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Construing the sounds of Constitution's speech: Meanings beyond text

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Interpreting the Indian Constitution

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- **How does one interpret the world's lengthiest codified Constitution?**

- **How does one flesh out meaning from the text that governs 1.3 billion people, in 29 States, speaking 22 constitutionally recognized languages (and hundreds of other languages/dialects) and practicing virtually every mainstream religion of the world?** Following theoretical approaches exist for constitutional interpretations – these are not mutually exclusive watertight compartments:

Historical	Textual	Structural/ Purposive
This approach relies heavily upon **what a particular constitutional provision would have meant to its framers**. The focus is on the subjective intent of the framers, and how they would have wished the constitutional provision to operate within the confines of a particular case.	Textualism **focusses on the specific words used (and words not used) in a constitutional provision** but requires interpreters to consider the 'present sense' of the text rather than the meaning of the said text at the time it was enacted. As Justice Scalia of the US Supreme Court noted in his book ('*A Matter of Interpretation")* – *textualists look for an 'objectified' intent from the language of the provision itself*	Under this approach, the **focus is more on inference** rather than close reading of the text. The **Constitution is treated as an organic whole** rather than as a collection of autonomous provisions that are isolated from their natural environment. One tries to discover the purpose of a particular provision, the mischief that the said provision seeks to deal with.

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- **Interpretative approaches in India typically classified in three phases**
  - Phase I – where textualism was the dominant interpretative approach
  - Phase II – Structural/purposive was the dominant interpretative approach
  - Phase III – result-oriented decision making using both the above approaches is dominant
- **The above phases are merely categorized for convenience of study – there were many instances of deviation/dissent from the dominant interpretative approaches**

Textualist phase:

- *AK Gopalan V State of Madras* **(AIR 1950 SC 27)** was one of the early decisions in which the Court was called upon to interpret the fundamental rights
  - *Habeas Corpus* petition filed by Communist leader detained under preventive detention legislation claiming that the legislation was inconsistent with the Article 19, 21 and 22 (the protection against arrest and detention) of the Constitution
  - **Interpretative questions before the SC**: What did the expression 'procedure established by law' mean? It could either have meant any procedure that was validly enacted into primary legislation by Parliament (which would result in Article 21 being a safeguard only against executive action), or could include a substantive component, resembling the 'due process' clauses of the US Constitution. Secondly, what was the interrelationship between Articles 19, 21, and 22 of the Constitution, which, at first glance, appeared to cover similar ground?

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- *AK Gopalan V State of Madras (CONT.)*
  - **Constitutional history** had something to say on these questions.
    - On the first question, there was plenty of evidence to suggest that the framers had adopted the phrase '*procedure established by law*' instead of the American 'due process of law'.
    - On the second question, evidence from the report of the Drafting Committee of the Constituent Assembly suggested that Article 21 was intended to cover separate territory from Article 19.
  - The **judgments of the majority and minority agreed that this history was irrelevant in construing the constitutional provisions**.
  - **Kania CJ, for the majority**, **construed the constitutional text based on its plan meaning**. He held that the expression 'procedure established by law' must mean, based on its ordinary interpretation, the procedure prescribed by the statutory law of the State. On the second question, he decided that Article 19,21, and 22 covered entirely different subject matter, and were to be read as separate codes.

- Most controversial question in Indian constitutional jurisprudence - **whether there are any limitations on Parliament's power to amend the Constitution, especially fundamental rights?**
  - Article 368 enables the Union Parliament by two-thirds majority, to amend the Constitution. Amendments to fundamental rights under Part III do not require the ratification of States. Article 13(2) provides that '*The State shall not make any law which takes away or abridges the rights conferred by this Part [the chapter on fundamental rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void*'.

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- **Most controversial question in Indian constitutional jurisprudence**…..(CONT.)
  - The Constitution was amended eight times in its first ten years. A question that frequently arose was whether the word 'law' in Article 13(2) included constitutional amendments. If it did, then the chapter on fundamental rights would be rendered immune from amendment.
- ***Sri Sankari Prasad Singh Deo v Union of India*** *(AIR 1951 SC 458)*
  - SC adopted a **textualist approach**, finding that any intended limitations on the power to amend fundamental rights would have been clearly expressed in Articles 13(2) and 368
  - **As Patanjali Sastri J noted**: *We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they [the framers] also intended to make those [fundamental] rights immune from constitutional amendment....the terms of Article 368 are perfectly general and* ***empower Parliament to amend the Constitution, without any exception whatever***
- ***Sajjan Singh v State of Rajasthan*** *(AIR 1965 SC 845)*
  - **Gajendragadkar CJ adopted a similar textualist approach**, holding that if the framers had intended to restrict future amendments to Part III, they would have made a specific provision manifesting that intention. He also categorically rejected a purposive approach to interpreting Article 368, noting that it was illegitimate to construe that provision '*on any theoretical concept of political science*'.
  - Other judges, however, were not equally convinced. **Hidayatullah J and Mudholkar J expressed scepticism albeit framed in textualist arguments**. Hidayatullah J turned the prevailing argument on its head by stating that Article 368 did not say that every provision of the Constitution could be amended with a two-thirds majority. Mudholkar J failed to see why the word 'law' in Article 13(2) could not be read to include constitutional amendments

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- **Eleven-judge bench of the SC in *Golak Nath V State of Punjab* (AIR 1967 SC1643)**
  - Majority of the **SC reversed its position on the amendability of fundamental rights -**
  - **Textualist approach adopted in the majority as well as the minority opinions**. The arguments did not center on how to interpret the Constitution: all the judges seemed to agree that textualism was the pre-eminent approach. Rather, differences between the majority and the minority hinged on what the outcome of a legitimate textualist interpretation would be
  - **In the majority, Subba Rao J held** that the open-ended definition of the word 'law' under Article 13 rendered the term wide enough to include constitutional amendments. Further, the marginal note to Article 368 described the Article as only setting out the 'procedure for amendment of the Constitution; Parliament's power to amend the Constitution did not emanate from that provision. Therefore, **Parliaments power to amend the Constitution was subject to Part III**.
  - **Judges in the minority drew different inferences through their textualist approach from the same pieces of constitutional text**
    - **Wanchoo J**: text of Article 368 made it clear that it not only specified the procedure, but also established the power for Parliament to amend any Constitutional provision
    - **Bachawat J**: since Article 368 allowed Parliament to amend any provision of 'this Constitution', it authorised amendment of 'each and every part' of the Constitution.
    - **Ramaswamy J**: adopted an argument resembling that of Gajendragadkar CJ in *Sajjan Singh*, noting that if the framers conceived of limitations to the amending power, they would have expressly said so in Article 368

Interpreting the Indian Constitution (Structural/ Purposive phase)

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- The **leading case of Kesavananda Bharati v State of Kerala** (1973 4 SCC 225) demonstrates this gradual shift in interpretative methodology
- In the context of further amendments to the Constitution in the tussle between the Supreme Court and Parliament over the validity of land reform legislation, the Court was once again tasked with considering the scope of Parliament's power to amend the Constitution. This time, the decision was entrusted to a thirteen-judge bench, which was legally capable of overruling *Golak Nath*
  - Eleven separate opinions were delivered. Majority on the Court is understood to have held that **Parliament can amend any provision of the Constitution (including fundamental rights), so long as it does not alter, abrogate, or destroy the 'basic structure'** or essential features' of the Constitution
  - **Some of the judges still relied on textualist arguments, including the clinching judgment by Khanna J. :** *"The words 'amendment' of this Constitution' and ' the Constitution shall stand amended in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution"*
  - **However, movement towards structural interpretation was discernible**
    - **Shelat and Grover JJ** held that the word 'amendment' in Article 368 needed to be construed with reference to the scheme of the Constitution as a whole
    - **Sikri CJ** highlighted that the word 'amend' was employed to mean different things in different provisions of the Constitution and that its real content could only be gleaned with reference to the structure of the Constitution.
    - **Hegde and Mukherjea JJ**, relied on both textual and structural arguments in support of their conclusions

Interpreting the Indian Constitution (Structural/ Purposive phase)

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- The SC **categorically rejected the *Gopalan* approach** in favour of a structuralist one in ***Maneka Gandhi V Union of India*** (1978 AIR SC 597), which involved a challenge to a statutory provision under which the passport of the Petitoner was impounded for political reasons.
- **Part III of the Constitution was conceived as a cohesive bill of rights** rather than a miscellaneous grouping of constitutional guarantees.
- This **structuralist conceptualization of fundamental rights** had profound implications - **State would no longer be able to claim refuge of limitation clauses of a single fundamental right**. Even if it did so, it would still need to establish why other interrelated rights remained sufficiently unaffected
- **Reading articles 14, 19 and 21 together**, the SC in Maneka Gandhi also made it clear that ***procedure established by law*** (under article 21) **did not only provide a guarantee of procedural due process, but also included a substantive component** - even a **procedure provided for by way of primary legislation would need to be 'fair, just and reasonable',** not fanciful, oppressive or arbitrary and should be '*carefully designed to effectuate, not to subvert, the substantive right itself*.'
- This was **coupled with a wide reading of the phrase 'personal liberty' which opened the door to the inclusion of a wide range of unremunerated rights under Article 21 in subsequent cases**.
  - Article 21 was incrementally interpreted to include the rights to privacy, pollution-free Air, education, livelihood, health, speedy trial, and free legal aid
  - In many of these cases, non-justiciable Directive Principles were read into the right to life and personal liberty, paving the way for the Supreme Court to play an unprecedented role in the governance of the nation

Interpreting the Indian Constitution (result-oriented decision making phase)

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- **This phase is a categorization arrived at by critical commentators** who point out that in this phase, Courts started undertaking constitutional interpretation based on a certain conception of its own role whether as social transformer, sentinel of democracy, or protector of the market economy
- Commentators say that the unique decision- making process has led to inconsistent interpretative approaches giving preference to arriving at outcomes/conclusions that match the Courts' perception of its role
- **Cases in point apropos electoral reforms** – In the space of a few weeks in 2013, the SC decided three important cases in the context of 'criminalisation of politics'/electoral reforms, inconsistently
- Legal provisions in question:
  - Article 326 provides that elections to the Lower House of Parliament and State legislative assemblies should be on the basis of adult suffrage and: *Every person who is a citizen of India and who is not less than eighteen years of age ... and not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter....*
  - Section 62(5) of the Representation of the People Act 1951 (RPA) denies prisoners the right to vote and section 4 of the same statute stipulates that in order to be a member of the Lower House of Parliament or a State Legislative Assembly, a person must be registered as an 'elector' for a parliamentary or State constituency
- **Cases in point (i)** – In ***Chief Election Commissioner v Jan Chaukidar*** (2013 7 SCC 507), an NGO contended that since prisoners were deprived of the right to vote, they could not be considered as 'electors' and should automatically be disqualified from standing for elections during periods of incarceration. A two-judge bench of the Supreme Court affirmed this contention.

Interpreting the Indian Constitution (result-oriented decision making phase)

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- **Cases in point (i)** (*Chief Election Commissioner v Jan Chaukidar*):
  - One of the key reasons for this decision was that the SC considered the right to vote as a statutory endowment that is conferred (and equally, revoked) by the ordinary legislative process. It had *'no hesitation in interpreting the Constitution and the Law framed under it, read together, that persons in the lawful custody of the Police also will not be voters, in which case, they will neither be electors*'.
  - This was a **highly textualist reading of Article 326**, focusing on the fact that it permits denial of the right to vote on account of illegal practices.
  - A **structuralist reading could have produced a very different outcome** (one that was, as commentators say, inconsistent with the SC's conception of its role). Commentators highlight that India's status as an inclusive, participatory democracy forms part of the basic structure of the Constitution, and raise questions as to whether excluding a large class of people from the vote is consistent with that scheme.
- **Cases in point (ii): *Lily Thomas v Union of India*** (AIR 2013 SC 655)
  - Section 8(4) of the RPA gives sitting legislators a period of three months before disqualification operates, enabling them to appeal against their conviction.
  - This statutory provision was challenged on the basis that it contravened Articles 102(1) and 191(1), dealing with the disqualifications for membership of Parliament and the State legislatures.
  - **Patnaik J adopted a highly textualist reading** of the provisions, stating that their language made it clear that the disqualifications for sitting legislators and those who planned to contest elections had to be coextensive

Interpreting the Indian Constitution (result-oriented decision making phase)

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- **Cases in point (iii):** ***'none-of-the-above' votes case [PUCL v. Union of India;*** *2013 10 SCC 1]*
  - Issue: Whether the rules governing the casting of NOTA votes, which in effect denied such votes of the benefit of secret ballot, violated the freedom of speech and expression?
  - **Sathasivam CJ adopted a structural approach and his opinion** was replete with references to the structure and scheme of the Constitution, of which free and fair elections is a cornerstone. He **struck down the relevant rules on the basis that the right to cast a 'none-of-the-above' vote was an essential part of the right to expression of a voter** in a parliamentary democracy, which had to be recognised and given effect in same manner as the right to cast a regular vote.
- **Commentators highlight that in each of the three electoral cases, the Supreme Court ascribed a very specific role to itself - that of an institution which was entrusted with 'cleaning' the political process** – and essentially concluded the following:
  - On one hand, the right to vote *per se* is a statutory privilege, which can be given and taken away by ordinary legislative majorities. **But** on the other hand, the right to secrecy in voting and the right to cast a negative vote are treated as fundamental rights based on the structure of the Constitution, and are immune from the ordinary political process.
  - Franchise can be denied to a large section of society (as per *Jan Chaukidar*), electoral disqualifications can be imposed liberally, albeit uniformly (as per Lily Thomas) - but those who have the vote must be able to cast an anonymous negative vote (as per *PUCL*)

3 benches of the Supreme Court relied on different interpretive approaches (in two cases, textualism and in the third, structuralism) – more elaborate reasoning was expected about the rights issues at stake; like whether it was proportionate to deny the vote to all prisoners or permissible to distinguish between sitting parliamentarians and future parliamentarians etc

Interpreting the Indian Constitution (result-oriented decision making phase)

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Cases in point apropos rights of sexual minorities

- In ***Suresh Kumar Koushal v Naz Foundation**** (2014 1 SCC 1), SC overturned the Delhi High Court's judgment reading down section 377 of the Indian Penal Code 1860:
  - The Delhi High Court's decision rested on the claim that section 377, in the form that it was, violated Article 14,15 and 21 of the Constitution, because it discriminated on the ground of sexual orientation, targeted homosexuals as a class, and was contrary to constitutional morality.
  - The Supreme Court seemed to impose numerical *de minimis* threshold for the enforcement of fundamental rights: *While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a **miniscule fraction of country's population constitute lesbians, gays**, bisexuals or transgenders and **in last more than 150 years less than 200 persons have been prosecuted** (as per the reported orders) for committing offence under Section 377 IPC; this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.*
  - Section 377, on the face of it, does not mention or classify any particular group or gender and hence is not violative of Article 14 and 15 and 21 respectively
  - Justice Singhvi also said that Section 377 is a pre-constitutional legislation and if it were violative of any of the rights guaranteed under Part III, then the Parliament would have noticed the same and repealed the section long ago
  - On Article 15, the Delhi Court had held that "*sexual orientation*" was a protected category, contained within the term "*sex*". This has not been effectively rebutted by SC

** It may be argued that the recent 'Right to Privacy' decision of the SC impliedly overrules this decision*

Interpreting the Indian Constitution (result-oriented decision making phase)

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- ***National Legal Services Authority (NALSA) V Union of India*** (2014 5 SCC 438) - Whether right to equality required State recognition of ***hijras* and transgenders as a third gender** for the purposes of public health, welfare, reservations in education and employment, etc. The two opinions in the case adopted contrasting interpretive techniques to arrive at the conclusion:
  - **Radhakrishnan J:** approached the issue from a **textualist** perspective, noting that the fundamental rights at issue used the words 'person' or 'citizen', which were gender neutral and applied equally to transgenders. He also contradicted the *de minimis* notion for the enforcement of fundamental rights articulated in *Naz Foundation* case.
  - **Sikri J:** on the other hand, approached the case from a **dynamic, prudential perspective**, arguing that the Constitution would need to **stimulate changes in social attitudes by requiring the recognition of transgenders as a category** separate from males and females. The Constitution, in his view, is a living organism that is sensitive to social realities
- **Commentators point out that**:
  - The present position of law appears to be that although the criminal prohibition on unnatural intercourse (including transgender intercourse) is consistent with the fundamental rights, the State's failure to recognise a third gender violates those very same rights.
  - Transgenders can putatively claim a violation of constitutional guarantees when they are denied separate public toilets, but cannot do so if they are arrested or questioned for engaging in '*non-traditional sexual intercourse*'.
  - In *Naz Foundation*, the Supreme Court conceived of its role as a majoritarian court that deferred to the democratic will. This conception led the Court to ignore important counter-majoritarian considerations, including section 377's effect on sexual minorities. The Court's restricted readings of Articles 14, 15, and 21 stood in contrast with established precedent.

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Recent interpretative instances: Constitutionality of Section 66A of IT Act

Constitutionality of Section 66A of IT Act

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- Example of how interpretation of the Constitution is not static but progressive to absorb new ideas and meet new situations - Decision of **Shreya Singhal v. Union of India; (**AIR 2015 SC 1523) whereby the Supreme Court held S. 66 A of the IT Act as unconstitutional on the ground of infringement of freedom of speech

- **Background and provisions in question**

  - Section 66 A of the IT Act prescribed punishment for sending offensive messages through communication service, etc.

    "a. any information that is grossly offensive or has menacing character
    b. Any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger,…….hatred or ill will, persistently by making use of such computer resource or a communication device
    c. Any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or the recipient…."

  - S. 66A of IT Act challenged on the ground of infringement of freedom of speech and that the offences sought to be penalized by the said section were not saved by the subjects of Article 19 (2) which prescribes reasonable restriction including inter alia pubic order, decency or morality, defamation or incitement to an offence.

Constitutionality of Section 66A of IT Act

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- **Analysis of the Decision -** The Court struck down Section 66A of the IT Act in its entirety holding that it was not saved by Article 19(2) of the Constitution on account of the expressions used in the section, such as “annoying,” “grossly offensive,” “menacing,”, “causing annoyance.”

- The Court justified this by going through the reasonable restrictions that it considered relevant to the arguments and testing them against S66A. Apart from not falling within any of the categories for which speech may be restricted, S66A was struck down on the grounds of vagueness, over-breadth and chilling effect. The Court considered whether some parts of the section could be saved, and then concluded that no part of S66A was severable and declared the entire section unconstitutional.

- When it comes to regulating speech in the interest of public order, the Court distinguished between discussion, advocacy and incitement. It considered the first two to fall under the freedom of speech and expression granted under Article 19(1)(a), and held that it was only incitement that attracted Article 19(2).

- Key points of the decision are discussed below:- **Public order and Decency or Morality** – The test employed is **whether a particular act leads to disturbance for the community at large or does it merely affect an individual**.
  - No nexus with public order- It was held that S.66A had no nexus with public order as no distinction was made in the section between mass dissemination and dissemination to one person.
  - Clear and present danger - Further, S.66A did not require that messages should have clear tendency to disrupt public order. The nexus between the message and action that may be taken based on the message was absent.

Constitutionality of Section 66A of IT Act

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❖ Key points of the decision (contd.)

- **Defamation** – Held that S. 66 A does not concern with injury to reputation which is a basic ingredient of defamation. Offensive, annoying and inconvenient content may not affect the reputation and thus S. 66 A was not saved under the subject of defamation under Article 19 (2).

- **Incitement to an offence – S. 66A did not have any proximity with this subject of Article 19 (2). Information disseminated may purely be in the realm of "discussion" or "advocacy".**

- **Expression used in S. 66A of the IT Act have not been defined without conveying any demarcating line by any of the expressions rendering said section unconstitutionally vague – Disproportionately invades free speech and upsets balance between the right and reasonable restrictions that may be imposed on the right .**

- **Chilling effect on free speech -** Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society.

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Interpretative instances: Sedition and freedom of speech

Sedition

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- S.124 A of the Indian Penal Code provides for the offence of sedition in the following terms
  - Bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards, the Government of India.
  - Such act or attempt may be done (i) by words, either spoken or written, or (ii) by signs, (iii) by visible representation.
- In ***Romesh Thapar v. State of Madras***, AIR 1950 SC 124 – Majority held that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the state or the overthrow of it, such law cannot fall within the reservation under Article 19(2), although the restriction which it seeks to impose may have been conceived generally in the interest of public order. *Basis this reasoning, the Court struck down Section 9 (1-A) of Madras Maintenance of Public Order Act whereby ban upon the entry and circulation was imposed in the interest of public order.*
- To avert the constitutional difficulty *vis a vis* sedition - Constitutional 1st (Amendment) Act, 1951 was introduced vide which the words “in the interest of” “public order” were added to Art 19 (2) .
- **Kedarnath v. State of Bihar AIR 1962 SC 955** - held that section 124-A, of I.P.C is constitutional and is not in contravention of Art 19(1) (a) as it is saved by the expression “in the interest of public order” in Art 19(2).

Sedition

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- **Kedarnath v. State of Bihar (contd.)**
  - Clear distinction between strong criticism of the government and those words which excite with the inclination to cause public disorder and violence
  - 'Strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means' would not come within the section.
  - What is forbidden are 'words, written or spoken, etc. which have the tendency or intention of creating public disorder or disturbance of law and order'.
- **S. Rangarajan vs. P. Jagjivan Ram, 1989 SCC (2) 574**
  - Freedom of speech cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered.
  - Anticipated danger should not be remote, conjectural or far-fetched and should have proximate and direct nexus with the expression.
  - Court held that while there has to be a balance between free speech and restrictions for special interest, the two cannot be balanced as though they were of equal weight – It may be inferred and concluded that free speech should prevail except in exceptional circumstances.

Sedition

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- **Ramji Lal Modi vs. State Of U.P. (1957 AIR 620)**
  - Not a sedition case, but one about Section 295A which criminalises any deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs
  - The court introduced two tests—'aggravated form' which defines the criteria for what counts as an insult, and the 'calculated tendency' of the insult, which must be to disrupt the public order.
  - The court held that Section 295A does not penalise every act of insult; it penalises only those acts of insult which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class.
- **Examples of sedition charges in recent years**
  - Against Aseem Trivedi, a cartoonist who was arrested in 2012 after altering the three lions, India's national emblem, to lampoon corruption;
  - Arundhati Roy, the Booker Prize-winning novelist and social activist who was accused of making an anti-national speech in 2010 when she called for Kashmir's independence; and
  - Binayak Sen, a social activist accused of helping India's Maoist rebellion
  - Kanhaiya Kumar, Student Union Leader from JNU

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Recent interpretative conundrums: *Aadhar* and Right to Privacy

What is Aadhar?

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- **Background**
  - AADHAR under Unique Identification Authority of India is a scheme which aims at providing identification for each resident across the country. This identification is bases upon registration process which involves submission of individual's personal credentials, i.e. his demographic and biometric information, this information is then linked to a random 12 digit number which is unique to that particular individual and serves as proof of his identity.
  - In this scheme an individual has to submit his biometric data, and his iris and fingerprints are scanned but there is no proper system in place to safeguard that all this data and prevent misuse.
  - Aadhaar is not meant to replace existing identification documents like PAN, passport, driving license etc.
- **Development of Right to Privacy – Indian Constitution**
  - The Supreme Court of India, for the first time considered the right to privacy in the case of M.P Sharma v Satish Chandra AIR 1954 SC 300 wherein the contours of the police's powers of search and surveillance were outlined, it was held that there is no right to privacy under the Constitution.

Right to Privacy

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❖ **Development of Right to Privacy – Indian Constitution (contd.)**

- In, **Kharak Singh v State of U.P, AIR 1963 SC 1295**, a case on police surveillance and domestic visit at night by the police personnel. In the instant case majority found that the Constitution contained no explicit guarantee of a 'right to privacy' but **Justice Subba Rao in his minority opinion** observed that "the right to personal liberty takes not only a right to be free from restrictions place on his movements but also free from encroachments on his personal life".

- **In Maneka Gandhi v Union of India AIR 1978 SC 597,** the majority on the seven-judge bench observed that any procedure established by law under Article 21 would have to be "fair, just and reasonable" and could not be "fanciful, oppressive or arbitrary". It is also clear that 'a fundamental right is not an island in itself" and Article 21 is wide enough to engulf a variety of rights within itself.

- In **Justice KS Puttaswamy (RETD.) AND ANR. V Union of India; 2017 (10) SCC 1**, the Supreme Court held that the right to privacy is protected as a fundamental right under Articles 14, 19 and 21 of the Constitution of India on the following grounds:
  - The judgment in M P Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20 (3) of the Indian Constitution.
  - The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M P Sharma is overruled to the extent to which it indicates to the contrary.

Right to Privacy

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❖ **Justice KS Puttaswamy (retd.) AND ANR. V Union of India 2017 (10) SCC 1**

- Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III.

- Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty

- The Court, in the exercise of its power of judicial review, is unquestionably vested with the constitutional power to adjudicate upon the validity of a law. When the validity of a law is questioned on the ground that it violates a guarantee contained in Article 21, the scope of the challenge is not confined only to whether the procedure for the deprivation of life or personal liberty is fair, just and reasonable

Arguments taken so far by petitioners in the Aadhar Case

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- **Arguments in Aadhar case** (*as gleaned from media reports*)
  - State seeks to deprive individuals of the choice of manner of identification and that Article 21 mentions that any measure of state must be procedurally and substantively reasonable
  - Article 21 of the Constitution guarantees choice, and Aadhaar takes it away
  - Consent was for authentication but the law requires to get the entitlement only through Aadhar
  - Very concept of Aadhar is inconsistent with the doctrine of proportionality. One's right to livelihood was protected by the Constitution and further imposing a condition to exercise that right amounted to violation of that fundamental right.
  - The Constitution mandates the creation of a 'limited government'. It imposes restrictions on State power. Aadhaar focuses on the individual being transparent to the State. It is in fact the reverse of what 'limited government' mandates.

Interpreting the Indian Constitution – summing up: as articulated beautifully by Chelameswar J. in the 'right to privacy' case:

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"*The Two categories of Constitutional interpretation - textualist and living constitutionalist approach are well known. The former, as is illustrated by the Gopalan case, focuses on the text at hand i.e. the language of the relevant provision. The text and the intent of the original framers are determinative under the textualist approach.* ***The living constitutionalist approach, while acknowledging the importance of the text, takes into account a variety of factors as aids to interpret the text****.*

Depending on the nature of factor used, academics have added further nuance to the this approach of interpretation (For instance, in his book titled 'Constitutional Interpretation' (which builds on his earlier work titled 'Constitutional Fate'), Philip Bobbitt categorizes the six approaches to interpretation of Constitutions as historical, textual, prudential, doctrinal, structural, and ethical. The latter four approaches treat the text as less determinative than the former two approaches).

This court has progressively adopted a living constitutionalist approach. Varyingly, it has interpreted the Constitutional text by reference to Constitutional values (liberal democratic ideals which form the bedrock on which our text sits); a mix of cultural, social, political and historical ethos which surround our Constitutional text; a structuralist technique typified by looking at the structural divisions of power within the Constitution and interpreting it as an integrated whole etc.

This ***court need not, in the abstract, fit a particular interpretative technique within specific pigeonholes of a living constitutionalist interpretation****. Depending on which particular source is most useful and what the matter at hand warrants, the court can resort to variants of a living constitutionalist interpretation.*

This ***lack of rigidity allows for an enduring constitution****. The important criticisms against the living constitutionalist approach are that of uncertainty and that it can lead to arbitrary exercise of judicial power. The* ***living constitutionalist approach in my view is preferable despite these criticisms, for two reasons****. First, adaptability cannot be equated to lack of discipline in judicial reasoning. Second,* ***it is still the text of the constitution which acquires the requisite interpretative hues and therefore, it is not as if there is violence being perpetrated upon the text if one resorts to the living constitutionalist approach.*****"**

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Qualitative comments have been sourced from multiple commentaries/ newspaper articles/ journals