

Formalism or It's Alternative ? While Interpreting Constitution

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BACKGROUND

Probably one of the most strenuous tasks a court may face is the interpretation of the constitution. Indeed, interpreting constitution is the primary duty of the Court in a constitutional setup that values separation of power. And yet the task is arduous, largely due to the fact that the judiciary's work of telling what constitution is, has direct and visible implications on how and what the other two branches of the government should carry out their functions.

Constitution, on the other hand is an incredible document. It is so amazing that a short text, like constitution, is not only meant to order the present life but also the future of unborn generations. That is, constitution not only has a constant influence on the lives of the people and to the smooth functioning of the state apparatus at present but also to the changed lifestyle and aspirations of people and sophisticated state organs of the future.

As most constitutions are hard to change, the work on the constitution of discovering the relevance of constitutional provisions within the ambit of new born facts and problems is ensured by the interpretation of the text of constitution. However, this process of interpreting constitution is bound to be affected by the presence of multifarious arguments and school of thoughts that seek to pin the answer to the question, what law is? or how law should be understood and then applied?

And among such thoughts or principles, formalism represents a group of thoughts that strongly asserts for objectivism in law, among other things, thus stressing for

determinacy¹, fidelity, transparency and objective prescription of law as rules², instead of understanding law on the basis of some background reasons for which it is present³ or values that it advocates. Hence, expectations or sometimes the ostensible assertion of formalism towards interpreting constitution stems from the very need of preserving the objectivity of law.

Notwithstanding what any principle seeks in the interpretation of constitution, it is true, as once opined by chief justice John Marshall, “provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”⁴ That is, even though the constitution is drafted sometime in the past the application of the text changes overtime though the text remains the same. And in a democratic society the task of “adapting to the various crises of human affairs” and to tell what constitution is “is the province and duty of the Judicial Department.”⁵ That is, through the interpretation of the constitution the same text can arbitrate in different context dissimilar disputes.

And when that context or dispute culminate into ‘Hard Case’ as defined by Ronald Dworkin⁶ as those case which cannot be brought under a clear rule of law, laid down by some institution in advance, and that there exist no definitive provision that endows any of the party to the dispute any clear cut rights and that the judges, who are

¹ See for discussion on legal determinacy Modak-Truran, Mark C., Secularization, Legal Indeterminacy, And Habermas's Discourse Theory of Law <http://papers.ssrn.com/abstract=987821> accessed on 24 December 2007

² See for further discussion, Grey, Thomas C., The New Formalism, Stanford Public Law and Legal Theory Working Paper Series, http://papers.ssrn.com/paper.taf?abstract_id=200732 accessed on 24 December 2007

³ Lawrence Alexander defines formalism as “adherence to a norm’s prescription without regard to the background reasons the norm is meant to serve (even when the norm’s prescription fails to serve those background reasons in a particular case). A formalist looks to the form of a prescription-that it is contained in an authoritative rule-rather than to the substantive end or ends that it was meant to achieve. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it.” Alexander, Lawrence, Law And Formalism, University of San Diego Legal Studies Research Paper Series Research Paper No. 07-18 October 2005 http://papers.ssrn.com/sol3/papers.cfm?abstract_ID=829327 accessed on 25 February 2008

⁴ *Mcculloch v. The state of Maryland et al.* 4 L. Ed. 579, 603 – 604

⁵ *Marbury v Madison*, 1. Cranch 137; 2 L. Ed. 60, 73 (1803)

⁶ See, Dworkin Ronald, Taking Rights Seriously, pg 81-130, Universal Law Publishing Co. pvt. Ltd. 3rd Indian Reprint 2005

called upon to decide the case have to within the ambit of the recognized principle of adjudication discover the rights of the parties involved in the case⁷.

INTERPRETING THE CONSTITUTION

The sense of a Constitutional text normally go beyond its literal words and transcends rather underlying values and object of the text. That is why to probe into the real sense of the Constitution; it is to be constructed with logic and wit. Almost everyone would agree that traditional literal Construction would be miserably inefficacious in deriving the true meaning and thereby solving compound constitutional disputes that the courts are asked to settle. The text doesn't tell the court that the prime minister after resigning from his post can dissolve the parliament⁸ or the prime minister cannot dissolve the parliament after the house is summoned⁹. In fact it is one of the important features of a constitutional texts that it almost never provide "direct answers to the cases that are taken to court that make the ideas of judges being able to tell people they cannot decide for themselves..."¹⁰

At this juncture different philosophies of Constitutional Construction come together to agree upon an idea to again dispute over it. That is, when a court encounters 'Hard Cases' all legal luminaries should agree, in such cases a court needs to go beyond the text of the constitution and step over the limited and inefficacious scope of literal

⁷ A 'hard case' like *Hari Prasad Nepal v Honorable Prime Minister Girija Prasad Koirala* NKP Golden jubilee edition 88 (2052), where the major question of dispute (law) was whether the Prime Minister can resign and then dissolve the parliament or not was decided by the Supreme Court. The then Constitution of the Kingdom of Nepal 2047, in Article 53 (4) provided that His Majesty on the recommendation of the Prime Minister may dissolve the parliament. However it was uncertain whether the Prime Minister could resign first and then recommend for the dissolution of the parliament. In this way this case as a Hard Case, the Supreme Court had to decide in favor of one of the party by adhering to the Constitutional provision, which kept utter silence in regard of very fact. The court had to and thus did interpreted the Constitution and the impugned provision of the Constitution and decided in favor of the Prime Minister's act of dissolving the Parliament. Question raised here is not related to the merit of the case, rather the work of the Supreme Court that of making real sense of the Constitution and Constitutional provision challenged by new problems not anticipated during the drafting of the Constitution.

⁸ *Hari Prasad Nepal v. Honorable Prime Minister Girija Prasad Koirala* NKP Golden jubilee edition 88 (2052)

⁹ *Rabi Raj Bhandari and Others v Honorable Prime Minister Man Mohan Adhikari* NKP Golden Jubilee edition 1 (2052)

¹⁰ Beatty, M. David, *The Ultimate Rule of Law*, pg 5, Oxford University Press 2004

interpretation of the constitution. And discover true and effective answers to the ambiguous questions offered by 'Hard Cases'.

However, with this resolve also there arise profound differences on how to really discover true answers to ambiguous text. And at this point of development of jurisprudence, there are simply two principles ruling the works. A general principle of formalism against what will be discussed as the doctrine of Contextualism¹¹ that seek to stand as an answer to "Hard Cases". In fact both these doctrines are successful in at least giving answers sought by the parties to the constitutional disputes, which then is natural that both the doctrines would contest that theirs is better. Nonetheless, questions shall be answered. Which then lead to the analysis of the merit of the process and answers offered.

FORMALISM IN CONSTITUTIONAL INTERPRETATION

Formalism in relation to the constitutional interpretation particularly stresses on the general notion of 'value-neutral judging'¹². For this purpose formalism generally reflects three 'tendencies,' Originalism, Textualism and Conceptualism¹³ in interpreting constitution. This paper however, only takes and analyses originalism as representation of formalist interpretation of the constitution.

In constitutional law, originalism corresponds to the assertion that the original intent of the text of the Constitution should be reflected on any meaning given to it by the court,¹⁴ thus authoritatively settling any possible 'moral' differences¹⁵ for the purpose of

¹¹ Author would refer contextualism in place of non-originalism as used by Antonin Scalia in "Originalism: The Lesser Evil" 57 University of Cincinnati Law Review 849 (1995) and Practical Reason as used by Larry Alexander in "Practical Reason and statutory interpretation, Collected Essays in Law, Legal rules and Legal Reasoning", pg 319-328, Dartmouth Publishing Company Limited 2000 simply to cohere the idea under different name and to avoid a negative understanding of the concept as oppose to originalism in particular and formalism in general.

¹² Chemerinsky, Erwin, Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters, 54 Okla. L. Rev. 1, 2 (2001)

¹³ Grey supra note 2 at pg 2

¹⁴ See for detail discussion on the development of the principle, Segall, Eric J., 'A Century Lost: The End of The Originalism Debate' 15 Const. Commentary 411 (1998)

¹⁵ Alexander supra note 3 at pg 2-14

ensuring predictability¹⁶ (determinacy) among others, in the decision of the court and in the application of the law.

Originalism, hence is guided by the fundamental assumption that a “constitution does not suggest changeability, but rather its whole purpose is to prevent change - to embed certain rights in such a manner that future generations cannot readily take them away.”¹⁷ Hence originalism clearly advocates, “rightly constituted laws should be the final sovereign”¹⁸ and thus constitutions are the “solemn pacts in which communities commit themselves to their deepest values and highest aspiration. They are supposed to stand above and be immune to the passion and prejudices of politics.”¹⁹

Originalist further assert courts do not make law, they just interpret them however interpretation coupled with the principle of *stare decisis* means interpretation once given to any law or constitutional provision, is given preference over the words of law. Which could be fatal blow to the pillars of constitutionalism and parliamentary democracy as this might encroach into the constitutional authority of the legislature. So, while interpreting the constitution, courts should realize that they don't end up amending or changing the meaning of the provision the way it was understood when it was drafted.

Originalism, as argued, “represents fidelity”²⁰ to Constitution, it represents respect to the text and its original meaning and thus represents relatively uncontroversial way of deriving meaning of the constitution. As it is argued that such interpretation provides a measure of certainty and stability by allowing the words of the constitution to be read in a way that was originally understood, creating a “moral center of gravity”²¹ in the constitution, that would constantly guarantee identical deduction of constitutional meaning.

Advocates of originalism also argue that originalism prevents “judges own predilections for the law... for it establishes a historical criterion that is conceptually

¹⁶ See for detail Scalia, Antonin, ‘The Rule of Law as a Law of Rules’ 56 U. Chi. L. Rev. 1175 (1989)

¹⁷ Segall supra note 14 at 420,421

¹⁸ Cited in Scalia supra note 16 at *fn* 3

¹⁹ Beatty supra note 10 at pg 6

²⁰ Greenwalt, Kent Constitutional and Statutory Interpretation, The Oxford Handbook of Jurisprudence and Philosophy of Law (edt. Jules Coleman, Scott Shapiro) pg. 300, Oxford University Press 2002

²¹ Beatty supra note 10 at pg 6

quite separate from the preferences of judges.”²² Similarly originalism is said to nail the “unconstrained judicial discretion”²³ that may take center stage in any other form of interpretation other than originalism and that originalism also allows “desirable latitude to political body”²⁴ in relation to public policy.

PITFALLS OF FORMALISM IN CONSTITUTIONAL INTERPRETATION

Probably very reasons why formalism is favored by many are also the reasons arguments can be rallied against formalistic means of constitutional interpretation. For an instance, the sturdiest of the argument put forwarded by originalist is that originalism contributes to the “fidelity to constitution”. However, constitution being the source of legitimacy and reflection of political and legal norms of the state in different periods of history, deems originalism inapt. Possibility of fidelity ties with the problems of legitimacy. Duty to comply with constitution comes from its value in the lives of our and future generations. Therefore “we...[cannot and should] not have any duty of compliance to people who lived long ago”²⁵, who possibly failed to anticipate the aspirations and preferences of future generations. Of course, this by no means is suggestive of that normative consideration in the form of history in drawing the real sense of the constitution is worthless. Rather more than the good it seek to achieve as being singular consideration, on the flip side it end up ruining the ultimate purpose of interpreting the constitution and serving justice to the people.

Directing judges to resolve the flashpoints of social conflict in their communities against the understandings of people who lived years ago, leaves them, free to come down on whatever side of a case their consciences tell them is right. Definitely originalist cannot claim that they intend to grant such unfettered discretion to the judges, which will be then veering off the foundations of the originalism as its advocates understood it.²⁶ And further Judge Scalia himself acknowledged,

²² Scalia, Antonin “Originalism: The Lesser Evil” 57 University of Cincinnati Law Review 849 (1995)

²³ Greenwalt supra note 20

²⁴ Ibid.

²⁵ Id. at pg 301

²⁶ “The Originalist conception of adjudication would seem to rest on two broad and interrelated sets of ideas. The first comprises beliefs about the certainty of language and the methods of discovering its

“...[Originalism] requires immersing oneself in the political and intellectual atmosphere of the time-somewhat placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer”²⁷

In fact, it is not the only problem of originalism that it most often leads to erroneous construction of the constitution. By taking into account only the intention of the text, it is both practically impossible to pin exactly, original understanding of the constitution and (thus) would allow judges to come to any conclusion by referring to a vague idea deduced from time, which is evident to us not through our experiences and lives but through inscriptions and history books. That is like telling judges they must give effect to the original intent of the constitution “but without providing them with any guidance or direction and imposing no constraints”²⁸ which inevitably leads to the countless understandings from which they can choose the meaning they wish.

Furthermore, the obsessive credence given to the intention of the drafters of the constitution, if at all it is correctly inferred, may not reasonably be able to conduce the real and overarching sense of the constitution. And by sticking to originalism importance is given to the mind of the drafters who most often than not are preoccupied by their own political and personal belief and ideology, which are bound to differ from person to person and thus fails to create a collective intention of the group of drafters creating a same common constitution and as Larry Alexander identified the problem of multiplicity of authors that “if there are no group minds, how can there be group intentions.”²⁹ So attribution of any sort of intention to the constitutional provision then would be mere on assumption rather than on fact. Ultimately originalist cannot assure unconditional fidelity to the text.

Foregoing argument also raises another significant point that no matter how good it sounds in theory, originalism “in practice can’t meet the standards it sets for itself.

meaning. The second is made up of beliefs about the *allocation of institutional responsibilities between legislative bodies and courts.*” (*emphasis added*) Wellington, Harry H. The Supreme Court and the process of Adjudication, Interpreting the Constitution, pg. 54-55, Universal Law publishing Co. Pvt. Ltd. First Indian Reprint 2005 See also Segall supra note 14, Scalia supra note 16

²⁷ Scalia supra note 22

²⁸ Beatty supra note 10 at pg. 9

²⁹ Alexander, Larry, Originalism or Who is Fred, 19 Harv. J. L. & Pub. Pol. 321, 322 (1996)

There is in originalism, in fact, no neutrality in the derivation, the definition, or even the application of the law.”³⁰ And yet originalism fails to be reflexive while accommodating other normative and value based considerations of constructing a constitution. This in turn results into dim and sometimes dangerous construction of the constitution³¹.

Hence the originalism fails is all account in ascertaining the true meaning and purpose of the constitution. First, it relies solely on one element of interpretation, that when alone not only makes hard to find out the meaning of the constitution but also leads to the defeat of its own idea and the reason for its existence, neutrality of judges and courts. Secondly, it fails to cloth new aspirations and expectations of people from the constitution. Thirdly, it is of no value while serving to resolve new and improvised constitutional deadlocks,³² that is, originalism is flagrantly impracticable.

CONTEXTUALISM: AN ALTERNATIVE TO FORMALISM

Formalism has so far failed to even address, at the first place, the problems posed by “Hard Cases,” let alone solving intricate constitutional disputes to the satisfaction of both parties to the dispute and public in general. Hence contextualism is the proper

³⁰ Beatty supra note 10 at pg. 9

³¹ When the Royal Government after February 1st coup tried to quell the Press and especially electronic media, it stucked to such construction of Article 13 of the then Constitution which read, “(1) No news item, article or any other reading material shall be censored. (2) No press shall be closed or seized for printing any news item, article or other reading material.”³¹ In relation to above provision the government maintained that the Constitution did not guaranteed the right of Press and Publication of transmitting or broadcasting news by electronic media including television and the internet as it did to the press to publish newspaper and other articles. Probably originalist should assert that in 1990 in Nepal the electronic media, let alone Internet was a distant, unanticipated source of information that was not surely covered within the ambit of Article 13 of the Constitution of the Kingdom of Nepal 1990 as it is done in article 16 of the interim Constitution of Nepal 2007, so it was in fact logical from the side of the government to put forward such construction of Article 13. However the far cry that such interpretation of government and initial Supreme Court’s “Green Signal”(It is noteworthy that Supreme Court denied an interim order against the Press Ordinance that tried to differentate news media into electronic media and print media.) to such interpretation was the evidence that the social value and constitutional right as understood by rest of the nation was against the originalism that the authoritative government tried to use as its weapon.

³² Formalist argue “the golden rule of [formalist] interpretation is that if a judge can find nothing in the constitution that limits what a democratically elected majority can do, she or he must stand aside and allow the will of the people to prevail.” Beatty supra note 10 at pg 8. Imagine the two Parliament dissolution case, Supra 8 and 9, it was definite that The Constitution of the Kingdom of Nepal 1990 had kept utter silence on the matter and that the drafters could not have possibly thought of the matter and not dealt on the issue. Now if courts were to follow the formalist conception of the construction of the constitution then, they should have left the issue for public to decide, which would have been not only utterly irresponsible but also a serious threat to the foundation on which the court, the parliament and the government rested.

alternative to the formalism while interpreting constitution. In fact, contextualism is much more than an antonym of formalism, that is understood as something opposite to originalism. By contextualism, it should be understood as the technique as well as the philosophy of constitutional interpretation in which there is a blend of factual and normative considerations, which are taken into account while interpreting the constitution.

In fact, if taken together formalism and contextualism are complementary to a certain extent. Contextualism does complement and incorporate some ideas of originalism in it. Understanding the true intention of the drafters of the constitution and the politico-legal environment that contributed to the development of constitution, is one of many normative considerations that contextualism takes into its account in interpreting the constitution. However, unlike formalism it is not the only one consideration that it takes into account.

And probably the most distinct and deliberate element that differentiates contextualism from formalism and invests contextualism with the identity of its own is the notion of “living constitution”³³ associated with contextualism. And it is all the more fair for contextualism is to say that notion of living constitution and contextualism share the same roots upon which both stand. As an stout supporter of living constitution Justice Holmes once opined that, “When we are dealing with the constitution, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken years and has cost their successors much sweat and blood to prove that they created a nation.”³⁴

Justice Holmes by referring to the successors work in preserving and keeping alive the living constitution clearly intended a theory of constitutional construction beyond mere interrogation of history. Justice Holmes deliberating on the same case made it clear when he opined, “Cases should be considered in light of their whole experience and not merely on what was said a hundred years ago.”³⁵ Thereby Justice Holmes creates

³³ See for detail, Rehnquist, William H. “The Notion of a Living Constitution” 54 Tex. L. Rev. 693 (1976)

³⁴ *Missouri v Holland* (1920) as cited in Ibid.

³⁵ *Missouri v Holland* (1920) as cited in Supra 8 at pg 13

enough bases now to come to an agreement in defining contextualism, as one of the doctrines of constitutional construction. Contextualism could be thus defined as the philosophy as well as the technique of making real sense of constitution based on the text, intention of the drafters, constitutional values, contemporary sense of justice and subjective rights, morality³⁶, “wisdom and justice of various interpretations,”³⁷ norms regarding institutional relationship, rule of law virtues, social norms, efficiency, and most importantly of all the practical efficacy of constitution and constitutional provisions to the present context.

Indeed, a constitution must not necessarily always be read looking backwards, with an eye to the past, but also with full knowledge of the present. What is needed is an independent reason, some separate principle or value that would justify the serious costs that the formalistic interpretation would entail. In all these cases there is a contest between several possible meanings that could only be settled by reasons and arguments that are independent of the methods of interpretation that lie behind each. And it is for and only for contextualism that dares to conflate reasons, arguments, values and sense of justice (Normative Considerations) with the purely Factual Considerations in the form of words, meanings and provisions in order to rightly come to a conclusion regarding what the constitution really means.³⁸

So contextualist interpretation of the constitution would involve more than amassing evidence of the text's meaning, it would involve value judgment and churning out of the spirits and norms of constitution in order to get over the impediments of new generations and Hard Cases in the constitutional development. And as Ronald Dworkin

³⁶ See for detail Dworkin Ronald, 'In Praise of Theory' 29 Arizona St. L. J. 353 (1997)

³⁷ Alexander, Larry in "Practical Reason and statutory interpretation, Collected Essays in Law, Legal rules and Legal Reasoning" pg 321, Dartmouth Publishing Company Limited 2000 pg 321

³⁸ Perhaps the illustration put forwarded by Ronald Dworkin in this juncture is of some use, in throwing better light to the principle, "Suppose I tell my Children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind." Dworkin supra note 6 at pg 134

suggests judges to think themselves as joint authors writing separate chapters that fit in and make sense of a novel that never ends,³⁹ also contributes to the transition of mechanical to more alive interpretation of constitution.

CONCLUSION

It is not that formalism seeks evil end to the interpretation of the constitution, it is not the reason formalism is despised, at least when it comes to the interpretation of the constitution. In fact, formalism too seek protection of prized value of constitutionalism and constitutional law, it is just that formalism is ill founded and it survives on false anticipation of result from its applicability. For an instance, formalists obsessively guard neutrality of court, that is they argue that judges should not make rather apply constitution as they properly mean, that is meaning should not be changed in any case, which of course is well founded, but then question arise what is the actual meaning that is not to be changed by the courts. And after all it is judges whose job is to discover the real meaning of the constitution. Certainly judges should never allow their own preference to have primacy over the actual construction they are supposed to make under the available factual and normative considerations. But it will also be myth to believe that judges own sense of understanding does not get reflected in the construction they make. In fact, as argued earlier originalism is marked by this possibility and it shall be admitted now that contextualism also to a certain extent shows this tendency. However, in comparison to originalism where judges rely on vague historical 'evidence' in retrospect to justify their decision or construction, in contextualism even when judges justify their decisions or constructions they normally adhere to the pervasive and widely acknowledged values and principles of the society.

In short, contextualism provides narrower room for arbitrary construction of the constitution than it appears. And that by creating number of normative considerations, which function as sort of roadmap of construction, possible straying away from the path of the central common value and norms of the politics, law and culture of a state is

³⁹ See for Detail, Dworkin, Ronald, Law's Empire, pg. 225-275, Universal Law Publishing Co. Pvt. Ltd. First Indian Reprint 2002

avoided and yet without loosing practical efficacy of constitution and retaining the ability to solve 'Hard Cases' whenever courts encounter them.

Moreover, the value-based construction of the constitution as opposed by formalist is in many cases not only inevitable but also desirable. Friedmann observes, "principled neutrality has its limits, it cannot possibly mean the abandonment of a choice of values...in the interpretation of the Bill of Rights and of the Fourteenth Amendment, a value choice is inevitable"⁴⁰ In fact the cost of maintaining strict neutrality these days is too high to afford, courts cannot throw blind eye towards shifting tide in areas of constitutionalism and growth of human rights of people in making sense of the constitution that is suppose to rest on the rights of people and some broad philosophical idea of the time⁴¹. Hence contextualism makes all the more sense as the better way of reading constitution as it accommodate new values with the old facts to really make constitution speak its mind.

⁴⁰ Friedmann, W. Law in a Changing Society, pg. 72, Universal Law Publishing Co. Pvt. Ltd. Second Edition 2003

⁴¹ For instance the Grundnorm as proposed by Hans Kelsen in his Pure Theory of Law, represents underlying constitutional principle distinct from the content of the constitution but always adapted to the prevailing state of affairs, so that it could impart validity to the constitution and all others norms derived from it.

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