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ARTICLE

Examining the *living* metaphor in the Indian Constitution

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Abstract

One popular understanding of the Indian Constitution is that it is a *living* document that evolves with time. Even though this metaphor has been used consistently by all three branches of the Indian state, its use in Indian legal texts is underexplored—as of most metaphors generally. In this article, we critically evaluate the application of the *living* metaphor in Indian constitutional discourse. We first provide an overview of the use of metaphors generally, and especially in the legal field. We then identify the origins and trace the use of the *living* metaphor by studying select Supreme Court judgments which have likened the Constitution to a *living* text and analyse the Court's reasons, if any, for doing so. A comparative analysis of how the Canadian, US, and Australian courts have employed the *living* metaphor demonstrates how the Indian experience differs in its application of the metaphor. We find that the Supreme Court has used different variants of the *living* metaphor, primarily to expand the ambit of Part III of the Constitution. However, due to the inconsistent and unreliable use of this metaphor, we find that this has the potential to lead to illiberal results. We thus make a case for the formulation of a doctrine of *living* constitutionalism which we think will be more resilient to anti-democratic challenges.

Keywords: Metaphors · Living constitution · Constitution of India · Supreme Court · Constitutional interpretation

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1 Introduction

Metaphors abound in the language of political and legal discourse. In matters of interpretation, judges often deliberate whether to follow the spirit of the law or its black letter. Lawmakers and jurists often use metaphors to relay the importance and meaning of legal texts. BR Ambedkar considered Article 32 of the Indian Constitution as the 'very soul … and the very heart of it'.[1] Perhaps the most famous and salient of metaphors in the Indian constitutional discourse is that of the *basic structure*—parts of the legal text so sacred and inviolable that they cannot be amended.[2] Another influential metaphor has been the conception of the Constitution as *living*, one not frozen in time by the original intentions of its drafters but free to evolve and grow with changing times. This idea sometimes takes the form of a *living tree* metaphor as employed in Canadian constitutional interpretation or the *living force* metaphor in Australia. In this article, we analyse the use and usefulness of this temporal metaphor in the Indian context and its broader implications for constitutional interpretation.

Section 2 of this article discusses the role played by metaphors in the legal and political discourse, the assumptions buttressing their usage, and the weaknesses that limit their efficacy. In Section 3, we conduct a comparative examination of the use of the *living* metaphor in the three countries of Canada, the United States, and Australia. Section 4 locates the *living* metaphor in the Indian constitutional discourse by investigating select judgments of the Supreme Court of India. We note the general trend of the Supreme Court's use of the *living* metaphor. Based on these observations, in Section 5, we evaluate of the use of the *living* metaphor as deployed by the Supreme Court. The use of metaphors in Indian legal texts is an underexplored area and we conduct this inquiry to investigate the issues relating to the use of the *living* metaphor in the Indian constitutional context. We conclude that the Supreme Court has been inconsistent in applying this metaphor and has failed to achieve coherence in its application. Mindless repetition of the *living* metaphor no longer serves a useful purpose and is prone to misuse by authoritarian actors. We conclude that, despite its drawbacks, the establishment of a doctrine of *living constitutionalism* is imperative for a liberal and democratic interpretation of constitutional provisions.

2 The use of metaphors in political analysis and constitutional interpretation

Whether one perceives metaphors as plants that bear fruit or brambles that need to be cleared away,[3] they are a powerful analytic device essential to the working and understanding of modern political and legal institutions. The root word for metaphor is

[1] *Constitutional Assembly Debates*, vol 7, document 70, para 172, 9 December 1948. https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-09. Accessed 28 May 2022.

[2] *Kesavananda Bharati v State of Kerala & Anr* (1973) 4 SCC 225.

[3] Eugene F Miller, 'Metaphor and Political Knowledge' (1979) 73(1) *American Political Science Review* 155.

metapherein, a Greek verb which means to 'carry from one place to another'.[4] Aristotle explained its basic function as 'giving the thing a name that belongs to something else'.[5] Metaphors can 'bridge the abstract and the concrete',[6] thus playing an instrumental role in increasing our understanding of the complex physical, political, and social realities we inhabit. By analogising between unlike things (for instance, an apple and the moon), the use of metaphors seeks to reduce the complexity of the new concept or idea (orbital motion) by imputing to it characteristics already known and familiar to the human mind (the visual of an apple falling from the branch of a tree). Metaphors are also employed to compare things already known (for instance, the human brain and a computer) in order to get a better perspective by investigating how the two are like or unlike each other.[7] We learn something new about both regardless of whether the analogy proves to be true or false.[8] Some models of metaphoric thought that have prominently influenced legal and political theory involve the machine, the organism, and the servomechanism.[9] A few examples would include the state *machinery*, the *breaking* of contracts, the *watertight* compartmentalisation of rights, the *balance* of powers between the three *organs* or *branches* of the state, the *birth* and *death* of nations, *grandfather* clauses, the *dead hand* of precedent, the *evolution* of law. The mechanical model held currency in the 18th century before it was replaced by the biological model and thus Newtonian language gave way to Darwinian expression.[10] A change in image necessitated a change in method,[11] facts were favoured over abstractions,[12] leading to the emergence of the realistic, pragmatic form of political theory we are immersed in today.[13] Social choice theorists also favour the use of the market metaphor for explaining the political system, given that both politics and markets give primacy to individual rational choice and are ways of aggregating individual preferences.[14]

[4] Ibid. 156.

[5] Aristotle, *The Basic Works of Aristotle* (Richard McKeon tr, first published 1941, Random House 2009) 1457b.

[6] Benjamin L Berger, 'Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text' (2002) 39(3) *Court Review: Journal of the American Judges Association* 30, 30.

[7] Martin Landau, 'On the Use of Metaphor in Political Analysis' (1961) 28(3) *Social Research* 331, 334–335.

[8] Ibid. 335.

[9] Miller, 'Metaphor and Political Knowledge' (n 3) 157.

[10] Landau, 'On the Use of Metaphor in Political Analysis' (n 7) 344.

[11] Ibid. 343.

[12] Ibid. 351.

[13] Ibid. 345. See also Elliot Zashin and Phillip C Chapman, 'The Uses of Metaphor and Analogy: Toward a Renewal of Political Language' (1974) 36(2) *The Journal of Politics* 290; Giuseppa Saccaro-Battisti, 'Changing Metaphors of Political Structures' (1983) 44(1) *Journal of the History of Ideas* 31; Terrell Carver and Jernej Pikalo (eds), *Political Language and Metaphor: Interpreting and Changing the World* (Routledge 2008).

[14] Debra C Rosenthal, 'Metaphors, Models, and Analogies in Social Science and Public Policy' (1982) 4(3) *Political Behavior* 283, 289.

Legal thought, and legal text, is often abstract and intricate in nature. 'All law is metaphoric. It speaks about (and decides) concrete disputes in abstract terms'.[15] Its specialised knowledge system and particular vocabulary are to be learnt and cultivated, for it does not come naturally to anyone. Metaphors can, and do, occupy a valuable space in legal interpretation because of their ability to simplify the complex and make it more accessible to someone not already fluent in the language of the law. It may be easier to explain to a layperson the constraints a court functions under—being bound by the decisions given by prior benches—by employing the phrase *stare decisis* (the duty to *stand* by things decided). A similar purpose is served by the use of Dworkin's *chain novel* metaphor, where each judge drafts judgments as if writing the chapters of a novel in series; the latter judges are constrained in their choices (of where to take the plot or the characters) by the decisions made by judges earlier along the story, while also mindful and accommodating of possible choices that could be made by judges that come after them.[16] In a similar manner, the visual imagery of the moon eclipsing the sun can be brought into play to explain the status of laws inconsistent with Part III of the Constitution of India—neither dead, nor alive, but merely in the shadows until the moon spins away and the inconsistency is removed by subsequent legislation (the doctrine of *eclipse*). Courts use metaphors not only to explain legal concepts, but also to 'create the meaning of the law'.[17]

In fact, metaphors perform an essential function in the realm of constitutional interpretation, predominantly because of the central position that any constitution occupies in the constellation of legal texts. 'Good' and/or 'strong' metaphors are needed to fill the 'emerging gaps' that continually appear in the already constructed 'analytical skeleton' of constitutional discourse.[18] One of these metaphors is that of the *penumbra* that originated in American constitutional law—'specific guarantees in the Bill of Rights have penumbras, formed by emanation from those guarantees that help give them life and substance'.[19] In the Indian context, the right to privacy has often been considered to be one such penumbral right, flowing from Article 21. In South Africa, rights are variously described by the metaphors of *relationship*, *dialogue*, and *boundaries*, each approach illustrating the multifarious facets of the collective understanding of this idea.[20] The metaphor under study in this article is that of the *living* constitution. Often portrayed as the counter to originalism, this method of constitutional interpretation refers to the 'growth, development and/or change in constitutional law'[21] which 'occurs through the interpretations of the Constitution by

[15] Burr Henly, 'Penumbra: The Roots of a Legal Metaphor' (1987) 15(1) *Hastings Constitutional Law Quarterly* 81, 82.

[16] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 229–231.

[17] Louis J Sirico, Jr, 'Failed Constitutional Metaphors: The Wall of Separation and the Penumbra' (2011) 45(2) *University of Richmond Law Review* 459, 459.

[18] Ian C Bartrum, 'Metaphors and Modalities: Meditations on Bobbitt's Theory of the Constitution' (2008) 17(1) *William & Mary Bill of Rights Journal* 157, 167.

[19] *Griswold v Connecticut* (1965) 381 US 479, 484 [William O Douglas J].

[20] Henk Botha, 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' (2003) *Journal of South African Law* 20.

[21] Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16(1) *Canadian Journal of Law and Jurisprudence* 55, 55.

the judges of the constitutional court'.[22] The objective is to fill in the gaps thrown up by human and societal progress, and the creation of circumstances which were not strictly envisaged by the drafters at the time of making the constitution.

The use of metaphors in the realm of political and legal knowledge is not without its attendant concerns and one must exercise caution with such use. Perhaps the primary question that arises is about the unique nature of these ideas that one needs metaphorical language to explain or understand them. Secondly, why and how are metaphors able to provide this explanation? What is the similarity between these ideas and the metaphors used to explain them? Does the idea exist by itself or is it created by the very use of the metaphor? Is political and legal thought limited by the use of certain metaphors? Lastly, what criteria does one use to evaluate whether the chosen metaphor is the most appropriate one?[23] A few theories have emerged to tackle the challenges raised by these questions. The verificationist view posits that in order for a metaphor to be acceptable, one must be able to verify the analogy that the metaphor presumes exists between the model and the idea. Thus, the metaphoric model must be tested operationally for its relevance. Hence, the politics–markets analogy fails since economic choices are expressed through legal tender while political choices are expressed though votes.[24] On the other hand, the constitutivist view holds that political and/or legal reality cannot be observed, rather it is shaped and defined by language. People choose from a 'range of metaphors and myths that are available for understanding a particular political situation'.[25] Thus, metaphors cannot be verified by perception because perception itself is determined by the metaphor.[26] Rather than discovering likeness between the model and the idea, metaphors create the idea.[27] Miller proposes a middle path of sorts, the manifestationist view, that political reality has an intelligible structure that is manifested, but not created, by the use of metaphors.[28]

One method of gauging the usefulness of a given metaphor uses the 'cognitive distance' between the metaphor and the idea to which it is applied.[29] The utility of the metaphor increases proportionately to the distance, generality, and abstraction of the idea under question. Hence, it is better to use an apple to explain the motion of the moon than the sun. Rosenthal further proposes two methods for evaluating metaphors. If one compares political life to markets or to the human body, it is first necessary to gain an abstract understanding of economic life or the human organism. This process will reveal the inadequacy, if any, in the metaphor of choice (the discounting of collective action, the strict division of labour). Rosenthal warns us against taking

[22] Ibid. 56.

[23] Miller, 'Metaphor and Political Knowledge' (n 3) 158; Rosenthal, 'Metaphors, Models, and Analogies in Social Science and Public Policy' (n 14) 290.

[24] Rosenthal, 'Metaphors, Models, and Analogies in Social Science and Public Policy' (n 14) 293.

[25] Miller, 'Metaphor and Political Knowledge' (n 3) 160.

[26] Ibid.

[27] Ibid. 161.

[28] Ibid.

[29] Robert A Nisbet, *Social Change and History: Aspects of the Western Theory of Development* (Oxford University Press 1969) 240.

the comparison too far or too literally and thus reducing it to absurdity. The effort instead should be directed towards uncovering the 'ignored, hidden, or obscured'.[30]

A dominant metaphor is a 'very powerful instrument'[31] since choosing a metaphor is akin to choosing a world view. Issues arise when we forget the analogy and start taking the metaphor literally. The abuse of metaphors can turn them into myths,[32] while also distorting and misrepresenting reality.[33] 'The metaphor is turned into, not only *a* literal truth, but *the* literal truth about the principal subject in question.'[34] No other interpretation is possible or welcome. Our words have the power to mould our thoughts, and the undiscerning use of inappropriate metaphors will lead to an incorrect understanding of the political/legal reality one is attempting to comprehend, which in certain cases may lead to actual harm. The human brain is not exactly a computer machine, and it can be quite dangerous to conflate the two, for it would do away with the requirements of rest, play, hormonal effects, and external stimulation, to name a few, that a human brain needs but a machine does not. Using the computer metaphor may also preclude the use of other, possibly more suitable, metaphors. Are these metaphorical abstractions doing violence to the subject matter?[35] It thus becomes imperative that we examine the metaphors we use to confirm that we are using them responsibly and that we are actually seeing the full picture we think we are seeing.

3 The constitution as a *living tree*, a *living force*, a *living document*

Several jurisdictions apply temporal qualities to their constitutions. The idea that the constitution is *living* and not *frozen* in time, in its original form and understanding, has been robustly maintained, and defended, across time and geographies. This section outlines the use of the *living* metaphor in jurisdictions other than India and examines the constitutional doctrine that has evolved under the direction of their courts. We have undertaken this exercise to better understand the manner in which the Supreme Court of India has deployed the *living* metaphor in its judgments, to uncover the similarities and differences in each of these experiences. The choice of the three jurisdictions of Canada, the United States, and Australia is predicated on the prolonged use of the *living* metaphor by these constitutional courts, and the relatively greater number of judgments where it has been employed, as compared to the United Kingdom or South Africa, where the metaphor has been used either sporadically or not at all. These countries also fall within Ran Hirschl's 'most similar' category for India.[36] As

[30] Rosenthal, 'Metaphors, Models, and Analogies in Social Science and Public Policy' (n 14) 295.

[31] Landau, 'On the Use of Metaphor in Political Analysis' (n 7) 351.

[32] Ibid. 335. See also Douglas Berggren, 'The Use and Abuse of Metaphor, I' (1962) 16(2) *Review of Metaphysics* 237.

[33] Ibid. 331.

[34] Berggren, 'The Use and Abuse of Metaphor, I' (n 32) 245; emphasis in original.

[35] Rosenthal, 'Metaphors, Models, and Analogies in Social Science and Public Policy' (n 14) 295.

[36] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 245-246.

acknowledged by the Supreme Court of India, the *living* metaphor is a constitutional idea that has migrated from Canadian constitutional jurisprudence. One possible reason for the use of this metaphor in Canada, the United States, Australia, and India is the rigidity (and longevity) of all four constitutions, thus necessitating judicial reinterpretation of constitutional provisions, rather than formal amendments, to keep pace with societal developments. We have undertaken a chronological, positive, and descriptive examination of judicial decisions, attempting to provide a general overview of the use of the metaphor or the development of a constitutional doctrine, as the case may be. Our aim with this exercise is to provide a starting point for comparison and not to provide a causal explanation as to why these courts employ the *living* metaphor. We juxtapose the experiences of other constitutional courts in using this metaphor with that of the Supreme Court of India to highlight the lack of theoretical engagement and scholarship around the *living* metaphor in the Indian context. We claim that the Supreme Court, unlike the other courts, has not only been inconsistent in applying the *living* metaphor, but has also failed to substantially engage with it.

3.1 Canada

Canadian courts have used the *living* metaphor to give 'a large and liberal interpretation … but within certain fixed limits' to statutory and constitutional provisions.[37] Our story begins with *Edwards v Attorney-General for Canada*, which is also known as the *Persons* case for it was the last in a series of judicial decisions which firmly established the idea that women are persons and in this particular instance fulfilled the requirement laid down in the British North America Act 1867[38] (BNA Act) to serve on the Senate.[39] The Privy Council found that the BNA Act 'planted in Canada a living tree capable of growth and expansion within its natural limits'.[40] Lord Chancellor Sankey parallelly used another metaphor, that of a mistress of a house, to exposit on the power of the Dominion to liberally interpret constitutional provisions.[41]

Edwards appears to be the genesis of the *living tree* doctrine in Canadian constitutional law. Since the 1930s, this metaphor has been applied consistently, albeit, it has been argued, in a perfunctory manner.[42] The first application of this metaphor was

[37] *Edwards v Attorney-General for Canada* [1930] AC 124, 107 (Privy Council) per Lord Sankey LC.

[38] The British North America Act 1867 was enacted by the Parliament of the United Kingdom to unite the three British colonies of Canada, Nova Scotia, and New Brunswick into the single Dominion of Canada. It formed the core of the constitutional structure of the Canadian nation. It was renamed and transformed into the Constitution Act in 1982. 'British North America Act', *Encyclopaedia Britannica*. https://www.britannica.com/event/British-North-America-Act. Accessed 11 June 2022.

[39] Vicki C Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' (2006) 75(2) *Fordham Law Review* 921, 945.

[40] *Edwards v Attorney-General for Canada* (n 37) 107.

[41] Ibid. 'Their Lordships do not conceive it to be the duty of this board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be the mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.'

[42] Bradley W Miller, 'Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada' (2009) 22(2) *Canadian Journal of Law and Jurisprudence* 331, 332.

in the realm of gender equality, but its subsequent uses have ranged far and wide. In *Reference re Jurisdiction of Parliament to Regulate and Control Radio Communication*, the Supreme Court of Canada was called upon to decide the Dominion's authority to legislate on a subject which ostensibly fell within the provincial legislative jurisdiction.[43] To Chief Justice Anglin it appeared that though Hertzian waves and radio communication were both 'unknown to' and 'undreamt of by' the framers, if the BNA Act had to be viewed 'as a living tree, capable of growth and expansion within its natural limits', 'every effort should be made to find in the B.N.A. Act some head of legislative jurisdiction capable of including the subject matter of this reference'.[44] There is no discussion as to why the BNA Act must be viewed so, just a tacit acceptance of this *living tree* interpretation. It has also found currency in language rights litigation. In *Attorney General of Quebec v Blaikie et al.*, the Supreme Court of Canada decided that Quebec's direction that French be used exclusively in the legislature and courts of Quebec was ultra vires Section 133[45] of the BNA Act.[46] A broad construction of the BNA Act was necessary to accommodate 'changing circumstances', in this case the 'modern development of non-curial adjudicative agencies which play so important a role in our society'; an 'overly-technical' interpretation would result in a refusal to extend constitutional guarantees to these proceedings which were not envisioned at the time the BNA Act was enacted.[47]

The doctrine of *living tree* interpretation has been applied to the Canadian Charter of Rights and Freedoms (Charter) that was added on to the Canadian Constitution in 1982. *Attorney General for Saskatchewan v Roger Carter, QC* was a 1991 case which challenged certain proposed changes to electoral boundaries and the resulting variance in the size of voter populations as violative of the right to vote under Section 3[48] of the Charter.[49] McLachlin J reiterated that the 'Charter is engrafted onto the living tree that is the Canadian constitution' and this doctrine 'mandates that narrow technical approaches are to be eschewed'.[50] The judge further elaborated on the doctrine: 'It also suggests that the past plays a critical but non-exclusive role in determining the contents of the rights and freedoms granted by the *Charter*. The tree is rooted in past

[43] *Reference re Jurisdiction of Parliament to Regulate and Control Radio Communication* [1931] SCR 541.

[44] Ibid. 546.

[45] Section 133 of the BNA Act reads: Use of English and French languages — Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this Act, and in or from all or any of the courts of Quebec.The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

[46] *Attorney General of Quebec v Blaikie et al.* [1979] 2 SCR 1016.

[47] Ibid. 1029.

[48] Section 3 of the Charter reads: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[49] *Attorney General for Saskatchewan v Roger Carter, QC* [1991] 2 SCR 158.

[50] Ibid. 180.

and present institutions, but must be capable of growth to meet the future'.[51] Hence, while the right to vote was 'rooted' in historical practices, it could not be considered as 'frozen by particular historical anomalies'.[52] The need of the hour was a broad interpretive philosophy that was 'capable of explaining the past and animating the future'.[53] It is clear that the Court considered the *living tree* doctrine equal to the task.

Another decision of import employing this metaphor, *Reference re Same-Sex Marriage*, dealt with the federal legislation providing legal recognition to same-sex marriages, while also allowing officials of religious groups the freedom to refuse to perform, or not perform, these civil marriages.[54] Lord Sankey's judgment in the *Persons* case was relied upon to argue that the natural limits, to which the *living tree* of the Constitution is subject, 'preclude same-sex marriage'.[55] Once again the *frozen concepts* metaphor was employed in juxtaposition to the *living tree* metaphor.[56] None of the arguments in favour of a departure from the latter doctrine on this point found favour with the Court. It ruled that expanding the scope of civil marriage to include same-sex unions, in pith and substance, fell within the exclusive legislative authority of the Parliament, thus buttressing the viewpoint that the Canadian Constitution was a 'living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life'.[57] This progressive interpretation, however, did not extend to the performance or solemnisation of these marriages, which firmly remained within the legislative competence of the provinces.[58]

Another instance of the unsuccessful deployment of the *living tree* doctrine can be found in *R v Prosper*.[59] The question before the Supreme Court was whether Section 10(b)[60] of the Charter imposed a substantial constitutional obligation on the government to provide free and immediate preliminary legal advice to persons taken into custody. The defendant was arrested for driving while intoxicated and, unable to contact a legal aid lawyer or afford a private one, took and failed a breathalyser test. The majority held that the breathalyser evidence should be excluded but the Court unanimously found that the provinces were not constitutionally required to provide free and immediate legal aid to detainees. Justice L'Heureux-Dubé, in her dissent, engaged substantially (relatively speaking) with the natural limits of the *living tree* theory, doubting that it could be employed to 'transform completely a docu-

[51] Ibid.

[52] Ibid. 181.

[53] Ibid.

[54] *Reference re Same-Sex Marriage* [2004] 3 SCR 698.

[55] Ibid. [26].

[56] Ibid. [22].

[57] Ibid.

[58] Ibid. [39].

[59] *R v Prosper* [1994] 3 SCR 236.

[60] Section 10 of the Charter states: Everyone has the right on arrest or detention: a) to be informed promptly of the reasons therefor; b) to retain and instruct counsel without delay and to be informed of that right; and c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

ment or add a provision which was specifically rejected at the outset'.[61] While the *living tree* doctrine enabled the courts to 'by-pass the will of the legislature', it was 'usually used to put right an interpretation which [was] no longer in accordance with the current socio-economic context'.[62] The judge also expressed her reservations about using this doctrine to 'interpret a constitutional document, such as the *Charter*, which [was] still in its infancy at a time when the socio-economic contract [had] not evolved' to a considerable extent.[63] The doctrine/metaphor must be used cautiously and responsibly since it 'would be strange, and even dangerous, if courts could so alter the constitution of a country'.[64]

The *living tree* doctrine is firmly entrenched in Canadian constitutional jurisprudence and applies to both federalism issues and bill of rights matters.[65] Bradley Miller, however, notes a degree of complacency in its use, suggesting that lawyers and judges 'have been content to recite metaphors instead of developing actual doctrine'.[66] He observes that *living tree* constitutionalism comprises four elements—the doctrine of progressive interpretation; the use of a purposive methodology in progressive interpretation; the absence of any necessary role for the original intent of framers in interpreting the constitution; and the presence of other constraints on judicial interpretation.[67] This, however, is Miller's contribution to the development of the doctrine, not the court's. Miller maintains that 'Canadian constitutional interpretive scholarship needs to be refined beyond unhelpful and obscuring metaphors of the "living tree" and "frozen concepts" before Canadian constitutional law can benefit from the debates … that are going on in the United States, Australia, and elsewhere',[68] and it is to these very jurisdictions that we now turn.

3.2 United States

The two frameworks pitted against each other in the battle for constitutional interpretation are *living* constitutionalism and originalism.[69] Ackerman believes that the *living* (US) Constitution is a product of 'eight cycles of popular sovereignty' and almost

[61] *R v Prosper* (n 59) [287].

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] See generally Jackson, 'Constitutions as "Living Trees"?' (n 39) ; Kavanagh, 'The Idea of a Living Constitution' (n 21); Grant Huscroft, 'The Trouble with Living Tree Interpretation' (2006) 25(1) *University of Queensland Law Journal* 3; Peter W Hogg, 'Canada: From Privy Council to Supreme Court' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006) 55.

[66] Miller, 'Beguiled by Metaphors' (n 42) 332.

[67] Ibid. 333.

[68] Ibid. 354.

[69] A few scholars have put forth the argument that the two approaches are compatible and not completely in opposition with each other. See Thomas B Colby and Peter J Smith, 'Living Originalism' (2009) 59(2) *Duke Law Journal* 239; Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 *Northwestern University Law Review* 549.

200 years in the making.[70] The first iteration of this philosophy was in *McCulloch v Maryland*, where the US Supreme Court had to determine whether the Congress has the power to establish a national bank.[71] Chief Justice John Marshall held that even though no specific provision of the US Constitution gave this power to the federal government, it was one that could be inferred from the existing enumerated powers, employing a 'fair construction of the whole instrument'.[72] The US Constitution was 'intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs'.[73] It has been suggested that this reasoning pervaded the constitutional ethos even though the term *living* Constitution was not used during the 19th and early 20th centuries.[74]

On the specific point of the choice of metaphors, Jackson prefers the Canadian *living tree* metaphor to the US *living* Constitution one because the former 'draws attention to origins, to roots, as well as to the possibility of growth. It implies a connection with interpretation in older decisions and a more constrained view of the choices open to later generations'.[75] Jackson believes the *living* Constitution understanding to be less tethered than the *living tree* one: the latter better 'captures the idea of constraint, the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth'.[76] She suggests moving to the 'more rooted "living tree"' metaphor so as to diminish the polarisation between the originalists and living constitutionalists.[77]

The charge of an unfettered judiciary is addressed by Strauss who suggests that the US Constitution is a common law constitution, 'one that evolves, changes over time, and adapts to new circumstances, without being formally amended',[78] through the mechanism of precedents and traditions over time. Constitutional changes are possible 'only within certain limits and only in ways that are rooted in the past'.[79] He argues that the principles protecting free speech do not come from the text of the Constitution but 'were hammered out in fits and starts, in a series of judicial decisions and extrajudicial developments, over the course of the twentieth century'.[80] Beginning with *Schenck v United States*,[81] where the clear and present danger test was laid down, Strauss traces the development of the freedom of speech through

[70] Bruce Ackerman, '2006 Oliver Wendell Holmes Lectures: The Living Constitution' (2007) 120(7) *Harvard Law Review* 1737, 1758.

[71] *McCulloch v Maryland* 17 US 316.

[72] Ibid. 406.

[73] Ibid. 415.

[74] William H Rehnquist, 'The Notion of a Living Constitution' (2006) 29(2) *Harvard Journal of Law & Public Policy* 401, 409.

[75] Jackson, 'Constitutions as "Living Trees"?' (n 39) 954.

[76] Ibid. 926.

[77] Ibid. 960.

[78] David A Strauss, *The Living Constitution* (Oxford University Press 2010) 1.

[79] Ibid. 3.

[80] Ibid. 53.

[81] *Schenck v United States* 249 US 47 (1919).

Abrams v United States,[82] *West Virginia State Board of Education v Barnette*,[83] and *New York Times Co. v Sullivan*,[84] concluding that 'the law of the First Amendment is a creation of the living Constitution'.[85] He repeats this exercise with the judicial decisions regarding racial segregation.[86] The US Supreme Court relied on the equal protection clause of the Fourteenth Amendment to strike down racial segregation in public schools in *Brown v Board of Education of Topeka*.[87] This is despite the fact that the Fourteenth Amendment was understood to support racial equality and not desegregation; seen in the light of the separate but equal doctrine of *Plessy v Ferguson*,[88] segregation in schools was not perceived as violative of equality.[89] In a similar vein, Ackerman contends that the official constitutional canon, the 1787 US Constitution and its formal amendments, does not completely 'express the key changes in America's constitutional identity during the twentieth century'.[90] The gap filling is done by what he terms the 'operational canon'—the 'landmark statutes and superprecedents'—which resemble formal amendments and are often given more weight than the official canon.[91]

Balkin suggests that the *living* Constitution, or the doctrine of *living* constitutionalism, is not a theory of constitutional interpretation but one of constitutional construction.[92] This construction, gradually carried out by both the political and judicial branches of the government through development of caselaw and enactment of framework statutes, is more effective than the formal amendment process in responding to problems, creating new rules, revising previous doctrines, and promoting wholesale change.[93] According to Balkin, the bulk of *living* constitutionalism is produced by the political branch, in fact the 'very concept of a "living" Constitution arose in the early twentieth century due to innovations by Congress and by state and local governments in constructing early versions of the regulatory state'.[94] The courts legitimate these changes through a series of landmark decisions. Balkin illustrates this process through the example of the New Deal Court. The judges 'legitimated the creation of the administrative and welfare state' by 'reinterpreting and expanding federal and state power' though a series of decisions relating to redistributive programmes, which also created 'new procedures to rationalize the expansion of

[82] *Abrams v United States* 250 US 616 (1919).

[83] *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

[84] *New York Times Co. v Sullivan* 376 US 254 (1964).

[85] Strauss, *The Living Constitution* (n 78) 76.

[86] Ibid. 77–97.

[87] *Brown v Board of Education of Topeka* 347 US 483 (1954).

[88] *Plessy v Ferguson* 163 US 537 (1896).

[89] David A Strauss, 'Do We Have a Living Constitution?' (2011) 59 *Drake Law Review* 973, 978.

[90] Ackerman, '2006 Oliver Wendell Holmes Lectures' (n 70) 1750.

[91] Ibid. 1750–1752.

[92] Balkin, 'Framework Originalism and the Living Constitution' (n 69) 550.

[93] Ibid. 561.

[94] Ibid.

administrative agencies'.[95] *Lawrence v Texas* is another example of this double act.[96] The US Supreme Court used the Due Process clause to declare a Texas state law that criminalised sodomy as unconstitutional, but it did so, Balkin claims, only after several states had legalised same-sex sexual activity.[97] Thus, the doctrine of *living* constitutionalism is about the 'processes of constitutional development produced by the interaction of the courts with the political branches'.[98]

3.3 Australia

The Australian Constitution[99] is a product of the American Revolution much like the US Constitution.[100] Andrew Inglis Clark, one of Australia's founding fathers and principal drafters of its Constitution, was heavily inspired by the US Constitution.[101] Inglis Clark's theory of constitutional interpretation placed the duty on the 'present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it'.[102] Being in the 'immediate presence of the problems to be solved', they are the ones best placed to 'make a living force of [the Constitution] which would otherwise be a silent and lifeless document'.[103] What sets the Australian Constitution apart from its US, Canadian, and Indian counterparts is the lack of express rights in the constitutional or accompanying texts; this creates the space for the use of the *living* metaphor to overcome the difficulties presented by this constitutional choice. It is Hon Michael Kirby's opinion that had the judges 'adhered strictly to a construction that fixed the text with the meaning intended by [the] founding gentlemen', the country would have been 'plagued by an uninterrupted series of constitutional crises'.[104]

[95] Ibid. 562.

[96] *Lawrence v Texas* 539 US 558 (2003).

[97] Balkin, 'Framework Originalism and the Living Constitution' (n 69) 564. This sentiment, regarding courts being drivers of social change in conjunction with the legislature, is echoed by Gerald Rosenberg. He suggests that American courts are political institutions but, popular perceptions aside, do not single-handedly produce significant social reform. See Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008).

[98] Ibid. 566.

[99] The corpus of Australian constitutional law comprises the federal Constitution, the Australia Act 1986, and constitutions of the six states. Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Goldsworthy, *Interpreting Constitutions* (n 65) 106.

[100] See generally James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33(3) *Melbourne University Law Review* 1032, 1035; Robert French, 'Inglis Clark: A Living Force' (Papers on Parliament No. 61, May 2014). https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop61/c12. Accessed 14 June 2022.

[101] French, 'Inglis Clark' (n 100).

[102] Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell 1901) 21.

[103] Ibid.

[104] Hon Justice Michael Kirby, 'A I Clark and the High Court of Australia'. https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_clarkandhighcourt.htm#_ftnref1. Accessed 14 June 2022.

Since the 1980s, Australian judges have begun reading in implied rights into the text of the Australian Constitution, a move necessary to 'achieve some of its most fundamental purposes'.[105] One of these landmark cases is *Theophanous v Herald & Weekly Times Ltd.*, where the Court held that the common law of defamation was violative of the implied freedom of political communication.[106] Deane J quoted Inglis Clark at length to construe the Constitution as a *living force* and warned against interpreting it 'on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines' since that would 'deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations'.[107] *Sue v Hill* is another judgment which employed Inglis Clark's *living force* principle of constitutional interpretation, though without referring to it by name.[108] The Court was asked to decide upon the candidature of a UK citizen to the Australian Senate in light of the restriction laid down in Section 44(i)[109] of the Constitution which barred subjects of a foreign power from serving on the Senate. While the UK was not a foreign power in 1900 when the Australian Constitution was adopted, it certainly was so almost 100 years later. The Court was cognisant of the reality facing the present generations of Australians and decided against the candidature, clearly taking the stance that the meaning of the constitutional text must necessarily change with the changing times.

However, the balance tilted in favour of originalists with the decision in *McGinty v Western Australia*.[110] The plaintiffs argued that the principle of representative democracy required that each legally capable adult had the right to vote, and that each such vote was equal to every other vote. The majority rejected the argument that the Constitution protected the principle of 'one vote, one value' on the ground that it was not widely accepted in 1900.[111] Toohey J in a dissenting opinion reiterated the *living* met-

[105] Goldsworthy, 'Australia: Devotion to Legalism' (n 99) 145.

[106] *Theophanous v Herald & Weekly Times Ltd.* [1994] HCA 46.

[107] Ibid. [13].

[108] *Sue v Hill* [1999] HCA 30.

[109] Section 44 of the Commonwealth of Australia Constitution Act reads: Any person who—(i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or(ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or(iii.) Is an undischarged bankrupt or insolvent: or(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

[110] *McGinty v Western Australia* [1996] 70 ALJR 200.

[111] Ibid. 289.

aphor, stating that the Constitution 'must be construed as a living force and the court must take account of political, social and economic development since that time'.[112]

This interpretation, however, has not carried the day. Goldsworthy observes that though Deane and Toohey JJ have consistently referred to the Constitution as a *living instrument* or a *living force*, with Kirby J supporting them, most of the judges have sided with the 'Court's traditional, moderately "originalist" position'.[113] He further predicts that the Court will stick to interpreting the Constitution in 'broad, general terms consistent with original understandings'.[114] Thus, Miller's charge against the Canadian judges, of the lack of a consistent doctrine of *living tree* interpretation, can be laid against the Australian judges too. What we see in the Australian constitutional milieu is neither an engagement with the doctrine of *living* constitutionalism (unlike the United States) nor a continued use of the *living* metaphor (unlike Canada or India). There is great scope for the development of both, especially since this method of interpretation has been in play for barely 40 years.

4 The *living* Constitution of India

This part of the article attempts to locate the *living* metaphor in Indian jurisprudence. That the Constitution of India is a *living* document is an oft-repeated statement but one that is seldom questioned. Indian schools also teach this viewpoint in their curriculum, sans a detailed explanation of what *living* actually means, other than always evolving.[115] As commentors of the legal discipline, born into this understanding of the Constitution as *living*, it seems that we have taken this *living* metaphor for granted and have not stopped to examine whether it has been used purposefully, and to what end. We chart the course of the metaphor within Indian constitutional law through select judgments of the Supreme Court of India. We have chosen to restrict our analysis to the Supreme Court because of its position as the apex constitutional court in the country and the visibility, relevance, and importance of its judgments in the national and international arena.

In India, the *living* metaphor has been largely inspired from Canadian and American jurisprudence. Its origin in the judicial record seems to be within a 1938 Federal Court judgment where the then Governor-General of India referred a question to the Court, relating to the constitutionality of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act 1938.[116] While expanding upon what canons of interpretation and construction the Court would use to answer the question, Sir Maurice Gwyer CJ stated that 'a Constitution of government is a living and organic

[112] Ibid. 200.

[113] Goldsworthy, 'Australia: Devotion to Legalism' (n 99) 150.

[114] Ibid. 152.

[115] 'Chapter Nine: Constitution as a Living Document' in *India Constitution at Work* (National Council for Education Research and Training 2015-16). https://ncert.nic.in/ncerts/l/keps209.pdf. Accessed 10 May 2022.

[116] *In Re: The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* AIR 1939 FC 1; Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act 1938.

thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*'.[117] It is to be noted that this holding is pre-independence. Hence, the Federal Court was dealing with the Government of India Act 1935, which the Court refers to as the Constitution Act throughout the judgment. This Act provided for the federal structure of governance for the country and functioned as the federal Constitution of India at the time. The Court urged that in the case of federal constitutions, 'a broad and liberal spirit should inspire those whose duty it is to interpret it' but they were not 'free to stretch or pervert the language of the enactment' to further any interest.[118] Then, in the landmark judgment of *State of West Bengal v Anwar Ali Sarkar*,[119] the Court struck down the West Bengal Special Courts Act 1950, holding that it violated Article 14 of the Constitution.[120] The Court found that the Act conferred arbitrary powers on the government, allowing at-will classification of offences and cases, violating a fundamental right. Vivian Bose J in a separate judgment stated that it was difficult to interpret provisions of the Constitution 'without regard to the background out of which they arose' as they were not 'just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present'.[121] Thus, the Court used the *living* metaphor to allow flexible interpretation of the Constitution and stated that this was 'no new or startling doctrine'.[122] We note here that the Court states that this is not a new doctrine but does not engage with what the doctrine entails.

Almost two decades later, in *Kesavananda Bharati v Union of India*, the Court utilised the *living* metaphor to decide upon the amending powers of the Parliament.[123] The Court held that the Parliament could amend the Constitution even to abridge fundamental rights, 'as long as the basic structure of the Constitution is retained'.[124] To reach this conclusion about the constituent power of the Parliament, the Court referred to multiple iterations of the US understanding of the *living constitution*.[125] Supplementing that with Nehru's speech in the Constituent Assembly and the Provi-

[117] *In Re: The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (n 116) [10].

[118] Ibid.

[119] *State of West Bengal v Anwar Ali Sarkar* 1952 1 SCR 284.

[120] Constitution of India 1950 art 14 (Equality before Law).

[121] *State of West Bengal v Anwar Ali Sarkar* (n 119) [53], Vivian Bose J.

[122] Ibid. [94].

[123] *Kesavananda Bharati v State of Kerala & Anr* (n 2).

[124] Ibid. [1421].

[125] Ibid. A few instances of the reference to the US doctrine of *living* constitution are as follows: The Court refers to a passage by 'Carl, J, Friedrich, p. 272 of *Man and His Government* (1963): A Constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper function' [1431]; the Court further quotes Justice Holmes: 'the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. (See *Gompers v United States*, 233 US 604 (1914), 610 (1914).' Ibid. [1437].

sional Parliament, YV Chandrachud J quoted an extract from Nehru's speech where the former Prime Minister explained that constitutions could not be static and must be flexible.[126] A connection is made between the aspirational goals of constitutions in general and their need to be flexible. As such there can be 'no permanence in the [Indian] Constitution.[127] YV Chandrachud J, in his concurring opinion, states that a 'Constitution is a living organism and there can be no doubt that a Constitution is evolved to suit the history and genius of the nation.'[128] Thus, the end—solidifying the constituent power of the Parliament to ensure flexibility of the Constitution—was justified by means of the *living* metaphor. Of note, however, are the variants of the metaphor being used.

Since then, the Court has continued to work with the understanding that the Constitution is *living*.[129] In one case, the Court stated that when multiple interpretations are possible, the constitutional provisions must be interpreted harmoniously, as 'the Constitution is a living, integrated organism having a soul and consciousness of its own.'[130] Then soon, in *ADM, Jabalpur v Shivakant Shukla*, the Court went with the same holding of harmonious interpretation and used the *living* metaphor.[131] This case has since been overruled, but the Court held that during an emergency, fundamental rights of detainees could be suspended. When the Court was urged to 'listen to the voice of judicial conscience'[132] to protect personal liberty, the Court stated that 'judicial conscience' or '*spirit* of law' could not be allowed to frustrate the express provisions of the Constitution.[133] The Court went ahead to state that it would not resort to 'judicial constitution making' and go change the meaning of the Constitution, as such '*spirit* of law [], which we recognise, cannot, hover ominously around like some disembodied ghost serving as a substitute for the *living* Constitution we actually have.'[134] One can safely say that here the Court considers the *living* nature of the Constitution a matter of fact.

Further, in *Video Electronics (P) Ltd. and Anr v State of Punjab and Anr*, the Court calls the Constitution an 'organic document',[135] and also a 'living organism'.[136] The Court discussed the constitutional interpretation in the context of 'economic unity' of the states and held that constitutional adjudication must construe this 'organic docu-

[126] Ibid. [1481], YV Chandrachud J.

[127] Ibid. [505].

[128] Ibid. [2105].

[129] In *Sita Ram & Ors v State of Uttar Pradesh* AIR 1979 SC 745 [21], the Court gives the Constitution a 'humane' character while conflating it with another metaphor of a harmonica: 'Petrified print processed through the legislative mint becomes living law when, and only when, its text is tuned to the humane note of the Constitution. We will dwell on the harmonics of the Constitution first since the fundamental note must emanate from it.'

[130] *Chief Justice of Andhra Pradesh & Ors v L.V.A. Dixitulu & Ors* (1979) 2 SCC 34 [67].

[131] *Additional District Magistrate, Jabalpur v Shivakant Shukla* (1976) 2 SCC 521.

[132] Ibid. [485].

[133] Ibid. [165].

[134] Ibid. Emphasis added.

[135] *Video Electronics (P) Ltd. & Anr v State of Punjab & Anr* (1990) 3 SCC 87 [20].

[136] Ibid. These two variants are used in the same judgment by the same judge.

ment' as *living* and adaptive to an evolving society.[137] We note the further mixing of metaphors, the almost arbitrary using of variants of the *living* metaphor within the same judgment. The Court has routinely switched back and forth between the *living* metaphor and the *organic* metaphor, not explaining its choice of words, possibly even not being aware that the two are not perfect substitutes. In another case dealing with separation of powers, the Court stated that the Constitution should be viewed as a 'living and organic thing', which 'must adapt itself to the changing situations and pattern in which it has to be interpreted'.[138] The Court does caution against perversion of the language of the Constitution to fit any constitutional or legal theory, but nonetheless advocates liberal interpretation of the provisions.[139]

A few years later, the Court applied this metaphor in a case discussing independence of judiciary.[140] The main issue before the Court was whether consultation with the Chief Justice of India was mandatory for the appointment of high court judges. In order to answer this, the Court had to first justify revisiting issues already adjudged upon, in an attempt to further legitimise its powers of judicial review. The Court recalled Dr Rajendra Prasad characterising the Constitution 'like a machine … a lifeless thing' which 'acquires life because of the men who control it and operate it'.[141] The judges consider themselves to be these very men that will breathe life into this Constitution and interpret its *living* status, the ones best suited to operate the living Constitution to achieve its aspirational goals.[142] The Court, in addition to calling it an 'ever evolving organic document',[143] reproduced the Canadian Court's words, applying the *living tree* metaphor to the Indian Constitution as follows: 'The Framers of the Constitution planted in India a living tree capable of growth and expansion within its natural limits. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.'[144] It is worthy of note that the judges have picked up the language from one terrain and translocated it to another without any modification, a literal copy-paste. This one instance seems to be a blind and perhaps irresponsible application of the *living* metaphor.

We note a haphazard pattern forming when the Court in one case called the Constitution a 'living entity',[145] then in another case stated that the Constitution can be 'living moral' in a constitutional supremacy, while ultimately calling it a 'living Constitution' in a subsequent paragraph.[146] The Court used these variants to hold that the judiciary had the power to declare a legislation ultra vires.[147] Within a few years,

[137] Ibid. [20].

[138] *Synthetics and Chemicals Ltd. & Ors v State of Uttar Pradesh & Ors* (1990) 1 SCC 109 [67].

[139] Ibid.

[140] *Supreme Court Advocates-On-Record Association & Ors v Union of India* (1993) 4 SCC 441.

[141] Ibid. [429].

[142] Ibid. [423].

[143] Ibid. [300].

[144] Ibid. [321]. 'The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.' *Edwards v Attorney-General for Canada* (n 37) 107.

[145] *Kihoto Hollohan v Zachillhu & Ors* 1992 Supp (2) SCC 651 [38].

[146] *S.S. Bola & Ors v B.D. Sardana & Ors* (1997) 8 SCC 522 [88, 158].

[147] Ibid.

the Court used another variant of the metaphor by categorising the Constitution this time as a 'living framework for the Government of the people exhibiting a sufficient degree of cohesion'.[148]

Soon after, in *Kapila Hingorani v State of Bihar*, the Court considered it 'well-settled' that the Indian Constitution was a 'living organ', one that warranted a change in law as per the change in time.[149] While dealing with the question of liability of the State of Bihar for the non-payment of salaries of government employees, the Court discussed at length and expanded the right to life under Article 21[150] by using the metaphor. The Court held that 'financial stringency [of the State] may not be a ground … for violation of [a] fundamental right'.[151] In an attempt to guarantee the right to liberty, dignity, shelter, and food under the right to life, the Court stated that '[n]ew rights may have to be found out within the constitutional scheme' owing to its *living* nature.[152] The Court, in another case dealing with separation of powers between the centre and the state, deployed the *living* metaphor to move away from centre-leaning interpretation of the Constitution.[153] The Court held that in relation to financial matters, the framers' intent to make a strong Centre has inevitably led to states' being in a weaker position.[154] Hence, constitutional interpretation must 'keep pace with the changing times' and in case of conflict, must be in 'favour of the weaker'.[155] The Court justified this stance by stating that the 'Constitution is an organic living document'[156] and subsequently calling it a 'living organ'[157] in the same judgment. We note how the Court has not only conjoined the *organic* and *living* metaphors but also maintained the inconsistency in using the *living* metaphor. Only the *living* part of the metaphor is consistent, while the other half of the metaphor keeps changing.

In 2004, the Court employed the *living* metaphor in another case of expansive interpretation of fundamental rights. The Court held that the 'Constitution being a living organ, its ongoing interpretation is permissible,'[158] adding further that '[f]or the aforesaid reason we hold,… [r]ight to fly the National Flag freely with respect and dignity is a fundamental right of a citizen.'[159] In 2005, the Court saw 'no two views about the fact that the Constitution of this country is a living organism' and took upon itself the burden of interpreting the document through that lens.[160] Such interpretation, owing to changed circumstances, was to allow the Court to change its posi-

[148] *S.R. Chaudhuri v State of Punjab and Ors* AIR 2001 SC 2707 [33].

[149] *Kapila Hingorani v State of Bihar* (2003) 6 SCC 1 [60].

[150] Constitution of India 1950 art 21 (Protection of Life and Personal Liberty).

[151] *Kapila Hingorani v State of Bihar* (n 149) [65].

[152] Ibid. [60].

[153] *State of West Bengal v Kesoram Industries Ltd. & Ors* (2004) 10 SCC 201.

[154] Ibid. [50], Lahoti J.

[155] Ibid.

[156] Ibid.

[157] Ibid. [262], Sinha J.

[158] *Union of India (UOI) v Naveen Jindal & Anr* (2004) 2 SCC 510 [39].

[159] Ibid. [90].

[160] *Zee Telefilms Ltd. v Union of India* AIR 2005 SC 2677 [35].

tion and interpretation that might have been considered constitutional at the time of adopting the Constitution.[161] One notes that here again, the metaphor is used with the 'organism' variant. In 2006, the Court while holding that right to employment could not be a fundamental right, used *living* in a hopeful manner, stating that '[t]he law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right.'[162] It is noteworthy that the Court, in a prior case, had already called the Constitution a 'living entity' that evolved.[163]

Then, in 2006, the Court again called the Constitution a 'living organ', while considering the issue of '[s]ituational change how far could give rise to a new interpretation of a statutory provision'.[164] The Court allowed itself creative interpretation to strike a balance between 'age-old and rigid laws … and advanced technology'[165] as certain matters might not have been envisioned at the time of the adoption of the Constitution.[166] The Court then, in 2007, proceeded to apply the metaphor as a principle of construction of constitutional provisions.[167] It held that violation of fundamental rights would be violation of *basic structure*, and any law violating the fundamental rights would be void. To reach this conclusion, Sabharwal CJ viewed the Constitution as a 'living document' whose 'provisions have to be construed having regard to the march of time and the development of law' giving regard to the prior decisions that have led to the expansion of the law.[168] In essence, the Court uses one metaphor—*living*—to explain another metaphor—*basic structure*—which was initially employed by the judiciary to delineate the inviolability of core constitutional ideas.

Then in *Suresh Kumar Koushal and Anr v NAZ Foundation and Ors*, the Court deviated from its path of expansive interpretation as it rejected the plea to hold part of Section 377 of the Indian Penal Code (IPC)[169] unconstitutional.[170] A counsel in the case submitted that '[f]undamental rights must be interpreted in an expansive and purposive manner so as to enhance the dignity of the individual and worth of the

[161] Ibid. [55–60]. 'Our Constitution is an ongoing document and, thus, should be interpreted liberally. Interpretation of Article 12, having regard to the exclusive control and management of sport of cricket by the Board and enormous power exercised by it calls for a new approach. The Constitution, it is trite, should be interpreted in the light of our whole experience and not merely in that of what was the state of law at the commencement of the Constitution.' Ibid. [55].

[162] *Secretary, State of Karnataka & Ors v Umadevi (3) & Ors* (2006) 4 SCC 1 [51].

[163] *Rameshwar Prasad & Ors (VI) v Union of India & Anr* (2006) 2 SCC 1 [78].

[164] *State of Punjab and Ors v Amritsar Beverages Ltd. & Ors* (2006) 7 SCC 607 [2]. In [9-10], the Court refers to the Constitution as a 'living organ': 'The Constitution of India is a living organ.… Creative interpretation had been resorted to by the Court so as to achieve a balance between the age-old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science.'

[165] Ibid. [10].

[166] Ibid.

[167] *I.R. Coelho (Dead) by LRs v State of Tamil Nadu* (2007) 2 SCC 1.

[168] Ibid. [42].

[169] Indian Penal Code 1860 s 377 (Unnatural Offences).

[170] *Suresh Kumar Koushal & Anr v NAZ Foundation & Ors* (2014) 1 SCC 1.

human person. The Constitution is a living document and it should remain flexible to meet newly emerging problems and challenges.'[171] The counsel further urged that '[t]he Constitution is a living document and the Court can breathe content into rights.'[172] It is surprising how in this case the Court did not engage in purposive interpretation of the Constitution, despite having already held that situational changes could allow for changes in interpretation to strike a balance between age-old, rigid laws and changing times.[173] We observe that despite the Court's rejection of the plea to apply this metaphor in this particular case concerning fundamental rights, the Court in the subsequent years continued to use it and toy with the variants.[174]

In *NALSA v Union of India and Ors*, the Court upheld the right of transgender persons to decide their self-identified gender and safeguarded their rights under Part III of the Constitution, expanding the purview of fundamental rights.[175] To that end, the Court categorised the Indian Constitution as a 'living organism' which was 'based on a factual and social reality that is constantly changing'.[176] The Court acknowledged that the use of such metaphors became imperative in order to bring a 'complete paradigm shift' and for the law to play a 'predominant role'. In this instance, the Court used the living metaphor to bring about a change in law that 'precedes societal change and is even intended to stimulate it'.[177] The Court also claimed that the Constitution '*is a* living character … [and] must be understood in a way that is intricate and advances modern reality'.[178] Subsequently, within two years, the Court, again while settling a question of the independence of the judiciary, held that 'being an organic and living document must be and has been interpreted positively and meaningfully.'[179] This can be considered a nod to the petitioner's suggestion that

[171] Ibid. [25.11].

[172] Ibid. [25.19].

[173] *State of Punjab and Ors v Amritsar Beverages Ltd. & Ors* (n 164).

[174] In *State of Gujarat & Anr v Justice R.A. Mehta (Retd.) & Ors*, the Court held that '[w]e must always keep in mind that the Constitution is a *living organism* and is meant for the people not just for the Government as it provides for promotion of public welfare.' *State of Gujarat & Anr v Justice R.A. Mehta (Retd.) & Ors* (2013) 3 SCC 1 [99]; emphasis added. In *Manoj Narula v Union of India*, the Court calls the Constitution a '*living instrument* with capabilities of enormous dynamism'. *Manoj Narula v Union of India* (2014) 9 SCC 1 [74]; emphasis added. The counsel in this case also used the metaphor to urge the Court to hold the appointment of persons with criminal records as ministers in the Council of Ministers unconstitutional. The learned counsel contended that 'the doctrine of implied limitation has been accepted as a principle of interpretation of our organic and *living Constitution* to meet the requirements of the contemporaneous societal metamorphosis.' Ibid. [28]; emphasis added. In *Association of Unified Tele Services Providers & Ors v Union of India & Ors*, the Court held that the Constitution '"is a *living organic thing* and must be applied to meet the current needs and requirements". Constitution, therefore, is not bound to be understood or accepted to the original understanding of the constitutional economics.' *Association of Unified Tele Services Providers & Ors v Union of India & Ors* (2014) 6 SCC 110 [43]; emphasis added.

[175] *National Legal Services Authority v Union of India & Ors* (2014) 5 SCC 438.

[176] Ibid. [125].

[177] Ibid.

[178] Ibid. [128]; emphasis added.

[179] *Supreme Court Advocates-on-Record-Association & Anr v Union of India* (2016) 5 SCC 1 [693].

the Court revisit the previously settled issue of appointment of judges, because the Constitution was a *living* document.[180]

In further expansion of fundamental rights, the Court has extended the rationale of a 'purposive interpretation'[181] to protecting the right to privacy in *K.S. Puttaswamy and Anr v Union of India and Ors*.[182] The Court held that privacy was essential to the exercise of most fundamental rights, and hence 'must itself be regarded as a fundamental right'.[183] While engaging in such an expansive interpretation of the constitutional provisions, the Court described the Constitution as a 'living instrument' that was resilient enough to ensure its continued relevance.[184] The Court took this one step further by calling the Constitution a '*sacred* living document [] susceptible to appropriate interpretation of its provisions based on changing needs'.[185] A considerable portion of the judgment was devoted to the development of this understanding of the Constitution as a *living* document, almost romanticising this process.[186] The Court imagines a 'brooding spirit'[187] with several 'good' qualities which inspired the Constituent Assembly and was given the corporeal form of the Constitution of India, a codified representation of the spirit itself.[188] It seems that the Court is now elevating the 'living' metaphor from the physical, material world to the realm of the otherworldly and ethereal. The Court claimed that the drafters were aware of the reality that 'the Constitution would need alteration to keep up with the mores and trends of the age,' thus reading the existence of Article 368[189] in the Constitution as proof that the document was intended to be 'timeless [], eternal in nature, organic and living'.[190] The Court does not elaborate on, or perhaps even realise that, by using these metaphors, it is applying temporal features to what it considers to be an apparently timeless entity.

However, it is in *Puttaswamy* that, for the first time, the Court offered substantial engagement with the *living* metaphor, admitting that a more in-depth analysis of the metaphors being used by the judiciary was needed.[191] Curiously, the Court put this explanation in a footnote, clarifying that it had 'progressively adopted a living constitutionalist approach'.[192] Clearly, the Court did not feel the need to be pigeonholed by 'particular interpretative techniques', claiming that it could 'resort to variants of

[180] Ibid. [71].

[181] Ibid. [773].

[182] *K.S. Puttaswamy & Anr v Union of India & Ors* (2017) 10 SCC 1.

[183] Ibid. [406].

[184] Ibid. [262].

[185] Ibid. [549]; emphasis added.

[186] Ibid. [595–617].

[187] Ibid. [596].

[188] Ibid.

[189] Constitution of India 1950 art 368 (Power of Parliament to Amend the Constitution and Procedure Thereof).

[190] *K.S. Puttaswamy & Anr v Union of India & Ors* (n 182) [601].

[191] Ibid. [344], Jasti Chelameswar J.

[192] Ibid. [fn 282].

a living constitutionalist interpretation' depending on the instant exigencies.[193] We now see how the Court is merging the two concepts, that of the *Constitution*, and the *constitutionalist approach*. The subject of the *living* metaphor has changed; while earlier benches were looking at the nature of the constitutional document, this bench seems to be focusing on the theory of constitutional interpretation, conflating the two in the process. Readers may question the relevance of drawing this distinction since the result is the same regardless of the metaphor used, but our aim at this juncture is to draw attention to the lack of consistency demonstrated by the Court with its use of metaphors. This is imperative as the Court has now, in addition to growth and evolution, attached the quality of compassion to the *living* Constitution that changes in pace with social thinking.[194]

In the spirit of progressive realisation of rights, the Court held Section 497 of the IPC unconstitutional, striking down adultery as an offence.[195] The Court held that any law that did not give a woman the right to prosecute could not be considered a gender-neutral law, and was 'unreasonable, discriminatory, and arbitrary', thus violative of Article 14.[196] The Court stated that as the rights which are 'the reflective perception of the organic and living Constitution' are expanded, a flexible interpretation of the Constitution was required.[197] We note that here the Court does not use a variant for the metaphor, and refers to the Constitution as just *living*, much like the US doctrine. Then, in *Navtej Singh Johar and Ors v Union of India*, the Court called upon the several versions of the *living* metaphor to declare unconstitutional a portion of Section 377 of the Indian Penal Code 1860.[198] In this case, the Court held that the right to life under Article 21 of the Constitution inherently carried with it the right to dignity and liberty. The Court also held that the right to privacy, recently recognised and protected, 'now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice'.[199] It 'extends to the right to make fundamental personal choices,… which would further a dignified existence and a meaningful life as a full person'.[200] The Court recalled a judgment where it affirmed that 'the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.'[201] In addition to the use of the *living* metaphor to expand fundamental rights, we now note the introduction of a new

[193] Ibid.

[194] *Rishi Malhotra v Union of India* (2017) 16 SCC 767 [4]. Perhaps the Court thought it appropriate to apply the quality of compassion to the Constitution as the matter related to the death sentence, and the petitioner had challenged the constitutionality of the provision 'hanged till death', claiming that it was not dignified and violated the rights of the person.

[195] *Joseph Shine v Union of India* (2019) 3 SCC 39.

[196] Ibid. [272.4].

[197] Ibid. [3].

[198] *Navtej Singh Johar & Ors v Union of India* (2018) 10 SCC 1.

[199] Ibid. [640.3.3].

[200] Ibid. [640.3.3–640.3.4].

[201] Ibid. [93], citing *Chief Justice of Andhra Pradesh & Ors v L.V.A. Dixitulu & Ors* (n 130) [67].

understanding of the *living* metaphor. Earlier benches spoke about the *sacred* nature of the *living*, while this bench has located the *living* metaphor in the animal body.

The Court has applied this metaphor for expansion of not only fundamental rights, but also state powers. In *Rajeev Suri v Delhi Development Authority and Ors*,[202] commonly known as the 'Central Vista' case, the Court while discussing 'rule of law' and the authority to take decisions and make laws, stated that the Constitution could 'grow and stay effective with the growth of socio-economic structures and vicissitudes' as it was 'living and dynamic'.[203]

Recently, based on the judicial treatment of the *living* metaphor, a counsel in *Dr Jaishri Laxmanrao Patil v State of Maharashtra and Anr* pleaded that since the Constitution was a 'living document', it must adapt to changing circumstances to revisit the landmark judgment of *Indra Sawhney*.[204] The Court affirmed that it did consider the Constitution to be a ' organic and living document'[205] which was also transformative.[206] The Court reiterated that literal interpretation had given way to liberal and purposive interpretation, more in line with the objects of the Constitution as it was a *living* document.[207] Here, the Court returns to the *living* document variant. Thus, we can see that through the years, the Court has applied the *living* metaphor to interpret separation of powers and federalism disputes, along with the expansion of fundamental rights. It is noteworthy that throughout this journey, it has only applied the *living* part of the metaphor consistently, while toying with its variants.

It is also interesting to see how other organs of the government and its functionaries, and the media, use this metaphor. The legislature, while enacting the 42nd Amendment to the Constitution, noted that for 'a Constitution to be living, [it] must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy.'[208] This is perhaps the only instance where the living metaphor is applied in its restrictive sense. While the courts have assumed the Constitution to be living in order to give its provisions an expansive interpretation by adding on to what was already existing, the legislature is seen using the metaphor to cull out parts of the Constitution. In addition to the series of cases discussed above, the Supreme Court through its website seems to subscribe to the *living* metaphor, and makes references to the Indian 'law and jurisprudence stretch[ing] back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people'.[209] Even the former President of India, Pranab Mukherjee, called the Indian Constitution a 'living document and not a relic cast in stone', which was

[202] *Rajeev Suri v Delhi Development Authority & Ors* 2021 SCC Online SC 7.

[203] Ibid. [143].

[204] *Dr Jaishri Laxmanrao Patil v State of Maharashtra & Anr* (2021) 2 SCC 785 [5]; *Indra Sawhney & Ors v Union of India & Ors* 1992 Supp (3) SCC 217.

[205] *Dr Jaishri Laxmanrao Patil v State of Maharashtra & Anr* (n 204) [450, 402].

[206] Ibid. [96].

[207] Ibid. [442(24)].

[208] Legislative Department, 'The Constitution (Forty-Second Amendment) Act, 1976' (Ministry of Law and Justice). https://legislative.gov.in/constitution-forty-second-amendment-act-1976. Accessed 10 May 2022.

[209] 'Constitution' (Supreme Court of India). https://main.sci.gov.in/constitution. Accessed 10 May 2022.

a 'magna-carta of socio-economic transformation'.[210] The former President stated that this interpretation was enabling the country to mature into the constitutional mandates listed in the Preamble.[211] Other government agencies, like the Ministry of Information and Broadcasting, also endorse the view that the Constitution is a 'living, dynamic reality'.[212] Even the former Solicitor General of India has likened the Indian Constitution to a 'living tree'.[213] Popular news outlets have not refrained from using this metaphor to describe the Indian Constitution either.[214] Even educational publications, state-sponsored and otherwise, state that the Constitution of India is a *living* document.[215] This is merely a small sampling of the use of the *living* metaphor by extra-judicial entities. We see how they rely exclusively on the judicial understanding of the metaphor, and continue with its use, without conducting their independent enquiries. It seems that consistent use by the judiciary has legitimised the viewing of the Constitution as *living* and no further contemplation was necessary or useful for the others when deciding to adopt this metaphor.

5 Evaluating the use of the *living* metaphor in the Indian context

How has the use of the *living* metaphor by the Indian judges fared? Our twin aims in writing this article were to examine how the *living* metaphor has been deployed by the Supreme Court of India and whether its use should be continued. We find that the Court has been intellectually inconsistent while using the *living* metaphor, deploying whichever variant it fancies in the moment—*living document*, *organ*, *organism*, *flames*, *entity*, *character*. Choosing to put ends above the means, the Court does not distinguish between variants of the *living* metaphor since all, in its opinion, produce the identical result, namely the progressive realisation of rights through an expansive interpretation. The distinction is merely semantic, and not one based on principle. In

[210] Press Information Bureau, 'Government of India, President's Secretariat, Constitution of India a Living Document, not Relic Cast in Stone, Says President' (16 April 2016). https://pib.gov.in/newsite/PrintRelease.aspx?relid=138917. Accessed 10 May 2022.

[211] Ibid.

[212] 'Indian Constitution a Living & Dynamic Document', *Employment News Weekly*, vol 43, 25–31 January 2020. http://employmentnews.gov.in/newemp/MoreContentNew.aspx?n=Editorial&k=50262. Accessed 10 May 2022.

[213] Express News Service, 'Constitution Is Futuristic, Evolves Like Tree: Ex-SG Gopal Subramanium' (*Indian Express*, 13 February 2022). https://indianexpress.com/article/cities/ahmedabad/constitution-is-futuristic-evolves-like-tree-ex-sg-gopal-subramanium-7769872/. Accessed 10 May 2022.

[214] See, for example, Ronojoy Sen, 'India's Living Constitution' (*Times of India*, 23 January 2010). http://timesofindia.indiatimes.com/articleshow/5490343.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. Accessed 10 May 2022; Muneeb Rashid Malik, '72nd Republic Day: Our Living Constitution' (*Daily Guardian*, 26 January 2021). https://thedailyguardian.com/72nd-republic-day-our-living-constitution/. Accessed 10 May 2022; Siddhant Kohli, 'Judicial Activism and India's Living Constitution' (*Qruis*, 1 June 2016). https://qrius.com/judicial-activism-indias-living-constitution/. Accessed 10 May 2022.

[215] For state-sponsored publications, see 'Constitution as a Living Document' (n 115); for private initiatives, see, Dhrubaa Ghosh, 'The Indian Constitution Is Called a "Living Document": Why?' (*HT School*, 26 January 2022). https://htschool.hindustantimes.com/editorsdesk/knowledge-vine/the-indian-constitution-is-called-a-living-document-why/. Accessed 10 May 2022.

our opinion, this distinction may even be irrelevant. The three jurisdictions examined in our article—Canada, United States, Australia—all use three different variations of the *living* metaphor to the same end, to expand the scope of constitutional interpretation, to cover situations not in the contemplation of the makers at the time of drafting the constitutional text. These courts, however, differ from the Supreme Court of India in the sense that each court has chosen one variant and stuck to it, while the Supreme Court of India has used several variants synonymously and interchangeably. We do not believe that employing the different variants of the *living* metaphor indisputably results in different ways of viewing the Constitution.[216] All four courts, in our understanding, have similar, if not identical, perceptions of their *living* Constitutions, despite using different phrases to describe it. There is, however, the broader issue of the power of language and its casual use by the Supreme Court. Indian judges have often been criticised for their lengthy and linguistically convoluted judgments.[217] This blasé attitude towards the words that the Supreme Court uses is indicative of the little value it accords to the *living* metaphor. The Court seems to be deploying this metaphor carelessly, simply to signal its 'desire to be included in the liberal-democratic club of nations'.[218] The choice and use of these words is not a thoughtful one supported by legal theory and/or doctrine. Our concern is not with the use of metaphors in the realm of constitutional law generally but with the overuse of the *living* metaphor by the Supreme Court by which it has effectively abdicated its duty to develop a doctrine of *living* constitutionalism. As discussed earlier, this is a charge levied against other constitutional courts as well, but we contend that the Supreme Court's approach is more lacking since it suffers from additional faults.

This brings us to the two issues we have identified with the Indian Supreme Court's use of the *living* metaphor. The first relates to the inconsistent application of this metaphor to similar matters. We observe that the Court has been ideologically inconsistent and indulged in cherry-picking the cases in which it has viewed the constitutional provisions in a progressive light. It is the same *living* Constitution that, in the hands of the Indian Supreme Court justices, has resulted in both *Kesavananda Bharati* and *ADM*, *Jabalpur*. Both benches used the *living* metaphor—one to expand the scope of Part III of the Indian Constitution and the other to severely restrict it. The Court has used the metaphor to read into Article 21 a right to privacy (in *Puttaswamy*) but has eschewed its use in decisions relating to gender equality (the Triple Talaq and Sabarimala judgments).[219] We are unable to discern a pattern regarding the Court's

[216] In our review of the literature in this field, we have found only one scholar—Vicki Jackson—who has expressed a preference for one variant (the living tree) over the other (the living Constitution). However, even Jackson has not comprehensively detailed the differing consequences of using the two variants. See Jackson, 'Constitutions as "Living Trees"?' (n 39) 921.

[217] See, generally, Tunku Varadarajan, 'Judgment by Thesaurus' (*Wire*, 16 May 2016). https://thewire.in/law/judgment-by-thesaurus. Accessed 6 September 2022; 'Does This Court Judgment Make Any Sense?' (*BBC*, 21 April 2017). https://www.bbc.com/news/world-asia-india-39672453. Accessed 6 September 2022.

[218] Hirschl, *Comparative Matters* (n 36) 9.

[219] *Shayara Bano v Union of India & Ors* (2017) 9 SCC 1 (where the practice of instantaneous triple talaq was held unconstitutional as it was found to violate the right to equality); *Indian Young Lawyers Association & Ors v State of Kerala & Ors* (2019) 11 SCC 1 (where the temple's custom of barring the entry of

use of the *living* metaphor. Another glaring example of this judicial inconsistency is the litigation surrounding Section 377 of the Indian Penal Code. When the matter was first decided by the Supreme Court in *Suresh Kumar Koushal*, the bench made no reference to the *living* nature of the Indian Constitution and the need to read its provisions to achieve the goal of the progressive realisation of rights. This is despite the counsel for the respondent relying on the *living* metaphor to make his argument for decriminalisation of homosexuality. In the second act, when the matter was heard as *Navtej Singh Johar*, the Supreme Court changed its tune and relied extensively on the *living* metaphor to enlarge the ambit of Article 21. In the words of Tiller and Cross, it seems that the 'judges first identified their desired resolution of a case, perhaps due to personal ideological preferences, and then manipulated the available legal materials to support that conclusion'.[220] In this realist framework, the use of the *living* metaphor is 'mere window dressing'.[221] Does the Court use the *living* metaphor because it believes in a progressive interpretation of the Constitution or is it merely virtue-signalling to its audience?

Our second issue with the Supreme Court's use of the *living* metaphor pertains to the lack of a legal doctrine. If the Court wants to be seen as a liberal and progressive institution, which we think it does, merely mentioning the phrase *living* Constitution is not enough. In the absence of a coherent doctrine which is consistently and predictably applied, these words are empty promises, dependent on the whims of individual judges. The Court is abdicating its duty of producing 'legal reasoning that can generate outcomes in controversial disputes independent of the political or economic ideology of the judge'.[222] In our opinion, the *living* metaphor is not binding precedent in the same way as the *basic structure* metaphor is, primarily because the latter is a doctrine while the former is not. This is, we believe, the reason behind the inconsistent and unreliable use of the *living* Constitution metaphor in the Indian constitutional discourse. At present, it is a half measure and not powerful enough to carry the weight of the responsibilities placed on it by the Supreme Court, that of the creation of new rights and new understandings of old ones.

How does the *living* metaphor differ from a doctrine of *living* constitutionalism? The former is a linguistic tool of comparison that helps us understand a complex idea while the latter is a theory that seeks to 'give a systematic exposition of the principles, rules and concepts governing a particular legal field … with a view to solving unclarities and gaps in the existing law'.[223] Metaphors can be used unthinkingly and irresponsibly while doctrines undergo a prolonged and rigorous developmental process before they can be characterised as doctrine. Take for example the

menstruating women was held unconstitutional as violative of the right to religious freedom). Despite expanding the scope of Part III rights, neither of the benches made any reference to the *living* metaphor.

[220] Emerson H Tiller and Frank B Cross, 'What Is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517, 519.

[221] Ibid.

[222] Phillip E Johnson, 'Do You Sincerely Want to Be Radical?' (1984) 36(1–2) *Stanford Law Review* 247, 252.

[223] Jan M Smits, 'What Is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz, and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 207, 210.

living metaphor and the *basic structure* metaphor in the Indian context. The former is under-theorised, its nomenclature is not uniform, and it is applied inconsistently. The latter, because of its status as a doctrine (and not being a mere phrase), has been defined, described, discussed, and developed beyond its first iteration. It has gained the status of a superprecedent, a constitutional norm so fundamental that it transcends the text of the Constitution. The idea of a *living* Constitution is as vital as that of the *basic structure*, but it does not carry the same weight in constitutional law and jurisprudence. Smits identifies three goals of any legal doctrine: description, prescription, and justification.[224] The Court has not undertaken an analysis of metaphorical usage in constitutional interpretation and construction in any decision thus far. It has not described the usage of this metaphor, or the practical consequences of such systematisation of law, or provided an independent justification for its use. Miller's charge against the Canadian courts holds true for the Indian Supreme Court too; both 'have been content to recite metaphors instead of developing actual doctrine'.[225] The only instance we could find of the Court's engagement with the *living* metaphor was in the footnotes of a relatively recent judgment.[226] If a researcher were to enquire about the Indian doctrine of *living* constitutionalism, they would only be able to come up with a list of cases where the word *living* has been used, much like we have done in this article.

We are aware that *living* constitutionalism is not a politically neutral idea and does not always lead to a liberal and progressive interpretation of rights or constitutional provisions.[227] In its current inchoate form, it can easily be turned, by both political and legal actors, to serve anti-democratic ends. The *living* metaphor thus faces the risk of being termed an act of 'abusive constitutional borrowing'[228] where the 'intended unity of form and substance' of the constitutional norm is decoupled.[229] In the current political climate, fundamental and constitutional rights could possibly be interpreted in a manner to sideline and disempower minority groups, 'consolidate power for the regime', and to repress opposition.[230] Since formally changing the text of the constitution, either via amendments or replacements (large-C changes), is a more difficult task than changing its meaning through creative interpretation

[224] Ibid. 213.

[225] Miller, 'Beguiled by Metaphors' (n 42) 332.

[226] *K.S. Puttaswamy & Anr v Union of India & Ors* (n 182) [fn 282].

[227] The proliferation of constitutionally protected rights is not without its critics. The efficacy of these rights to bring about social change has been questioned. See, for instance, Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press 2020). Hirschl has also argued that the constitutionalisation of rights does not have the intended effects on distributive justice since it is a strategic powerplay to protect the hegemony of political and other elites. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

[228] Defined by Dixon and Landau as 'involv[ing] the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy'. Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) 36.

[229] Ibid. 19.

[230] Ibid. 20.

(small-c changes),[231] a populist government can easily co-opt the judiciary, or create a system of political patronage, to interpret the constitutional text and rights in a manner to 'advance authoritarian projects'.[232] A topical example of 'abusive judicial review'[233] is that of the Citizenship Amendment Act 2019 (CAA) and National Register of Citizens (NRC). The Supreme Court held that the state of Assam was facing internal disturbance and external aggression as a result of 'large-scale illegal migration of Bangladeshi nationals'[234] (read Muslims) and used this as a justification for initiating a state-wide NRC in 2014, wherein each resident had to provide documentary evidence of citizenship or be rendered stateless.[235] Read with the CAA, which allows illegal immigrants belonging to certain religious communities (namely Hindus, Christians, Sikhs, Buddhists, Jains, and Parsis) from Pakistan, Bangladesh, and Afghanistan a swifter path to citizenship, these instruments are rightly condemned for systematically disenfranchising and discriminating against Muslims, in line with the Hindutva ideology of the ruling party. The Supreme Court has been complicit on both fronts. Having initiated the NRC in Assam, it has also not yet heard the challenges to CAA's constitutional validity.[236]

To illustrate how *living* constitutionalism may serve regressive goals, we consider the beef ban controversy. Anti–cow slaughter legislations have been passed by several states of the Indian union,[237] and the Supreme Court has consistently upheld the constitutionality of these statutes, basing their reasoning on Article 48 of the Constitution.[238] While no legislation explicitly bans the consumption of beef, cow vigilante violence has been on the rise since 2015, leading to mob lynchings of Muslims and Dalits over suspicions of beef consumption or cow slaughter.[239] Very recently, several meat shops in parts of Delhi were ordered shut during the Navratras by local civic bodies, since '90% people do not consume non-vegetarian food' (a claim that is

[231] Ibid. 31–32.

[232] Ibid. 21, 59.

[233] Ibid. 81–115.

[234] *Sarbananda Sonowal v Union of India & Anr* (2005) 5 SCC 665 [63].

[235] M Mohsin Alam Bhat, 'Twilight Citizenship' (2020) 729 *Seminar* 39, 40.

[236] 'Supreme Court to Hear Pleas Challenging Constitutional Validity of CAA on September 12' (*Scroll*, 8 September 2022). https://scroll.in/latest/1032362/supreme-court-to-hear-pleas-challenging-constitutional-validity-of-caa-on-september-12. Accessed 9 September 2022.

[237] For e.g., The Bihar Preservation and Improvement of Animals Act 1955, The Uttar Pradesh Prevention of Cow Slaughter Act 1955, The Tamil Nadu Animal Preservation Act 1958, and The Andhra Pradesh Prohibition of Cow Slaughter and Animal Preservation Act 1977, among several others. See CJP Team, 'Cow Slaughter Prevention Laws in India: How the Law Not Just Protects Cow Vigilantes, but Sanctifies Lynchings' (*Citizens for Justice and Peace*, 2 July 2018). https://cjp.org.in/cow-slaughter-prevention-laws-in-india/. Accessed 10 September 2022.

[238] Constitution of India 1950 art 48 reads thus: The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle.

[239] 'India: "Cow Protection" Spurs Vigilante Violence: Prosecute Assailants, Protect Targeted Minorities' (*Human Rights Watch*, 27 April 2017). https://www.hrw.org/news/2017/04/27/india-cow-protection-spurs-vigilante-violence. Accessed 10 September 2022.

blatantly false).[240] What we are witnessing, in the current political climate, is another facet of militant Hindu nationalism that seeks to tear asunder the secular fabric of the nation. In the anti–cow slaughter cases, we observe a Directive Principle of State Policy (DPSP)[241] holding its ground against the two fundamental rights of freedom of religion and the freedom to practise a profession, despite belonging to a lower pedigree of constitutional protections. Hypothetically speaking, a future bench of the Supreme Court may take inspiration from the Rights of Nature movement[242] and, employing the *living* metaphor, hold that a *living* constitution responsive to societal changes must read animal rights in an expansive manner, and prescribe a vegan or vegetarian diet for the nation. A 'progressive' reading of rights may have illiberal consequences, and the judiciary becomes a pawn in the hands of an authoritarian regime.

In the form that it exists today, it is judicially permissible for future benches of the Supreme Court to not apply the *living* metaphor when hearing constitutional matters, or to apply it in a way that has profound and disastrous implications for a democratic polity. We believe that one way of 'abuse-proofing'[243] this norm is to have a well-formulated doctrine that is entrenched in Indian constitutional jurisprudence. It is our understanding that as a doctrine, *living* constitutionalism will be better placed to withstand the anti-democracy challenges, will be more resilient to misuse and abuse because of its strong foundational base in legal theory and constitutional philosophy. As a doctrine, with well-defined aims and limits, it will also provide a systematic, predictable framework for constitutional interpretation and the development of constitutional jurisprudence.

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Declarations

Conflict of interest The authors have no conflicts of interest to declare that are relevant to the content of this article.

[240] 'Still No Official Note, Meats Shops in South, East Delhi Remain Shut on Mayors' Verbal Orders' (*Wire*, 6 April 2022). https://thewire.in/government/meat-ban-south-east-delhi-mayor. Accessed 10 September 2022.

[241] The DPSPs, found in Part IV of the Indian Constitution, are non-enforceable guidelines that the state must follow for the making of laws and the general governance of the country. These 'duties' of the state are often juxtaposed with the 'rights' of citizens, and often relied upon to restrict the scope of the Part III fundamental rights.

[242] The Rights of Nature movement advocates for seeing nature and non-human entities as subjects of basic rights rather than as objects to be exploited. See, generally, Global Alliance for the Rights of Nature. https://www.garn.org/. Accessed 6 November 2022; Community Environment Legal Defense Fund (CELDF). https://celdf.org/rights-of-nature/. Accessed 6 November 2022.

[243] Dixon and Landau, *Abusive Constitutional Borrowing* (n 228) 20.