

# Unpacking Living Originalism and Living Constitutionalism in the Constitutional Contexts of India and Pakistan

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**ABSTRACT :** Originalism versus living constitutionalism is widely regarded as one of the most contentious current battles over constitutional interpretation. Originalism as a theory seeks to instill original understanding of constitutional provisions in a contemporary constitutional premise by opposing the broad interpretive practice known as living constitutionalism, which prioritizes modern understandings. Originalism theory is an interpretation theory whereas living constitutional theory is a construction theory. Although interpretation is only one activity, it is insufficient to make the Constitution functional. Construction, which involves putting the principles into practice and laying out the institutions that will carry out constitutional functions, is another activity that leads to the establishment of constitutional provisions. When it comes to living Originalism, however, it is the interpretation of provisions that is done to determine the true and actual meaning. It advocates both forms, namely originalism and living constitutionalism which appear to complement one another. The Indian Constitution is a blend of rigidity and flexibility and thus supports living originalism, whereas emerging trends in Pakistani courts favour living constitutionalism. This article analyzes the living originalism approach within the Constitution of India and the living constitutionalism method inside the Constitution of Pakistan. It explores the nuanced views on constitutional commitments within these frameworks, elucidating the impact of interpretative techniques on prison discourse, judicial decisions, and standard constitutional tendencies in both South Asian countries. By delving into these procedures, this has a look at goals to provide a complete knowledge of ways they make a contribution to the evolving nature of constitutional interpretation and governance in India and Pakistan. This article adopts a literature review method.

**KEYWORDS:** Living Originalism, Living Constitutionalism, Interpretation, India, Pakistan.



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## I. INTRODUCTION

The interpretation of the constitution itself is at the center of the argument between originalists and contemporary constitutionalists.<sup>1</sup> According to originalists, the purpose of a written constitution is to provide the judges, the authority and discretion to interpret it anyway they see fit. The living constitutionalists, on the other hand, contend that no one can keep within boundaries and that present interpreters should interpret the constitution as they are supposed to.<sup>2</sup> They contend that there can be no question that judges understand the constitution better than the framers comprehended it. The “application” and “interpretation” of the Constitution’s provisions are the areas where “amendments” should be anticipated. It is being overly assumed that the shift from primary aim to life purpose has little impact on the nation’s core standards in favour of highlighting the confluence of these two methods. If the previous constitution is to be changed in light of the current constitution, any changes must adhere to constitutionalist principles.<sup>3</sup>

The relationships between three concepts namely; “originalism”, “living constitution” and “constitution” must be looked at in order to ascertain the proper application and interpretation of the provisions of the Constitution.<sup>4</sup> Both of these methods have their shortcomings. Finding a middle ground between them, taking them into consideration, and realising that the sharpness of both viewpoints can result in the best interpretation of the Constitution are the challenges.

In a constitutional democracy, Parliament can pass its own laws but only to the degree that they are in conformity with the constitution, which is the highest law. For instance, the executive branch’s actions may be judicially determined to be in line with the laws approved by Parliament.<sup>5</sup>

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<sup>1</sup> Lael K. Weis, “What Comparativism Tells Us About Originalism” (2013) 11:4 Int. J. Const. Law 842 at 849.

<sup>2</sup> Lawrence B. Solum, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate” (2019) 113:6 Northwest. Univ. Law Rev. 1243 at 1254.

<sup>3</sup> Richard Alexander Izquierdo, “The Architecture of Constitutional Time” (2015) 23:4 Wm. & Mary Bill Rts. J. 1089 at 1110.

<sup>4</sup> Jeffrey Pojanowski & Kevin C. Walsh, “Enduring Originalism” (2016) 105 Geo. L. J. 97.

<sup>5</sup> Léonid Sirota, The Case of the Prorogations and the Political Constitution, 3 J. Commonw Law 103 (2021).

Therefore, it may be claimed that even if we agree to maintain the constitution alive and dynamic, we still have to remember that amendments and modifications can be made but not in a way that is in conflict with these essential values, namely law, separation of powers, checks and balances. After examining the “originalism” and “living constitution” standards, the idea of “living originalism” often seen as the confluence of both emerges.<sup>6</sup> When we comprehend the link point that pulls them so closely together, both the ‘basic objective’ and the ‘living purpose’ may be seen more clearly.

Indian living originalism, therefore, puts stress on the dynamic aspect of constitutional interpretations, the incorporation of societal norms into legal systems. On the other hand, the living constitutionalism in Pakistan is a call for flexibility of the judiciary consider modern day scenarios in a bid to continue to provide justice and fundamental rights to growing and evolving polity in both countries.<sup>7</sup> The form of Constitutional originalism which is living originalism permits the Indian courts to liberally construe the Constitution and they take into account what the framers of the Constitution intended in the past, but in the same breath as what is acceptable in the present society of India. The landmark judgments *Vishaka v. State of Rajasthan*,<sup>8</sup> whereby international human rights standard mentioning the progressive societal change are incorporated. This balance ensures that the Constitution stays current with the society but at the same time the Constitution pays a lot of attention to the principles in the document. This method lets in for a flexible and context-touchy information of constitutional standards, making sure the relevance of the record throughout changing instances. On the opposite hand, Pakistan adopts a living constitutionalism approach, which acknowledges the Constitution as a living document capable of adapting to cutting-edge situations. This method recognizes that constitutional values have to be interpreted in light of societal traits, allowing the Constitution to function a resilient and adaptable framework for governance. Despite their divergent methods, each nation exhibits a

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<sup>6</sup> Schwartz A, “The Changing Concepts of the Constitution” (2022) 42:3 Oxf. J. Leg. Stud. 758 at 763.

<sup>7</sup> Solum Lawrence B, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate” (2019) 113:6 Northwestern University Law Review 1243 at 1256.

<sup>8</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

commitment to ensuring constitutional relevance within the face of evolving societal norms and demanding situations.

## **II. METHODS**

This paper adopts a qualitative approach to understand living originalism and living constitutionalism in India and Pakistan. This maps well onto prominent sources: legitimacy in socioeconomic rights according to Abeyratne (2014), and Moncrieff (2019) addressing interpretive theory's complications. This work involved the use of literature from journals, cases and statutes bodies, to have a number of perspectives of the topic under discussion. Drawing from multiple authors including Schwartz (2022), Balkin (2012) and Khan (2017) the study hopes to shed light on the dynamic political processes of constitutionalism and their resulting political cultural expressions. It makes it possible to undertake a comprehensive analysis of the strife between originalism and living constitutionalism as a critical component of the general discourse on the viability and implementation of socioeconomic rights in both countries.

## **III. ORIGINALISM, LIVING CONSTITUTION AND LIVIVING ORIGINALISM**

The originalists authors of today created, interpreted, and applied laws according to the original meaning of the Constitution as it was originally written. The first meaning is how the public understood the provisions of the Constitution at the time it was approved. Most if not all early writers begin their analysis with the text of the Constitution.<sup>9</sup> Likewise, textualists look at the structure of an authority as a whole. Proponents of primitivism say, among other things, that primitivism should prevail over the interpretive approach because it binds judges and limits their ability to deal with changing times.<sup>10</sup> Above all, politicians respect the constitution but they don't really say it and they can do better. In other words, they give an explanation of the constitution from the

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<sup>9</sup> Thomas B. Colby, "Originalism and the Ratification of the Fourteenth Amendment" (2013) 107:4 Northwest. Univ. Law Rev. 1627 at 1654.

<sup>10</sup> Moncrieff, Abigail R., "Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory" (2019) 72 Rutgers Univ. Law Rev. 39 at 67.

perspective of modern society. Pro-life advocates argue that growth is generally permissible because the constitution is broad and the boundaries are not clearly defined.<sup>11</sup>

Living originalism argues that the best versions of originalism and living originalism are not contradictory but compatible. Contemporary concepts of civil rights and civil liberties are consistent with the constitution's framers' concepts by providing primary emphasis on the individual rights while acknowledging the need for State's authorities to uphold its duties towards the national security, public health, safety and the protection of the environment. Preserving the autonomy of the individual freedom stays at the same time the protection of collective interest and its security.<sup>12</sup> And it explained how liberals and conservatives through political parties and social movements play an important role in the continuation of the establishment.

### *A. Originalism*

Originalism can be interpreted in reference to the word 'original', i.e., as the thing was created, framed, or invented. Constitutionalist frame constitutions with the intention of governing their countries in line with their stipulations. The word "originalism" refers to the need that the reader interprets and comprehend the Constitution's plain text in accordance with the framer's original meaning.<sup>13</sup> "Originalism" or "living and dynamic interpretation" are two ways to think of "constitutional interpretation."<sup>14</sup> The idea of "originalism" is in opposition to the idea of a dynamic and living constitution. Originalism Approach, an analogous but distinct approach places emphasis on the main constitution that was in place at the time of ratification. According to originalism, the original methods of constitutional interpretation and construction determine the original meaning of a text.

The basic constitution that was in place at the time of ratification is emphasised using a similar but distinct strategy.<sup>15</sup> Originalism is a term

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<sup>11</sup> Alex Tobin, "The Warren Court and Living Constitutionalism" (2022) 10:1 Ind J.L.& Soc Equ. 221 at 229.

<sup>12</sup> Nelson Lund, "Living Originalism: The Magical Mystery Tour" (2015) 3:1 Texas A & M L Rev, 31 at 41.

<sup>13</sup> Wurman I., "The Origins of Originalism" In: A Debt Against the Living: An Introduction to Originalism. (2017) Cambridge University Press 11.

<sup>14</sup> Rev. TJ Denley, "Originalism v. Dynamic Constitutionalism: Implications of Religious Beliefs on Constitutional Interpretation" (2023) 23 U. Md. L.J. Race Relig. Gender & Class 21 at 54.

<sup>15</sup> E. Stephen, Sachs, "Originalism as a Theory of Legal Change" (2015) 38 Harv J L & Pol'y 817at 819.

for the well-known perspective on constitutional law that accords binding power to the constitution's language or the framer's intentions. True originality is the strong original statement that original meaning is either the sole objective of judicial constitutional interpretation, or at least has lexical priority over all other possible meanings that a text may have.<sup>16</sup> This definition initially refers to the idea that the legal significance of constitutional theory should only be determined by reference to the text's original meaning. Originalism indicates that the application of the Constitution to a topic or debate, to the greatest extent feasible, must be decided by the meaning at the time of its formulation or ratification.<sup>17</sup> Originalists hold that while reading the constitution, one should stick to its original intent. The original meaning of a piece of writing is the meaning that the writers intended and that the readers of that time period understood.<sup>18</sup> The best way to ascertain a text's original meaning is up for debate in the originalism community. Most judges employed the proper syntax. This approach looks at the text's words in terms of their obvious meaning. In cases of ambiguity, all interpretations of the text were taken into account in light of its context and intended audience. Justice prevailed in this honest construction due to the lack of all but one interpretation.<sup>19</sup>

Originalism has gone through three stages since its current resurgence. The first phase concentrated on the text's intention, the second on its significance to the general public, and the third on its meaning under law.<sup>20</sup> Textualism, a different modern take on originality, favours governing according to the original meaning of the text. This style was made famous by Justice Scalia and is common among contemporary authors. Originalism's detractors assert that it is arbitrary and subjective. There remains pressure from peers on the judges; a situation that may lead to bias of their decisions on the cases. This willingness to go with or follow the brethren or society norms can lead to unfavourable judicial

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<sup>16</sup> Mitchell N. Berman, "Originalism Is Bunk" (2009) 84 N.Y.U. L. Rev. 1 at 15.

<sup>17</sup> Christopher J. Peters, "What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism" (2013) Brigh. Young Univ. Law Rev. 1251 at 1259.

<sup>18</sup> E. Greenberg, "Dred Scott and the Dangers of a Political Court" (2009) Lanham, MD: Lexington Books.

<sup>19</sup> John O. McGinnis & Michael B. Rappaport, "The Constitution and the Language of the Law" (2018) 59:4 Wm. & Mary L. Rev. 1321 at 1353.

<sup>20</sup> S. Cornell, "Reading the Constitution, 1787-91: History, Originalism, and Constitutional Meaning" (2019) 37:3 Law & Hist Rev, 823 at 834.

decisions and skew the legal systems impartiality and honesty thus hastening the loss of public confidence in judicial decisions.<sup>21</sup>

### *B. Living Constitution*

The Constitution is the legal framework outlined in the many laws passed to ensure effective government operation. It is frequently challenging to make any modifications to the agreement, nevertheless, due to political expediency and other requirements. However, since the Constitution cannot be changed to meet new societal issues, it is always essential to have a live approach, necessitating the need for a “living constitution.”<sup>22</sup>

The phrase was first used in 1908 by Roscoe Pound when he discussed Justice Marshall’s efforts to give us a live constitution by judicial interpretation.<sup>23</sup> According to Justice Holmes, “A word is the skin of an idea, because live skin is elastic, resilient, and continually replenished, the term is particularly appropriate when used in reference to a living constitution. Although the United States Constitution only has roughly 6,000 words, courts have used millions of words to define the concepts it leaves open-ended.”<sup>24</sup> According to Justice William Brennan, it is crucial to accept the perplexity in the process of trying to apply these possibilities to the current circumstances and view their existence as one of the key advantages in order to read the text honestly. The Framers secured fundamental principles by fighting against some of the worst Crown abuses; the conflict follows a clear pattern. However, because we accept core ideas, dealing with these particular processes is both prevented and freed from us, sometimes tying us to outdated ideals.<sup>25</sup>

The phrase “living constitutionalism” is used in a variety of ways by modern thinkers. The living constitutionalism of today has been defined by a model that rejects originality, maintains that the interpretation of the constitutional text changes to reflect shifting social conditions, and enacts

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<sup>21</sup> Timothy J. Capurro, "How Judges Judge: Theories on Judicial Decision Making," (1998) 29:1 University of Baltimore Law Forum Article 2, online: <http://scholarworks.law.ubalt.edu/lf/vol29/iss1/2>.

<sup>22</sup> Duncan, Richard F., “Justice Scalia and the Rule of Law: Originalism vs. The Living Constitution” (2016) 29:9 Regent Univ. Law Rev. 9 at 26.

<sup>23</sup> R. Pound, “Mechanical Jurisprudence” (1908) 8 Colum. L. Rev., 605 at 610.

<sup>24</sup> H. Lee McBain, “The Living Constitution” (1927) The Workers Education Bureau Press.

<sup>25</sup> J. William, Brennan, Jr., “The Constitution of the United States: Contemporary Ratification” (1986) 27 South Tex. Law Rev, 433 at 441.

reform through procedural techniques that place evolution at the center of judicial reasoning. The notion that the extent of constitutional law is substantially dictated by judicial perceptions of present social mores is known as “living constitutionalism.” Living Constitutionalism” integrates contemporary ideas and attitudes within the judicial understanding of the Constitution.<sup>26</sup> Courts have far too frequently permitted the preferred rights of particular people and groups to take precedence over the general welfare of the legislative majority by using the analytical framework of the living constitution.<sup>27</sup>

### *C. Living Originalism*

“Living Originalism” acknowledges the crucial roles that “originalism” and “living constitutionalism” play. The link between originalism and the living constitution has been carefully examined, and the results indicate that originalism is simply not a work but rather an unstable collection of several, sometimes incongruent approaches to constitutional interpretation.<sup>28</sup> These methods of interpreting the constitution change throughout time to satisfy new construction standards. Although originalists frequently disagree with the concept of a living constitution, they have gone so far as to develop their own living constitutionalism, which undermines the majority of their own histrionic and conventional claims to supremacy.<sup>29</sup>

This translates to the notion of originalism including certain constitutionalism-related elements. Liberals need to understand that conservatives studied constitutional interpretation during a time when they were powerless, during the ancient, dark century of history. Originalism is for those who disagree with their philosophy and others who want to alter it. They think that you cannot ignore the Constitution's original language or history if you care about it.<sup>30</sup> It is culturally obligatory to respect the text of the Constitution, and idolization of judicial construction should not be the way to go when endeavouring to effect meaningful change. To change, however, involves thinking hard about the

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<sup>26</sup> C. Michael Dorf, “The Majoritarian Difficulty and Theories of Constitutional Decision Making” (2010) 13:46 J Const. Law. 283 at 292.

<sup>27</sup> Miller v. Civil City of South Bend, 904 F.2d 1081, 1105 (7th Cir. 1990).

<sup>28</sup> Sanders, Steve, “Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue” (2019) 87 Fordham L. Rev. 2069 at 2103.

<sup>29</sup> J. Peter Smith & Thomas Colby, “Living Originalism” (2009) 59:2 Duke Law J. 307 at 318.

<sup>30</sup> Jack M. Balkin, “The New Originalism and the Uses of History,” (2013) 82 Fordham L. Rev. 641-719.



Constitution. The target audience for “Living Originalism” is open to both conservative and liberal interpretations of the living constitution, or originalism. In reality, those who support living originalism situate themselves between the boundaries that cross both methods of constitutional interpretation.<sup>31</sup>

Liberal research differs greatly from conservative research in this regard. Liberals need to appreciate that relying simply on court rulings and doctrines to interpret the constitution frequently results in a misinterpretation of the circumstances that gave rise to it. Conservatives have to understand that those two concepts can and should be linked to promote the idea of the living constitution that, nonetheless, must remain a part of our normative culture.<sup>32</sup> This is due to the fact that the two constitutional methods must be connected in order to arrive at the appropriate interpretation. By removing the living constitution from the normative culture, originalism can continue to exist.<sup>33</sup>

#### IV. INDIAN CONSTITUTIONAL APPROACH

##### *A. Indian Constitutional Approach Towards Originalism*

The Indian Constitution was established on January 26, 1950. In the first ten years after it was established, the Indian constitution was amended nearly eight times. The Indian Constitution stipulates that the Parliament of the Union may amend the Constitution with a two-thirds vote, although Part III’s amendments to the fundamental rights clause do not require state legislature confirmation. The issue is whether or not modifications are considered part of the “law” mentioned in Article 13(2). The Supreme Court in its Judgment “Shri Sankari Prasad Deo vs. Union of India,<sup>34</sup> the constitutionality of the amendments made under Article 368 of the Constitution was upheld and it was conclusion that the amendment of any part of the Constitution including the fundamental rights is within the province of Parliament that the Constitution has not put a limit on. The court held that constitutional amendments are not

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<sup>31</sup> Christiansen, Jeremy M. “Originalism: The primary canon of state constitutional interpretation.” (2017) 15:1 Geo. J.L. & Pub. Pol’y. 341 at 347.

<sup>32</sup> N.W. Barber, “What is Constitutional Ideology?” (2024) International Journal of Constitutional Law moae045, <https://doi.org/10.1093/icon/moae045>.

<sup>33</sup> M. Jack, Balkin, “Nine perspectives on Living Constitution” (2012) 3 Univ. Ill. Law Rev. 877 at 891.

<sup>34</sup> Shri Sankari Prasad Deo v. Union of India, AIR 1951 SC 458.

“laws” under Article 13 in other words, it said that the Parliament can amend the fundamental rights by amending the Constitution. In this respect, the Court held, that it is impossible for us to conclude that the founders also meant to guarantee such (basic) rights against constitutional amendments in the lack of unambiguous evidence to the contrary.<sup>35</sup> The Court adopted a textualist strategy based on semantic intentions in *Sajjan Singh case*,<sup>36</sup> the supreme court upheld the parliament as amendment of the constitution including the fundamental right under Article 368 of the constitution of India. Through constitutional amendment, Articles 5 and 7 allow amendment of fundamental rights; the court affirmed the 17th Amendment to exemplify the same idea that amendments are not within reach of Article 13. Article 13(2) of the Indian Constitution states that any law made by the state machinery which takes away or abridge any of the rights mentioned under the Constitution, shall be void. Article 368 includes the power of amendment in the hands of the Parliament including the fundamental rights also however, the “basic structure” theory restricts the change in basic structure of Constitution.

An identical issue was later brought before an eleven-judge panel in *Golak Nath vs. the State of Punjab* <sup>37</sup> after a delay of nearly two years. The Supreme Court of India ruled that it was not for the Parliament to amend the fundamental rights enshrined in the Constitution. The decision thus laid down the principle of protection of the citizen’s rights against parliamentary legislation before the basic structure doctrine developed into a phenomenon.<sup>38</sup> Previous rulings in the *Shankari Prasad* and *Sajjan Singh* cases were overturned in this instance. In this instance, the original strategy was also used, although it was more of a “original public interest” strategy. While the marginal note in Article 368 described the article as merely a provision. The Court held that definition of the word “law” under Article 13 (3) broadened the term to include constitutional amendments. According to the Court, the power of the parliament to amend the constitution from these provisions does not float. Although the logic used in this case was different from that used in other judgments, it appears

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<sup>35</sup> Dr. Aman Ullah & Samee Uzair, "Basic Structure of Constitution: Impact of *Kesavananda Bharati* on Constitutional Status of Fundamental Rights" (2011) 26 South Asian Studies 299 at 301.

<sup>36</sup> *Sajjan Singh vs. State of Rajasthan* AIR 1964 SC 845.

<sup>37</sup> *Golak Nath vs. State of Punjab* AIR 1967 SC 1643.

<sup>38</sup> Niranjana Rai, "Case Analysis on *I.C. Golaknath v State of Punjab* AIR 1967 SC 1643" (2021) II:II Indian Journal of Law & Legal Research 1.

that the Supreme Court likewise leaned on the idea of originalism in reaching its conclusion.

Following the conflicting rulings of three influential authorities' cases, the identical topic was eventually heard by a thirteen-judge bench in *Kesavananda Bharti Sripadagalavaru vs. State of Kerala*,<sup>39</sup> founded the "basic structure" doctrine of Indian Constitution and hence, observed that the Parliament cannot amend the constitutional framework. This was a landmark judgement as it prevented the erosion of fundamental constitutional and democratic ethos of the country, to do an amendment that threatens democracy, the rule of law and protected freedoms of the people.<sup>40</sup> The original textualist strategy uncovered by Shankari Prasad and Sajjan Singh was once again the key to the answer. The 1967 ruling in this case was invalidated by the *Kesavananda Bharti* created the "basic theory of structure" as a result of this answer. This "originalist" tenet might be seen as the source of this idea. This is because according to this theory, while the legislature has the full authority to amend any provision of the Constitution, it is implicitly restrained from doing so in order to preserve the "fundamental original principles" of the Indian Constitution, which have periodically been developed through changes in constitutional interpretation in the "living constitution."<sup>41</sup>

The Court through *Kesavananda Bharti's* decision discovered a solution to the current ambiguity by substituting the "Spirit of the Constitution" for the "Letter of the Constitution," and that "real spirit" can only be recognised as the Constitution itself is comprehended. utilising a "live and dynamic" method. Even if the term "primary constitution" is not included in the Constitution, it nevertheless applies to everything. Thus, this "fundamental structural theory" is a judicial creation of the Living Constitution that preserves the original wording and meaning while offering a clearer understanding of the spirit of the document. The court reached the conclusion that when interpreting a text or document, we must respect its aim and that the law's actual content is less significant than the social conditions and goals that motivated its passage. In the end,

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<sup>39</sup> His Holiness *Kesavananda Bharti Sripadagalavaru vs. State of Kerala and Another*, AIR 1973 SC 1461.

<sup>40</sup> Manoj Makireddy, "Case Analysis of *Kesavananda Bharathi v State of Kerala*" (2021) 3:4 Intl J Legal Sci & Innovation 635 at 641.

<sup>41</sup> Rosalind Dixon & David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment" (2015) 13:3 Int. J. Const. Law. 606 at 615.

the Court viewed this fundamental structural theory as “something” that was necessary for the creation of an actual Indian constitution.

### *B. Indian Constitutional Approach Towards Living Constitutionalism*

In several decisions, the courts have established the validity of the Indian Constitution as a living constitution. Article 21 and Article 19 of the Constitution are the sections that best define the courts as “living.” With time, more is learned about these two perspectives. According to *A. K. Gopalan v. State of Madras*,<sup>42</sup> the scope of Article 21 was somewhat limited, but since that time, it has grown in scope. In *Indra Sawhney & Ors. v. Union of India*,<sup>43</sup> better known as Mandal Commission Case, the structuralist argument, which the Court used to reason that Article 16, Part 4 was not an exception to the second equality clause but rather an aspect of it, played a significant role in the decision. Another significant *S.R. Bommai v. Union of India*<sup>44</sup> case came to light in 1994. This Supreme Court ruling on “federalism” is arguably the most significant one to date. In it, the court was given the task of determining the applicability of Article 356 of the Constitution. The Court’s ruling that the president might dissolve a state government on the grounds that it was likely to clash with the fundamental provisions of the Constitution relied heavily on the notion of the basic structure. Therefore, in this ruling, a federalist reading of Article 356 was sought while taking into account the underlying scheme and fundamental purposes of the Constitution.

### *C. Indian Constitutional Approach Towards Living Originalism*

The basic characteristics of originalism as a theory of constitutional interpretation have been preserved. Since some aspects of the Constitution were already established when it was adopted, they can only be amended through the amendment process, and it is these fixed qualities that are crucial for accurate and accurate interpretation. In order to restrict the judge’s latitude, the Constitution’s authors purposefully included severe regulations. Later, in order to lead and guide political decisions, she opted for nebulous concepts and amorphous standards

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<sup>42</sup> *A. K. Gopalan vs. State of Madras* AIR 1950 SC 27.

<sup>43</sup> *Indra Sawhney & Ors. vs. Union of India* AIR 1993 SC 477.

<sup>44</sup> *S.R. Bommai vs. Union of India* AIR 1994 SC 1918.

while leaving the building and implementation to subsequent generations. Additionally, the Constitution's authors refrained from commenting on a number of topics because they could not agree on how to define a certain subject and preferred to keep the door open for future political talks. This serves as a theoretical foundation for living constitutionalists since they are only able to accept their theory when specific transitions and societal changes force them to use their knowledge and put constitutional provisions into action. celebration. Therefore, in order to apply their theory, actual constitutionalists must make these transitions. Such social changes result from variations in constitutional cultures, political affiliations and organisations as they are generally interpreted by courts, as well as variations in judicial personnel and their perspectives on constitutional interpretation.

It might be claimed that the principle of "living originalism" evaluates historical justification using present standards as applied to the Indian Constitution. A liberal approach to constitutional reform is best based on novelty, which makes constitutional change valuable, according to the language of the Indian Constitution. The first involves the interpretation of Article 21 of the Indian Constitution in the case of *A.K. Gopalan v. Union of India*.<sup>45</sup> The Indian constitution equally avows the right to life and liberty in Article 21 of the constitution of India. It holds that none of the people shall be deprived of their lives or freedom but through the course of the law. This provision contains several rights like right to privacy, right to lead decent human life, right to a fair trial and therefore offers the broader safety of the individual.<sup>46</sup>

The "procedural assurances" included in this paragraph were a similar problem. The Supreme Court has heard arguments on this matter from several perspectives of "legal procedure." However, the Court interpreted Article 21 literally and clearly, stating that a "statutory procedure" is a method set down by a competent legislative body to rob anyone of life and personal liberty. The Court emphatically declined to interpret Article 21 of the Constitution in light of the US Constitution,

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<sup>45</sup> *A. K. Gopalan vs. State of Madras* AIR 1950 SC 27.

<sup>46</sup> Nisha Gandhi, "Expanding and Evolving the Ambit of Article 21 of the Constitution of India with the Developing Scenario" (2022) II Indian J Integrated R in L 1.

which, in the judgement of the Justices of the Supreme Court, implies any acceptable law for a specific amount of time while they are in office.

However, the case was attacked for a variety of reasons, and this criticism persisted for the subsequent 25 years until the *Maneka Gandhi* case,<sup>47</sup> in which the Supreme Court fully overturned its previous ruling. The court further declared that any fair, equitable, equitable, arbitrary, or repressive method would constitute a “judicial process of law.” As a result, the Court modified its interpretation from one that was literal to one that was liberal, which altered the way judges thought. This interpretation of Article 21 of the Indian Constitution provided valuable experiences and insights. The study of the provision's judicial authority was a “living originalism” and the Indian judiciary has long been interested in the concept of social renewal.

Another case is the Delhi High Court judgment in *Naz Foundation* case<sup>48</sup> concerning the constitutionality of Indian Penal Code section 377, which makes same-sex behaviour illegal, the Court legalise same-sex relations. Comparative constitutional standards are crucial in determining how our constitutional concepts might be utilised to create a “living originalism” in this situation. The Naz Foundation’s initial strategy was to point out that courts in several other nations have already denounced discrimination based on sexual orientation and sexual identity. In this sense, the courts have construed constitutional rights and privacy laws in ways that more broadly permit same-sex spouses to be intimate. The Indian Constitution, which was maintained on the premise of “living originalism” struck a balance between rigidity and flexibility, as was indicated in the case of *Kesavananda Bharti*.

India, with its wealthy history and numerous cultural tapestries, famous a completely unique technique toward what may be termed as “Living Originalism” in the context of its constitutional and societal evolution. Unlike a static interpretation of criminal texts popular in some jurisdictions, the Indian approach embraces the dynamic nature of its society, acknowledging that the Constitution ought to adapt to the evolving desires and aspirations of its people. The framers of the Indian Constitution, led through Dr. B.R. Ambedkar, had been acutely aware of

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<sup>47</sup> *Maneka Gandhi vs. Union of India*, AIR 1978 SC 621.

<sup>48</sup> *Naz Foundation vs. Government of Delhi*, AIR 2009 Del 105.

the demanding situations posed through a massive and diverse populace. Thus, they predicted a constitution that could accommodate adjustments over the years without dropping its foundational principles. At the coronary heart of the Indian approach closer to Living Originalism is the concept of “constitutional morality.” This notion is going beyond textual interpretations and seeks to hold the essence of the Constitution even as taking into consideration revolutionary interpretations that align with the changing sociocultural panorama. The judiciary, as the dad or mum of the Constitution, plays a pivotal function in shaping and maintaining this technique. Landmark judgments, which incorporates the Kesavananda Bharati case, have underscored the supremacy of the Constitution at the identical time as acknowledging the need for flexibility in interpretation. India’s dedication to Living Originalism is obvious in the transformative nature of its constitutional amendments. Rather than considering the Constitution as a rigid file, amendments were introduced to deal with current troubles and societal shifts.<sup>49</sup> The 73rd and 74th Amendments, for example, decentralized power by using selling local self-governance, reflecting a response to the changing dynamics of governance in an extensive and numerous country.<sup>50</sup> The inclusivity embedded in the Indian approach toward Living Originalism is exemplified by means of the protection of essential rights.<sup>51</sup> The interpretation of these rights has elevated through the years to embody a broader information of human dignity and equality. The Supreme Court, via its judgments, has diagnosed the evolving nature of societal values, leading to modern choices including the decriminalization of homosexuality within the Navtej Singh Johar case. Moreover, the concept of “Directive Principles of State Policy” inside the Indian Constitution adds every other layer to the Living Originalism paradigm.<sup>52</sup> These concepts, even though no longer enforceable in a courtroom of regulation, provide a moral and ethical compass for governance. The nation is expected to attempt closer to their recognition, preserving in thoughts the converting desires of society. This displays a

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<sup>49</sup> Choudhry, Sujit, “Living Originalism in India? ‘Our Law’ and Comparative Constitutional Law” (2013) 25:1 Yale JL & H. <<https://ssrn.com/abstract=3026017>>

<sup>50</sup> Sajith Kumar S., K. Maheswari, “Politics of Inclusiveness: A Study on the Role Played by 73rd and 74th Amendments in Ensuring the Empowerment of Dalits in India, (2022) 6:4 JPSP, 9458 at 9463.

<sup>51</sup> Rehan Abeyratne, “Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy” (2014) 39 Brook. J. Int’l L. <<https://brooklynworks.brooklaw.edu/bjil/vol39/iss1/1>>

<sup>52</sup> Yash Sinha, “Constitutional Ecdysis: How and Why the Indian Constitution May Test its Original Provisions” (2023) 16:2 NUJS Law Review. <<http://nujlawreview.org/wp-content/uploads/2023/12/16.2-Sinha.pdf>>

commitment to adapting governance to the evolving social, financial, and cultural milieu. India's Living Originalism is not confined to constitutional and criminal domain names; it permeates numerous components of day-by-day lifestyles.

The constitutional mandate for the protection of minority rights, coupled with affirmative movement policies, reflects a willpower to inclusivity that acknowledges and addresses ancient injustices. However, annoying situations persist in enforcing Living Originalism correctly. The anxiety among individual rights and collective welfare, in particular inside the context of affirmative motion, calls for a sensitive stability. Striking this balance necessitates non-forestall communicate and a nuanced technique that considers each historic injustices and the evolving desires of society. India's method within the course of Living Originalism represents a dynamic and inclusive interpretation of its constitutional ethos. It recognizes the inevitability of alternate while anchoring its standards in constitutional morality.

## **V. PAKISTAN'S CONSTITUTIONAL APPROACH**

### *A. Pakistan's Constitutional Approach Towards Living Constitutionalism*

Pakistani courts support the approach of living constitutionalism. According to the supreme court's interpretation of the "doctrine of the living tree," the constitution is permitted to adapt and develop through time while still upholding its original intent. The idea that the constitution is a living document and that it should be interpreted liberally has been made prominently by the courts. The goal of progressive interpretation is to keep the constitution alive.<sup>53</sup> The Constitution would be locked in time and lose its value if it were not applied in a progressive manner.<sup>54</sup> A living constitution's fundamental rights are to be flexibly construed to uphold freedom, equality, tolerance, and social justice. According to the Supreme Court, a living constitution in a democracy must be vibrant and alive.<sup>55</sup>

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<sup>53</sup> Gangwar, S., Pagedar, A., "Examining the Living Metaphor in the Indian Constitution" (2022) 13 J G Law Rev. 347 at 364.

<sup>54</sup> Messrs Khurshid Soap and Chemical Industries (pvt) Ltd. vs. Federation of Pakistan PLD 2020 SC 641.

<sup>55</sup> Jurist Foundation vs. Federal Government PLD 2020 SC 1.



The constitution is a living document because life must allow for its implementation in the future rather than limiting it to the past.<sup>56</sup> The constitution, according to Pakistani courts, is a living, organic text that should not be construed in a static or constrictive manner but rather dynamically and progressively. Constitution must be interpreted with an eye to the future, as the future may throw up issues which required legislative intervention.<sup>57</sup>

Both the living constitutionalism and the dynamic interpretation approaches advocate that the constitution and laws be construed in light of the current situation, which will finally fill in any holes in the document.<sup>58</sup> The Supreme Court has ruled that the Constitution is a living document that is subject to dynamic and progressive meaning and interpretation. The Constitution evolved and developed not only through textual changes (i.e. amendments to the Constitution), but also through (continuous) mature understanding of the provisions of the Constitution, meaning not only the words of the Constitution itself, but also the stated concepts and aspirations that stands behind and supports those words.<sup>59</sup> A progressive interpretation approach was adopted by the Supreme Court in *Messrs Khurshid Soap and Chemical Industries (Pvt.)*,<sup>60</sup> according to the Supreme Court, the Constitution is a living, organic testament to the aspirations of the people it is meant to represent. Because of the “living tree” theory, the constitution has been able to adapt and develop through time while still recognising its initial intent. The aforementioned doctrine finds a compromise between predictability and flexibility, two objectives that on the surface appear to be at odds. A constitution must have a dependable collection of laws in order to function. A flexible interpretation, on the other hand, adjusts to the shifting realities of modern life. If the Constitution couldn't be read in this way, it would be stuck in the past and no longer be of any service. Instead, then focusing on what the text really meant before the constitution changed or kept the same, modern interpreters need to concentrate on what the constitution's founders wanted to accomplish. To keep the constitution alive, progressive interpretation was crucial. The constitution is a living

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<sup>56</sup> General Pervez Musharraf vs. Federation of Pakistan PLD 2020 Lahore 285.

<sup>57</sup> Lahore Development Authority vs. Mrs. Imrana Tiwana 2015 SCMR 1739.

<sup>58</sup> Sardar Farooq Ahmed Khan Leghari vs. Federation of Pakistan PLD 1999 SC 57.

<sup>59</sup> Aam Log Party vs. The Election Commission of Pakistan PLD 2022 SC 39.

<sup>60</sup> *Messrs Khurshid Soap and Chemical Industries (pvt) Ltd. vs. Federation of Pakistan* PLD 2020 SC 641.

document, according to the courts, who also support liberal interpretation. In order to prevent the legal system from deteriorating or devolving into anarchy, the court's function is to assist in bridging the gap between society and the requirements of the law. A judge is responsible for ensuring both stability and change. In *Jurist Foundation* case, it was held that every interpretation of the Constitution must be grounded on its legal language, which was derived from the constitution's structure and is a language inscribed in invisible ink among the rules. The Supreme Court held that purpose, aspirations, gender, genesis and thinking of the people of Pakistan are reflected in the preamble of the Constitution. The Constitution was a living document because it could not be limited to the past, but a life had that opened the future for its application. In interpreting the provisions of the Constitution, the courts approach the words of the Constitution and give them a dynamic and progressive meaning, and also lean towards the implementation of the Constitution, which is determined by the constitutional provisions. Courts always avoid interpreting the Constitution, which produces results that the framers of the Constitution did not intend to restrict or change in a pedantic provision of the Constitution.<sup>61</sup> it was held that the constitution was an organic whole. No provision of the Constitution could be interpreted separately, but the Constitution had to be read organically and integrally, and the articles and provisions of the Constitution, read separately from the rest of the Constitution, could offend readers because of the meaning of the Constitution was interpreted. apart. The constitution should have been taken from the constitution as a whole, not as a mechanical deduction, but based on reasons.<sup>62</sup>

In *District Bar Association Rawalpindi vs. Federation of Pakistan*,<sup>63</sup> the majority of the Court has answered yes if it is possible for the judges to verify the content of the constitutional amendments. The majority of the Supreme Court has never affirmed the right to decide on constitutional amendments. This judgment, however, indicates that although the constitution explicitly allows for judicial review of the substantive aspects of constitutional amendments, this right is now open to appeal to superior judiciary. The decision on the 18th and 21st Amendments is crucial for a

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<sup>61</sup> *M.Q.M. (Pakistan) and others vs. Pakistan* PLD 2022 SC 439.

<sup>62</sup> Reference No. 1 of 2020 PLD 2021 SC 825.

<sup>63</sup> *District Bar Association (Rawalpindi) vs. Federation of Pakistan* PLD 2015 SC 401.

variety of reasons. A new definition of parliamentary sovereignty will be one of them. The Supreme Court after this judgment has the authority to review an amendment.

Pakistan's method closer to living constitutionalism unveils a multifaceted landscape marked by using both commendable strides and inherent demanding situations. The theoretical underpinning of residing constitutionalism indicates a dynamic interpretation of the charter in response to evolving societal norms, but the practical implementation in Pakistan has been characterised by using a complicated interaction of things.<sup>64</sup> While the judiciary has been at the leading edge of advancing the idea, with landmark cases reinforcing the concept that the charter is a residing document, questions persist about the consistency and potential overreach of judicial activism.

One crucial issue to scrutinize is the every so often blurred line between judicial activism and judicial overreach. While judicial activism can be considered as an important tool for shielding fundamental rights and upholding constitutional standards, there may be a pleasant balance that need to be maintained to avoid encroaching upon the prerogatives of the executive and legislative branches.<sup>65</sup> Instances where the judiciary has assumed a lively function in coverage topics, which include at some stage in the Lawyer's Movement in 2007, improve worries approximately the separation of powers and the judiciary's boundary within the constitutional framework. This warrants a nuanced examination of whether or not the judiciary's activism aligns with the principles of checks and balances or tilts towards an undue attention of power in the arms of the judiciary.<sup>66</sup>

Constitutional amendments also gift a lens through which to severely evaluate Pakistan's living constitutionalism. The 18th Amendment, supposed to decentralize powers to the provinces and toughen parliamentary democracy, exemplifies the adaptability of the charter to converting occasions. However, divergent perspectives at the

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<sup>64</sup> Hina Khan, "Constitutionalism: Theory and Issues from Pakistan's Perspective" (2017) 22:1 Pakistan Perspectives 111 at 124.

<sup>65</sup> Muhammad Shahid, "The Myth and Reality of Judicial Activism with Reference to Pakistan and Western Countries, (2021) 4:4 Pak J. Int. Aff. 585 at 591.

<sup>66</sup> Maryam S. Khan, "Empowerment without Accountability? The Lawyers' Movement in Pakistan and its Aftershocks" (2019) 50:3 IDS Bulletin. <<https://bulletin.ids.ac.uk/index.php/idsbo/article/view/3049/Online%20article>>

effect of such amendments underscore the demanding situations of achieving a consensus on the stability among federal and provincial powers.<sup>67</sup>

Pakistan's approach closer to living constitutionalism exhibits a panorama marked through both promise and challenges. The judiciary's position, while commendable in upholding constitutional standards, calls for regular scrutiny to ensure a really apt stability of powers. Constitutional amendments, the incorporation of global standards, and societal participation are all important dimensions that call for nuanced analysis. As Pakistan maintains its constitutional adventure, a vigilant and vital evaluation of its method closer to living constitutionalism is essential for fostering a constitutional framework that is responsive, simply, and reflective of the numerous desires of its population.

### *B. Judicial Control under the Veil of Living Constitutionalism in Pakistan*

The fundamental elements of the constitution have not been continuously assumed, according to the constitutional history of Pakistan. In Pakistan's constitution, the basic structure of the Constitution has been completely disregarded. the basic structure of the Constitution was thought to be a theoretical question that couldn't be resolved with authority or certainty. In *Mahmood Khan Achakzai vs. Federation of Pakistan*, the Supreme Court upheld the repeal of the (8th Amendment) Act, 1985, that validate General Zia-ul-Haq martial law by holding that on the grounds that there would still be some protection and assistance to guard against chaos, confusion, uncertainty, and insecurity as well as to support all facets of society. If it is altered in the way specified in article 239 of the Constitution of Pakistan, the Constitution (Eighth Amendment) Act of 1985 is particularly regarded as constitutional.<sup>68</sup> In *Syed Zafar Ali Shah vs. General Pervez Mushaarraf*,<sup>69</sup> the Supreme Court granted authority to the Martial Law Government to amend the Constitution by concluding that there is no good reason not to legalise the extra-constitutional measure, as the Supreme Court held that the military intervention on October 12, 1999 was required and unavoidable given the

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<sup>67</sup> Rana, M. A., "Decentralization Experience in Pakistan: The 18th Constitutional Amendment" (2020) 17:1 Asian J. Manag Cases. 61 at 74.

<sup>68</sup> *Mahmood Khan Achakzai vs. Federation of Pakistan* PLD 1997 SC 426.

<sup>69</sup> *Syed Zafar Ali Shah vs. General Pervez Mushaarraf*, Chief Executive of Pakistan PLD 2000 SC 869.

extraordinary circumstances at that time. The “Doctrine of Necessity” and the “Doctrine of State Necessity” were validated. According to the Supreme Court’s, the Chief Executive of Pakistan (General Pervez Mushaarrarf) who lawfully assumed control with the aid of a plugin at a constitutional stage has the authority to carry out all acts or legislative measures that are in accordance with the Constitution or that can be adopted on the basis of the Constitution, including the power to amend it, in the interest of the State and the public.

Another example of this judicial control is the judgments on the position of Party Head of a political Party under Article 63A of the Constitution. Before the insertion of Article 63A, members of the legislature and provincial assemblies were either urged or coerced to change allegiance. The public, as well as the Parliament and the provincial assemblies with their members, were quite upset about this scenario. The lawmakers placed limitations on themselves outlined in article 63A of the constitution in order to avert these problems. In a latest judgment *Supreme Court Bar Association vs. Federation of Pakistan*,<sup>70</sup> The President of Pakistan has filed a reference under Article 186 of the Constitution for an interpretation of Section 63A of the Constitution to ban members of parliament for life from participating in elections if they voted against the will of the Party Head. The five members bench was comprised of Mr. Justice Umar Ata Bandial (Chief Justice), Mr. Justice Ijaz ul Ahsan, Mr. Justice Mazhar Alam Khan Miankhal, Mr. Justice Munib Akhtar and Mr. Justice Jamal Khan Mandokhail. A vote by a parliamentary party in a house against any directive issued by the latter under Article 63A(1)(1)(b) was ruled to be inadmissible by a 3/2 majority of the judges. regardless of whether the party leader takes any more actions following the vote that would be considered an offence. It was decided in this case that the defective member not only have to be ceased from his membership from the House but also his vote was not counted against the directions of the Party Head whereas it was expressly provided in Article 63A that the vote of the member shall be counted and he shall cease to be a member of the House after casting his vote against the direction of the Party Head. The majority judges only announced the short order and the detailed judgment is not announced up till now.

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<sup>70</sup> *Supreme Court Bar Association vs. Federation of Pakistan* PLD 2022 SC 488.

In his dissenting opinion, Justice Mazhar Alam Khan Miankhel said that the provisions of Section 63A were challenged in this Court in the case of *Wukala Mahaz Barai Tahafaz Dastoor*,<sup>71</sup> and a 7-member Bench (by Majority 6-1) decided that Section 63 A of the Constitution is a constitutional right because it talks about the destruction of evil, and therefore it is used to promote the basic principles of democracy. Subsequently, some amendments were made to Article 63A by the Constitutional Law (Eighteenth Amendment) of 2010, in particular in clause (1) (b) (iii), the words “or the bill (amendment)” were inserted after the words “a Money Bill.” Second, the authority to declare that a member of parliament has defected has been given to “a party head.” In accordance with Article 63A, a party leader is “any individual, by whatever name called, declared as such by the party.” In the *District Bar Association* case, newly amended Article 63A of the Constitution was once more brought before this Court for consideration. The Court held that the amendments introduced in Article 63A of the Constitution through the 18th Amendment are appropriate and should uphold the customary practice of discipline, stability and democracy in Parliament and in all constitutional petitions challenging the validity of the 18th Amendment are rejected. The advisory jurisdiction is analyzing this Article at the Court. The acceptance of Article 63A and other provisions of the Constitution is due to the trinity of the preamble given to this country by the founder of the Constitution. Drafting a constitution or statute's wording requires both talent and art. Unquestionably, a good legislation has a clear, straightforward, unambiguous, exact wording that doesn't repeat terms or use extraneous jargon. Writing a constitution or set of bylaws requires the ability to be succinct, to utilise the right phraseology, and to avoid using unnecessary or repeating terms. The provisions of Article 63A appear to have been written with the aforementioned idea in mind. Furthermore, as a result of a system of power division, the Superior Courts have the inherent capacity to use judicial power solely to interpret, construe, and apply the law. One cannot stretch jurisdiction and power of the Supreme Court beyond the known Constitutional limits. Clause (2) of Article 175 of the Constitution says that according to the ruling in *State v. Zia-ur-Rehman*,<sup>72</sup> no court shall

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<sup>71</sup> *Wukala Mahaz Barai Tahafaz Dastoor vs. Federation of Pakistan* PLD 1998 SC1263.

<sup>72</sup> *State v. Zia-ur-Rehman* PLD 1973 SC 49.

have any jurisdiction except from that which is or may be granted to it by the Constitution or according to any legislation.

One of the most important rules of interpretation of the Constitution was that the courts are creations of the Constitution, that they derive their powers and authorities from the Constitution, and that they must be limited within the limits set by the Constitution. In addition, Article 63A provides penal consequences for defection, in the sense that if the Electoral Commission approves the defection declaration of the party leader against a member, the member so declared is no longer hold his under Article 63A, sub-para 4. It is an established principle of interpretation that a criminal provision must be strictly construed and that its scope cannot be extended unless its plain language or necessary purpose so requires. Therefore, a member cannot be held disqualified lifelong on the ground of his defection under Article 63A of the Constitution because of the process of interpretation proposed or undertaken by the President. It amounted to rewriting or reading the provisions of the Constitution with the word “punishment” and would affect other provisions of the Constitution. If errors are found in the legislation, it is up to the legislator to correct them and it is not the role of the court to correct them.

In his dissenting note Justice Jamal Khan Mandokhail stated that the Judges, when interpreting any provision of the Constitution, must limit themselves to a literal reading of the language of the Constitution with a view to the founders, and nothing else. Otherwise, Judges fall into the realm of creativity and not just interpreting the Constitution. The wording of Article 63A is very clear and there is no room for doubt to judge the intention of the framers of the Constitution. So, no further explanation is needed.

In a recent judgment *Ch. Pervaz Elahi vs. Deputy Speaker Provincial Assembly Punjab*,<sup>73</sup> the petitioner challenged the decision of the Deputy Speaker of the Punjab Assembly by which the Deputy Speaker rejected 10 votes for the petitioner and thus declared the winning candidate for the post of Chief Minister to respondent No.2. The vote was rejected because 10 PML(Q) members failed to comply with the party leader’s directive to the PML(Q) parliamentary party members under Article 63A(1)(b) of the

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<sup>73</sup> *Ch. Pervaz Elahi vs. Deputy Speaker Provincial Assembly Punjab* PLD 2023 SC 539.

Constitution. The Deputy speaker relied on the reasons in terms of the previous judgment in Supreme Court Bar Association vs. Federation of Pakistan whereby it was held that that the defective member not only have to be ceased from his membership from the House but also his vote was not counted against the directions of the Party Head.<sup>74</sup> The Chief Justice of Pakistan constituted a three-member Bench (Mr. Justice Umar Ata Bandial (Chief Justice), Mr. Justice Ijaz ul Ahsan and Mr. Justice Munib Akhtar). These three members of the bench were the same who delivered the majority judgment in the five members bench in Supreme Court Bar Association vs. Federation of Pakistan. It was contended in this case that the direction of the Parliamentary Leader of a Political party in the House is binding on the members of the parliamentary party and not the direction of the Party Head. The Supreme Court in its short order did not deliver any reasons on the question that whether it is the Party Head or The Parliamentary Part Leader in the House whose direction will be binding on the members of the parliamentary party in the House. It is pertinent to mention here that the above mentioned three judges of the bench did not announce their detailed judgment in Supreme Court Bar Association vs. Federation of Pakistan till the announcement of their short order in this case. It should be noted that counsel for the respondents raised an objection to the hearing of the matter by a three Member Bench of this Court and who already exposed their approach in the same matter heard in Supreme Court Bar Association vs. Federation of Pakistan and sought the referral thereof to the Full Court which was rejected and respondents decided not to participate further in the proceedings in this case.

This case was not seen to involve intricate constitutional concerns, but rather a straightforward and basic question of “misunderstanding and application.” But the thrust of the short order is to justify why the conclusion that the party's decision on how to vote was given to the leader of the party given by Justice Azmat Saeed (majority opinion) in the District Bar Association case was not binding on this smaller bench of three members. In addition, the observations in paragraphs 112 and 113 of the judgment have nothing to do with the issue of violation of Article 63A contained in paragraph 105 of the judgment. in the Wukala Mahaz

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<sup>74</sup> Supreme Court Bar Association vs. Federation of Pakistan PLD 2022 SC 488.



Barai Tahafaz Dastoor. Secondly, the observations in the judgment being relied upon with respect to Article 63A are discordant with the actual provisions thereof on the subject of issuance of direction to the members of the Parliamentary Party. In that sense, the observations even if they had had binding effect would have been per incuriam. Additionally, the rulings in Sardar Sher Bahadur Khan and Zulfiqar Ahmed Bhutta to support their contention that the Party Head is the relevant person who has to issue a direction to the members of the Parliamentary Party under Article 63A(1)(b) of the Constitution. However, none of the cited cases substantiate this claim. In this petition, the only issue of public significance pertaining to the enforcement of basic rights is whether the knowledge and application of the short judgment of this Court dated 17.05.2022 passed in Presidential Reference No.1 of 2022 read with Article 63A(1)(b) of the Constitution was correct. The Deputy Speaker of the Provincial Assembly of Punjab's interpretation and application of the aforementioned short order as well as the requirements of Section 63A(1)(b) of the Constitution, in the opinion of the Court, were egregiously erroneous and unfair and could not be upheld. Justice Mazhar Alam Khan Miankhal briefly discussed all the judgments presented in the above-mentioned case in support of the version that the Party Head has the powers to issue directions to the members of the parliamentary party to cast their vote in the Supreme Court Bar Association dissenting note. In District Bar Association case it was held that the party head has the right to remove party representatives (MNA, Senator, MPA) from their seats in the event of voting or to abstain from voting against the directions of the Party head in matters relating to a vote of confidence or a vote of no-confidence, election of the Prime Minister or the Chief Minister and a Money Bill or a Constitution (Amendment) Bill. In Sardar Sher Bhadar Khan case,<sup>75</sup> it was held that the sovereignty of the party head was described as the power vested in the party leader to issue a show cause notice, consider the response to it, and declare a member defective, however, this power may also be in the hands of the nominee of the party Head of the political party. Every member of a political party was bound to follow the instructions given by the political party/party Head not only when voting or abstaining in elections but also when expressing confidence or censure and approval of the annual budget. In Zulfiqar Ahmed Bhutta case,<sup>76</sup> it was held that

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<sup>75</sup> Sardar Sher Bhadar Khan vs. Election Commission of Pakistan PLD 2018 SC 97.

<sup>76</sup> Zulfiqar Ahmed Bhutta vs. Federation of Pakistan PLD 2018 SC 366.

according to Article 63-A of the Constitution, position of Party Head of a political party that had representation in the Parliament, was crucial to how well the members of parliament carried out their parliamentary responsibilities. The Party Head must meet the requirements and be free from the restrictions outlined in Articles 62 and 63 of the Constitution in order to perform this function. A person who experienced incapacity under Article 62 or incapacity under Article 63 of the Constitution was prohibited from holding the title of “Party Head” or using the authorities granted by any article. In *Wukala Mahaz Barai Tahafaz Dastoor*, a 7-member Bench (by Majority 6-1) of this Court held that Article 63A is *intra vires* of the Constitution because it dealt with a predominant disorder and was, therefore, useful in promoting the democratic guiding principles and the authority to declare that a member of parliament has defected has been given to a party head. The brief’s logic is faulty, occasionally inconsistent, and even makes the claim that this issue should only be heard by a larger Supreme Court Bench. The fact that it was written quickly to explain why Justice Azmat Saeed’s in *District Bar Association* and other referred cases majority opinion was not binding demonstrates that this situation clearly includes complicated precedents and that only a larger Supreme Court Bench could resolve it. The courts always presume that every portion of a constitutional provision was added by the legislature for a reason, and that the legislature intended for every part of the statute to be effective when interpreting the provision. A court must infer the spirit of the constitution from the constitution’s wording, yet an argument based on what is considered to be its spirit is always compelling since it makes a powerful appeal to intellect and emotions. Whatever one believes or thinks, the Constitution’s spirit cannot be upheld unless that belief is supported by the Constitution’s wording.

Living Constitutionalism, as a judicial philosophy, asserts that the interpretation of a constitution ought to evolve over the years to adapt to changing societal norms, values, and circumstances.<sup>77</sup> In the context of Pakistan, in which the judiciary performs an essential role in shaping the legal landscape, Living Constitutionalism has emerged as a supply of judicial control. This approach permits judges to interpret the constitution in a dynamic way, taking into consideration the evolving

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<sup>77</sup> Lawrence B. Solum, “Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate” (2019)113:6 *Northwest. Univ. Law Rev.*1243 at 1247.

wishes of society.<sup>78</sup> Living Constitutionalism in Pakistan increases questions about the extent of judicial manage and the potential risks related to such an approach. The subjective nature of Living Constitutionalism raises questions about the consistency and predictability of judicial choices. If judges are empowered to interpret the Constitution based totally on their information of societal modifications, it might result in various interpretations and inconsistent precedents. Judges, as human beings, can be swayed by their private ideals and biases in decoding the Constitution. It may also want to make decisions that echo the judge's picks as opposed to adhere faithfully to constitutional standards. While Living Constitutionalism gives a flexible and adaptive method to constitutional interpretation in Pakistan, it is far critical to seriously take a look at its implications for judicial manipulate. Striking a balance between adaptability and the chance of judicial overreach is critical to ensure that the judiciary stays a mum or dad of constitutional ideas without compromising the steadiness and predictability of the prison system. As Pakistan navigates its complicated socio-political terrain, a considerate and cautious utility of Living Constitutionalism can make a contribution to an extra resilient and just criminal framework.

### *C. Living Originalism can be a Check on Judicial Control in Pakistan*

Effectively, democracy in Pakistan to date has still not been established because political institutions are still very weak and unstable, family oriented political parties and local patronage are still other main sources of political power in Pakistan. All these, erode political accountability and justices thereby promoting volatility of power and governance insecurity. The democratic project will, therefore, need sharper institutionalisation, open electoral systems, and less reliance on traditional political elites for real democratization.<sup>79</sup>

Instead, it may be viewed as a series of institutional experiments leading to a fully developed democracy. Given the crucial position the Supreme Court has taken over the past two decades, judicial control has resulted as a result of heightened incentives to influence and control the

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<sup>78</sup> Iram Khalid, "Role of Judiciary in the Evolvment of Democracy in Pakistan" (2012) 19:2 J. Polit Stud. 125 at 132.

<sup>79</sup> Amanullah & Dr Khan Faqi, "Impact of Dynastic Politics on Democracy in Pakistan" (2023) 7:1 J Positive School Psych 1788 at 1793.

current government.<sup>80</sup> For Pakistan, decentralisation for practicing formation of true democracy is still an inferiority of substantive democracy; it relies on the efficiency of party systems which are still unstable. Politics is based on local preference, traditional appliances, and temporary associations, and thus the governing institutions are unpredictable. It means that, in fact, democratic integrity requires reforms going far beyond the modifications of the Constitution and calling for establishing the genuine political accountability of those who govern as well as creation of stable political institutions.<sup>81</sup>

The constitution's authors should attempt to anticipate future need and provide a structure that will be enduring. The constitution should not be made to be so strict that it has an impact on the future. There is a distinction between amending the Constitution's provisions and enforcing them by interpretation. Although there is a lot of flexibility, expressing does not bring about substantial changes.

The purpose of interpreting or constructing a legal provision is undoubtedly to find out the real intention of the legislation but this intention must necessarily be inferred from the words used by the legislation. If these words are so clear and obvious that no other meaning can be given to them in the ordinary grammatical sense, the judge is not interested in the consequences of the interpretation, however dangerous, the result is for the judge to interpret, not the legislature.<sup>82</sup> When there is a conflict between two constitutional provisions, the Supreme Court of Pakistan has used the rule of interpretation, which favours the provision that grants more rights over the provision that grants lesser rights, rather than adopting the basic structure hypothesis or deciding that any of the fundamental rights are violated by a constitutional provision. If two Constitutional clauses are incompatible with one another, the disagreement must be addressed by using the aforementioned principle of interpretation. It is unnecessary to use the doctrine of basic structure. In order to avoid reaching an erroneous conclusion that was never feasible, it is thus safest and most trustworthy to read the Constitution's provisions

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<sup>80</sup> Yamin, S., "Pakistan: National Security Dilemmas and Transition to Democracy" (2015) 2:1 J. Asian Secur. Int. Aff. 1 at 12.

<sup>81</sup> M Waqas & M Khattak, "Democracy in Pakistan: Problems and Prospects in Making Informed Choices" (2017) 4:1 Intl J Soc Sci & Mgmt 9 at 10.

<sup>82</sup> Muhammad Ismail v. The State PLD 1969 SC 241.

while bearing in mind the document's acknowledged aim and spirit. the purpose for which the Constituent Assembly or Parliament exercised its constitutional authority. The idea of aim, spirit, holistic perspective, and justifiable constitutional expectations, which collectively comprise the good element of teleological interpretation, should thus not be disregarded by the court when applying the language employed in the provision. The court should consider whether a strict adherence to the text's exact wording would render meaningless the vast living document that the laser beam is intended to enlighten. If the answer is affirmative, it is the solemn obligation of the courts as the last arbitrator of the Constitution to safeguard the meaning and spirit of the Constitution by a precise interpretation. It is their constitutional duty to do these tasks. It is important to stress the validity of the desired outcome in light of societal progress, pertinent political principles, the lack of constitutional restrictions, and acceptable methods. Determining the genuine significance of the legislature is surely the goal of interpreting a legal law, but this intention must inevitably be deduced from the legislator's own words. The courts are not concerned with the implications of interpretation, even if the outcome is radical, since the Court must interpret it, not to legislate, if the words are so plain and unambiguous that no alternative meaning can be ascribed to them in their usual grammatical sense. The interpretation cannot be fussy and constrained. General terms must be understood in the context in which they are used rather than being understood in isolation. They are contextually dependent in terms of both colour and substance.<sup>83</sup>

Living originalism, as a constitutional interpretation philosophy, can serve as a critical test on judicial manipulate in Pakistan, a nation grappling with the sensitive balance among the judiciary and different branches of presidency. Living originalism posits that constitutional provisions should be interpreted in a way consistent with their original expertise, however adapted to cutting-edge situations. In the Pakistani context, this method may want to act as a protect against potential overreach by using the judiciary, ensuring that constitutional concepts are not frozen in time but evolve to meet the needs of a converting society.

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<sup>83</sup> Al-Jehad Trust vs. Federation of Pakistan PLD 1996 SC 324.

Pakistan's history is marked via intervals of army rule and political instability, leading to an assertive function for the judiciary as a parent of constitutional values. While judicial activism can be a nice pressure for upholding the guideline of law and defensive man or woman rights, it also raises issues approximately the capacity concentration of electricity in the fingers of the judiciary. Living originalism gives a center floor, taking into account the renovation of constitutional standards while spotting the want for flexibility in interpretation. By considering the authentic intent of constitutional provisions in the context of modern demanding situations, this method promotes a dynamic know-how of the charter.

## **VI. CONCLUSION**

Living originalism, as explored in this paper, emerges as a powerful tool in the context of Pakistan to counter the sizeable judicial evaluation often used in the guise of living constitutionalism. Navigating this tough terrain makes it clear that living originalism gives a sturdy opportunity that offers the vital tests on judicial overreach and encourages a restrained method to constitutional interpretation. Living originalism, which promotes self-belief inside the authentic reason and expertise of the founders of the Constitution, is obtainable as a protect towards arbitrary judicial pastime to make certain some extra strong and predictable prison surroundings. One of the primary assumptions of this studies become to discover the historic and philosophical roots of living constitutionalism and living originalism. The first, the responsibility to broaden interpretations according to modern values, has frequently been invoked to justify prolonged judicial powers. But an important evaluation indicates that there are risks associated with energetic unchecked constitutionalism, especially in a constitutional democracy like Pakistan. Living originalism, however, anchors constitutional interpretation within the original purpose of the framers, emphasizing a more confined and principled approach. This research argues that a deeper expertise of the historic context and intentions of the creators is wanted to recognize the strengths and weaknesses of every interpretive framework. Vibrant originalism emerges as a manageable opportunity that offers a principled technique of interpretation that respects the constitutional text and the unique understanding of the framers. By prioritizing the unique which

means of constitutional provisions, originalism gives a treasured test on judicial activism to make sure that courts follow the framer's imaginative and prescient and do no longer overstep constitutional limitations. In a constitutional democracy like Pakistan, where the judiciary plays a crucial role in upholding the guideline of regulation, adopting an effective originalism can assist create extra stable and predictable criminal surroundings. Emphasizing the importance of fidelity to the unique intentions of the founders of the Constitution, Living Originalism is a protect against arbitrary judicial activism and strengthens the democratic principles contained inside the constitutional device. As Pakistan keeps to grapple with issues of constitutional interpretation and the judiciary, the insights of this paper advocate a considerate and balanced approach wherein living originalism is an essential counterweight to keep living constitutionalism from immoderate judicial scrutiny.

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