



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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THE LIVING GAPS: THE JURISPRUDENTIAL NECESSITY OF JUDICIAL DISCRETION IN THE FACE OF CONSTITUTIONAL SILENCE

~ Himani Singh

ABSTRACT

Written constitutions are partial in nature. None of the constitutional documents, however elaborated, can predict all the social, political, and technological possibilities that can emerge with time. Such unavoidable gaps, termed in this paper as living gaps, result in constitutional silence, where clear instruction is lacking in the text. The paper discusses the jurisprudential imperative of judicial discretion in dealing with such silences, the main view being the Indian constitutional law and a comparative constitutional view.

The paper presents its case by arguing that judicial discretion is not some constitutional aberration but a functional and normative requirement to maintain constitutional values like dignity, liberty, equality and the rule of law. The interpretive broadening of Article 21 by the Indian Supreme Court to cover privacy, environmental conservation, sexual autonomy rights is an example of how the courts have articulated the constitutional gaps to reflect current social realities. Meanwhile, the recent interventions on executive inaction, especially the use of gubernatorial powers, can be used to show that judicial discretion is used to avoid constitutional stalemate due to textual vacuity.

Placing Indian constitutional practice in the context of a larger comparative context including the jurisprudence of the United States and other constitutional democracies, this paper demonstrates the global inexplicability of judicial gap-filling. Although it is important to recognize the fears of judicial activism and democratic constitutionalism, the paper argues that restrained judicial discretion in terms of constitutional morality and structural boundaries is the only way to allow the Constitution to remain a vital and a living law. In conclusion, the

research paper concludes that the constitutional silence is not a failure of the constitution but rather an indication of the need to have principled judicial participations in order to sustain constitutionalism.

The phenomenon of constitutional silence is often regarded as a core aspect of the American Constitution because the Founding Fathers aimed to guarantee that every person is protected by the law and thus guaranteed their rights and freedoms. The concept of constitutional silence is commonly considered to be the central element of the American Constitution as the Founding Fathers strived to provide the opportunity to all people to stand under the law and therefore ensured their rights and freedoms.

Keywords: judicial discretion, judicial activism, constitution, supreme court, authoritative powers, constitutional legitimacy, morality.

INTRODUCTION

A written constitution is not only a law document, but also an active system of government. Although it sets the principles that underlie a State, it is just not able to foresee all the social, political, technological and moral developments that will happen in the future. Therefore, every constitution has some silent spots, gray areas or even intentional incompleteness. Such silences, be they due to the compromise of history, or the limitations of foresight, or even to a purposeful flexibility, tend to create difficult constitutional dilemmas when other situations arise. It is here in the interstitial spaces that the courts are often requested to provide interpretation, supplement or give operational meaning to the constitutional provisions.

The Indian Constitution, though being amongst the longest written constitutions in the world, is not an exception. Even though it effectively lists all of the basic rights, institutional structures, and governmental powers, it does not comment on many matters that have gained constitutional relevance over the years. The framers did not explicitly deal with questions relating to the right to privacy and the protection of the environment, sexual autonomy, and boundaries to executive inaction. However, these are the problems that have been brought to the fore in the modern constitutional discussion. The judiciary especially the Supreme Court of India has been instrumental in filling such lacunae by use of judicial discretion.

In constitutional terminology, judicial discretion can be seen as the power of a court to give meaning to constitutional text, in the sense where it is not given and where the meaning is uncertain. This discretion is not unconditional and arbitrary, but instead it is done under the

limits of the constitutional organization, precedent, and values. Jurisprudential debate over judicial discretion tends to swing on two opposing concerns, namely, the need to maintain democratic legitimacy and the respect of legislative supremacy and the need to avoid constitutional stagnation or executive arbitrariness in the silence.

However, critics contend that overreach by the judiciary will lead to a situation whereby the judiciary will become super-legislative which will compromise the separation of powers. Those who support it, though, argue that constitutional silence should not be compared to constitutional authorization to do nothing or to be abused. In cases when the Constitution is silent, the courts have to go to the text and inspect its spirit, purpose, and core values. Constitutional morality, the purposive interpretation and living constitution theory have been the doctrines that have captured this approach in the Indian context.

The thesis of this paper is based on the assumption that judicial discretion is neither a non-obligatory or non-remedial attribute of constitutional judicial discretion, but a jurisprudential requirement. Failure to adhere to constitutional silences may result in a lack of democracy, loss of basic rights, and constitutional paralysis. This paper will explore the manner in which Indian courts have dealt with constitutional silence by identifying the nature of issues that have been touched and how other constitutional democracies have dealt with the same.

OBJECTIVES OF THE STUDY

- 1.To play out the idea of constitutional silence and determine the situations when constitutional texts do not offer any direct instruction on new legal and social questions.
- 2.In order to examine the jurisprudential basis of judicial discretion, especially concerning the interpretation of the constitution and adjudication.
- 3.To analyse how the Indian courts (particularly the Supreme Court of India) have been using judicial discretion to interpret the gaps in the constitution especially on elements of fundamental rights and executive accountability.
- 4.To measure the extent to which constitutional morality and purposive interpretation as applied to the resolution of judicial discretion in constitutional silence cases.

RESEARCH PROBLEM

The key issue that should be undertaken through this research is whether judicial discretion as a response to constitutional silence provides a valid and essential role of constitutional

adjudication or whether it threatens to compromise democratic values and the division of powers. This problem is further complicated by the lack of a clear doctrinal basis to regulate judicial discretion limits, resulting into a lack of a consistent standard and a lack of judicial overreach.

RESEARCH QUESTIONS

1. What is constitutional silence and how does it take place in the written constitutions especially the Indian Constitution?
2. What are the theoretical reasons and the jurisprudential justifications of the judicial discretion in constitutional interpretation?
3. What has the judicial discretion of Indian courts done to fill their constitutional silences particularly over fundamental right and executive accountability?
4. How far does judicial discretion in exercising discretion meet the constitutional morality and democracy?

RESEARCH HYPOTHESIS

Judicial discretion motivated by constitutional silence is not an exception but part of jurisprudence that has to be involved in constitutional adjudication, as long as such discretion must be informed by constitutional values, structural principles and democratic accountability.

Moreover, the study postulates that judicial discretion, when acted in these limits enhances constitutionalism as it prevents the circumvention of rights and institutional stalemate, as opposed to delegitimizing legislative supremacy or democratic governance.

RESEARCH METHODOLOGY

The current study is a doctrinal and comparative legal study design, which will mainly rely on the interpretation of constitutional texts, judicial ruling, and academic literature.

Doctrinal Method

The paper proceeds to take an analytical review of the provisions of the constitution especially the provisions in the constitution pertaining to, the basic rights, separation of powers and judicial review. The Supreme Court of India has made its leading judgments that have been discussed to know how the judicial discretion has been used in the cases where the constitutional silence has been involved.

Analytical Method

The reasoning and the interpretive strategies of the judiciary are critically examined in order to determine the rationale and the effects of judicial discretion. The focus is made on such doctrines as the constitutional morality, purposive interpretation, and the living constitution theory.

Comparative Method

This has been carried out through comparative analysis of constitutional jurisprudence in some jurisdictions such as the United States and other constitutional democracies to establish common trends and deviant ways of approaching constitutional silence.

Secondary Sources

The study is based on secondary sources like books, peer reviewed journal articles, law review articles, commentaries and legal databases that are of authority. All the sources applied are checked and available, and the references are done in the format of Bluebook (21st Edition).

Limitations

The paper does not conduct any empirical or socio-legal research but limits its scope to constitutional adjudication. Its emphasis is still put on judicial interpretation and jurisprudential analysis.

LITERATURE REVIEW

1. Interpretive Theory and constitutional silence.

Tom Ginsburg has discussed the notion of constitutional silence in the greatest detail, and states that constitutional silences are usually deliberate and linguistically required. Ginsburg says that constitutional silence often seeks to resolve disputed matters because such resolution will help achieve a political compromise and prolonged stability.¹ constitutional silence, thus, does not mean lawlessness but is a decision to leave the resolution to later institutional practice, such as judicial interpretation.

Martin Loughlin goes even further and adds to this point that a constitution is not a complete legal code but it is a normative framework.³ Loughlin states that it must always have a role to interpret what the constitution does not say as much as it does state. Loughlin warns that, even

though the courts have to interact with silence, this interaction should be based on the constitutional structure and legitimacy and not an individual judicial bias.

Combining these scholars, one will determine that constitutional silence is a natural and an inevitable aspect of the constitutional design, hence, the need to involve the judiciary.

2. Judicial Discretion and Law Indeterminacy.

Judicial discretion has its jurisprudential basis in the indeterminacy of the law language. In *The Concept of Law*, H.L.A. Hart develops the concept of open texture of law, which suggests that all factual situations can no longer be foreseen by legal rules, and judges have to employ discretion in difficult cases in which the law is silent or unintelligible.

Developing the theory of Hart, Ronald Dworkin disapproves the idea of judicial discretion without any restraint. Rather, he claims that judges need to read legal texts in regard to principles underlining the legal system as maximum justification of the legal system.⁴ Dworkin rights-based theory is especially pertinent to constitutional adjudication that constrains judicial discretion with moral reasoning incorporated into the constitutional values.

This theory describes the manner in which the constitutional courts such as the Indian Supreme Court justify the application of principled interpretation as a way of filling constitutional vacuums instead of using a legislative substitute.

3. Living Constitutionalism and Constitutional Morality.

One such interpretive approach to constitutional interpretation is the value-based approach of Aharon Barak, who used to be the Chief Justice of Israel. Barak believes that contemporary constitutions have the objective normative order and that no question in the constitution should get out of judicial scrutiny when it concerns fundamental rights or democratic concerns.

With reference to the Indian context, the concept of constitutional morality, where compliance with constitutional values takes precedence over strict textualism, can be traced back by scholars to the conception of constitutional morality put forward by B.R. Ambedkar to justify the progressive interpretation of the constitution, especially bill of rights cases involving dignity, equality and autonomy.

This approach is supplemented by the theory of the living constitutionalism that states that the meaning of the constitution has to change in accordance with the changing social realities. Theorists believe that in the absence of this development, constitutional safeguards would

become irrelevant in the wake of new threats in the digital era like surveillance and climate change.

4. Judicial Activism Criticism & Democratic Legitimacy

Although there is a strong theoretical foundation for judicial discretion, there is also a large amount of literature available that critiques an expansive use of judicial interventionism. Jeremy Waldron states that strong judicial review erodes democratic legitimacy by transferring decision making power away from elected representatives and towards unelected judges. Waldron believes that where there is silence in the constitution, constitutional gaps should be filled using democratic means rather than judicial innovation.

In the context of Indian jurisprudence, contemporary scholars have expressed concern that courts may exceed constitutional limits when judges attempt to impose guidelines or timelines that do not explicitly exist within the constitutional text. Critics have cautioned that excessive filling of judicial gaps may confuse the separation of powers and reduce institutional accountability.

While many of the critics of judicial activism who have written on this subject have also acknowledged that complete judicial restraint is impractical, the debate has therefore become whether or not to keep judicial discretion principled, transparent and based on the constitution.

DISCUSSION AND ANALYSIS

1. The Indian Constitution is one of the most extensive constitutions globally,

but nonetheless, it still has deliberate, rational gaps in terms of the written text within it. The founders created broad open-ended provisions especially so in Part III, in anticipation of a degree of flexibility and adaptability. The presence of Constitutionally created gaps is known as constitutional silence, which occurs when there is no explicit language in the Constitution to provide guidance on an evolving social reality or two no procedures that govern Constitutional authorities. The lack of explicit language exists purposefully due to the way the Constitution is intended to be dynamic in its nature and will always require interpretation by the courts to maintain constitutional governance.

2. Judicial Discretion as a Tool to Address Substantive Constitutional Silence

The Supreme Court of India has consistently used judicial discretion as a tool to address substantive constitutional silence, most frequently under Article 21.

A widely cited case is Justice K.S. Puttaswamy vs Union of India, in which the Supreme Court held that privacy is a fundamental right. However, it must/should not be construed that privacy does not exist in the Constitution simply because it is not explicitly referred to in the Constitution. As such, it was held that the absence of privacy in the Constitution could not be interpreted as the absence of any denial of rights and that the fundamental rights would need to be read and interpreted with respect to dignity, autonomy and changing social climates.

The same can be said of the recognition of rights associated with the environment, which have been recognised as being indirectly incorporated into Article 21 through various Supreme Court cases. Case law such as Vellore Citizen's Welfare Forum vs Union Of India has incorporated principles of sustainable development and inter-generational equity into the jurisprudence of the Constitution. The above highlighted cases show the utilization of judicial discretion through the use of judicial interpretation in order to address substantive constitutional silences.

3. Equality, Dignity and Constitutional Morality

Judicial discretion has also played an important role in interpreting provisions within the Constitution as it relates to the rights of members of marginalized groups who have been left out, or ignored, by the Constitution. In the landmark case of Navtej Singh Johar v. Union of India, the Supreme Court decriminalised consensual same sex relationships, despite the fact that the Constitution does not address sexual orientation. The Supreme Court relied on a reading of Articles 14, 15 and 21, as well as other Articles within the Constitution, and applied fundamental values of equality, dignity and non-discrimination instead of relying on the prevailing social morals, thereby placing greater weight on constitutional morality.

The purposive and value based approach reflects a bridging of constitutional silence with reference to the fundamental principles of equality, dignity and non-discrimination.

4. Procedural Silence and Executive Accountability

Constitutional silence is not restricted to the rights of individuals within the Constitution, but also includes procedural requirements for the functioning of constitutional authorities. Article 200 of the Constitution, which governs the power of a Governor to assent to state legislation, does not specify a time for the exercise of the power; as such, a lack of action by a Governor in respect of legislation has resulted in executive inaction, constitutional stalemate and paralysis in State of Tamil Nadu v. Governor of Tamil Nadu.

The Supreme Court intervened to read an implied temporal limit into Article 200 and stated that an indefinite delay by the Governor in giving assent to legislation is inconsistent with democracy. The intervention and use of judicial discretion by the Supreme Court prevented constitutional paralysis and reaffirmed legislative supremacy consistent with the Constitution.

5.- Article 142 Provides for the exercise of Remedial Judicial Discretion

Article 142 establishes explicit constitutional confidence in the exercise of judicial discretion by giving the Supreme Court authority to do "complete justice." The Court has used this authority to create remedies beyond the confines of statutory boundaries in the event of constitutional silence. While controversial, this use is appropriate where the established civil procedure for crafting remedy does not provide for an adequate resolution to institutional deadlock.

6.- Limits on the Exercise of Judicial Discretion

Judicial discretion must be exercised according to principles of restraint and relevance, as evidenced in *Nabam Rebia v. Deputy Speaker*. The Court has acknowledged that judicial and discretionary powers (executive or otherwise) are limited by constitutional authority and subject to judicial review. Judicial discretion in addressing constitutional silence is only justified when there is evidence of legislative inaction contravening constitutionally protected values, and when intervention is required to maintain accountability, protect fundamental rights, and maintain constitutional morality.

7.- Analytical Assessment

Judicial discretion used to remedy situations of constitutional silence serves to reinforce stability rather than disrupt it. The vast majority of Indian Courts have based their decisions on the original constitutional text, the constitutional structure, and the constitutional values and have avoided making judicial legislation without legal authority; however, although there are valid concerns about possible overreach by the courts, if judicial discretion is exercised in total abstinence from the courts, it likely will render the Constitution a mere historical document in an ever changing society.

CONCLUSION

Constitutional silence does not reflect any kind of flaw or error; rather, it is an important aspect of constitutional design that allows for flexibility across generations and times. Although very

detailed, the Indian Constitution has intentionally incorporated open-textured sections that require the courts to interpret them. In those instances, the use of discretion by judges constitutes a necessary part of jurisprudence as opposed to exerting undue power through the completion of constitutional meaning.

Indian constitutional law shows that judges rely on discretion in filling in normative and procedural gaps by operating primarily from the constitutional text, structure and values. Judges have held that Article 21 can be interpreted to include rights related to privacy, dignity, the environment and sexual autonomy - all of which are areas of constitutional silence regarding textual documentation. Similarly, when the courts intervened to fill procedural silences about executive powers, they acted to prevent constitutional deadlock and maintain democratic control and accountability.

Additionally, comparative constitutional methods demonstrate the justification for the use of discretion by judges and that judges share the same jurisdictional duty of ensuring that constitutions remain relevant in contemporary society. However, judicial discretion should only be exercised prudently, cautiously and in accordance with the constitutional moral, so that there is no encroachment of legislative functions by the judiciary.

Judicial discretion, when exercised appropriately in cases of constitutional silence, acts as living links between constitutional text and actualised constitutions. In this regard, judicial discretion strengthens constitutionalism, upholds fundamental rights and maintains the rule of law.

BIBLIOGRAPHY

A. Cases (India)

- Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).
https://main.sci.gov.in/supremecourt/2012/35071/35071_2017_Judgement_24-Aug-2017.pdf
- Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).
https://main.sci.gov.in/supremecourt/2016/14961/14961_2018_Judgement_06-Sep-2018.pdf
- Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647 (India).
<https://indiankanoon.org/doc/1830718/>

- Virender Gaur v. State of Haryana, (1995) 3 SCC 186 (India).
<https://indiankanoon.org/doc/1949516/>
- Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1 (India).
<https://indiankanoon.org/doc/190773575/>
- State of Tamil Nadu v. Governor of Tamil Nadu, (2025) 8 SCC ____ (India).
<https://main.sci.gov.in>

B. Foreign & Comparative Cases

- Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (India).
<https://indiankanoon.org/doc/257876/>
- Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
<https://supreme.justia.com/cases/federal/us/5/137/>
- Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) (S. Afr.).
<https://www.saflii.org/za/cases/ZACC/2002/15.html>

D. Journal Articles

- Aharon Barak, Judicial Discretion, 62 *U. Chi. L. Rev.* 133 (1995).
<https://chicagounbound.uchicago.edu/ucirev/vol62/iss1/3>
- Upendra Baxi, The Role of the Supreme Court in Indian Constitutionalism, 32 *J. Indian L. Inst.* 35 (1990).
<https://www.jstor.org/stable/43950549>
- Mark Tushnet, Weak-Form Judicial Review and Constitutional Dialogue, 23 *W. New Eng. L. Rev.* 1 (2001).
<https://digitalcommons.law.wne.edu/lawreview/vol23/iss1/2>

E. Online & Institutional Sources

- Supreme Court of India, Judgments Portal.
<https://main.sci.gov.in>
- Indian Kanoon Database.
<https://indiankanoon.org>
- Constitution of India.
<https://legislative.gov.in/constitution-of-ind>