeal is due to the relatively easy nature of originalism when it comes to understanding it.[32] A lay man may not be aware of the legal technicalities of the other approaches to constitutional interpretations such as Structuralism etc., and may not have faith in the living tree approach either as he/she does not want Judges masquerading as philosophers. Originalism gives the founders a reverence with which the population connects. This stems from a skepticism of the legal elite and relatively nationalist outlook of the general public.[33] Another view taken in this regard is that constitutional interpretations which seem complex are reduced to a very simple solution by following the Originalism approach.[34] However still Prof Greene in an article published after the decision of District of Columbia vs. Heller reasons that the temporary victory of Originalism is still no guarantee of a bright future for the theory.[35]

Under Chief Justice Earl Warren, (Somewhat around 1950s), the SCOTUS had come out with many landmark judgements where the rights discourse in constitutional law was being expanded.[36] One of the most famous cases being that of Miranda, where fifth amendment rights were duly and rightly stretched to include what is now known as the Miranda Warning[37]:

"*You have the right to remain silent, anything you say can be used against you in a Court of law…*"[38] This line usually said by a police officer making arrest is quite famous and appears in the popular culture too, eg. the American noir thrillers. Like the one badass cop, 'Dirty Harry'; the movie by Clint Eastwood showed some book defying stuff and the police's constant conflict with the law. While the movie gained popularity with the audience back then, cops like Harry Callahan (infamous for using extra-legal

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[31] Jamal Greene, Selling Originalism, 97 GEO. L. J. 657 (2009). Pg. 695-96.; See further, Randy E. Barnett, An Originalism for Non originalists, 45 Loy. L. Rev. 611 (1999); This position is also taken by Post & Siegel regarding the popularity of Originalism; Also See Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution,75 Fordham L. Rev. 545, 559 (2006).

[32] *Id.*

[33] *Id.*

[34] Mitchell N. Berman, Originalism is Bunk, 84 N.Y.U. L. Rev. 1, 8 (2009).

[35] Jamal Greene, Heller High Water? The Future of Originalism, 3 HARV. L. & POL'Y REV. 345 (2009).

[36] White, G. Edward, Earl Warren as Jurist, 67 Va. L. Rev. 461 (1981).

[37] Swapnil Tripathi, You Have The Right To Remain Silent'- Story Behind Miranda Rights, Live Law (Feb 17, 2021) https://www.livelaw.in/columns/right-to-remain-silent-story-behind-miranda-rights-167851.

[38] *Id.*

methods) and conservatives began to worry.[39] They feared that these judicially manufactured rights were interfering with them getting hold of the criminals. This fear of extra liberal judiciary and judges being more of law makers than being interpreters were felt by the American conservatives.[40]

A cry for judicial restraint/minimalism emerged where the underlining was that judges should not start acting as activists and the 'framers will' in this regard must be respected.[41] Amidst all of it, what shook the conservatives most was the case of Roe vs. Wade[42] in 1973, a case where the choice of a woman to abort her baby was debated. It seemed that the Chief Justice Burger was no less when it came to giving expansive and liberal interpretation to rights, in this case the right to abortion was held legal.[43] The dissenters followed an Originalist approach to say that they could not trace such a right from the history and understanding of the American Constitutional formation.[44] The dissenting judges were Justice White and Justice William Rehnquist.

> ***"A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a jurisprudence of original intention also reflects a deeply rooted commitment to the idea of democracy."***[45]
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> ***-Edwin Messe (1985); In a speech to the ABA***

These are the words from a very famous speech made by the Attorney General, Edwin Messe who was appointed and served under the era of the President Ronald Reagan. With Reagan administration it looked like the government was actively trying to push for Originalism, not only as a interpretative philosophy but also as an ideology to cater to the American conservatives.[46] However, it was not the case that Originalism was never a mainstream issue before the speech of Messe, Robert Bork (whose judicial appointment to SCOTUS was rejected by the senate) wrote about it in an article in 1971.[47]

After a period of few months came the reply to Mr. Messe's speech. This

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[39] *Supra,* 13, 12.
[40] *Supra*, 13, 12.
[41] *Supra* 13, 13.
[42] Roe v. Wade, 410 U.S. 113.
[43] *Id.*
[44] *Id.*
[45] Edwin Meese III, Attorney Gen., Dep't of Justice, Speech Before the American Bar Association (July 9, 1985).
[46] *Supra,* 13, 14.
[47] Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971).

was in a speech delivered by Justice William Brennan at the University of Georgetown where he defended the progressive outlook of the judiciary.[48] In his speech he said:

> ***"For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."***[49]

He launched a tirade of his own where he questioned the arrogance and ego behind an originalist interpretation. He even distinguished the framers and the modern judges and took the view that it is not always feasible to gather the intent in all the scenarios of a constitutional interpretation.[50]

In his paper titled, 'Can Originalism be saved?'; David Strauss has asked a very important question which strikes at the very core of originalism.[51] He questions that whether an originalist reading of the constitution elucidate the judgement in Brown vs. Board?[52] The seminal case on the equal protection clause seems to be anachronous when going with an originalist outlook. Thus, having a mass appeal can in no manner justify the evident shortcomings of originalism and therefore the author feels the need to realize the holes in the ship!

In the next section, I examine how the Indian Supreme Court has perceived the intent of the framers and the overall acceptability of the doctrine in India.

Indian Supreme Court and the Originalist Approach

Gautam Bhatia in his book, '*The Transformative Constitution*' has talked about interpreting the constitution in a transformative manner which is somewhat a middle ground between a strict originalist and the living tree approach.[53] In the prologue of the book he states that classical originalism has more or less been rejected. Quoting

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[48] Justice William J. Brennan, Jr., The Great Debate: Justice William J. Brennan, Jr. - October 12, 1985, The Federalist Society (Feb 17, 2021) https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985.
[49] *Id.*
[50] *Id.*
[51] David A. Strauss, Can Originalism Be Saved*?*, 92 B. U. L. Rev., 1161-1162 (2012).
[52] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[53] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts, (2019); See *Prologue: The past is a foreign country*, refer footnote no. 100.

the phrase *'return of the Gopalan era'*[54] he gives a brief account of the bar to bench exchange in the famous Puttaswamy case (On the right to privacy). According to him when an attempt was made by a counsel arguing for the union to invoke 'the original intent' of the framers;[55] the attitude of the bench was dismissive. A view that privacy was never espoused by the founding fathers and so it holds no sound constitutional backing was rejected by the Supreme Court.[56]

While adding/showing light on the Indian approach to Originalism, the author in no way seeks to strike any sort of similarity between the two. The American approach cannot be compared to that of India because of the three main factors.

(a) The first one being on the appointment of judges. Since the process of appointment is very different from that of India we do not have conservative/ liberal judges. The judicial philosophies of the Indian judges largely stay latent and they can be '*ideologically fluid*' in their approach. This is not the case for America and it affects the approach taken for constitutional interpretation.

(b) The second point relates to the sitting and number of judges in SCOTUS and the Indian Supreme Court. The Judges in SCOTUS sit '*en-banc*'. In India judges sit in fragments of benches as decided and directed by the chief justice. Chintan Chandrachud in his essay in the Oxford Handbook of the Indian Constitution has argued that the difference in structure and manner of sitting of the courts has an impact on the decision making.[57]

(c) The conditions in which our constitution was framed and adopted were very different from them. The striking difference is with respect to ratification because our constitution was never ratified like that of the United States. The ratification in some way can be attributed to an acceptability of the framer's view by the general public; therefore, they may still have some justification for originalism citing the '*will of the people*'.[58]

Having pointed out the three main differences I contend that in India we are

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[54] Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts, (2019); See *Prologue: The past is a foreign country*, refer footnote no. 99.

[55] *Id.*

[56] *Id.*

[57] Chintan Chandrachud, Constitutional Interpretation in Oxford Handbook of the Indian Constitution Ch. 5 (2016).

[58] Dennis J. Goldford, The American Constitution And The Debate Over Originalism, 134 (2005).

in no way obligated to follow originalism. The Supreme Court of India in its early formation years followed a somewhat Originalist approach in the questions which involved the interpretation of article 21.[59] In the cases like AK Gopalan the Supreme court, did not even care to bother for '*due process*' as it was deliberately left out by our founding fathers because of the advice of Justice Frankfurter.[60] It was not until Maneka Gandhi that '*due process*' was read into Article 21.[61] If one were to adopt an originalist understanding then our whole '*due process*' discourse will go to the drains.

In the case of Sajjan Singh, the Supreme Court of India went by an originalist approach which did not yield the best results and the position was changed later on.[62] Now it seems evident that Supreme Court is in no mood for a strict originalist understanding and this is clear by its decision in the case of *State of Punjab vs. Devans Modern Breweries ltd*.[63] In Paragraph 308 the court has observed:

> ***"….if we interpret the Constitution from the angle of the Constitution makers we may arrive at a completely outdated and unrealistic view."***[64]

It appears that the Indian Supreme Court in this case went one step ahead to make the originalist outlook of interpretation almost redundant in the Indian scenario. Now the 'original intent' is sought only for a better clarity on the issue but not as a conclusive interpretative method.[65] The author firmly agrees with this version of the Indian Supreme Court and holds the view that we in no manner can stick to a strict originalistic canon of constitutional interpretation.

Conclusion

Having put out the theory and analysis in the aforementioned sections of the article, now let me finally answer the question posed in the tittle of this paper. Is 'Originalism' a sinking ship? Normally while answer an abstract legal question, the answer is usually not given in the binary of black and white. There is an ample legal grey zone but in answer to this question; I would conclude that '*yes*', Originalism is indeed a sinking ship. The philosophy (as also mentioned in the paper) over time

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[59] Chintan Chandrachud, Constitutional Interpretation in Oxford Handbook of the Indian Constitution Ch. 5, Part 3 (2016).

[60] Aparna Chandra & Mrinal Satish, Criminal Law & the Constitution in Oxford Handbook of the Indian Constitution Ch. 44 (2016). See also Lochner vs. New York 198 U.S. 45 (1905).

[61] Maneka Gandhi Vs. Union Of India, 1978 SCR (2) 621.

[62] Sajjan Singh Vs. State of Punjab, AIR 1964 SC 464.

[63] State of Punjab vs. Devans Modern Breweries ltd, (2004) 11 SCC 40; Para 308.

[64] *Id.*

[65] NS Bindra, Interpretation of Statues, 552-553 (Prof. Amita Dhanda ed., 11th ed., 2015).

has faced quite significant criticisms from the public, legal scholars, jurists and even from the academia. Originalism in isolation and a strict sticking to it, in the view of the author gives rise to an intellectual obstinacy. I am not of the view that Originalism is to be completely discarded, the intent is definitely important but one must not forget the fact that the constitution indeed needs to grow. To some extent, the judiciary also has the responsibility of providing the scope for that growth.

An important point which must not be forgotten is that, we cannot straightaway compare ourselves with the United States. The conditions in which they got independence and their constitution was framed were completely different from ours. What might work for them might not work for us and I have stated in my analysis about the lost charisma of originalism in India. The framer's intention helps us to guide and reveals a lot but to put an extreme blind faith on it will be like a judicial hara-kiri. Originalists tend to place an undue faith on a so-called original meaning. In this approach they place the founding members on a very high pedestal and treat their words as some sort of adage or sermon. Constitutional interpretation is not like interpreting a religious holy book, that we have to keep continuing our quest for some sacrosanct will or intent. The author does not wish to be trenchant in his expression but he is of the view that in order to continue a smooth constitutional sailing we must abandon the sinking ship!