

CONTEXTUAL INTERPRETATION AND CONSTITUTIONAL INALIENABLES

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That the judicial prerogative of Constitutional interpretation should not render itself into a zealous imposition of personal values remains a fundamental tenet of representative governance. In a society of diverse, and often conflicting ways of life, and a judiciary that lays claim to widest possible legal creativity, and a polity of consociation, it is nothing but the construction of the provisions of the Constitution that acts as the binding gel between competing claims. The article primarily presents arguments in relation to: firstly, 'Interpretation For What?', where it is argued that in the final hermeneutic appreciation, the meaning arrived at should be audience-centred and the interpretation should be reflective of the reasons for belief of the people and not the belief itself, and secondly, 'Interpretation Of What?', where it is argued that, ascribing hallowed values to mere textual assurances dangerously borders on misuse of interpretative discretion and as such judicial systems should not only temper the phrasal promises with social demands, but should not move beyond, in the guise of discovering universal humane absolutes. The present article thus seeks to limit the judicial interpretation of the Constitution by appreciating such meanings of the textual expression alone that portray the undercurrents of social existence.

I. INTRODUCTION

The need for identification of certain constants in our civil being would perhaps lie in the understanding of progressive sustenance of our social existence; the idea of an ordered and structured society. The identification of these benchmarks to base our social, economic, and cultural development upon is thus independent,

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larger and more comprehensive than the mere requirements of structured growth of laws and rules. Irrespective of our allegiances, we all stand to common conclusions of endeavoring for higher dimensions of individual and group lives. That our survival should not suffocate itself in the absoluteness of fluidity is a thought constant through the ages. The extreme arguments of positivist objectivity however leave us with few tools for complete analysis of our life as a phenomenon. For experience shows that we improve only when justice prescribes the ends that laws attempt to seek. We develop and prosper only when the goodness of Bishop of Digne blossoms Jean Valjeans for the society.¹ Human actions and inactions need not merely be valid under the garb of being popularly accepted, they need to be efficacious as well.

These arguments however at best help us enter the quagmire that the problem of understanding societal fundamentals is. For recognition of these inheres in it a tacit acceptance of the limitation of human cognition and the fluidity of contexts. Deciding upon policy issues then becomes largely a matter of adoption of such aspects of living that are acceptable to all. Constitutional adjudication should therefore involve a process of legal interpretation as well as creation that caters not only to the existing, but provides touchstones against which the pliancy of tomorrow can be tested. The development of the Basic Structure doctrine in the Indian context is an attempt in consonance with this same logic that seeks law making as a two way process of both creation as well as abidance.

The present article develops an argument for a contextual interpretation for our constitutional problems. The following section starts off with an analysis about the indeterminacy of language structures, and an understanding of all that can be classified or understood as subject to interpretation. We delve into the fluidity of human thought process, and the general informing of our cognition with the contemporary contexts.

The third section brings to us the idea of consociation: the human need for a social existence. Human interdependence, accompanied with the general digression of our thought mandates a delicate balancing of our life processes. The fourth and the fifth sections narrow down our field of inquiry to the Indian context. The scope of inquiry then limits itself to the contours of the Indian Constitution and their treatment at the hands of the judiciary. The section takes a fundamental rights oriented approach, where an argument is made of discerning the constant touchstones of society on the basis of human entitlements that the society is obligated to allow.

¹ Jean Valjean's transformation from a disillusioned convict to a responsive human in the post Napoleon France of *Les Miserable* is a telling inspiration for all of us who would wish to assume the *humane* as the central premise in all our enterprises. As is sought to be argued, law, as a social instrument, and its interpretation exist as anthropocentric measures for better lives, and not merely as a matters of social functionalism.

II. LEGAL INDETERMINACY AND THE NEED OF CONTEXTUAL UNDERSTANDING

*Hai ghaib-e ghaib jis ko samjhatey hai hum shuhuud
Hain khvaab mein hanoz jo jage hai khvaab mein*

(The absent of the absent: what we see is the merest seeming. It is the dream into which we awaken from dreaming.)

Mirza Ghalib

The confusion in determining constitutional outcomes takes us to the fundamental problem of appreciation of words and their meanings. It is the indeterminacy and fluidity of our language structures, and more importantly, its bearing, both causative as well as resultant, on our thoughts which lead to the most complex of problems. It is therefore pertinent to begin off by asking why and what do we interpret. Paul Grice very learnedly points that the interpretation we seek is always of activities that are the result of human behaviour.² In other words, our interpretations of our contexts is nothing but superimposition of an imagined structure on them that helps us define our bearings in a better and more functional way. The idea of interpretation then is no more a matter of discernment of the inherent. Instead it is a description of the existing, in a language most suitable for the articulation of our psychological selves. Here then, and in contrast to what Paul Grice furthers on with, seemingly constant empirical specifics of physical world are understood in the same discourse of fluidity and indeterminacy as other products of human creativity: societies, cultures, languages, traditions. The realization of blurring boundaries appears more manifestly, where truth (the truth as the end of interpretation and cognition) is the epistemological myth that applies itself to our scientific inventions and discoveries much the same way as it helps us render our cultural predispositions and aspirations as values. It is here when along with these, also blur the differentia between phenomena and values: they both are ascriptions of our perceptions, and their subsequent renditions into these two categories on the basis of the level of comprehensiveness and abstraction required. So while the existence of particulate nature of matter became an uncontested phenomenon, the idea of gender based superiority of males became a dominant value throughout the cultures.³

Since the recognition of these values exists not as the recognition of the idea itself, but in fact as the idea communicated, the interpretation offered is syntactical and semantic. In comprehending the value therefore, what we end up

² Michael S. Moore, *Interpreting Interpretation* in ANDRE MARMOR, *LAW AND INTERPRETATION* 1(1995).

³ I take these as examples primarily because both have come to be refuted over the years now. This similarity in their human appreciation helps us understand them as nothing more than different discourses of the same idea: explaining human interaction with the external world. Also, for a greater elucidation on the concept of 'value', see Kurt Baier, *What is Value? An Analysis of the Concept* in KURT BAIER & NICHOLAS RESCHER, *VALUE AND THE FUTURE* (1969).

doing is analyzing symbolic structures that exist as social functions rather than mere constant representatives of the idea itself. The understanding of this relativity that renders ideas and their representations as social patterns of specific space-time frames is important in our attempt to identify our governing constants. In all discourses, social, legal or political we base our actions upon them: principles and thoughts that we deem to be fundamental; principles that are nothing but our own personal and social rendition of the constant truth.

This idea of truth however, is variable, and is constant only within specific contours of social existence. It means different things to different people at different times. The fact that something is true derives from its applicability to the existent. For how else can we talk of something as correct if the existing phenomenon stands incommensurate with what we observe. Truth then is the end result of this dialogical pursuit within the society where a constant exchange exists amongst its members to keep constantly arriving at a more refined and better position. A true belief therefore is an unwavering thought that would be the end result of our inquiries: an inquiry that is a reasoned process, constantly pushing against the held beliefs and testing them against the anvil of experience and hope. By reason however one does not mean a cold, detached logic that exists in denial of the culture, the passion and the emotion. It is instead a composition of human experiences manifest in the form of what may easily be termed as the common sense of the society.

It is necessary that we understand the significance of this common sense of the society. If one were to believe in the veracity of a statement, say, x is p , then the belief that x is the same as p would essentially have to be sensitive to the fact that p in itself has to be true. In other words, any averment of truth stands coupled with sensitiveness to a certain something- a something that must be able to speak for or against it. If there was nothing a belief had to be sensitive to, then we would not be able to individuate it; we would not be able to tell it from another. A belief would have a distinguishable content only when we envisage a sanction that may help us project it in realistic terms. This realistic term, or the p of our example is the common sense of the society that was mentioned earlier. This dependence of x on p can also be expressed as the dependence of our necessity to understand the phenomena around us, on our faith in the veracity of our existing knowledge systems. In other words, to conform to Donald Davidson's coherence thesis, the objective standard of deducing the truth value of a proposition is nothing but its satisfaction of the existing pool of ideas and knowledge that the human cognition possesses⁴. The truth value of the proposition is completely a function of the human psyche's belief in the proposition's correspondence with the existing corpus of knowledge.

⁴ Donald Davidson, *A Coherence Theory of Truth and Knowledge* in ALAN R. MALACHOWSKI, READING RORTY (1990). Also, for similar discussions, see JAMES TULLY, PHILOSOPHY IN AN AGE OF REALISM (1994).

To put it alternatively, the crucial link between the acceptance of a statement as true, and its actually being true is nothing but a faith in its truth value because of its relationship with the existing. For, on the basis of our own personal experiences we know that we cannot let our language or vocabulary determine all things for us. As humans we all tend to have faith in people around us; we always in times of crisis tend to look up to or look for something or someone. These may be the humans we know, or the superhuman we tend to conceive. The key thing here is then faith. One needs to have faith in something or the other. The relationship between truth and knowledge that Davidson establishes is because of this same faith. If we have collective pools of knowledge to draw from, then we tend to be comforted by the perception that our thought is not dissociated, and that it belongs to a larger community of thoughts. The probability of making the right choice then increases. So when a knowledge system, which in fact is nothing but a collective perception: a representation of things that may or may not be causally independent of us, talks about things that are indeed causally independent of us, we tend to be surer of our immediate perception and assign it a positive truth value. There is no objective reality then, as it is nothing but a matter of construction.

It is therefore, as stated earlier, in constant challenging of the held perspectives that the society attempts the unraveling of the truth. Truth then exists as a held notion upon which inquiry can not improve upon.⁵ It is important to dwell upon this statement before we move any further. In saying that truth is something that inquiry can not improve upon any further, there are two major thoughts that are intended to be put across:

1. The inquiry that we talk of is not a universal and complete inquiry. It is rather a personal inquiry, complete only from a singular and personal vantage point, and unaware of other perspectives that may exist. One inquires only to the extent where one achieves a semblance to logic. It is not a global and complete inquiry; it is majorly an effort to improve upon our previous positions. This inquiry would then not aim at a result that would necessarily fit the demand. It would instead be something that would be expected to measure up to the demand, were the inquiry to be followed to the extent that no recalcitrant experience and no further revisions in the standard of inquiry be called for. In other words, the idea of inquiry would be constantly informed by standards that are functions of our experiences.
2. The truth that we seek would have to be wrenched away from the metaphysical attribution that it has been confined to, and would be brought to more pragmatic conceptions of functionalism. To put the way Charles Peirce did, "You only puzzle yourself by talking of this metaphysical 'truth' and metaphysical 'falsity'. All you have any

⁵ For a more sustained illustration, see CHERYL MISAK, TRUTH, POLITICS AND MORALITY 48 (2000).

dealings with are your doubts and beliefs...if your terms 'truth' and 'falsity' are taken in such senses as to be definable in terms of doubts and beliefs and the cause of experience, well and good: in that case you are only talking about doubt and belief. But if by truth and falsity, you mean something not definable in terms of doubt and belief anyway, then you are talking about entities of whose existence you know nothing about..."⁶

This idea of truth works on some major claims. Foremost among them is the dissociation of human cognition with the idea of linearity of time: the argument that human beings, and along with them all the concomitant systems of the world, are fundamentally oriented towards a higher revelation that awaits in our scientific progresses and in the adoption of liberalism.⁷ The divinity associated with truth then has nothing to do with its association with the invisible End. It exists instead in its association with the all pervasive, the fluid culture and the human psychology.

To explain it further, one needs to start off with the realization of the existence of an all pervasive variability. This variability exists in its numerous forms, from indeterminacy of our cultures, languages, and traditions, to the impermanence of the physical world. We then see the fundamental building block of all human knowledge as nothing else but making sense of this complete chaos that confronts us, from quantum mechanics and wave-particle duality of matter, to the realization in the destruction of the divide between the self and the other, and

⁶ Charles Peirce, *Collected Papers*, as cited in Truth Politics and Morality, 55.

⁷ Isaiah Berlin, while responding to the philosophy of Charles Taylor, explains this point more persuasively when he says, "I do not believe in teleology. I do not deny that society and cultures develop in certain fashion- nobody can understand either human beings or history who does not grasp that. But like Spinoza, Hume and other thinkers less sympathetic to Taylor than they are to me, I believe that purposes are imposed by human beings upon nature and the world, rather than pursued by them as part of their own central nature or essences...I believe that it is human beings, their imagination, intellect and character that form the world in which they live, not of course in isolation but in communities- that I would not deny; but that this is in sense a free unorganized development, which cannot be causally predicted. It is not part of determinist structure, it does not march inexorably towards some single predestined, as Christians, Hegelians, Marxists and other determinists and teleologists, have in a varied and often conflicting ways, and still believe to the present day...I believe in a multiplicity of values, some of which conflict, or are incompatible with each other, pursued by different societies, different individuals, and different cultures; so that the notion of one world, one humanity moving in one single march of the faithful, *laeti triumphantes*, is unreal. The incompatibility of equally valid ideals and ends of individual human beings of whom these societies are composed- these and these alone, not a cosmic plan, determine what the total outcome of human behavior must be, even if the individuals cannot themselves tell what the result of these interacting activities will turn out to be. These consequences, which only privileged or super observers can analyse, do not emanate from concrete universals or super individual entities, but consist of what, Aristotle's phrase, men do and suffer, their acts and purposes, the entire web of social and individual experience." See Sir Isaiah Berlin *Introduction*, JAMES TULLY, PHILOSOPHY IN AN AGE OF REASON (1994).

the formlessness of our collective knowledge systems.⁸ The most important understanding then is that of time as this continuous stretch of unbroken knowledge. And as humans, our job in leading our lives is nothing but adopting best possible discourses that help us understand our bearings in this infinity of nothingness. In cartographing this infinity, however, one needs to shun off all the pretenses of a forward march, for we may at best describe our situations in closed specific contexts. Our laws derive their efficacy, therefore, in their relevance with the context they exist in: the narrative of the *nomos* Robert Cover famously wrote about in 1983.⁹ These thoughts, as they may appear to be, are not in opposition to the objectivity of truth. They instead are the first of the building blocks that allow knowledge, and hence law, to be a normative touchstone.

The comprehension of this relativity, and its concomitant helps us in distancing the semantic articulation of the law (or the truth) from the context of the articulator, and helps us associate the language with the present of the interpreter¹⁰. In other words, what we do is to create meanings, as against discovering them, for given conditions. The public nature of the object mandates its appreciation more as matter of contextual truth than an absolute.

III. THE ASCERTAINMENT OF THE CONSTANT AS A PRODUCT OF THE REFLECTIVE EQUILIBRIUM

The foregoing analysis makes a strong case for recognition of the indeterminacy as an essential for interpretation. On the face of it, the idea seems contradictory and antithetical to the notions of ascertainable constants. The following analysis attempts an argument to the contrary, and as is sought, shows the latter to be a mere refinement of the former.

The truth lies in the multiplicity of the meanings, each in a world of its own causing retaliatory pulls in different directions. The determination of the unitary therefore is a mechanism for imparting coherence. The process goes like this: the different pulls cause a societal instability that needs to be resolved for small communities. Humans are social and they ought to live in communities. On a comprehensive scale, we do realize that the establishment of the universals does not help because the circumstances and the situations vary. But when individuals come closer to form families and groups, this leeway remains as removed; for the otherwise essentially entails the frustration of the very end that they seek: of

⁸ For an interesting account of fluidity of meaning and reality with reference to theoretical physics see a collection of Professor David Bohm's lectures. DONALD FACTOR, *UNFOLDING MEANING* (1985).

⁹ Robert Cover, *Nomos and Narrative* Supreme Court Term 1982 HARV L. REV. Foreword. (1983).

¹⁰ Instructive in this regard is Michael S. Moore's proposition of the interpretation being centered around the audience rather than that of the articulator. Moore emphasises upon the need of understanding of law both by the judiciary as well as the legislature, as a practical utility that needs to be applied to the existing sets of situations, *infra* 3.

sustained mutual existence. Hence comes the need for establishing certain commonalities. These in themselves are mundane chores of existence, like observing an off on Sundays, or uncovering or covering heads in the place of worship, or consistently following or disallowing certain family practices. And in these commonalities themselves there needs an attempt to distill the unity of thought and action. At certain levels we may say that this discernment in itself is wrong, for we attempt a discovery which hardly exists. Given one opportunity, even despite the patent commonalities of existence, there would be digressions and divisions. Our perceptions differ not only as communities but even as individuals. Where does then lie the need for the constant that we talk of? This common way of living that we have just mentioned informs our thoughts, ideas and reaction to the external stimuli. In a fleeting moment this exists in tandem with the truth, which in itself is relative, and after that one moment, differences crop up in ways of life and priorities. But the unity of thought and reality in that one fleeting moment lives on, and forms the basis for further actions and inactions. And it is this unity that existed in some fleeing past that acts as the determinative criterion for everything else. It, of course is constructed and not real, but its utility lies in its ability to help us have informed and determined courses.¹¹ Most importantly, it helps us have hope, and keeps the vast multitude of disparate identities always on the move for greener pastures. It is because of this myth, this important incentive of a dreamland, be it couched in terms of a celestial heaven, or a Zionistic state, that societies undertake upon themselves the propagation of moralities and values.

We have talked about the necessity of creation of this artificial unity. But this should not at all be deemed as a measure that undermines or is employed to subvert the contextuality. It in fact strengthens it. In its decisions, say, the Supreme Court not only lays rules and principles that create history, but in arriving at these and its usage of interpretative techniques it also determines a strictured reading of that history. The argument is that, irrespective of the close interrelation of these two actions, and the sanctioned adherence of the constituting masses to the former, the abiding to latter is impossible to achieve. All individuals, irrespective of the extent of the totalitarianism of the state, have the capability and in fact they do at some stage or the other, of associating with the history in their own communal, cultural, individual; essentially personal ways. These cannot be subverted by any means of coercion or indoctrination. And it is in the effectuation of this phenomenon of rationality and human understanding, wherein lies the need for determination of coherent *nomos*, that bases its functionality upon a fiction, and yet serves the purpose of the reality.

¹¹ Take the Indian example of sovereignty. In that ephemeral point of time after Indian independence, the values of majority of the Indians did conform to the conception of the state as the overarching parenting entity. The idea has long vanished and mutually constraining ideas of separation and independence have cropped up amongst those same people who once thought of India as a monolith political identity. Truly, sovereignty is a myth for many, but continues to act as a touchstone that enables the state to carry out its executive functions. It is at this realization of the artifice as the touchstone for determining the social action where law moves beyond the confines of experiences and perceptions.

The creation of this fiction is really a matter of sieving through all that we inherit, and all that we wish for. What we are essentially talking about is this idea of a co-originality between the creation of law, and its abidance by those themselves who have created it.¹² This co-originality is then a democratic process that bears a necessary semblance with the idea of inquiry, as we have portrayed it, in its form as one of continuous discovery, firmly grounded in the experiences of the past and looking forward expectantly into the future: a teleological cognition of the future, the present and the past as components of a singular idea of time. The inquiry for truth in fact, exists as nothing but the same deliberative democracy that enables people to decide upon their future collectively. It then exists as a promise of an exchange of sufficiently wide range of reasons and perceptions. The truth that is being inquired, or the democratic fundamental¹³ that is being deliberated, then takes the same meaning of a reference point (or the fiction that we talk of) which is sought to be located in the firm ground of the tradition as much as more *performance-oriented approach* of the future: temporality, historicity, and futurity of time understood as present, as a modality of present.

We now talk of the anchoring point of the society, the truth that we have been talking about, or the governing constant as we may call it, as an outcome or a deliberative process, where all get to be heard with the central premise that better outcomes can only be achieved by further refinement and adjustment alone. It can neither exist in isolation of the past, nor can it be based in the idealized utopia of the future. It needs to be a combination of both, and many other things, including the context of present, and our commitments and responsibilities to the immediate future and the immediate past¹⁴.

¹² This idea of a deliberative democratic process does not restricts itself to the modern conception of democracy alone, for we see that deliberations and dialogues exist always. Just that their manifestations are different at different times. In a pre-modern monarchical setup, this dialogue would take place through the media of ethnicity, religion, or such other communal reference point. In modern day democracy, the same interaction exists in the form of electoral contests, constitution making or judicial decisions.

¹³ By democratic fundamental is meant the common agreeing points that are to be decided before any further deliberation may be undertaken by the society: H.L.A Hart's rules of recognition.

¹⁴ The argument against a complete break from our past is important, for often in our bid to do away with the negatives of our inheritance; we wash away all that was good, and better, all that could have been instructive for the present and the future. In fact, the foremost of the limitations with the attempts of such breaks that have ever been attempted, in our revolutions and rebellions, have only converted our utopias into disillusioned escapisms from the realities. To put it in the words of Theodore Adorno, "... (to) extirpate, with the false, all that was true also, all that however importantly tries to escape the confines of universal practice, every chimerical anticipation of a nobler condition, and so to bring about directly that the culture is reproached for furthering indirectly". T. W. Adorno, *MINIMA MORALIA*, E. F. N. Jephcott (trans.) 43-44 (1977) as cited in Ashish Nandy, *Towards a Third World Utopia* in ASHISH NANDY, *BONFIRE OF CREEDS* (2004).

IV. FOR AN EUPSYCHIA¹⁵

An inquiry into the profitability of determination of constants (or the 'unamendables' in the constitutional discourse) posits before us the fundamental question of utility of such tools for any sort of theoretical analysis. And in trying to answer this, we are led to another and perhaps an even more important question of the applicability and scope of these analytical tools. It thus becomes pertinent to highlight the purposes that such measures can seek to address.

The idea remains at best a theoretical assumption that enables an easier and more comprehensible rendition of the problems of legality, morality and societal development. A purely positivist approach, explaining the approach to determine the content of these unalterable constants would frustrate the idea. For issues as determination of the fundamental rights cannot be achieved by emphasizing a dissociation of the rights from the morality. All rights have a moral content that makes them claimable. Mere objective evaluation of rights fails to grasp the entirety of the idea.¹⁶ In fact, the idea stands vindicated, at least in all modern conceptions, by enabling in true sense the complete and unhindered play of forces of democracy. For, it is only in the instrument of participatory governance that one can suitably locate the ideals discussed above: from an articulation of the constituent will that reflects the prevailing social identity, and an ability to decide and transform into corrections, such measures that otherwise would be deemed as aberrations. In other words, the determination of the fundamental constants does not remain confined to the strictures of legalese alone, and judges do remain the final adjudicators. They become, along with everyone else, components of the larger system of responsive and responsible governance.¹⁷

Therefore, the idea for developing constants in the Indian context needs to be, *inter alia*, tempered with the role of the state and its relationship with the constituting populace. The need for stating definitive obligations that govern the conduct of the state towards its citizens becomes pertinent because of the patent lack of capabilities among the masses to utilize the Western model of claims based entitlements. This should not, however, be taken as an argument for an overarching patriarchal state - what is asked is the recognition and determination of

¹⁵ PENGUIN DICTIONARY OF PSYCHOLOGY (1985), "A Maslow's term for the humanistic utopia which would be reached when all persons were psychologically healthy, especially in the sense of optimistic humanism."

¹⁶ Mahendra P. Singh, speaking in the Indian context, makes a persuasive point when he says, "Every right needs a moral justification. Dharma in the Indian tradition supported by the Islamic and Christian traditions which joined it later, creates the moral base for the rights expressed in legal language today." Also, he remarks, "Even though the moral standards for a common man may not be high, they are certainly higher than the legal ones." Mahendra Pal Singh, *Human Rights in Indian Tradition-Search for an Alternative model* in MAHENDRA PAL SINGH, HELMUT GOERLICH, MICHAEL VON HAUFF, HUMAN RIGHTS AND BASIC NEEDS: THEORY AND PRACTICE (2008).

¹⁷ See generally Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, And Nerve* 65 FORDHAM L. REV. 1249.

standard for mutual relationship between the governing and the governed. What is emphasized is the pre-requisite for political initiative to further and sustain the individual initiative. So the definitive obligations of the basic structure of the Constitution creates working spaces both for the constituting populace, as well as the state. There exists an interrelationship between the various components of the state as much as between the state and the constituting populace. The binding gel is one of morality and the general value structure. So when one has to define the character of the basic structure, it needs to be with a view to create it as measure that helps the constitution deliver itself to the people, and more importantly help the people deliver themselves both individually as well as collectively. It needs to create a moral structure that helps establish rules of relationships in all the spheres of human activity, no matter how personal or how public they might be. It needs to create a eupsychia.

This eupsychia however, is not an unrealizable Shangri La. It cannot be an abolitionist dreamland. Its structure not only needs to be contextual, but in fact determinable and identifiable. Gautam Buddha emphasized the need for this eupsychia when he called for a state based on the idea of consequentialism. Unlike Mill's utilitarianism, consequentialism talks about the course of societal as well as individual action being determined by a sum total which is couched in the language of the motivational aspect of action, the action itself, the effects of the action, and the end sought. These are not individuated, and so important is the consequence of the action on the society, the animate and the inanimate world, and the resultant consequence on oneself. Buddha's consequentialism culminates in an aspiration for a sort of democratic deliberation which yields to the perfect one, the *arahant*. This perfect one may as much be a human individual as a social circumstance. It needs to be one capable of richness of virtues, with a tremendous variety and refinement. Though he could discern humanity in impersonal terms, i.e. in terms of the law of dependent origination, and in terms of five constituents that got to make the individual, he was yet capable of understanding the logic of character, the shades of good and evil in their multiplicity, among those who come to it with their problems. In modern times, a similar structure was sought by Gandhi, who asked the society as well as the individual to base their actions with from the perspectives of their ends alone.¹⁸

An intrinsic part of this consequentialism is the accommodation of dissent. One of the most important duty of the basic structure of the Constitution is to allow a breathing space for the illegitimacy it causes, and then resolves the tension, not by subjugation but by harmony. In doing so, the society and its constitution are mandated to allow for all the usurpers and the digressers, and helps them become a part of the dialectic by incorporation of criticisms from the alternative perspective. It is then a matter of owning up as much as it is about

¹⁸ Interestingly, Gandhi's talisman, as this idea was projected around by the Indian state machinery, was to be found on the first page of all the school books published by the National Council for Educational Research and Training; till until some years back the Indians felt the need of dissociating education with Gandhi and discontinued with the practice.

disowning.¹⁹ The argument here is then one against totalism of thought. The Basic Structure that we argue for, therefore acts as a balance against the hegemonisation by the dominant. The alternate then is prevented from summary marginalization. The Basic Structure here works on the fundamentals of negativism. It guides itself by its opposites; it works by considering what it is not supposed to.

V. THE DETERMINATIVE TEST

The Supreme Court of India in these many years of judicial exercise of thought has often sought interpenetration of the phrasal specifics of the Constitution in its attempt to effectuate into practice what for the Benches have been the social optima. Constitutional rendition of such policies as affirmative action, or gender oriented social engineering, or anthropocentric evaluation of governmental policies or the lack of them; has often been articulated as either directly emanating from the provisions of the Fundamental Rights, or in consonance with the essence of the same. Ever since the pronouncement of *Kesavananda Bharti v. Union of India*,²⁰ the Indian judiciary in a series of epoch making decisions has interpreted the organic guarantees of life, liberty and equality by developing newer touchstones for governmental adherence to the principles of constitutionalism.

This urge for an activist judiciary has been warranted, and in certain senses condoned, by the overwhelming under expression of the populist thought, both in the legislature as well as the executive. The constituent power, as it has come to be understood, has found its receptors in the form of a judiciary that has long checked the digressions of majoritarian politics. It has largely been the history of the governmental impropriety, and therefore the India that has prompted a quick and more often than not, a shallow acceptance of these judicial zealots. The effects, however, have stood to inflict more sustained damage. As has been the experience, the determination of these tests has not only at times defied logical consistency; it has also been the bedrock for some of the same legal bedlam that the judgments themselves have sought to address.

In the analysis that follows, what we adopt is a two pronged evaluation of the system. The interpretation of constitutional provisions by the Supreme Court has been largely the test of the law-making powers of the legislatures against

¹⁹ As Ashis Nandy would put it, "Only by retaining a feel for the immediacy of man-made suffering can a utopia sustain a permanent critical attitude towards itself and other utopias and yet have a creative dialogue with the latter. A utopia is a language; it is a language of interpretation and criticism, an 'exercise in suspicion' as Paul Ricoeur calls. Neither the suspicion nor the criticism can ever end. There are always interpretations of interpretations and meaning of meanings. What some traditions call 'maya' and what moderns like to call ideology or ego defense can never be fully eliminated; its changing form can only be seen through or demystified at different points of time." See Ashis Nandy, *Evaluating Utopias: Consideration for a Dialogue Cultures in Faiths* in ASHIS NANDY, TRADITIONS TYRANNY AND UTOPIAS (1987) 6-13.

²⁰ (1973) 4 SCC 225.

the back drop of the Fundamental Rights enshrined in the Constitution. This approach has seldom stood to deliver in complete (incomplete sentence construction), and the Court has often indulged in expanding its ambit by resorting to interpretative adventurism that has been uncalled for. The Supreme Court of India, as late as 2006 in its decision in *M. Nagraj v. Union of India*²¹ was compelled to deliver in a vein that it had hitherto not even mentioned. The Court while speaking about the policies of affirmative action talked in a rhetoric that came troublingly closed to confront its own decisions in *I. R. Coelho v. State of Tamil Nadu*,²² and also *Indira Sawhney v. Union of India*.²³ Though, as many would be inclined to believe, the differences that have been drawn in these various pronouncements have been only superficial and that the Court has only, and rightly perfected its earlier stances by further qualifying them. What remains condemnable is the lack of development of coherent principles of adjudication. The constant vacillation, no matter how little, has been in conflict with the very idea of basic structure: the development of such ideas that remain constant touchstones for a comparatively unreliable and politically sensitive legislature.

Even in *M. Nagraj* the Court after ages of deliberation provided a test that only burdens the constitutional scheme by giving unwarranted discretion in the hands of the judiciary. That judicial discretion and independence remains fundamental to the concepts of impartial adjudication is a truism, and is invariably never contested. What should be realized is the scope and direction of this power. An over emphasized or wrongly entrusted comprehension may well turn this advantage into causes for regret. For unaccountability and lack of enforcement relegates this organ of the state to the fringes wherefrom only logical, consistent and correct decisions may salvage it. The recent brouhaha created by a passionate appeal of a division bench of the Supreme Court in the *Aravali Golf Club*²⁴ case for restraint of judicial adventurism is nothing but a recognition of this same power that gets all too unwieldy if not exercised with due care.

Before venturing any further, it remains instructive for us if we have a fleeting glimpse of the inclinations of the Supreme Court. The judgment in *M. Nagraj* in 2006 has been enlightening in ways more than one. The decision may be termed as one that has substantially unbridled the reach of fundamental rights. What the Court emphasizes upon is an 'essence' of rights rather than a narrowed dependence upon phrasal specifics. The move remains not only as healthy in that it departs from the frustrating holds of semantics, it also signifies a complete articulation of what had always been intended and desired: usage of law as means and not as an end. The Court emphasizes upon the structure of rights as enshrined in the Constitution.

²¹(2006) 8 SCC 212.

²² (2007) 2 SCC 1.

²³ 1992 Supp. (3) SCC 217.

²⁴ Divisional Manager, Aravali Golf Club & Another v. Chander Hass and Another, (2008) 1 SCC 683.

The Court harps upon a purposive interpretation of the words in Part III of the Constitution, especially the term “equality” as stated in Article 14. The interpretation of the features of the constitution that have come to be deemed inviolable need to be interpreted in certain contexts. What remains problematic in this is a silence about the limits to the judicial discretion in construing these rights themselves. The interpretation of provisions of the Constitution for development of the doctrine has attracted as much criticism as it has been lauded. The extended understanding of the provisions, especially in Articles 14, 19 and 21 have led to inclusion of a catena of varied aspects of social life into seemingly lifeless provisions. The exercise while on one hand has enabled rectification of many faults that have come to be associated with a majoritarian democracy, on the other hand has been the centre of an overwhelming storm with issues of judicial adventurism as its eye. And it is this idea of an unwarranted usage of judicial privilege that take us to the first of our propositions.

The interpretative mechanisms, especially if one seeks to answer questions like “What is a right?”, or “What is secularism?” need to be not only expansive but also contextual. The Court in India has on innumerable counts been expansive, but seldom has recognized or defined the ambit of this contextualism. Such deficiency takes gargantuan proportions if one brings in this element of judicial adventurism. Even in *M. Nagraj*, where the general structure of the argument for an expansive interpretation is well founded, the work remains undone by a patent absence of talk for delimitation. Notions of virtues and characteristics that render the existence of laws efficacious for the population that they govern need to be structured in ways that provide us with definitive pools to choose from. In other words, judicial discretion in determination of what would and what would not count as the values that stand to be signified by Part III would be nothing but reification of something that needs not only to be organic but also determinable. Thus, in proffering us what the judiciary thought to be the essence of rights in *M. Nagraj*, the Court took unto itself the illimitable power of constructing the provisions of the Constitution and determining what would be best for the nation, without being electorally responsible or dependent to the constituting populace. As stated earlier, such abstraction would go against the very notion of having fundamental constants as it would provide for too wide a discretion that would dangerously border on vacillation.

The recognition of this problem takes us to the next logical step of establishing this determinable super set from which the judiciary, as well as the legislature can draw from. Instructive in this regard would be the decision of the Supreme Court in *Minerva Mills v. Union of India*.²⁵ The Court while deciding upon the basic structure of the Constitution had stated it to be essentially a harmonization between the Fundamental Rights and Directive Principles of State Policy. This confluence of the two is of immense significance, for it helps in two ways:

²⁵ (1980) 2 SCC 591.

1. It creates before us a specified set of goals that need to be addressed, and towards which the interpretation of the values enshrined within Part III can be directed towards. This precludes the judiciary to adopt an overtly adventurist bent of mind.
2. It allows for sufficient pliancy that is required to effectuate the ends that are required for social improvement, thereby doing away with a strictured conformity to the black letter of law.

Central to this scheme is the idea of determining Basic Structure not through singular institutions of the judiciary alone, but in creating principles that are as much an aspect of governance and law-making as they are about adjudication. In determining this confluence of the Directive Principles of State Policy, and the Fundamental Rights, what is intended is an identification of the dominant instance of fructifying the constitutional mandate of sustained living. Instructive in this regard is Brin Bix's approach where he emphasises upon the identity of the explanation offered by the socio-legal theory and the real understanding of the masses.²⁶ In other words, the Basic Structure we talk of or the Indian-ness of the Indian Constitution that we think of, is essential because our Constitution should not end up merely expositing on issues that really do not happen. A notion of equality of Article 14 which no doubt explains the extensions of reservation policies, or cases of upliftment of women, is wrong when it stands departed from the real ethos of the society. On the need of this Indian-ness, instructive is the approach what John Finnis talks of as the refinement of Hart's internal view of law. In other words, one may say that the need of having an internal view of law is to have the focal case, the central case or the flourishing case of the situation that may encompass the dominant perceptions. And by dominant we should not mean the majoritarian, the dominant would mean such shared principles that govern other forms of existence. Like what in the Indian context would mean cultural pluralism would inform its bearing on all such other aspects as federal organization, lingual identities etc.

VI. CONCLUSION

The paper has been argument for our collected histories, and their continuity into our present. As the Basic Structure evolves itself into newer paradigms of human cognition, it creates bulwarks against human limitations. These limitations have led us into broken and often presumptuously arrogant descriptions of our selves. But, these arrogances should not be understood as steeped in the traditions of human hypocrisy. They are instead our natural limitations in understanding the world around us. The Basic Structure then creates constitutional systems (fictional essentially) that shall help people, deviants and otherwise, to situate themselves more appropriately in the society.

²⁶ *Brian Bix*, H. L. A. Hart and the Hermeneutic Turn in Legal Theory [52 *SMU LAW REV.* 167 (1999)].

The harmonious construction that we so achieve not only conforms to the fundamental tenets of constitutionalism, but, in the Indian case, specifically enables us to build a human rights based approach towards evaluation of legislative or executive actions and inactions. In fact, an increasingly dominant voice that now surfaces is one of an integrated system of laws and human rights. Though, for many it stands as nothing but the natural rights rhetoric in a new cloak, the adoption of such standards as are suggested by the approach is markedly different from the classical natural law position, and is indeed bridging the gap between the seemingly conflicting positions of positivism and naturalism.

The adherence to these Directive Principles of State Policy enables us to integrate this same thought of anthropocentric development within the framework of the Constitution. In other words, it is beneficial to desire that when the Court pronounces upon the validity of an issue being *ultra vires* the Constitution, the touchstone of basic structure should be utilized so as to bring to practice the concepts within Part III in accordance with the guidelines enshrined in Part IV. Doing this we bring such aspects as secularism, equality and dignity out from the moulds of semantic puritanism and render their value beyond the same. Therefore the test that should be employed for judging the constitutionality of a legislation is one that evaluates the purported action in terms of its effects upon the people. The construction that needs to be followed should be purposive, contextual and at the same time, expansive.