THE LOUDNESS OF CONSTITUTIONAL SILENCES

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The Constitution of India, the longest written constitution globally, cannot be said 'complete' or 'exhaustive' in nature as there is always something unaddressed, left, forgotten, undetermined. The article first lays down the significance of constitutional silences in national political life. It has addressed issues that arise out of silences in constitutional texts and how sometimes courts have evolved constitutional culture by filling some spaces and at the same time leaving some space to be filled in the future as and when the time comes, for instance, in the Doctrine of Basic Structure. The article had examined the normative implications of silences by arguing the views of scholars such as Martin Loughlin, Laurence Claus, Gabor Halmai, Benjamin Constant, Mohd Fadel. The author has briefly discussed the criticism faced by reading too much through silences and finally concluded that there is still a lot to be explored in the unsaid of constitutional texts which can influence the future course of constitutional jurisprudence.

Keywords: Constitutional Silences, the Basic Structure Doctrine, Article 21, the Doctrine of Invisible Constitution.

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I. Introduction

> *"And in the naked light, I saw Ten thousand people, maybe more People talking without speaking, People hearing without listening, People writing songs that voices never shared anyone dared disturb the sound of silence."*
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> *P. Simon, "The Sounds of Silence"*[1]

Indian constitution is said to be the longest written constitution in the world which has significantly laid down everything, be it the fundamental rights or the governance of States affairs or even the commissions like the Union Public Service Commission with originally 395 articles, eight schedules taking up 251 printed pages in the official version. Indeed, one cannot ask for anything more. However, constitutions can never be exhaustive or complete; certain matters of constitutional importance will still be unaddressed or substantially under determined.[2] In "*Enumeration and the Silences of Constitutional Federalism*," Laurence Claus demonstrated that silences would exist even when the designers feel they have done a thorough work of enumerating them.[3] In Benjamin Constant's view, even though political circumstances necessitate the creation of a constitution, but in proper understanding, the constitution is an evolutionary process. Therefore, what is left out of a constitution's enactment: the silences and omissions are sanctioned by the injunction to do "only what is absolutely necessary."[4] In "*The Silences of Constitutions*," Martin Loughlin delves further into the forms in which constitutional silences are both functional and unavoidable. He argued that gaps and abeyances in constitutions contribute to their longevity and effectiveness and that good constitutionalism needs to accept constitutional silences' inevitable

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[1] Lawrence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Indiana Law J. 515 (1982).
[2] John Gardner, Can There be a Written Constitution? 162 (Oxford Studies in Philosophy of Law, 2009).
[3] Richard Albert and David Kenny, *The Challenges of Constitutional Silence: Doctrine, Theory, and Applications*,16 Int. J. Const. Law, 880-886 (2018) (hereinafter 'Albert & Kenny').
[4] Benjamin Constant, Réflections Sur Les Constitutions, Constant Pol' Writings 172 (1988) (hereinafter 'Benjamin Constant').

reality. He further invoked Constant's view of including only what is necessary for the main texts of Constitutions.[5]

The opposite view of scholars is that a significantly silent Constitution can lead to navigation without maps. For instance, Mohammad Fadel argues in *The Sounds of Silence: The Supreme Constitutional Court of Egypt, Constitutional Crisis, and Constitutional Silence* that the constitution's prolixity does not determine a constitutional culture of appreciating constitutional silence. Fadel's exposition of the Egyptian example (demise of Egyptian constitution) shows how Constitutional Courts can generate something very different by insisting to fill every gap with an instantaneous and rigid response even if the text itself appears to be less than incomplete on the pretext of providing definite answers and removing uncertainty.[6] Likewise, Gabor Halmai in *Silence of Transitional Constitutions: The 'Invisible Constitution* examined the development of the "doctrine of the invisible Constitution" in Hungary. Just like our Courts expanded the scope of Article 21, this doctrine was used by the Constitutional Courts of Hungary to introduce liberal ideas on abortions, the death penalty, freedom of speech by expanding its scope to the texts which were not as such present in the constitution.[7] With such precursors in mind, the article will first explore the normative implications of silences; secondly, it will argue that the silences in our constitution are as profound as their written texts. For example, the basic structure theory in India has arisen from the constitution's great silence as the constitution only provided that it can be amended, but it certainly did not state that it can be abrogated or that its fundamental features could be thrown to the winds.

II. The Normative Implications of Constitutional Silences

According to Martin Loughlin, the constitution should leave room for silence. He claims that if silences are not allowed, it will jeopardize the transparency, indeterminacy, and adaptability that helped constitutionalism to succeed in the first place.[8] Silences in

[5] *Id.*
[6] Albert & Kenny, *supra* note 3, at 2.
[7] Albert & Kenny, *supra* note 3, at 2.
[8] Martin Loughlin, *The Silences of Constitutions*, 16 Int. J. Const. Law 922 (2018).

constitutional texts lead to more deliberation and compromises than a rigid comprehensive view of the constitution.[9] On the contrary, McHarg believes that constitutional silence could have the opposite impact in times of crises; the ambiguity silences can generate or jeopardize the very stability that Loughlin and Fadel claim they represent. Of course, the acceptance or rejection of silence has political implications, and it is unclear if these effects are constant and inherent or whether they are contingent and dependent on cultural factors. Further, in a constitutional framework, the question is whether silences are essential for evolution and longevity? Some scholars argue that it is not silence that breeds ground for liberal constitutionalism. Instead, it is the way around, that is the liberal constitutionalism breeds tolerance towards silence. Gabor Halmai's example of Hungary may be used to make a normative argument for accepting silences. He explains how the rise of Hungary's contentious new constitutional nationalism was closely related to the collapse of the 'invisible constitution,' which originated through interpreting constitutional silences. Hungary replaced the old constitution with a new Fundamental Law in 2011. The new Fundamental Law was based on nationalist principles and opposed judicial activism, which got its inspiration through the theory of the invisible constitution. The end of a dominant legal culture that once valued silence has resulted in a loss of respect for the separation of powers and other fundamental constitutional principles.

In India, in Bhanumati v. State of U.P.,[10] the contention of parties that the clause of 'no confidence motion' in Section 28 of the U.P. (Panchayat Laws) 1961 Act is in conflict or repugnant with Part IX of Indian Constitution since part IX has no such provision for removing Pradhan was rejected. Justice A K Ganguly observed that seventy-third amendment regarding decentralization of democracy should not be interpreted to disregard 'no confidence motion' clause regarding Chairperson just based on silence on that aspect.

Laurence Claus argued in *Enumeration and the Silences of Constitutional Federalism* that the lack of clarity or silence around

[9] Albert & Kenny, *supra* note 3, at 2.
[10] Bhanumati v. State of U.P., (2010) 12 SCC 1 : AIR 2010 SC 3796.

enumerated powers, as well as the courts' subsequent empowerment, may lead to the creation of an implied rights doctrine. He claims that the power to refuse the government's competence could be used to establish protections for different rights and freedoms, even though the constitution did not include any explicit protections for the same.[11] For instance, the expansion of Article 21 to include rights such as Right to food, Right to sleep, Right to Privacy, etc. Another example could be Article 19, which explicitly lists eight reasons for restricting freedom of expression. The crucial question of whether Article 19 contains an exhaustive list of restrictions has received little attention in scholarly literature. Recently, in Kaushal Kishor v. State of U.P. (2020),[12] the Supreme Court heard arguments on whether speech can be limited by invoking fundamental rights beyond Article 19. The matter is sub-judice, so let us see how the Supreme Court interprets the existence of silence on the relationships between fundamental rights.[13] Therefore, we can say the acceptance or rejection of Constitutional silences may lead to normative implications.

III. Significance of listening constitutional silences

A. "To be" or "not to be"?

While reviewing the constitutionality of laws, the question arises, whether our judges should limit themselves in deciding whether such laws conflict with norms of the written constitution or whether they should explore outside the four corners of the constitution to reflect principles of liberty and justice.[14] While comprehending how to interpret what Justice Jackson referred to as the "great silences"[15] of the constitution, the issue is how to interpret constitutional silence and the juxtaposition of constitutional declaration in one realm with the absence

[11] Albert & Kenny, *supra* note 3, at 2.
[12] Kaushal Kishor v. State of U.P., (2017) 1 SCC 406.
[13] Raghav Kohli, *The Sound of Constitutional Silences: Interpretive Holism and Free Speech under Article 19 of the Indian Constitution*, 20 Statut. Law Rev. (2020).
[14] Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 Stan L. Rev. 703 (1975).
[15] H.P. Hood & Sons Inc. v. Du Mond, 1949 SCC OnLine US SC 43 : 336 US 525, 535 (1949).

of declaration in another.[16] For instance, in the Constitution-making process, the deliberations on putting up either a powerful president or a strong government view Dr. Rajendra Prasad as a 'strong President' who also happened to be the President of Constituent Assembly is not reflected in the constitution. Nonetheless, the constitution did not envision a President who is merely a cipher or a figurehead through silences in the constitution regarding his powers.

It seems that the drafter stops writing a text when it occurs not to go any further when one is sure that the political culture will manage in times of need.[17] According to Loughlin, Fadel, and McHarg, another explanation for where the text might end is a strategic or political benefit in uncertainty. For example, McHarg addresses the context of secession, suggesting that formal laws are more likely to cause tension and discord in the handling of secession, and it is more strategic to leave the text silent on secession as it may prompt active discussion.[18] Similarly, silence can work for political compromises. It can strategize to avoid a controversial problem that could jeopardize the constitution-making process or as a deferment tactic to avoid addressing an issue that is not yet advanced. For example, the interpretation of the word "law" under Article 13(2) vis-à-vis the Parliament's power to amend the Constitution under Article 368, which followed a series of cases such as Sankari Prasad Singh Deo v. Union of India[19], Sajjan Singh v. State of Rajasthan[20], C. Golak Nath v. State of Punjab,[21] Kesavananda Bharati v. State of Kerala.[22] The reasoning of *Golak Nath* case was abandoned in *Kesavananda Bharati case*. However, it emphasized that the amending power of Parliament has to be limited in some way. The controversy centered on the scope of such restrictions led the Judges to search in the depths of our constitution's silences.

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[16] Lawrence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515 (1982).
[17] Albert & Kenny, *supra* note 3, at 2.
[18] benjamin constant, *supra* note 11, at 4.
[19] Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.
[20] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
[21] C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[22] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

Silence may be deliberate or simply an oversight or of the third category- circumstantial or evolutionary silence (a silence that has developed over time). The drafters may have thought that the issue is laid down or omitted from the constitution, so the drafters did not find it necessary to write down the same in the founding document. For instance, the Supreme Court in Indira Nehru Gandhi v. Raj Narain[23] held that judicial review and free and fair elections were basic features of the constitution and are beyond the amending power of the parliamentarians. The constitution does not lay it explicitly, but the Supreme Court inferred this from the constitution's silence. Likewise, while interpreting if the silence in Article 106 leads to prohibition of pensions to former Members of Parliament, the Supreme Court observed in Lok Prahari v. Union of India that the payment of pensions to some constitutional functionaries through express provisions in the constitution does not imply that it forbids the payment to other constitutional functionaries.[24]

B. Decisions of not to 'decide'?

Invisibility is not something that is not written; instead, it is something that is not obvious to an ordinary person. As Susan Sontag aptly puts it, "*to look at something that is 'empty' is indeed to look, to see something—even if it is just the ghosts of one's expectations. Silence is inextricably a mode of expression...*"[25] By the Forty-fourth constitutional amendment in 1978, a proviso was added to Article 74(1), which stated that even though the President was mandated to act per the advice of his Council of Ministers, he could require his Council of Ministers to reconsider such advice. However, when such advice had been reconsidered and again tendered to the President, he had to act under that advice. However, there is no prescription as to the time when he should so act. President Giani Zail Singh took advantage of this chasm while considering the controversial Post Office Bill, 1987. Even though the bill was passed by both the Houses of Parliament,

[23] Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159 : AIR 1975 SC 1590.
[24] Lok Prahari v. Union of India, (2018) 4 SCC 699.
[25] Susan Sontag, *The Aesthetics of Silence*, in Styles of Radical Will 310-11 (1969) (hereinafter 'Sontag').

there was public outcry about its clause enabling the government of the day to intercept all communications through the mails. He did not clear the bill in his tenure. In fact, he wrote on the file that he hopes his successor would not clear the bill either.[26] All this was possible by taking advantage of one of the constitution's deliberate silences as to when a Bill passed by both Houses of Parliament should be assented by the President. Another instance of taking advantage of silences is by our ex-President A.P.J. Kalam. The Constitution of India mandates a Presidential address at the start of each session, but it does not lay any provision for who will prepare it. By convention, it is done by the government of the day. In 2005, he chose to start it with a poem in Tamil, a critique of parliamentarians and their previous methods of operation.[27] Since he could not alter the speech, the President devised a way to express what he intended to say in verse by utilizing one of the silences in the constitution.

The issue in Jindal Stainless Ltd. v. State of Haryana[28] whether the State required Presidential approval to levy a tax under List II of Schedule VII of the Constitution, the court held that in the absence of any explicit clause mandating such assent, such a condition could not be read into the provision because that would erode the foundation of federalism, which is a part of the constitution's basic structure. In this case, the court used the "door closing silence" doctrine, treating the silence as equal to an expression of an intention that Presidential assent was unnecessary.

C. Listening to silences too much?

Professor John Ely[29] strongly criticized the trend followed by United States Supreme Court in abortion cases. He argued that the court violates its "obligation to trace its propositions to the charter from which it derives its authority" in those rulings which are founded on a right to "privacy" as it cannot be derived from the constitutional text

[26] Fali S. Nariman, *The Silences in Our Constitutional Law*, (2006) 2 SCC J-15.
[27] *Id.*
[28] Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1.
[29] Brian Boynton, *Democracy and Distrust after Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 Stan. L. Rev. 397 (2000).

through arts of construction or interpretation.[30] He even went on to say that a neutral and long-lasting principle can be a thing of beauty and joy forever; however, if it has no relation to any value that the constitution identifies as unique, the court has no authority to impose it as it will no longer be considered as a constitutional principle.[31] Similar jurisprudential development took place in India on the right to privacy and abortion rights by expanding Article 21 by Indian Courts. Even critical of *Kesavananda*'s decision, Durga Das Basu wrote in his commentary, "*The Court took it upon itself to distinguish between the Constitution's essential and non-essential features.*"[32] However, article 368 does not directly or obliquely grant the court any such authority. Recently, in State (NCT of Delhi) v. Union of India,[33] Court denied interpreting proviso to sub-clause (4) of Article 239AA on the principle of constitutional silence or implications and went on to put a caveat that while reading through the silences, the express provisions of text should not become obsolete.

IV. Concluding Remarks

It can sum up that silence is a phenomenon from which we derive practical benefits in interpreting the constitution and developing national political life, rather than a mere theory. For instance, in Manoj Narula v. Union of India,[34] the honorable court recognized that this principle is used to fill gaps to further the larger public interest. On the same note, expanding the scope of locus standi into developing public interest litigation, or when Courts give guidelines as procedural safeguards for protecting the rights of an arrestee[35], women employees at the workplace,[36] etc. is just another expansion of this doctrine. The existence of silences in the constitutional texts occur not always because of linguistic ambiguity or the incapability to forecast the future;

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[30] Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 Stan. L. Rev. 703 (1975).
[31] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 949 (1973).
[32] Sontag, *supra* note 25, at 7.
[33] State (NCT) of Delhi v. Union of India, (2018) 8 SCC 501.
[34] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[35] D.K. Basu v. State of W.B., (1997) 1 SCC 416 : AIR 1997 SC 610.
[36] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

they are often there purely to be filled by subsequent constitutional interpretation. It is left deliberately in the cases of controversial political issues on which compromise is not immediately possible. As famously said, "*What we cannot speak about, we must pass over in silence*." The questions that arose during this discourse need to be debated and further examined before anything concrete can be laid down because the function and status of written constitutions in governing national political life differ significantly around the world. It can end on the note that the texts of the constitution, though significant, are never decisive, as the silences in the constitution speak louder than words.