Construing the Sounds of the Constitution's Speech: Meanings beyond Text

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Introduction

How does a Constitution speak? How do we get its messages? Is it merely by reading the text and going by the letter of the law? Or is it something more- profound and fascinating? Is there a sound in the silences also? These are issues of great moment. Looking only to the text and the letter may give rise to cacophony. What is important is not only what a Constitution says, but even more what it means. Sometimes even the silences are eloquent. What is not expressly stated is also sometimes as eloquent and meaningful as what is said. It is when speech and silence are juxtaposed, you hear a fleeting message-that is the melody of the Constitution.

"Under all speech and writing that is good for anything, there lies a silence that is better," said Carlyle.

The operation of a statute is not automatic, like all legal rules it has to take effect through the interpretation of courts, remarked C.K. Allen. So it is with a Constitution. A Constitution is framed for ages to come, to respond to the needs of an expanding future and designed to approach immortality as nearly as human institutions can approach it. A Constitution does not work itself or speak like an oracle. It is by judicial interpretation that many a time you breathe life into the provisions of a Constitution. At the heart of this is the task of construing the true meaning and intent of the constitution's provisions.

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Government is man's unending adventure. Constitutional choices have to be made. That has to be done wisely guarding against erecting one's pet theories and prejudices into constitutional principles. Constitutional law is the intersection of law and politics in its noblest sense. It is an experiment as all life is an experiment.

To quote Alfred Deakin, a distinguished former Attorney General of Australia[1]: "The nation lives, grows and expands. Its circumstances change, its needs alter and its problems present themselves with new faces. ….. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious well considered steps that enable the past to join the future, without undue collision and strife in the present."[2]

In an interesting study[3], Z. Alkins, T. Ginsburg and J. Melton say that the average lifespan of a written Constitution is 19 years; only a handful last longer than 50. The study has 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[4] '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.' 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

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[1] Alfred Deakin, Commonwealth, *Parliamentary Debates*, House of Representatives, 18th March 1902.

[2] *Id* at 10967-68.

[3] Zachary Elkins, Tom Ginsburg & James Melton, The Endurance of National Constitutions (2009).

[4] William O. Douglas, From Marshall To Mukherjea : Studies In American And Indian Constitutional Law, 1939.

understanding the Constitution and the silences of the Constitution are also to be explored, identified and comprehended to understand the Constitution.

Time works changes, brings into existence new conditions and purposes. In the application of the Constitution our contemplation cannot be only of what has been, but of what may be. We must always be conscious of Chief Justice Marshall's insightful observations wherein he stated that "We must never forget that it is a Constitution we are expounding- a Constitution intended to endure for ages and consequently to be adapted to the various crises of human affairs."[5]

The whole of the British Constitution is unwritten. It is the customs and the conventions which make that Constitution. We have Anson's admirable classic- *Law and Custom of the Constitution*[6] which highlights its unwritten nature. Even in written Constitutions every conceivable situation is not and cannot be provided for. It is again customs and conventions that fill the gaps and the abeyances. Powers and limitations are implied from necessity or the scheme of the Constitution.

We cannot forget that Constitutions are best worked, apart from their express provisions, on the basis of practices and conventions that are evolved. Constitutional conventions are part of constitutional law. Further, as has been stated, there is a moral dimension to every constitutional issue; the language of the text is not necessarily a controlling factor.

There is Prof Laurence Tribe's *The Invisible Constitution*[7]; and there is *The Unwritten Constitution*[8] by Prof Akhil Amar dealing with some of these aspects and shedding light on the subject. To quote Tribe:

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[5] McCulloch v. Maryland, 17 U.S. 316 (1819)

[6] Sir William Reynell Anson, The Law and Custom of the Constitution (ed. 2010).

[7] Laurence H Tribe, The Invisible Constitution (2008)

[8] Akhil Reed Amar, America's Unwritten Constitution (2012)

"The visible Constitution floats in a vast deep ocean and crucially and invisibly in an ocean of ideas and experiences. It is only in the depths of that ocean that the Constitution finds its meaning."[9] He points out that constitutional silence pervades all of constitutional law. Invisible in the context means extra textual. Constitutional silences, like silences of other kinds, are not just occasional gaps or omissions in an otherwise seamless design. They are everywhere and come in as many flavours and varieties as sounds. Ambiguity and multiplicity of meanings are in a sense manifestations of silence. There are many reasons to be silent as there are to speak, and as many ways to hear meaning in the sounds of silence.

It is worthwhile to recall the views of some of the most illustrious law men and school men in the context of construing and expounding the Constitution.

Justice Holmes, while construing and interpreting the constitution in the case of Gompers V. US[10] stated that "The provisions of the Constitution are not mathematical formulas having their essence in their form. …Their significance is vital, not formal, it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth." Further, in the case of Towne v. Eisner[11], he has quoted that "A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

It is also pertinent to quote Justice Cardozo's opinion in expounding the constitution when he states that, "The great generalities of the Constitution have a content and a significance that vary from age to age."[12]

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[9] *Supra* 7.

[10] 233 U.S. 604 (1914).

[11] 245 U.S. 418 (1918).

[12] Benjamin N. Cardozo, The Nature of The Judicial Process (1921).

Justice Venkatachalliah in the famous case of R.C. Poudyal & Anr Vs. Union of India & Ors[13] has rightly pointed out that, "In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than the words themselves." It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details.'[14]

To quote Judge Learned Hand, in matters of constitutional law, the words that a judge must construe are empty vessels into which he can pour nearly anything at will. And as Frankfurter, J. reminded us, constitutional law cannot be confined to the mere words of the Constitution disregarding the gloss which life has written upon them. That is also the import of Holmes' famous dictum- "the life of the law has not been logic, it has been experience."[15] But Cardozo warned that Holmes did not tell us to ignore logic when experience is silent.[16]

The approach to constitutional interpretation is generally either textualist or living constitutionalist. Nowadays the courts adopt a living constitutionalist approach-interpreting the Constitution by reference to constitutional values, liberal democratic values which form the bedrock on which the text sits. As Justice Frankfurter has quoted in the case if Graves v. New York[17] "Judicial exegesis is unavoidable with reference to an organic Act like the Constitution drawn in many particulars with purposed vagueness so as to leave room for the unfolding future." It has to adjust in response to the felt necessities of the time and the practical needs of government and the society which cannot foresee today the developments of tomorrow in their nearly infinite variety. The interpretation of the Constitution or its exposition cannot be frozen by its

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[13] 1993 AIR 1804

[14] Tasmania v Commonwealth 1 CLR 329 (1904)

[15] Oliver Wendell Holmes, The Common Law 5 (ed. 2009)

[16] *Supra* 12 at 33.

[17] 306 US 466 (1939).

original understanding. The Constitution evolves and must continue to do so and the courts must leave open the path for succeeding generations to meet the challenges unknown today.

The criticism to such an approach is that it may lead to uncertainty in the law and arbitrary exercise of judicial power. But adaptability is not lack of discipline in judicial reasoning. It is still the Constitution which acquires the necessary interpretative colours. But no violence should be done to the text by re-writing it. Filling the gaps and construing the words in the provisions or the silences therein is one thing; re-writing them is quite another. While the former is permissible and welcomed within the parameters discussed here, the latter would be quite impermissible and illegitimate. The Court's fidelity to the Constitution secures its own insubordination. But fidelity and creativity are not necessarily antagonistic; they may with devoted insight enhance each other.

The provisions of a Constitution are pregnant with meaning. Even a written Constitution does not expressly provide for every conceivable situation. The silences also sometimes speak very tellingly. They have to be sagaciously construed, not lazily assumed or piously hoped. Some silences open up possibilities of purposive construction, some silences are advisedly so left. As Tribe tells us: In deciding how to give meaning to what Justice Jackson called 'the great silences of the Constitution' the issue typically is how to construe not constitutional silence alone, but rather the juxtaposition of constitutional statement in one realm with the absence of statement in an adjacent field.

The silences in some areas are deliberate: gaps must be filled by developing proper conventions in the working of the Constitution. This was also adverted to by Dr. Rajendra Prasad in the Constituent Assembly. To quote Michael Foley in *The Silence of Constitutions*[18], "…Abeyances are, in effect, compulsive hedges against the possibility of that which is

[18] Michael Foley, The Silence of Constitution (1989).

unresolved being exploited and given meanings almost guaranteed to generate profound division and disillusionment. Abeyances are important, therefore, because of their capacity to deter the formation of conflicting positions in just those areas where the potential for conflict is most acute. …Far from being a sign of decay, therefore, the presence of abeyances can denote the existence of an advanced constitutional culture, adept at assimilating diverse and even conflicting principles of government within a political solidarity geared to manageable constitutional ambiguity. If a Constitution does not have the means to subdue conflict by these means, moreover, it will be a weaker and less adaptable Constitution for that deficiency."[19]

Gaps in a Constitution should not be seen as simply empty space. They amount to a substantial plenum of strategic content and meaning vital to the preservation of a Constitution. The abeyances are valuable not in spite of their obscurity but because of it; they are significant for the attitudes and approaches of the Constitution that they evoke, rather than the content or substance of their strictures. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components.[20] Constitutional silences are functional.

In *The Invisible Constitution*[21], Tribe is of the view that much of the Constitution, including some of its most important parts is invisible, i.e., extra textual, many of our most cherished principles and propositions of constitutional law cannot be found in the text. He says that without the invisible Constitution the visible one is fatally, even logically, incomplete. According to him we need the invisible Constitution to tell us *what text to accept as the visible Constitution*. It is pointed out that application of the Bill of Rights against the States which is now

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[19] *Id*.

[20] *Id*

[21] *Supra* 7.

uncontested has been achieved through doctrinal skill and argument that bears no obvious connection to the text. The Constitution does not say that cannot and should not end an argument; for, to accept the position that whatever is not found in the Constitution cannot become part of it, is very simplistic and jejune.

It has been argued by some critics that Constitutions, at least in part, maintain their authority by reason of their uncertain character and ambiguity. Constitutions leave room for time and experience; of necessity they are unfinished. What is explicit in the text rests on implicit understandings, what is stated rests on what is unstated.

Views have also been expressed that the Constitution being a framework of government, silences are devices of political management. A Constitution's authority is strengthened through the cultivation of tradition which is the silent bond between contemporary political actors and the regime's founders. Tradition is what conserves that which continues to work while discarding that which is no longer of practical value. It is to be noted that as scholars have said elimination of constitutional silences comes about through political judgment, something that the judiciary implicitly acknowledges. "It should not be assumed that courts always have the capacity to provide authoritative answers to contentious constitutional questions. Courts assume the mantle of 'guardian of the Constitution' in cases of clear breach of legal rules, but the Constitution is not as much a system of norms as an intrinsically political framework." But viewed from another perspective of the Constitution establishing an inherently legal rather than political framework, it is argued that the task of providing authoritative answers to political-constitutional questions falls to the judiciary. That there are silences in a constitutional framework is clearly understood and accepted, but there is less appreciation and consensus about their functions.

What is said and what is not said in a Constitution have bearing on decisions about how to interpret what a Constitution says or fails to say. In interpreting and understanding the constitutional or legislative

messages there are two overriding temptations- to pass on responsibility to others by saying that one is *describing* their will when one is really *prescribing* what is to be; and to look not just to *text* but *context*, of which silence-the very boundary of speech- is necessarily a part.

Door-Closing Silences and Door-Opening Silences and its impact on Constitutional Interpretation

In the famous *Steel Seizure* case[22], the American Supreme Court opined that since 'the Constitution is not silent' about who shall make laws, Congress' omission left the President powerless to act as he did. The majority judges treated Congress' silence as speech, its non-enactment of authorizing legislation as a legally binding expression of intent to forbid seizure. This is a door-closing silence.

The development of jurisprudence on the right to privacy in American Constitutional Law provides examples of door-opening silences. Even though there is no express mention of the word 'privacy' in the Constitution, the courts recognized the right to privacy under various amendments to the Constitution and also progressively extended the ambit of protection under that right.[23] In all these cases the Court treated the silences as invitations to fill in gaps which were not left because of any deliberate design. These are all instances of silences that allowed doors to open. "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family… surely does not show that the Government was meant to have the power to do so. Rather as the Ninth Amendment expressly recognizes, there are fundamental personal rights …which are

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[22] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

[23] See generally, Griswold v. Connecticut, 381 U.S. 479 (1965); Katz v. United States 389 US 347 (1967); Roe v. Wade, 410 US 113 (1973); Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

protected from abridgment by the Government though not expressly mentioned in the Constitution."[24]

In one of the most conspicuous silences of the American Constitution, the dormant commerce clause, courts have heard an implied negative against unduly burdensome or discriminatory State or local interferences with free trade across State limits. In upholding State regulations judges have purported to 'hear' in Congressional silence both tacit veto and tacit consent.

Two of the American Constitution's very enigmatic but important provisions illustrate how constitutional silences or juxtapositions of silence with speech have to be read.

The Tenth Amendment which provides that powers 'not delegated' by the Constitution to the United States nor prohibited to the States are reserved to the States has been understood as silence meaning prohibition. But even this read in the light of its own omission of the language which was used in the Articles of Confederation reserving to the States all national powers 'not expressly delegated' was not construed to be a complete prohibition. In *McCulloch* vs *Maryland*[25], it was held that notwithstanding the absence of express constitutional delegation to Congress of power to create a national bank, such a power was implicitly delegated by the Constitution, within the meaning of the tenth amendment through the entire edifice of national powers read in conjunction with the necessary and proper clause. Further, *U.S.* vs *Nixon*[26], the Court found in the Constitution's silence re: executive privilege (as contrasted with the express immunity conferred on members of the Congress by the speech and debate clause) no prohibition against judicial inference of such a privilege from unenumerated principles with constitutional underpinnings.

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[24] Griswold v. Connecticut, 381 U.S. 479 (1965)

[25] *Supra* 5.

[26] 418 U.S 683 (1974).

In illuminating contrast to the Tenth Amendment, the Ninth Amendment provides that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people. Here silence has been understood and interpreted as an invitation to identify unenumerated rights. Rights-related silences do not mean prohibition because they *shall not be so construed.* Further the background of the amendment also supports this view: Madison introduced the ninth amendment in response to the arguments of Hamilton and others that those rights not enumerated in the Bill of Rights would otherwise be given up to the government.

Laurence Tribe cautions us that any rule of construction in such cases- attributing meaning to a constitutional provision as the Ninth or Tenth Amendment will necessarily be both *indeterminate* and *incomplete: indeterminate* because one has to make choices (like the role of history) which are not themselves fully specified by the Constitution in deciding how to construe the rule; *incomplete* because the rule or instruction cannot be applied without making still further choices (like what unenumerated rights to recognize) that the Constitution itself may constrain but does not dictate in any conclusive way. It is important to evaluate every instance of a pronouncement of what the Constitution says – or what it fails to say-against the background alternative of somehow contriving to remain silent. And we should also be conscious that silences (whether it be regarding what the Constitution requires, allows or forbids) cannot be meaningfully evaluated without comparing them to the array of alternatives – comparing them to the background of soundings that those silences interrupt or replace.[27] The question is always: silence – compared to what?

It is important and necessary that we should beware of 'hearing' silences when nearly everyone identifies determinative text that fills up

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[27] See generally, Laurence H. Tribe, *Toward a Syntax of the Unsaid*: *Construing the Sounds of Congressional and Constitutional Silence* (1982) 57 Indiana Law Journal 515, Issue 4; Laurence H. Tribe, *Soundings and Silences* (2016) 115 Mich. L.R. 26

the relevant field. "The heart has its reasons that reason does not know," as Pascal famously said. Those heartfelt reasons deserve a hearing. But when they defy reason, the meaning of living by the rule of law is that reason should prevail. Observers of the work of courts would be familiar with what Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[28]

It has been pointed out that the principle of implication is fundamentally founded on rational inference of an idea from the words used in the text and constitutional implications should be based on considerations which are compelling. Any proposition that is arrived at by such interpretation must be grounded in some words in the text or the scheme of the text. Otherwise, it may defeat the legitimacy of reasoning.

Prof. Archibald Cox's sage caution[29] also requires to be noted: The Court is charged with 'interpretation' of a written document, not with deciding what is good, or just or wise with the freedom of a legislature or constitutional convention. When the proper application of the words of the Constitution to a particular situation is plain, it is the Court's duty to give effect to the words. When the bearing of the words is uncertain … the words alone may not suffice. Then a reasoned search for the 'intent' of the instrument becomes important; but as history demonstrates, 'intent' is itself a slippery word as applied to unforeseen future conditions and the evidence of intent is often subject to conflicting interpretations.

In the Constitution of then Ceylon there was no express provision or mention of vesting judicial power in the judiciary unlike in the USA. In *Liyanag*e's case[30] the appellants were put up for trial under a special law before a special court. Tracing the history and traditions of the various provisions bearing on the matter, the Privy Council speaking through Lord Pearce held: "Those provisions manifest an intention to

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[28] *Supra* 12.

[29] Archibald Cox, The Court and the Constitution (1987).

[30] 1 All E.R. 650.

secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. …The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it has lain for more than a century, in the hands of the judicature."[31]

The High Court of Australia, in the absence of a Bill of Rights, has implied the concept of 'freedom of communication' from the Constitution's provisions providing for representative government. The rationale for this is that for a representative government in a democracy it is necessary that the people make an informed decision in making the choice of their representatives; and for this it is necessary that they must have full information of the diverse opinions, which can be achieved only through the freedom of communication.[32]

Interpreting the Constitutional Silences in the Indian Context

Most of the provisions of the Constitution particularly the various (fundamental) rights have no fixed content. They are mere empty vessels into which each generation pours its content by judicial interpretation in the light of its experience. Aharon Barak reminds us that constitutional interpretation is different from statutory as well as other legal interpretation; the difference lies in the special character of the constitutional text.[33] And as Hidayatullah, J. said, more freedom exists in the interpretation of the Constitution because in the domain of

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[31] *Id* at 658.

[32] See generally, Australian Capital Television Pty Ltd v The Commonwealth 108 ALR 577 (1992); Nationwide News Pty Ltd v Wills 108 ALR 681 (1992); Theophanous v Herald & Weekly Times Ltd 68 ALJ 713 (1994).

[33] Aharon Barak, Purposive Interpretation in Law (2005).

constitutional law there is again and again novelty of situation and approach.[34]

Almost at the very inception of our Constitution we have the landmark judgments of *Romesh Thappar*[35] and *Brij Bhushan*[36] where the Supreme Court construed the right to freedom of speech and expression under Art 19(1)(a) to include the freedom of the press. Much later it was held to include the right to know and to know about the antecedents and credentials of the candidates contesting elections so that the electorate could exercise their right to vote meaningfully.[37]

We may refer to 'State' in Art 12 whose import has expanded over the years, beginning with the *Rajasthan State Electricity Board* case[38]. The original idea of reasonable classification and right to equality before the law under Art 14 was interpreted so as to prohibit any arbitrary action saying that arbitrariness is the very antithesis of equality. Also, 'Life' and 'personal liberty' in Art 21 have been interpreted very widely and infused with newer connotations. A large number of rights not expressed in Art 21 or elsewhere in the Constitution have been read into Art 21 to make the right guaranteed therein more real and meaningful. Then again, the simple phrase 'procedure established by law' used in Art 21 was, over a period of time, construed to mean that life and personal liberty cannot be deprived except by a procedure which is reasonable, fair and just and established by a valid law, not any enacted apparition. The original view that fundamental rights are watertight compartments has given place to the theory that each of the fundamental rights is not a series of isolated

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34 Excerpts taken from The first B. N. Rau memorial lecture on judicial methods, 1969.

35 Romesh Thappar v. State of Madras, AIR 1950 SC 124.

36 Brij Bhushan v. Delhi, AIR 1950 SC 129.

37 See generally, Union Of India V. Association For Democratic Reforms And Another, (2002) 5 SCC 294; People's Union For Civil Liberties And Another V. Union Of India And Another, (2003) 4 SCC 349.

38 Rajasthan State Electricity Board v. Mohanlal, AIR 1967 SC 1857.

points but a rational continuum of the legal concept of liberty. Arts 14, 19, 21 form a vital triology whose ethos informs one another. To begin with only civil and political rights were being enforced. Socio economic rights embodied as Directive Principles in Part IV are expressly non justiciable. But the Court by a process of brilliant exposition harmonized and synthesized Parts III and IV for the realization of the goals in Part IV. All these interpretations read beyond the text, probed the subtext and plumbed the silences.

The Constitution speaks of the President in whom the executive power is vested, and all decisions and actions are in his name. But does he act personally? The President/Governor is only a metaphor or euphemism for the Council of Ministers headed by the Prime Minister/ Chief Minister on whose aid and advice alone he acts except in narrow areas strictly defined and confined. The constitutional requirement of the satisfaction of the President/Governor is not his personal satisfaction, but satisfaction in the constitutional sense in the cabinet system of government, i.e., satisfaction of the Council of Ministers. In constitutional law the 'functions' of the President/Governor and the 'business' of Government belong to the Ministers and not to the Head of State; 'aid' and 'advise' are terms of art which means the aider acts and the advisor decides in his own authority, not subject to the power of the President to accept or reject such action or decision.[39] All this is not construing the text of the Constitution, but finding meaning beyond the text.

Another example of construing the Constitution and finding meaning beyond the text is *R.C. Poudyal*[40]. By a deft and profound interpretation the majority judgment upheld the constitutional validity of Art 371F(f) which enables reservation of seats by law in the Sikkim Legislative Assembly for different sections of the people as providing for

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[39] See, Samsher Singh v. State of Punjab, AIR 1974 SC 2192.

[40] *Supra* 13.

a transitional phase in the political evolution of Sikkim. "Accommodations and adjustments, having regard to the political maturity, awareness and degree of political development in different parts of India might supply the justification for even non-elected Assemblies, wholly or in part…" Reservation of one seat in favour of the 'Sangha' was held to be permissible, the 'Sangha' being not merely a religious institution but historically a political and social institution in Sikkim and the reservation admitting of being construed as a nomination, the choice of the nominee being left to the 'Sangha' itself.

The Constitution does not say anything about which House of Parliament the Prime Minister should be a member or whether the Prime Minister could be a person who is not a member of either House. Art 75 (and 164) is silent on this. Art 75(1) says that the Prime Minister is to be appointed by the President and other Ministers are to be appointed by the President on the advice of the Prime Minister. With the Prime Minister's departure (by resignation or death) the entire Ministry goes; it is not so with any other Minister's departure. The Prime Minister is central to the life of the government and central to its death. The Ministry enjoying the confidence of the majority of the Lower House means the Prime Minister enjoying such majority. If he is not a member of that House, how can he be said to enjoy its confidence? The constitutional conventions in this behalf are unambiguous and are part of constitutional law. The Prime Minister has to be a member of the Lok Sabha. He cannot lawfully be Prime Minister being a member of the Rajya Sabha or of neither House for six months by virtue of Art 75(5). These are not issues to be interpreted literally going merely by the Constitution's text. The Supreme Court's decisions in *S.P. Anand*[41] and *Janak Raj Jai*[42], holding that it is permissible and lawful for a member of the Rajya Sabha to be Prime Minister, it is submitted, have not taken the correct view and call for a

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[41] S.P. Anand v. H.D. Deve Gowda, (1996)6 SCC 734.

[42] Janak Raj Jai (Dr.) v. H.D. Deve Gowda, (1997) 10 SCC 462.

revisit. The flaw lies in equating a Minister with the Prime Minister or Chief Minister. Art 75(5) or 164(4) permits a person who is not a member of either House to be a Minister for six months. But the position of the Prime Minister though he is the first among equals is totally different and paramount.

The Constitution does not stipulate that the senior most judge of the Supreme Court must be appointed the next Chief Justice of India. Art 124 is silent about this. But convention has developed in this regard and it is the senior most judge who is appointed the Chief Justice.

Arts 111, 200, 201 dealing with the assent by the President/ Governor to Bills do not stipulate any time frame within which assent should be accorded. But this silence is not to be construed as permission to act whimsically. It has to be done within a reasonable time. Further it is a grey area as to what matters the Governor can reserve for the President's consideration and what is to happen when a State Bill returned by the President is reconsidered and passed a second time and presented to the President again. The Constitution is silent on these aspects. Can the President/Governor stifle validly passed legislation by withholding or delaying assent? Convention has been developed in all countries that the power to assent is never intended, designed or exercised to defeat or undo or delay legislation.

The Constitution is silent as regards removal of Governors. Art 156 lays down that the Governor shall hold office during the pleasure of the President. But it has been held that withdrawal of pleasure and consequent removal cannot be for whimsical reasons like the Governor not being in sync with the policies of the Union Government or the ideology of the party in power. The doctrine of pleasure was read subject to the fundamentals of constitutionalism.[43] Constitutional limitations were read into seemingly wide and unfetterd powers. However, the Court in the same case said, and rightly, that in the context of removal of a

[43] See, B.P. Singhal v. Union of India, (2010) 6 SCC 331.

Minister who holds office during the pleasure of the President/Governor (Arts 75 & 164) such limitations would not apply, and the pleasure doctrine has its full scope. This is having regard to the position of a Governor vis-a vis a Minister. In law context is everything. Thus, while the constitutional provisions dealing with both are couched in the same language and the same silence permeates the provisions, the exercise of construing and giving meaning to them is advisedly different.

Again, in *Manoj Narula*[44] the Court refused to read any disqualification in Art 75(1) or 164(1) that a person with criminal antecedents cannot be a Minister. The Court observed that that the Constitution is silent and held that reading such an implied limitation as a prohibition would be tantamount to adding a disqualification which is neither expressly stated nor impliedly discernible from the provision. Thus, it is only the eligibility and not the suitability of the person to be a Minister which would be open to judicial scrutiny.

As the Supreme Court has observed the silences of the Constitution must be imbued with substantive content by infusing them with a meaning which enhances the rule of law. The Constitution is a living document which cannot be frozen at any point of time and interpretation must be resilient and flexible with the court always attempting to expand the reach and the ambit of the fundamental rights rather than attenuate their meaning and content by judicial construction.

One cannot resist the temptation of recalling what two of our most distinguished judges have said. "The provisions of the Constitution are not just dull lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic power, potent to mould the future as well as guide the present. The Constitution must be left elastic enough to meet from time to time the altering conditions of a

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[44] Manoj Narula v. Union of India, (2014) 9 SCC 1.

changing world with its shifting emphasis and differing needs."[45] In the famous words of H.R. Khanna, J, "The Constitution must of necessity be the vehicle of the life of a nation. It is not a gate but a road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that the life of a progressive nation as of an individual is not static but dynamic. A Constitution must therefore contain ample provision for experiment and trial."[46]

The greatest example of construing the Constitution and exploring and voicing the meaning beyond the text is the landmark judgment of *Kesavananda Bharati*[47] which enunciated the doctrine of basic structure. A constituent power cannot be limited or fettered and Art 368 has no limitation in its language. But the Court read implied limitations into the power of amendment and laid down that while the power of amendment is plenary and no part of the Constitution is immune from amendment, it does not include the power to abrogate the Constitution or amend its basic structure, features or framework. This doctrine flows from the silence of the Constitution. For, it is to ensure that by the process of amendment the Constitution is not denuded of its core or made to suffer a loss of identity that the theory has been conceived and evolved. This idea of the theory flowing from the Constitution's silence has been very neatly articulated in the concurring judgment of Chelameswar, J. in the *Privacy* judgment[48].

Implications are logical extensions of stipulations in the express language of a statute and arise only when a statute is silent on certain aspects. Implications are the product of the interpretative process, of silences of a statute. There are implications even in a written Constitution. The purpose of a statute is to be ascertained from its overall

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[45] Vivial Bose, J in State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

[46] Kesavananda Bharati v. State Kerala AIR 1973 SC 1461.

[47] *Id.*

[48] Justice K.S. Puttaswamy v. Union of India, (2017)10 SCC 1.

scheme. The intensity of analysis to ascertain the purpose of the Constitution is required to be more profound.

The implications arising from the scheme of the Constitution are 'Constitution's dark matter' and are as important as the express stipulations in its text. The basic structure doctrine is the most outstanding and brilliant exposition of the 'dark matter' and is a part of our Constitution though there is nothing in the text suggesting that principle. The necessity of probing seriously and respectfully into the invisible portion of the Constitution cannot be ignored.

'Dark matter' was first spoken of by Laurence Tribe in *The Invisible Constitution*[49] where in a single page chapter *Dark Matter* he states that the hope of the book is to "nudge the nation's constitutional conversation away from debates over what the Constitution says and whether various constitutional claims are properly rooted in the written text and toward debate over what the Constitution does."[50]

To what extent does and can the court adhere to the understanding of the Founding Fathers? In construing the speech and silence of the Constitution what factors can the court call in aid – history, philosophy, sociology, logic, the ideas and understanding that informed the makers, the contemporaneous view of things – the mores of the day? The issue does not admit of straight and simple answers. Cardozo reminds us that there are few rules in this regard, there are chiefly standards and degrees. The duty of a judge is also a question of degree. He must balance all his ingredients – his philosophy, logic, analogies, history, customs, his sense of right and all the rest, and adopting something new at one end and sloughing off something old at the other, determine as wisely as he can which weight shall tip the scales. After the wearisome process of analysis is finished, the judge will have to make for himself a new synthesis. With his deep study and thinking, with his years of experience and with the aid

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[49] *Supra* 7.

[50] *Id.*

of that inward grace which comes now and again to the elect of any calling, the analysis may help to make the synthesis a true one. Judges will have to feel their way here as elsewhere in the law. "Somewhere between worship of the past and exaltation of the present the path of safety will be found."[51]

Ultimately construing the sounds of the Constitution's speech and giving meaning to the silences of the Constitution is an act of judicial wisdom and statesmanship. It calls for a measure of activism as also of restraint. The question is where to draw the line. One must remember and heed the sagacious admonition of Cardozo that the judge even when he is free is not wholly free; yet wide enough is the field of discretion that remains. Aharon Barak has said that the key word in judging is *balancing*- balancing between various competing claims and conflicting interests.[52] While there can be no fixed rules for all this, the genius is to find the limits. In this delicate act of balancing, in choosing where to draw the line, lies the wisdom and genius of the judge, a quality which is God's gift, as Learned Hand says, but which can also be acquired by experience, dedication and application.

As Martin Luther King, Jr remarked, "Everything that we see is a shadow cast by that which we do not see." And "Everything that we do not see is a shadow cast by that which we might have seen."

"Constitutions are seldom made by the will of men. Time makes them. They are introduced gradually and in an almost imperceptible way. Yet there are circumstances in which it is indispensable to make a constitution. But then do only what is indispensable. Leave room for time and experience so that these two reforming powers may direct your already constituted powers in the improvement of what is done and the

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[51] *Supra* 12.

[52] *Supra* 33.

completion of what is still to be done."[53] [Benjamin Constant, 1814: Constant, Political Writings (1988)].

Profound truth- relevant and applicable everywhere!

[Adapted from Addresses at various conferences for High Court Justices organized by the National Judicial Academy, Bhopal in 2017 & 2018]

[53] Benjamin Constant, Constant: Political Writings (1988)