

THE DOCTRINE OF CONSTITUTIONAL SILENCE: WHEN THE CONSTITUTION SPEAKS BY SAYING NOTHING

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ABSTRACT

The idea of constitutional silence emphasizes the role the judiciary plays in interpreting the Indian Constitution in situations of constitutional text being silent, requiring the application of its principles of liberty, equality and dignity. This paper discusses how courts can address textual silence, engaging with constitutional morality and the living constitution. The importance of courts in recognizing unenumerated rights is claimed through references to seminal decisions (such as *S.R. Bommai v. Union of India*, *Puttaswamy v. Union of India*, *Shayara Bano*, *Navtej Johar*, and *Joseph Shine*) which each demonstrate an evolving recognition of unenumerated rights when responding to changes in society's beliefs and morals, and highlight the recognized status of constitutional morality in ruling on these contextual shifts. Inflections of Hans Kelsen's Grundnorm theory and the role judicial interpretation plays in linking on contemporary issues and applying constitutional morality to the normative order of the Constitution, illustrate how references to constitutional norms (such as morality) can be interpreted by the judiciary to affect substantive regimes of justice. Several comparative jurisdictions (the United States, Australia, and the United Kingdom) note decidedly different responses to constitutional silences than occurs in India, suggesting a distinctly creative judicial response in India. Ultimately, silence does not mean absence of meaning; silence may instead be held to represent a reservoir of meaning that courts draw on to recognize justice and the democratic values associated with the Constitution in a continually redefined society for its citizens.

INTRODUCTION

The constitution of India, while being of the most elaborate in the world, cannot possibly address every conceivable social political or moral issue that arises over time. Within its silence lies spaces for interpretation gaps that the judiciary often fills through reasoned judgements and evolving constitutional philosophy often backed by the legal doctrine of *Stare Decisis*. "To stand by things decided" (*Stare decisis*) is a legal doctrine that obligates courts to follow precedent or previous ruling which promote stability fairness in the judicial system. While sometime it may lead to inconsistency ideals within societal norms it can be challenged to adapt to new circumstances, although this

requires strong justification. The doctrine helps interpret the constitution by providing a history of how its principles have been applied, while also creating a dynamic tension between precedent and the need for constitutional principles to evolve with society. This interpretative approach is what scholars' term as the doctrine of constitutional silence. It represents the idea that even while the constitution is silent on a particular matter the core ideals such as liberty equality and justice continue to mold judicial reasoning in certain ways. Courts therefore act as the living conscience of the constitution, ensuring that its spirit adapt to changing societal reforms.

In the course of this paper, I will be exploring the doctrine of constitutional silence as a jurisprudential and practical tool for maintaining the vitality of the Indian Constitution. It integrates Hans Kelsen's Grundnorm theory, the distinction between textual constitutionalism and the living constitution, the judiciary's role as the Constitution's voice, and the evolution of rights amid changing social norms. Comparative insights from the American and Australian constitutional experiences will also contextualize India's unique interpretive approach.

UNDERSTANDING THE DOCTRINE OF CONSTITUTIONAL SILENCE

The doctrine refers to judicial recognition that certain constitutional provision though not explicitly stated are implied within the broader structure and philosophy that the constituent assembly had in mind. Unlike gaps or defects, silences are often intentional, as a way to leave future openings for adaptation in accordance with contemporary social norms and morals. The Supreme Court has invoked constitutional silences as substantial as explicit provisions in preserving the delicate balance of power and the moral fabric of governance. A notable example of this principle is found in the case *S.R. Bommai v. Union of India* (1994) when the Supreme Court emphasized that while the Constitution does not expressly define boundaries of federalism, its structure implies that the arbitrary use of Article 356 is prohibited¹⁷⁸⁵. The silence here is not an absence of meaning but an invitation to interpret principles consistent with constitutional morality and balance of power.

Similar principles can be seen in *Aruna Shanbaug v. Union of India* (2011) when the Court confronted the absence of any constitutional or statutory provision directly addressing euthanasia. However rather than simply denying relief based on silence, the Court read into Article

21 (Right to Life) a more nuanced understanding that includes the right to die with dignity¹⁷⁸⁶. The Constitution's silence thus became the foundation for recognizing evolving human rights.

THE JURISPRUDENTIAL FOUNDATION

Hans Kelsen's *Pure Theory of Law* introduced the idea of the Grundnorm – the basic norm or ultimate rule that underlies and validates all other laws within a legal system. For India, the Grundnorm is the Constitution itself. The Constitution of a country is important because it provides for individual freedom and maintains the check and balances amongst the different organs of the government in a country¹⁷⁸⁷. However, Kelsen's framework also allows for interpretive evolution; the validity of laws depends not only on textual authority but on their conformity to the higher normative order¹⁷⁸⁸. When the judiciary interprets constitutional silences, it is not creating law ex nihilo (from nothing) but reaffirming the Grundnorm's supremacy by aligning contemporary issues with foundational principles. For instance, in *Puttaswamy v. Union of India* (2017), the Court recognized the right to privacy as suggested though not directly expressed in Article 21 showcasing the implicit nature of the constitution¹⁷⁸⁹. Privacy was not a textual right but an inherent part of the Grundnorm's value system – liberty, dignity, and autonomy. Kelsen's framework thus legitimizes judicial creativity within constitutional boundaries. The Grundnorm serves as a compass guiding interpretation, ensuring that even silent areas of the Constitution are harmonized with its normative foundation.

An interesting study *The Endurance of National Constitutions* (2009) scholars Z. Elkins, T. Ginsburg and J. Melton noted that the average lifespan of a written Constitution is 19 years; only a handful last longer than 50¹⁷⁹⁰. The study has

¹⁷⁸⁵ *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1 (India).

¹⁷⁸⁶ *Aruna Ramchandra Shanbaug v. Union of India*, (2011) 4 S.C.C. 454 (India).

¹⁷⁸⁷ Geeta Chandrasekhar, Why Is Constitution Important, Quora (Feb. 6, 2019), available at <https://www.quora.com/What-is-the-importance-of-the-Constitution>.

¹⁷⁸⁸ Hans Kelsen, *Pure Theory of Law* 193–98 (Max Knight trans., 2d ed. Univ. of Cal. Press 1967).

¹⁷⁸⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁷⁹⁰ Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge Univ. Press 2009).

identified three factors that help a Constitution endure—specificity of its provisions, flexibility of the amending process and inclusiveness. And we may justifiably add judicial interpretation of the Constitution, because as Justice Douglas said in his Tagore Law Lectures From Marshall To Mukherjea ‘the judiciary must keep the charter of government current with the times and not allow it to become archaic or out of tune with the needs of the day’¹⁷⁹¹. Thus even in the matter of endurance or survival of a Constitution, apart from its successful working, judicial interpretation—construing the sounds of the Constitution’s speech as well as plumbing and giving voice to its silences—plays a vital role. It is now well accepted that the text of a constitution is only the primary source for understanding the Constitution and the silences of the Constitution are also to be explored, identified and comprehended to understand the Constitution¹⁷⁹². The judiciary serves as the medium through which the Constitution “speaks” in contemporary contexts. It interprets, clarifies, and restates constitutional principles in view of emerging challenges. In this way, the judiciary connects law as text with law as social reality. As Justice Dipak Misra remarked in *Joseph Shine v. Union of India (2018)*, which decriminalized adultery, aptly stated that “the Constitution is a living document; its meaning unfolds with time.” The Court held that Section 497 of the Indian Penal Code reduced a woman as the property of men, infringing Articles 14 and 21¹⁷⁹³. Although the Indian Constitution does not expressly guarantee marital autonomy or refer to sexual orientation, constitutional scholars have long emphasized that the endurance and legitimacy of constitutions often depend on the judiciary’s ability to interpret constitutional silences dynamically. As Madhav Khosla observes, the Indian Supreme Court has developed a “culture of justification,” wherein

abstract constitutional principles such as equality and dignity serve as the interpretive foundation for recognizing unenumerated rights.¹⁷⁹⁴ Similarly, Gautam Bhatia argues that the judiciary’s interpretive approach transforms the Constitution into a “living document” that adapts to evolving social realities while remaining grounded in its moral commitments¹⁷⁹⁵. This scholarly perspective suggests that rights to autonomy, intimacy, and identity—though not textually enumerated—are inherent within the broader constitutional ethos of liberty and human dignity¹⁷⁹⁶.

CONSTITUTIONAL SILENCES AND SOCIAL EVOLUTION

Constitutional silences function to provide judicial space for the law to “catch up” to the changing moral values of society. In a pluralistic society like India, societal morality is fluid and, therefore, sometimes requires principles of constitutionalism to be reinterpreted based on contemporary notions of morality. The *Shayara Bano v. Union of India (2017)* verdict, which declared instant triple talaq unlawful, exemplifies this process of aligning morality and legality. The court invalidated triple talaq despite Article 44 (Uniform Civil Code) being phrased as a directive principle and therefore silent on the question of enforceability — the Court invoked the equality provisions of Articles 14 and 15 to strike down practices violating women’s rights¹⁷⁹⁷. Justice Nariman stated that “constitutional morality, not religious patriarchy, must guide the interpretation of rights”. In the case of *Navtej Johar v. UOI*, Justice Chandrachud emphasized that the Constitution “must constantly evolve to meet the aspirations of a changing society.” Constitutional silence on sexual identity was filled through empathy and recognition of human dignity. These decisions demonstrate the silence of a particular constitutional principle has implications of the law that transcend

¹⁷⁹¹ Justice William O. Douglas, From Marshall to Mukherjea: Tagore Law Lectures (Tagore Law Lectures, 1956).

¹⁷⁹² Construing the Sounds of the Constitution (Nat’l Judicial Acad. 2018–19),

¹⁷⁹³ *Joseph Shine v. Union of India*, (2018) 2 S.C.C. 1 (India).

¹⁷⁹⁴ Madhav Khosla, *The Indian Constitution* 82–85 (Oxford Univ. Press 2020).

¹⁷⁹⁵ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 44–49 (HarperCollins 2019).

¹⁷⁹⁶ Sujit Choudhry, “Living Originalism in India? The Constitutional Interpretation of the Supreme Court,” in *Comparative Constitutional Law* 413, 416–18 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar 2011).

¹⁷⁹⁷ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

textual meaning. The judiciary uses silence not to limit, but to create constitutional space in order for the law to be relevant and reflective of a particular era's moral and cultural sensibilities.

COMPARATIVE CONSTITUTIONAL PERSPECTIVES

A comparative understanding of constitutional silence reveals how different countries try to inculcate and interpret their foundational documents (or not) to respond to evolving societal needs and ideas. While the United States, Australia, and the United Kingdom each have their own constitutional models while India's model arguably goes places that the others do not involve all their citizens most gravely affected by silences, which are addressed in judicial engagement with the voids the silences create.

The U.K. does not have a definitive form of 'constitution,' much like India with respect to political contextual silences – it has an unwritten or what is more precise an uncoded constitution in the form of statutes, conventions, judicial reasons and constitutional customs. The British Constitution relies on parliamentary sovereignty rather than a single supreme document, and thus, silence is managed through political, rather than judicial, mechanisms. Courts in the U.K. traditionally refrain from striking down legislation, as Parliament's word is legally final. Yet, with the advent of the Human Rights Act, 1998, the judiciary acquired a limited power to issue "declarations of incompatibility" where legislation conflicts with fundamental rights. This delicate evolution suggests that in an uncoded constitutional system, political silence is becoming more clearly construed through judicial conscience rather than simply as a political convention. But, unlike India, where the Constitution itself is the ultimate Grundnorm and judicial interpretation is constitutionally grounded, the U.K. still retains a parliamentary sense of the constitution where political

accountability, rather than judicial review, addresses constitutional silence.

In contrast, the United States has a written Constitution but one that is succinct and deliberately silent on numerous issues. Traditionally the U.S. Supreme Court has filled in these silences by recognizing implied rights – which refer specifically to right to privacy recognized in *Griswold v. Connecticut* (1965)¹⁷⁹⁸ which was later expanded in *Roe v. Wade* (1973)¹⁷⁹⁹. Through the doctrine of "penumbras and emanations,"¹⁸⁰⁰ the Court recognized unenumerated rights as part of the Bill of Rights, ensuring that constitutional principles evolve with society. The Tenth Amendment's reservation of powers to the states also mirrors the Indian idea of federal balance as articulated in *S.R. Bommai v. Union of India* (1994), though the U.S. approach is more structurally federal than substantively welfare-oriented.

Australia similar to the U.S., has a written Constitution but without a Bill of Rights. However, its High Court has read implied specific right as implied freedoms within the constitutional text, including the implied freedom of political communication established in *Australian Capital Television v. Commonwealth* (1992)¹⁸⁰¹. This approach parallels India's interpretative methodology where implied rights are flow from constitutional structure and principles rather than pre-textual list. However, Australia's interpretive restraint – restricting implied rights to political expression – as opposed to India's expansive judicial philosophy, which derives moral and social rights, including privacy (*Puttaswamy*), dignity (*Joseph Shine*), and equality (*Navtej Johar*), from constitutional silences.

India's Constitution, being the longest written document of its kind, combines the rigidity of a text with the elasticity of moral interpretation. Unlike the U.K.'s reliance on convention, the U.S.'s limited textualism, or Australia's structural

¹⁷⁹⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁷⁹⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁸⁰⁰ *Ibid*

¹⁸⁰¹ *Australian Capital Television Pty. Ltd. v. Commonwealth*, (1992) 177 C.L.R. 106 (Austl.).

implications, India's judiciary transforms constitutional silence into a dynamic source of rights. The concept respects the general philosophy of a living constitution – one that can speak through judicial voice and constitutional morality, which ensures that silence is an instrument for inclusion, justice, and social transformation.

CONSTITUTIONAL MORALITY AND JUDICIAL CREATIVITY

The principle of constitutional silence is linked to the notion of morality: the commitment to the spirit or intent rather than the mere text of the Constitution. B.R. Ambedkar indicated that constitutional morality is essential for the maintenance of democracy, and that institutions must act within the ethical bounds of constitutional values even in silence of the text.¹⁸⁰² Contemporary views on constitutional morality as a normative compass that guides interpretation in uncertain constitutional spaces, ensuring that governance aligns with equality, liberty, and dignity¹⁸⁰³. The judiciary's creative engagement with constitutional silence reflects this moral vision: it constrains executive excesses, promotes substantive justice, and reinforces democratic resilience.¹⁸⁰⁴ Yet, as scholars like Madhav Khosla and Gautam Bhatia note, this interpretive creativity raises enduring questions about judicial overreach and the balance of powers in a constitutional democracy¹⁸⁰⁵. Thus, while constitutional morality transforms silence into a source of meaning, it simultaneously demands restraint, ensuring that interpretation remains faithful to democratic legitimacy¹⁸⁰⁶. Yet, as the Supreme Court observed in *Puttaswamy*, interpretation is not usurpation but preservation – a means to uphold the Grundnorm when legislative inertia or political constraints impede progress.

CONCLUSION

Constitutional silence is at the heart of constitutional dynamism. It posits that silence is not absence, but a storehouse of meaning awaiting judicial acumen and moral deliberation to bring it forth. Indian courts have, in their reliance on Kelsen's Grundnorm, regard for constitutionalism, and living constitution paradigm, transformed silence into speech – turning gaps in text into justice. From *S.R. Bommai* to *Puttaswamy*, from *Shayara Bano* to *Navtej Johar* and *Joseph Shine*, the courts have shown that the living dynamic of the Constitution consists of its ability to take new shape while remaining faithful to the essential temperament of the original vision. When courts describe what the Constitution does not say, they are simply elucidating that the Constitution is still saying what matters – liberty, equality, and dignity for all. Thus, when the Constitution speaks by saying nothing, it, especially through the judiciary, through moral imagination, through the forward-looking pursuit of justice that will never die, will speak.

¹⁸⁰² B.R. Ambedkar, Speech in the Constituent Assembly Debates (Nov. 4, 1948), in *Constituent Assembly Debates*, Vol. VII, at 38–40 (Gov't of India 1949).

¹⁸⁰³ Upendra Baxi, "Constitutional Morality: An Oxymoron?" in *The Oxford Handbook of the Indian Constitution* 141, 142–45 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., Oxford Univ. Press 2016).

¹⁸⁰⁴ S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 112–15 (Oxford Univ. Press 2002).

¹⁸⁰⁵ Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* 84–86 (Oxford Univ. Press 2020); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 61–65 (HarperCollins 2019).

¹⁸⁰⁶ Manoj Mate, "The Origins of Constitutional Morality in India," 38 *Berkeley J. Int'l L.* 225, 231–34 (2020).