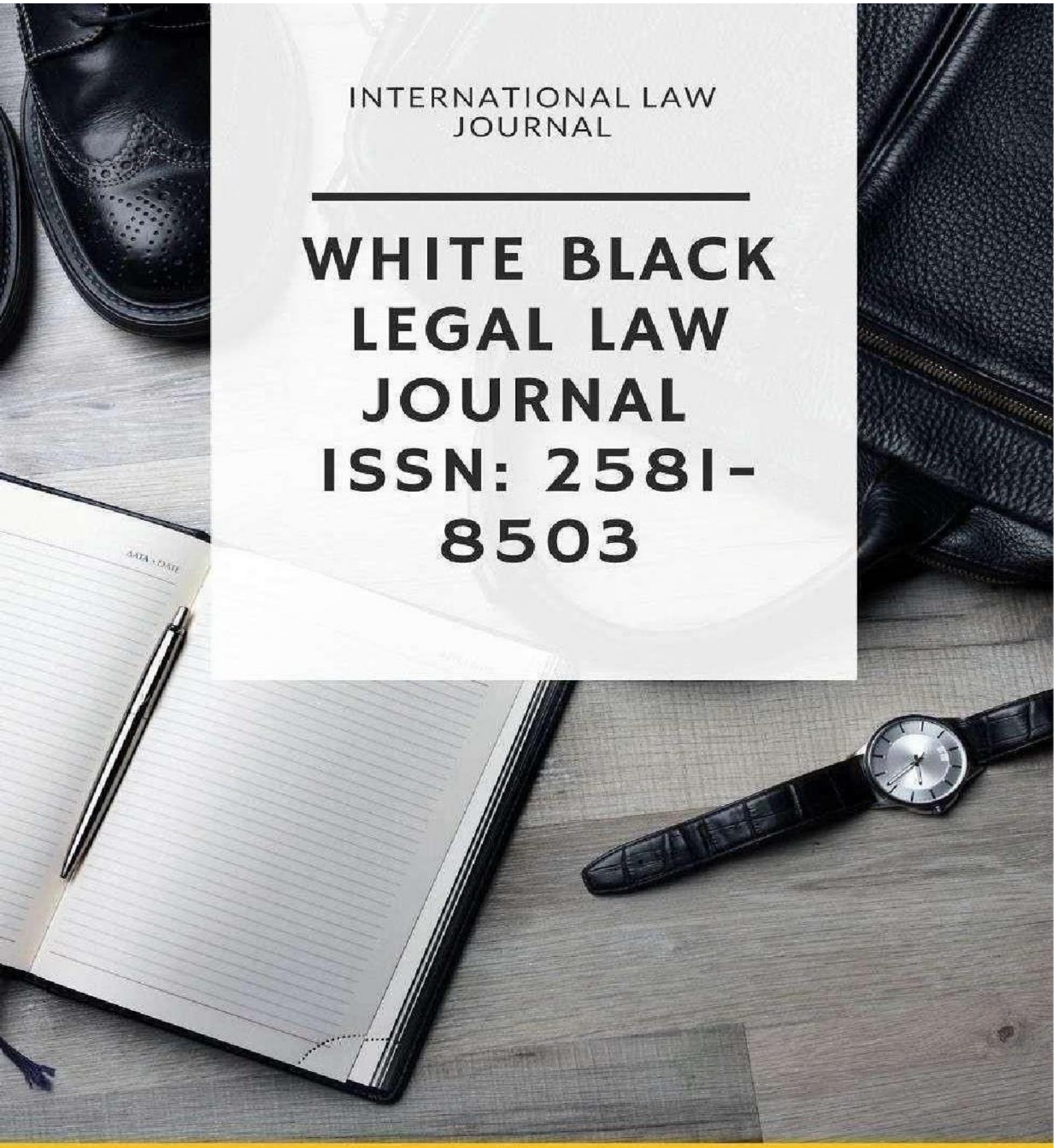


INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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CONSTITUTIONAL SILENCE AND JUDICIAL CREATIVITY: HAR-MONISING JUDICIAL INTERPRETATION WITH CONSTITUTIONAL PRINCIPLES IN INDIA

AUTHORED BY - YAMINI PANDEY*

Abstract

A recurring problem in Indian constitutional adjudication is constitutional silence. There are limits to what can be written into a written constitution: a rule may not be expressed in the Constitution but may nevertheless be determined by the courts, while the consequences of governmental inactivity may alter the distribution of constitutional power. This Article looks at the five ways in which the Supreme Court of India has dealt with constitutional silence: structural implication, rights-protective gap-filling, institutional design, statutory interpretation and remedial innovation. It examines the landmark decisions and the Supreme Court jurisprudence of 2025 and 2026 on the topics of gubernatorial assent, judicial service, judicial removal procedure, end-of-life decision-making and legislative limits using a doctrinal and analytical method. The analysis reveals that there is more than a single form of constitutional silence—deliberate openness, textual incompleteness, legislative failure and failure of implementation require different approaches by courts. Judge-made interpretations are best justified when they have roots in the text or structure of the constitution, when they are essential to avoid the frustration of another constitutional safeguard, when they are proportionate in remedial form or structure, when they are temporary in nature if legislation is available to fill the gap, and when they are respectful of functions delegated to other constitutional actors. The Article suggests that there should be a six-part Constitutional Harmony Test which includes silence identification, constitutional anchoring, necessity, remedial proportionality, temporal restraint and non-substitution. The cases cited recently show a growing gap between 'compelling' action, and substituting the result by judicial act, which provides a principled justification for the balance between effective judicial review, separation of powers and democratic responsibility.

Keywords: Constitutional Silence; Judicial Creativity; Constitutional Interpretation; Separation of Powers; Judicial Review

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1.1 INTRODUCTION

The Constitution of India is detailed, but constitutional detail does not eliminate every void. Some provisions intentionally leave the institutional choices up to legislation or constitutional practice; others are generally worded, and the application is worked out in the course of adjudications. The new situations may also bring up situations which the framers had not expressly addressed. Thus, the silence of the Constitution can hardly be interpreted as a drafting mistake. It could be an intentionally designed element of flexibility, an unexpected omission, a legislative void or the inherent incompleteness of a long-lasting constitutional document. The actual problems arise when a court is asked to determine a case, where no rule explicitly covers the controversy.[1]

For the institutions, the stakes are high since judicial decisions of silence can secure and/or displace constitutional power. Refusal to act can be a way to make a right ineffective, allow an indefinite period of executive inaction, or fail an institution to fulfil its constitutional function. However, the judiciary can cause decisions of elected institutions or constitutional actors to be shifted when it comes to substantive bans, qualifications, timelines, or how positions are appointed. Thus the core issue does not concern whether constitutional judges are necessarily creative interpreters. The question is whether a specific creative move can still be deemed an interpretation and enforcement of the Constitution, or instead replaces an activity assigned to a legislative, executive or constitutionally mandated decision-maker.[2]

This Article espouses a limited, yet working version of judicial creativity. It claims that there must be a true silence or true legal vacuum, a constitutional anchor, a manifest need, a proportionate solution, a time limit (when law might substitute for the judicial norm) and respect for the constitutional distribution of institutional powers. The study is basically doctrinal and literature has been limited exclusively to Indian Supreme Court decisions post the basic structure till September 2026. Special focus is given to recent cases which explicitly consider constitutional silence, governmental delay, gaps in legislation, temporary judicial guidance and restrictions on judicial lawmaking. These decisions permit a more precise assessment than the vague language of judicial activism of whether a judicial response is "more creative".[3]

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1 Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).

2 Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).

3 Martin Loughlin, "The Silences of Constitutions", 16 *International Journal of Constitutional Law* 922 (2018).

1.2 RESEARCH FRAMEWORK

Gleaning creative judgments is not enough if a rigorous treatment is demanded of constitutional silence. The research framework thus distinguishes conceptual classification from normative evaluation and specifies the questions which are applied to the cases and situates judicial reasoning in the scholarship on constitutional abeyance, judicial power, constitutional amendment and institutional competence.[4]

1.2.1 Statement of the Problem

There is no one consistent test in the Indian constitutional law to determine when courts should fill the voids by supplying principles, procedures or interim rules to substitute for the law's lacunae. In some instances, the Supreme Court of India has interpreted silence as one of structure, implication or rights-protective guidelines and in some instances, not. This results in both political and doctrinal uncertainty. What is missing from the constitution can be called a lack of enforcement, or it can be an overreach of the system. The real issue is how to tell the difference between a patch of true vacuity and a conscious choice of openness, or of a space that has been left unoccupied by the legislature, as well as how to choose a remedy that secures constitutional values without bequeathing another branch of government its work to the judges.[5]

1.2.2 Research Questions

1. What distinguishes constitutional silence from ambiguity, legislative vacuum, and deliberate constitutional choice?
2. When can the Supreme Court of India establish principles or interim norms that are justified given the silence of the constitution?
3. In what ways does the constitution, separation of powers, federalism and democratic accountability constrain judicial creativity?
4. Can a coherent doctrinal test distinguish legitimate constitutional gap-filling from judicial substitution?

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[4] Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments", 22 *International Journal of Constitutional Law* 161 (2024).

[5] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 3 (Oxford University Press, New Delhi, 2nd edn., 2003).

1.2.3 Research Objectives

1. To define and classify forms of constitutional silence relevant to Indian constitutional adjudication.
2. To analyze the main approaches of the Supreme Court of India in filling in the gaps in the constitution and legislation.
3. To examine the constitutional restraints on the judiciary's creativity through text, structure, separation of powers and by current laws.
4. To develop a principled approach to check judicial creativity against constitutional supremacy and institutional competence.

1.2.4 Research Methodology

The research uses a doctrinal and analytical method. The primary materials comprise the Constitution of India, the judgments of the Supreme Court of India, relevant legislation, reports from commissions and official governmental records. Judicial decisions are discussed in terms of the legal issue, the constitutional principle invoked to resolve it, the ratio, the reasoning, the remedial form, subsequent developments and the institutional impact, instead of by descriptive case summaries. Secondary materials are the leading academic books and peer-reviewed journal scholarship on constitutional silence and judicial review, constitutional amendment, and separation of powers. The analysis is qualitative and does not involve interviews, surveys or field research. Conclusions are derived from a comparative analysis of persistent judicial methods and from the analysis of whether the judicial methods meet the standards of the text, structure, democratic responsibility and institutional competence of the constitution.[6]

1.2.5 Scope of the Study

The study is limited to a narrow scope of Indian legislation and conclusions of the Supreme Court of India from 1973 to 27 September 2026. It is centered on indirect restrictions on constitutional powers, rights-enhancing benchmarks, judicial "gap-filling", gubernatorial "veto", statutory silence and judicial reactions to the lack of action. The principal constitutional provisions considered include Articles 32, 141, 142, 200, 201, 233, 324, and 368. The policy is that High Court cases will not be referenced unless they are essential for comprehending a Supreme Court case. There is no separate comparative study; comparative materials are used only to

[6] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 164 (Oxford University Press, New Delhi, 1st edn., 2010).

illuminate concepts. It does not try to provide a general history of judicial activism, or assess political desirability of specific institutional results divorced from the constitutional law.[7]

1.2.6 Literature Review

In conceptualising constitutions as abeyances, Michael Foley's book The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government, suggests that the gaps are not necessarily the places where things go wrong, but are open spaces within the constitution that can help political accommodation. The work is fundamental in determining what is to be countenanced as productive constitutional silence and accidental omission but the work is based on British and American constitutional practices and hence the concepts need to be adapted carefully before they can be applied to the Indian Constitution, which is textually dense.[8]

The book, "The Indian Constitution: Cornerstone of a Nation" by Granville Austin, portrays the Constituent Assembly's attempt at bringing social revolution, national unity and democratic institutions together. Its historical account can be used to evaluate whether silence is an institutional feature that is the result of constitutional design, or whether it is a later institutional practice. Many of today's episodes, however, in which courts have given detailed procedures and remedies, predate the work.[9]

S. P. Sathe's book "Judicial Activism in India: Transgressing Borders and Enforcing Limits", evaluates the expansion of judicial power and the tension between innovation and institutional boundaries. It is directly relevant to the legitimacy of creative remedies, although the vocabulary of activism is broader than the narrower inquiry into when constitutional silence authorises a specific judicial response.[10]

Sudhir Krishnaswamy's book, "Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine", is an organized attempt to defend and assess the legal, moral and sociological legitimacy of basic structure review. It helps the current study because it demonstrates how the implied constitutional restrictions can be construed and how they can provide

[7] The Constitution of India, arts. 32, 141, 142, 200, 201, 233, 324 and 368.
[8] Michael Foley, *The Silence of Constitutions: Gaps, 'abeyances' and Political Temperament in the Maintenance of Government* 3 (Routledge, London, 1st edn., 1989).
[9] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 26 (Oxford University Press, New Delhi, 2nd edn., 1999).
[10] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 3 (Oxford University Press, New Delhi, 2nd edn., 2003).

guidance, but it does not indicate how these should shape temporary guidelines, and institutional gap-filling, outside of Article 368.[11]

Gautam Bhatia's book, The Transformative Constitution: A Radical Biography in Nine Acts, elaborates an interpretive approach based on text, structure, history and the transformative pledges of the Constitution. It gives a rights-based justification for the court's willingness to be purposive in interpreting the constitution, as well as a reminder that principled interpretation is different from the courts establishing an independent regulatory system.[12]

Richard Albert and David Kenny's Article, The Challenges of Constitutional Silence: Doctrine, Theory, and Applications, suggests that silence is a unique constitutional phenomenon, and that various silences are likely to warrant different institutional responses to silence. The Arti-cle provides the conceptual language of classification but a framework specifically Indian in nature is required to move beyond the constitutional framework of fundamental rights, feder-alism, Article 142 remedies, and the latest of the Supreme Court's jurisprudence.[13]

"There are some obligations that are left to be carried out by the courts because of the absence of certainty in the constitution, and it is not always easy to see whether this is a failure or not", writes Martin Loughlin in his Article The Silences of Constitutions. This holds true for this story's silence, which helps to maintain political space. The pity is that the limitation, for present purposes, is that it is not an India-specific remedial test to find out when judicial intervention is constitutionally required.[14]

In the Article “Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights”, Raeesa Vakil demonstrates how non-codified principles can become part of constitutional law, and how constitutional principles may result in “doctrinal confusion” when legal categories overlap. Her analysis could also be applied in assessing judicial creativity – the uncertainty that may arise even in rights-enhancing interpretation can still not be overlooked when the source and yardstick of review are not properly expressed.[15]

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[11] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 164 (Oxford University Press, New Delhi, 1st edn., 2010).
[12] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts XXV* (HarperCollins Publishers India, Noida, 1st edn., 2019).
[13] Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).
[14] Martin Loughlin, "The Silences of Constitutions", 16 *International Journal of Constitutional Law* 922 (2018).
[15] Raeesa Vakil, "Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights", 16 *International Journal of Constitutional Law* 475 (2018).

In Emmett Macfarlane's Article "Judicial Amendment of the Constitution", he differentiates between ordinary interpretation and judicial amendment, whereby amendment goes beyond a "plausible" textual, purposive and structural reading. The comparison discussion helps to clarify the substitution problem. The Article is particularly helpful in the application of remedies which go beyond the text, compelling constitutional action without a constitutionally promulgated consequence.[16]

"Judicial Self-Empowerment and Unconstitutional Constitutional Amendments", by Nicola Tommasini, explores the way that constitutional amendment restrictions can at the same time expand judicial power. The analysis provides a valuable takeaway on structural implication: Courts can provide protection of constitutional identity and simultaneously enhance themselves. It thus requires exacting transparency in regard to the principle on which the constitutionality of the claimed power was based, as well as in regard to the basis for the claim to remedial power.[17]

The report of the Commission on Centre-State Relations – Report, Volume II: Constitutional Governance and the Management of Centre-State Relations – highlights that there has been ongoing conflict over Governors and State legislation and offers suggestions for various institutional responses to delay. It offers strong and convincing evidence that a lack of gubernatorial action is a federal issue, and that its recommendations are not self-enforcing constitutional rules.[18]

According to the report titled "Report No. 255: Electoral Reforms", issued by the Law Commission of India, a consultative system of appointments and robust institutional measures for the Election Commission of India are needed. It is relevant to Article 324 as it shows that the institutional concern is on-going and it was not brought to the court by the petitioner. Its proposals, however, are not enough to decide the constitutional validity of an interim appointment system created by the courts.[19]

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[16] Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).
[17] Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments", 22 *International Journal of Constitutional Law* 161 (2024).
[18] Commission on Centre-State Relations, "Report, Volume II: Constitutional Governance and the Management of Centre-State Relations" (2010).
[19] Law Commission of India, *"Report No. 255: Electoral Reforms"* (March, 2015).

1.2.7 Research Gap

The concepts of constitutional abeyance, judicial activism, basic structure review, constitutionalised adjudication and judicial amendment have been extensively discussed, as have institutional reports on specific failures in governance. What remains unexplored is how those lines of thought have engaged with the Supreme Court of India's recent judgments of 2025 and 2026 that directly grappled with silence, delay, and legislative vacuum and substitution. The present research seeks to fill this void, and suggest a single doctrinal framework that can assess structural implication, rights-protecting guidelines, institutional gap-filling, and more recent jurisprudence under the "gubernatorial-assent" without lumping them into the undifferentiated concept of judicial activism.[20]

1.3 CONCEPTUAL AND CONSTITUTIONAL FRAMEWORK

Once the source and setting of the constitutional silence is located, then it has legal meaning. The absence of an express rule can maintain democratic choice; it can be a regulatory vacuum or it can be an implication from the system of the Constitution. The legitimacy of the judicial ruling is thus bound up with the classification that precedes a determination of appropriate legal impacts.[21]

1.3.1 Meaning and Categories of Constitutional Silence

Ambiguity, deliberate openness, constitutional gap and legislative vacuum, are useful classifications. Ambiguity is the gap where there are at least two different interpretations of the text. Openness is intentional: it is a matter up to legislation, convention and institutional judgment. There is a constitutional gap where the constitutional scheme calls for a response which is not expressly addressed by the constitutional text. Legislative vacuum is a situation where there are constitutional guarantees which can be enforced, but there is not yet any statutory mecha-nism to enable this protection to be effective. The difference is relevant because what a court does when it interprets ambiguous language is a traditional judicial role, whereas when it adopts a new institutional mechanism for a prospective regime, it is asserting a much greater consti-tutional authority.[22]

[20] Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).
[21] Martin Loughlin, "The Silences of Constitutions", 16 *International Journal of Constitutional Law* 922 (2018).
[22] Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).

1.3.2 Sources of Judicial Authority

The starting point of the judges is the Constitution itself. Silent Choice depends on the text to indicate whether a choice is actually silenced, and who else might be delegated the choice. Then, structure can provide implications of Federalism, Representative Democracy, Judicial Independence, Rule of Law or Fundamental Rights. Both the Preamble and the basic structure doctrine provide a way to shed light on the constitutional purpose, but neither affords any independent power for the enhancement of governance. The remedial powers of the Supreme Court of India are enhanced by Articles 32 and 142 but remedial power is linked with a constitutional right or legal wrong. It is therefore necessary to know the source of the creativity of the judges before the content of the judicially provided rule can be advocated.[23]

1.3.3 Constitutional Limits

Constitutional restrictions are at the interpretational and remedial levels. Nor can implied norms remove language that is deliberately used just because a judge feels that a different arrangement is more desirable. Delivering separation of powers involves giving attention to institutional competence, particularly if legislation takes the place of this. When judicial remedies alter relations between Union and State governments, though, there is a further issue with federalism. Finally, the silence of the Constitution can be intentional, in itself a product of political negotiation or legislative choice. What is at issue is not mechanical restraint but disciplined justification: the restraint from the court must be justified in terms of the Constitution and, further, why not to intervene would violate that Constitution and why the chosen remedy does not unduly function as another branch of government.[24]

1.4 JUDICIAL DEVELOPMENT OF CONSTITUTIONAL SILENCE

Indian jurisprudence shows the various types of judicial creativities. The structures have resulted in implied constitutional bounds; rights cases have provided interim protections; institutional cases have crafted institutions; and recent federal battles have pushed remedial breaks. From these sentences, read together, it is clear that the legitimacy of creativity is becoming more a matter of what the remedy is, rather than simply how relevant the constitutional value is.[25]

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[23] The Constitution of India, arts. 32, 141, 142, 200, 201, 233, 324 and 368.

[24] Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).

[25] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 3 (Oxford University Press, New Delhi, 2nd edn., 2003).

1.4.1 Structural Implication and Restraint

The best known example of the phenomenon of structural implication is the basic structure doctrine. The Supreme Court in *Kesavananda Bharati Sripadagalvaru v. State of Kerala*[26] ruled that the power of the Parliament under Article 368 of the Constitution is limited in the sense of it not extending to the overturning of the basic structure of the Constitution. The doc-trine provided a substantive restraint that was never stipulated in the language of Article 368, but was nevertheless derived from engagement with constitutional supremacy and the nature of constituent power. Its importance with regard to constitutional silence is methodological. An implication may be valid where an institution under the constitution could otherwise be deprived of the very bases of its power. That is more limiting than a constitutional licence that the judges would otherwise have to develop new constitutional ideas.

Later the Court explicitly adopted the concept of silence. In *Bhanumati v. State of Uttar Pradesh*[27], it overruled the view that the Constitution's silence on a no-confidence mechanism for panchayat leaders precluded lawmakers from enacting such a mechanism, thereby showing that the Constitution's silence can create spaces for democratic choice, and not judicial ken. In *Manoj Narula v. Union of India*[28], the Court rejected the proposal to introduce a new constitutional disqualification for a person to become a Minister, if certain qualifications and disqualifications have been already laid down in the Constitution and the laws. Combined, the decisions demonstrate two types of restraint: silence can give a legislature the room to move and a court should not add further legal requirements without a constitutional basis merely because they have a moral or governance rationale.

1.4.2 Rights-Protective Gap-Filling

The greater the risk of a right becoming ineffective without a gap-filling, the stronger the protection of the right in the gap-filling. In *Vishaka v. State of Rajasthan*[29], the Supreme Court formulated interim relief measures to ban sexual harassment at the workplace, basing upon the four fundamental rights - Articles 14, 15, 19 and 21 of the Constitution - until the enactment of laws. In *Justice K.S. Puttaswamy (Retired) v Union of India*[30], a different approach was used – privacy was considered a part of liberty, dignity and Part III and was not transformed into a comprehensive judicial code. One of the fundamentals of legitimacy of institutions is the

[26] (1973) 4 SCC 225.
[27] (2010) 12 SCC 1.
[28] (2014) 9 SCC 1.
[29] (1997) 6 SCC 241.
[30] (2017) 10 SCC 1.

difference between the recognition of constitutionally guaranteed rights and the creation of a permanent set of rules.

The jurisprudence has strengthened in recent years the transitory nature of gap-filling. In *Harish Rana v. Union of India*[31], the Supreme Court had dealt with the questions of end-of-life decision-making and responded to these questions by articulating judicially crafted protections that were like a bridge, enabling constitutional protections to be realised in the absence of legislation. Such was not the general judicial authority to legislate. It was based on the premise that it would have to safeguard an identified right but competent legislation could replace the interim system. Temporariness thus maintains the relationship of constitutional protection and legislative responsibility.

1.4.3 Institutional Gap-Filling

Competence concerns are stronger in case of institutional silence, as remedies can be a redistribution of power. The idea and concept of consultation in judicial appointments evolved into Judicial Primacy and the collegium in *Supreme Court Advocates-on-Record Association v. Union of India*[32]. The Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 were declared unconstitutional in the later *Supreme Court Advocates-on-Record Association v. Union of India*[33] decision. Such decisions, in addition to preserving the independence of the judiciary, also have the effect of determining the make-up of the court; therefore, any reasoning on such decisions with respect to the origins of the Constitution, the necessity of the decision, and the institutional self-interest is particularly important.

In *Anoop Baranwal v. Union of India*[34], Article 324(2) of the Constitution envisaged legislation by Parliament on the appointment of members of the Election Commission of India, but no such law existed at that time. The Court called for a workaround interim committee-driven process until Parliament made new law. Later Parliament passed the "Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023"[35]. An important characteristic of defensible gap-filling is that the changes

[31] 2026 INSC 222.
[32] (1993) 4 SCC 441.
[33] (2016) 5 SCC 1.
[34] (2023) 6 SCC 161.
[35] The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023 (Act 49 of 2023), s. 7.

should not be viewed as a judicial usurpation of the power to decide on institutional design but as a provision that can be temporary and can be reverted to by legislation.

Two recent cases have made constitutional silence the subject of interpretation. In *Rejanish K.V. v. K. Deepa*[36], a Constitution Bench has gone on discussing the principle of constitutional silence while interpreting Article 233 and has given some "openness" as a sort of constitutional space. The Court in *X v. Office of the Speaker of the House of the People*[37] adopted constitutional structure to fill in a statutory gap in relation to the removal of judges. Both decisions favour functional interpretation of an already existing constitutional scheme, without assigning 'assent' to new and unrelated institutional end points, imagined by the Court in the absence of any legislative direction.

1.4.4 Gubernatorial Assent and Federal Consequences

The 2025 gubernatorial-assent litigation provides one of the clearest modern tests because Article 200 contains constitutional choices in the absence of any numerical deadlines for the Governor. Delay can make representative government a nullity; and a stipulation of a time or a presumption of assent can set aside a duty given in a constitution. The controversy thus brings to light the line between enforcing performance and providing constitutional consequences.[38]

The Supreme Court in *State of Tamil Nadu v. Governor of T.N.*[39] had to deal with the issue of prolonged inaction of State Bills, laid down time standards for the Governor's action and referred to Article 142 with regard to repassed Bills. The decision is a strong rebuke of indefinite neutralisation of the legislative process. The harder remedial question is whether enforcing a duty to act is enough to warrant imposing consequences not mentioned in Article 200. So in this case, it is not the nature of the specific judicial craftsmanship that is being disputed, but rather that the State is engaging in constitutionally obstructive conduct.

Figure 1 shows the factual distribution that directly resulted in the dispute which is the immediate factual distribution. Among the 12 Bills presented during the period, assent was withheld from 10 on 13 November 2023 while 2 were sent to the President for consideration. This concentration is important because it was a systemic delay and disposition at issue in the constitutional debate, not a particular extraordinary Bill.[40]

[36] 2025 INSC 1208.
[37] 2026 INSC 65.
[38] The Constitution of India, art. 200.
[39] 2025 INSC 481.
[40] 2025 INSC 481.

GUBERNATORIAL ACTION ON TWELVE TAMIL NADU BILLS

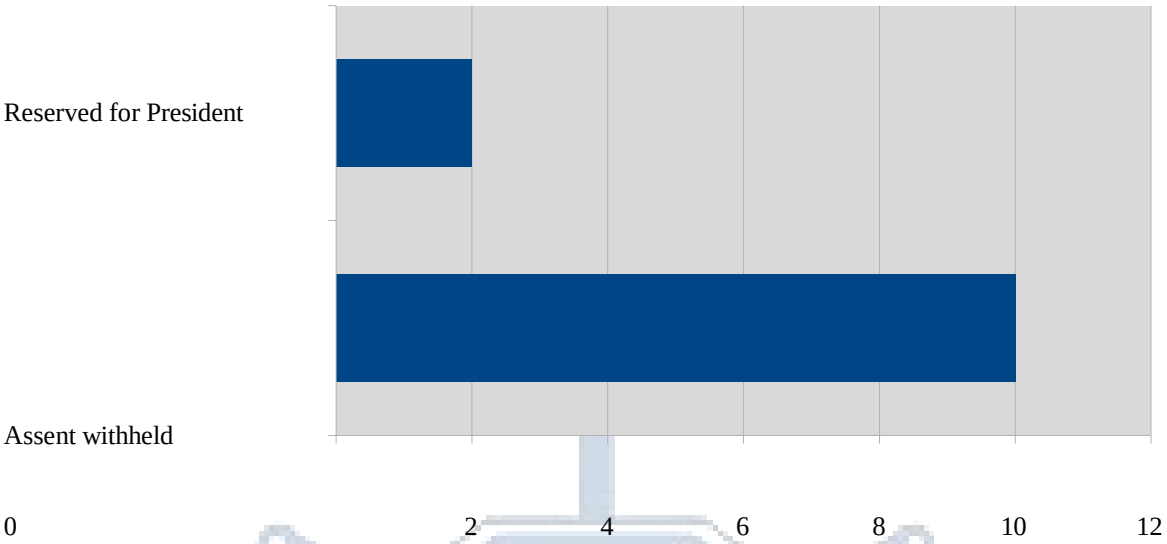


Figure 1: Gubernatorial Action on Twelve Tamil Nadu Bills on 13 November 2023

Figure 2 then illustrates the subsequent Presidential outcomes to explain why the controversy could not be reduced to delay alone. Of the 10 repassed bills later considered, 7 were disallowed, 1 was approved and 2 were still under consideration when the judgment was written. The pattern highlights federal implications of remedial design.[41]

PRESIDENTIAL OUTCOMES FOR TEN REPASSED BILLS

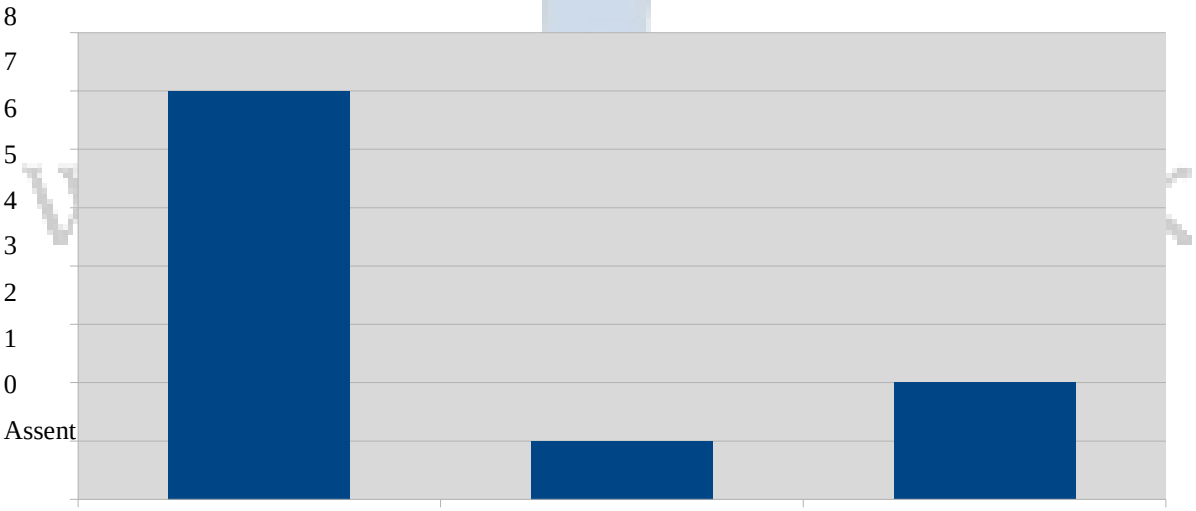


Figure 2: Presidential Outcomes for Ten Repassed Bills

The limits were refined in the advisory opinion in *In re: Assent, Withholding or Reservation of Bills by the Governor and the President of India*[42]. The Constitution Bench ruled that neither

[41] 2025 INSC 481.
[42] 2025 INSC 1333.

Article 200 nor Article 201 provides for universal timelines or a right to deemed assent simply because no time limit is specified. But if a decision is taken too long, and there is no explanation as to why, then this can be considered for review, and a court may require a decision to be made within a reasonable time without the substantive decision being made by the court. The distinction preserves judicial review without constitutional paralysis while leaving the substantive decision to the constitutional functionary.

1.4.5 Occupied Legislative Fields

The boundary is most apparent when there is existing legislation in the area. In *Ashwini Kumar Upadhyay v. Union of India*[43], the Supreme Court has countered efforts to extend the reach of judicial directions into creating or widening criminal offences, and reiterated that *Vishaka*[44]-type intervention needs to be based on a real legislative absence, and not discontent with the law. The relevant distinction is between the absence of law and the perceived inadequacy of law. Where Parliament has acted, to the extent that it has enacted legislation, courts have the power to examine the constitutionality of the law, interpret the law, and ask for its lawful implementation, but cannot use the Constitution's silence as a means of introducing new offences and their penalties, or reconstructing the policy framework. This is the 'occupied-field' principle which is needed to maintain legislative accountability.

1.5 CRITICAL ANALYSIS AND THE CONSTITUTIONAL HARMONY TEST

But neither absolute restraint nor unlimited creativity is supported by the cases. Instead, they exhibit a spectrum of responses to address the issue, from interpretation and declaration to interim guidance, process design, and institutional replacement. The source of the rule to be inferred, therefore, must be considered in the context of a coherent standard with the constitutional strength of the remedy intended to implement it.[45]

1.5.1 A Six-Part Constitutional Harmony Test

The Constitutional Harmony Test is proposed to have six progressive considerations. It demands that courts make transparent what might otherwise be a simple reference to constitutional "morality", "necessity", or "full justice", and it is intended to make effective review more

[43] 2026 INSC 432.
[44] (1997) 6 SCC 241.
[45] Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).

effective without providing a basis for judicial action in the absence of any constitutional direction.[46]

1.5.1.1 Silence identification

The court should label the issue as "Ambiguity", "Deliberate Openness", "Constitutional Incompleteness", "Legislative Vacuum", or "Implementation Failure". While a true vacuum allows for an interim protection, an open field, or one that is purposively occupied, normally requires some restraint.[47]

1.5.1.2 Constitutional anchoring

All rules provided should be traceable to a text, structure or an enforceable right in the constitution. Legitimacy is also based on some degree of providing reasons why the Constitution, not the judges' preference, calls for action.[48]

1.5.1.3 Constitutional necessity

Non-intervention must cause a "material frustration" of a constitutional right, duty, institution or process. Efficiency or desirability of another arrangement is not a necessity if elimination of the problem can be accomplished pursuant to an ordinary interpretation, review, or enforcement.[49]

1.5.1.4 Remedial proportionality

The remedy should be as minimally institutional an approach as possible that is necessary to cure the wrong. The Court should generally refrain from substituting its judgment for the constitutionally required result unless there has been a declaration and/or a direction to do something that is already a duty.[50]

1.5.1.5 Temporal restraint

In the absence of action by the legislature, judges' decisions reflecting these norms should ordinarily be provisional, in the expectation that they will be replaced by lawful legislation of the

[46] Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments", 22 *International Journal of Constitutional Law* 161 (2024).
[47] Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).
[48] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts XXV* (HarperCollins Publishers India, Noida, 1st edn., 2019).
[49] Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).
[50] 2025 INSC 1333.

legislature. This safeguards immediate rights without converting an emergency judicial measure into permanent policy.[51]

1.5.1.6 Non-substitution

Courts can require reconsideration, compel performance or declare action unconstitutional, but should not make a constitutional choice assigned to another actor unless there is an independent constitutional basis. This line will safeguard both review and separation of powers.[52]

1.5.2 Evaluation

Applied to the cases, the test explains why judicial creativity should not be assessed solely by its outcome. Basic-structure review derives an implied limitation from constitutional supremacy; *Vishaka*[53] provided temporary protection for existing rights; *Anoop Baranwal*[54] addressed an institutional vacuum; and the gubernatorial-assent reference[55] rejected automatic timelines or deemed assent while preserving review of prolonged inaction. The same reasoning supports restraint in *Manoj Narula*[56] and *Ashwini Kumar Upadhyay*[57], where judicial additions would have altered choices already made and regulated by constitutional or statutory law. The new concept is constitutional asymmetry: while courts may have great power to identify violations and to induce lawful action, that power is not so great when it comes to establishing permanent arrangements or establishing substantive rules that another constitutional body is competent to make.

1.6 FINDINGS

The comparison produces the following specific findings.

1. **Constitutional Silence Has Distinct Legal Forms:** The study shows that ambiguity, deliberate openness, constitutional incompleteness, legislative voids and implementa-tion failures are not all of one class, although they are related to one another. Their institutional effects vary since each entails a different interpretation, legislation, consti-tutional practice, and judicial remedy.[58]

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[51] (2023) 6 SCC 161.
[52] 2025 INSC 1333.
[53] (1997) 6 SCC 241.
[54] (2023) 6 SCC 161.
[55] 2025 INSC 1333.
[56] (2014) 9 SCC 1.
[57] 2026 INSC 432.
[58] Richard Albert and David Kenny, "The Challenges of Constitutional Silence: Doctrine, Theory, and Applications", 16 *International Journal of Constitutional Law* 880 (2018).

2. **Structural Implication Requires a Constitutional Anchor:** Firstly, the implied constitutional rules are most defensible if they are protecting a principle within the consti-tutional structure as is the case with basic structure review and judicial independence jurisprudence. Silence, by itself, does not create proper authority, but rather the justifi-catory power is given by the constitutional principle that would be hurt if the silence were not.[59]

3. **Rights-Protective Gap-Filling Is Exceptional and Temporary:** It is justified to give guidelines like those given in *Vishaka v. State of Rajasthan*[60], if there is a real void in the law, which leaves an existing fundamental right without effective protection. Recent precedent has made it clear that these directions are not as broad an authority for the court to build regulatory structures in the absence of proper laws: they are, instead, interim constitutional fixes, in effect, until properly enacted legislation.

4. **Occupied Legislative Fields Narrow Judicial Creativity:** In areas where the legislature has already enacted laws on the pertinent subject, the role of the courts tends to change to one of constitutional review, interpretation and application of existing laws. The mere fact that a scheme falling within a duty to consult was enacted but that it was found to be less complete, effective or of poorer policy quality than could have been hoped for does not itself mean that it creates a constitutional vacuum, empowering courts to add on to the scheme offences, disqualifications, or regulatory structures.[61]

5. **Institutional Gap-Filling Attracts Heightened Legitimacy Concerns:** Where appointment or governance mechanisms are judicially designed, they can protect judicial independence while also increasing judicial control over institutional architecture. Thus, the question of legitimacy will have to take into account the institutional self-interest, the competence of the legislatures as well as the need for it in the constitution, and whether the judicially fashioned arrangement is a provisional one, but still securely anchored in a constitutional principle.[62]

6. **Gubernatorial Inaction Is Reviewable Without Automatic Substitution:** The 2025 gubernatorial-assent decisions are very clear in that there are no numerical deadlines in the Constitution, and therefore, prolonged inaction is not immune from court

[59] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 164 (Oxford University Press, New Delhi, 1st edn., 2010).
[60] (1997) 6 SCC 241.
[61] 2026 INSC 432.
[62] Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments", 22 *International Journal of Constitutional Law* 161 (2024).

challenges. They also differentiate a judicial direction requiring timely performance of a constitutional duty from the imposition of universal time limits or implied assent for a lack of explicit textual and/or structural authorisation.[63]

7. **Remedial Form Is Part of Constitutional Legitimacy:** This research reveals that the different levels of judicial interventions can be justified in relation to the same consti-tutional values under the guise of different reliefs. The courts can rule that there is a violation of the Constitution, but fail to observe the boundaries of institutional compe-tence if, instead of enforcing the duty of the constitutionally mandated institution, the courts displace it.[64]

1.7 CONCLUSION

Although the framers may never have intended to define constitutional silence to be "constitu-tional", constitutional silence does not mean there is simply a missing space that courts may fill at will. Indian constitutional doctrine illustrates that silence can maintain legislatively-cho-sen limits, meaningfully suggest a structural implication, or reflect a rights-protective void, or a failure of implementation. A necessary starting point of the answer, therefore, is classifica-tion. Charging the courts with a duty to resolve every silence runs the risk of turning judicial review into constitution-making; ignoring every silence can lead to rights and institutions being outflanked by inaction from the courts.[65]

The Supreme Court has, at times, adopted a more restrained approach. Constitutional implica-tions such as basic-structure limitations and temporary safeguards derive legitimacy from con-stitutional supremacy; constitutional functionaries must perform their assigned duties, and gen-uine legislative gaps may justify carefully limited interim protection. Conversely, the *Presi-dential Reference, 2025*[66], *Manoj Narula*[67] and *Ashwini Kumar Upadhyay*[68] show that judicial authority is narrower when a proposed rule would add qualifications, consequences, offences or outcomes that another institution is constitutionally competent to determine.

63 2025 INSC 1333.
64 Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).
65 Martin Loughlin, "The Silences of Constitutions", 16 *International Journal of Constitutional Law* 922 (2018).
66 2025 INSC 1333.
67 (2014) 9 SCC 1.
68 2026 INSC 432.

Constitutional Harmony Test is a combination of these strands: silence identification, constitutional anchoring, necessity, remedial proportionality, temporal restraint and non-substitution. Its basic message is that the judge is allowed to be creative in the sense that a judge may make a constitution work without redistributing the institutional decisions of the constitution itself. The task is not to kill creativity, as every interpretation must, but to discipline it in ways that can be justified by reasons tied to the Constitution, its text and structure, the rights it secures, and democratic responsibility.[69]

1.8 SUGGESTIONS

The identified tensions support the following institutionally workable recommendations.

1. Require Express Classification of the Silence: Before crafting relief, constitutional courts should assess whether the dispute is about ambiguity or deliberate openness of the Constitution, a constitutional gap, a legislative gap or failure, or an implementation gap. This classification should be included in the reasoning of the judge, as it helps him/her decide on the level of intervention that is allowed.

2. State the Precise Constitutional Anchor: Gap-filling directions must state the principle of the constitution or the right guaranteed that backs up the direction. It is best avoided to have free-standing appeals to good governance, when there is no identifiable consti-tutional source of the judicial authority that is being exercised.

3. Apply a Necessity Threshold Before Creating Guidelines: Where material frustration of a constitutional right or institution would result from nonenforcement of the order, temporary court orders should be issued; otherwise, an ordinary remedy should be suf-ficient. The judgment should provide reasoning for its determination that a remedy of interpretation, declaratory relief, or a mandate to perform an existing duty is not an adequate resolution of the constitutional deficiency.

4. Prefer Performance Orders Over Substituted Outcomes: Courts should recognize a constitutional functionary's failure to act as a duty, and in such cases, require expedient action but leave to the constitutional decision-maker the responsibility for a substantive decision. All substituted outcomes should have a distinct and explained constitutional underpinning.

5. Add Legislative Sunset Language to Interim Norms: Where no law exists, directives issued in answer to a real legislative vacuum should clearly have limited validity and

[69] Emmett Macfarlane, "Judicial Amendment of the Constitution", 19 *International Journal of Constitutional Law* 1894 (2021).

should expire once competent legislation is adopted. It is a way of retaining the imme-diate constitutional protection and also restoring the policy design to the institution whose constitutionally mandated duty is to enact policies.

6. Use Remedial Proportionality Under Article 142: Where Art. 142 is resorted to, the Supreme Court should give a separate reasoning why the remedy chosen is necessary and why no less intrusive remedy would suffice to right the constitutional wrong found. This reasoning would distinguish the authority to grant complete justice from imper-missible remedial substitution and would enhance transparency.

7. Record Federal Effects in Article 200 Litigation: The courts considering the concept of gubernatorial assent under Article 200 of the Constitution of India should explicitly consider representative form of government as well as the role of Governors or Presi-dent under the federal structure of the Indian government. Judicial remedies should not turn judicial review into routine judicial oversight of the legislative process, but should deal with unconstitutional obstruction.

8. Preserve Legislative Responsibility in Occupied Fields: If Parliament or a State Legis-lature has a comprehensive legal regime in place, judicial decisions should indicate if the complaint is about the constitutionality, interpretation, or enforcement of the law. It is not for courts to label opposition to the current legislative policy as a lacuna in the law to establish new offences, disqualifications or regulatory obligations.

9. Require Periodic Review of Continuing Judicial Guidelines: However, where any in-terim judicial directions are in force for long duration, the Supreme Court can provide for periodic review solely to determine whether the legislative or regulatory vacuum still continues. Such review should not create a long-term judicial framework; it should determine whether subsequent legislation or regulation has displaced the interim direc-tions.

10. Develop a Consistent Constitutional Harmony Framework: There is a need for future Constitution Benches to articulate common elements in defining constitutional silence, ensuring there is a constitutional anchor, outlining necessity, ensuring remedial propor-tionality, upholding temporariness and avoiding institutional substitution. A consistent structure would make it easier to predict and more consistent, while also affording the flexibility needed to handle unexpected constitutional issues.

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