



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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Judicial Overreach vs. Constitutional Necessity: The Rise and Fall of “Deemed Assent”

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Abstract

The doctrine of “deemed assent” emerged in Indian constitutional discourse as a judicially contemplated response to prolonged executive inaction, particularly in relation to the Governor’s failure to grant or withhold assent to State legislation under Article 200 of the Constitution of India. Conceived as a mechanism to prevent democratic paralysis and protect legislative supremacy, the doctrine was grounded in broader constitutional values such as rule of law, reasonableness, and constitutional morality. However, the doctrine simultaneously raised profound concerns regarding separation of powers, federal balance, and the limits of judicial creativity. This paper undertakes a comprehensive doctrinal and theoretical analysis of the rise and fall of deemed assent in Indian constitutional jurisprudence. It argues that while judicial intervention was prompted by genuine constitutional necessity, the doctrine ultimately proved unsustainable due to its incompatibility with constitutional text and structure. The paper concludes that constitutional accountability must be enforced through interpretative discipline, time-bound directives, and institutional dialogue rather than judicial substitution of constitutionally designated authorities.

Keywords: Deemed Assent, Article 200, Governor, Judicial Overreach, Constitutional Necessity, Separation of Powers, Federalism

1. Introduction

The endurance of a constitutional democracy depends not only on the written text of the Constitution but also on the faithful and timely discharge of duties by constitutional functionaries. The Indian Constitution, while exhaustive in its scope, relies heavily on constitutional conventions, good faith, and institutional restraint to ensure its smooth functioning. When these unwritten norms are disregarded, the Constitution risks being reduced to a battleground of competing authorities rather than a framework for cooperative governance. One of the most contentious contemporary constitutional issues in India has been the recurring delay by Governors in granting assent to Bills passed by State Legislatures. Such delays, often unexplained and prolonged, have the practical effect of suspending duly enacted legislation indefinitely. This phenomenon has triggered significant constitutional concern, particularly in States where the political executive at the State level is ideologically opposed to the Union Government.

In response to this constitutional impasse, constitutional courts began to explore innovative remedies to prevent democratic stagnation. Among these was the notion of “deemed assent,” a judicially inferred doctrine under which a Bill would be treated as having received gubernatorial assent if no decision was taken within a reasonable period. Although the doctrine was motivated by the need to preserve democratic governance, it raised a fundamental question: can courts cure constitutional silence by creating legal consequences not explicitly provided for in the Constitution?

This paper examines the doctrine of deemed assent as a case study in the tension between judicial overreach and constitutional necessity. It traces the conceptual origins of the doctrine, evaluates its constitutional validity, and analyses the judiciary’s eventual retreat from it. In doing so, the paper seeks to contribute to broader debates on judicial role, federalism, and constitutional interpretation in India.

2. Constitutional Architecture of Article 200

Article 200 of the Constitution of India governs the assent of the Governor to Bills passed by

the State Legislature.

1. Reserve the Bill for the consideration of the President;
2. Return the Bill (if it is not a Money Bill) to the Legislature for reconsideration.

The provision does not prescribe a specific time limit within which the Governor must exercise any of these options. This omission has been the focal point of constitutional controversy. While some view the absence of a timeline as a deliberate choice to preserve gubernatorial discretion, others argue that it enables constitutional misuse through indefinite delay.

2.2 Constitutional Role of the Governor

The Governor occupies a unique position in India's constitutional scheme. Though formally the head of the State, the Governor is ordinarily bound by the aid and advice of the Council of Ministers. The office is intended to function as a constitutional sentinel rather than a parallel executive authority.

However, the power of assent under Article 200 is one of the few areas where the Governor appears to exercise personal discretion. This discretion, though constitutionally recognised, is not unfettered. It is circumscribed by constitutional morality, democratic principles, and the overarching framework of federalism.

Prolonged inaction by the Governor effectively nullifies the legislative will of an elected assembly. Such delay raises serious concerns about democratic legitimacy and the balance of power between the State and the Union.

3. Constitutional Silence: Flexibility or Flaw?

3.1 Nature of Constitutional Silence

Constitutional silence is not inherently problematic. Many constitutional systems deliberately leave certain matters unregulated to allow conventions and practices to evolve organically. Silence can serve as a space for political negotiation, flexibility, and adaptation to changing circumstances.

However, constitutional silence becomes problematic when it is exploited to frustrate constitutional objectives. In the context of Article 200, silence regarding timelines has enabled Governors to delay assent indefinitely, effectively exercising a pocket veto not explicitly contemplated by the Constitution.

3.2 Executive Inaction as Constitutional Abuse

Inaction, though passive in form, can have consequences as severe as overt action. When a constitutional authority refuses to act, it can paralyse governance without leaving a traceable decision for judicial review. This makes executive inaction a particularly insidious form of constitutional abuse.

The challenge for courts lies in addressing such inaction without transgressing their own constitutional boundaries. The doctrine of deemed assent emerged as an attempt to resolve this dilemma.

4. Conceptual Origins of Deemed Assent

4.1 Borrowing from Administrative Law

The doctrine of deemed assent draws conceptual inspiration from administrative law principles, particularly the idea that statutory powers must be exercised within a reasonable time. Courts have long held that unreasonable delay by administrative authorities can render their actions arbitrary and violative of the rule of law.

Transposing this principle to the constitutional sphere, some courts reasoned that gubernatorial discretion under Article 200 could not be exercised in a manner that defeats constitutional governance. If delay becomes unreasonable, it must attract constitutional consequences.

4.2 Deemed Consent as a Legal Fiction

Deemed assent operates as a legal fiction: the law treats assent as having been granted despite the absence of an express decision. Legal fictions are not unknown to constitutional law, but they are typically grounded in explicit statutory or constitutional provisions.

The novelty of deemed assent lay in its judicial creation without textual backing. This raised the question of whether courts can legitimately create constitutional fictions in the absence of express authorization.

5. Judicial Experimentation and Early Acceptance

5.1 Judicial Motivation

Courts that entertained the idea of deemed assent were motivated by a desire to prevent democratic breakdown. They perceived prolonged gubernatorial delay as an affront to the sovereignty of the people, expressed through their elected representatives.

The judiciary positioned itself as the ultimate guardian of constitutional values, stepping in where other institutions had failed. This approach reflects a broader trend in Indian constitutional jurisprudence, where courts have often adopted an expansive role in response to institutional dysfunction.

5.2 Constitutional Necessity as Justification

The doctrine was often justified on grounds of constitutional necessity. According to this reasoning, extraordinary remedies are permissible when ordinary constitutional mechanisms fail. Deemed assent was seen as a temporary corrective measure rather than a permanent reconfiguration of constitutional roles.

However, necessity is a double-edged sword. While it can justify judicial intervention, it can also become a slippery slope leading to judicial overreach.

6. Critique: The Charge of Judicial Overreach

6.1 Textual and Structural Objections

The most compelling critique of deemed assent lies in constitutional text. Article 200 explicitly enumerates the options available to the Governor. Deemed assent is conspicuously absent from this list.

From a structural perspective, granting assent is a constitutionally assigned function. When courts deem assent to have been granted, they effectively assume the role of the Governor. This substitution undermines the separation of powers, a basic feature of the Constitution.

6.2 Slippery Slope Concerns

If courts can deem assent in cases of delay, similar reasoning could be applied to other constitutional functions. Silence could be equated with consent in appointments, sanctions, or even constitutional amendments. Such an approach risks eroding clear institutional boundaries.

6.3 Federal Implications

The Governor, though often criticised, remains a constitutional link between the State and the Union. Judicially bypassing the Governor through deemed assent may inadvertently centralise power in the judiciary, disrupting the delicate federal balance.

7. Judicial Retreat and Course Correction

7.1 Shift Towards Institutional Restraint

Subsequent judicial pronouncements reflected a more restrained approach. Courts began to recognise that while gubernatorial delay is unconstitutional, the remedy cannot involve judicial usurpation of constitutional functions.

Instead of deeming assent, courts increasingly opted to:

Declare prolonged inaction unconstitutional;

Direct Governors to take a decision within a specified time;

Emphasise constitutional conventions and accountability.

7.2 Reaffirmation of Separation of Powers

This judicial retreat marked a reaffirmation of the separation of powers. The judiciary acknowledged that its role is to enforce constitutional discipline, not to replace constitutional actors.

The fall of deemed assent thus represents a maturation of constitutional jurisprudence rather than a failure of judicial resolve.

8. Comparative Constitutional Perspectives

A comparative analysis reveals that other constitutional democracies rely more on conventions and political accountability than judicial fictions.

In the United Kingdom, royal assent is a constitutional formality governed by long-standing convention. In Canada and Australia, gubernatorial assent is rarely withheld, and delays are resolved through political mechanisms rather than judicial intervention.

These systems underscore the importance of constitutional morality over judicial substitution.

9. Federalism and Democratic Accountability

The deemed assent debate highlights deeper issues of Indian federalism. Gubernatorial delay undermines State autonomy, while judicial substitution risks over-centralisation of constitutional power.

A sustainable solution must strengthen democratic accountability without distorting constitutional roles. Transparency, reasoned decisions, and political scrutiny are preferable to judicial shortcuts.

10. The Way Forward: Enforcing Accountability Without Substitution

Rather than reviving deemed assent, courts can adopt alternative mechanisms:

1. Time-bound Directives: Mandating Governors to act within reasonable, judicially prescribed timelines.
2. Reason-Giving Requirement: Insisting on written reasons for withholding or reserving assent.
3. Enhanced Judicial Review: Subjecting delays and reasons to strict constitutional scrutiny.
4. Political and Public Accountability: Encouraging legislative debate and public discourse on constitutional delays.

These measures preserve constitutional balance while addressing executive inertia.

11. Normative Theories Explaining Judicial Intervention

11.1 Living Constitution and Transformative Constitutionalism

One of the strongest theoretical justifications advanced—implicitly or explicitly—for doctrines like deemed assent is the idea of the Constitution as a living document. Under this approach, constitutional interpretation is not frozen in the text's original meaning but evolves to meet contemporary governance challenges. Indian constitutional jurisprudence has frequently embraced this philosophy, particularly in areas involving fundamental rights, social justice, and institutional accountability.

Transformative constitutionalism views the Constitution as an instrument for societal change rather than a static legal code. From this perspective, judicial intervention in cases of gubernatorial delay can be defended as necessary to preserve democratic transformation and prevent constitutional stagnation. However, even transformative interpretation acknowledges institutional limits. A living Constitution does not imply a limitless judiciary; rather, it requires principled evolution anchored in constitutional structure.

11.2 Constitutional Morality as a Limiting Principle

The concept of constitutional morality has emerged as a guiding force in Indian constitutional adjudication. It demands that constitutional actors exercise their powers in good faith, respecting democratic values and institutional boundaries. Gubernatorial delay in granting assent violates constitutional morality by subverting legislative intent through inaction.

At the same time, constitutional morality also restrains the judiciary. Courts are expected to act as constitutional sentinels, not constitutional substitutes. The demise of deemed assent reflects an implicit recognition that constitutional morality applies equally to judicial conduct.

12. Political Question Doctrine and Justiciability

12.1 Is Assent a Non-Justiciable Political Question?

A recurring argument against judicial scrutiny of gubernatorial assent is that it falls within the political question domain. According to this view, decisions relating to assent involve political discretion unsuitable for judicial review.

Indian courts, however, have consistently rejected a rigid application of the political question doctrine. While acknowledging the political context of constitutional functions, courts have maintained that constitutional powers are subject to judicial review when exercised arbitrarily, unreasonably, or in bad faith.

The key distinction lies between reviewing how a power is exercised and exercising the power itself. Deemed assent crossed this line by transforming judicial review into judicial execution.

12.2 Standards of Review for Constitutional Inaction

Judicial review of inaction presents unique challenges. Unlike overt decisions, inaction lacks explicit reasoning or form. Courts have therefore developed standards focusing on:

Length of delay

Absence of justification

Impact on democratic governance

Evidence of mala fide or political obstruction

These standards allow meaningful judicial scrutiny without institutional substitution.

13. Deemed Assent and the Basic Structure Doctrine

The basic structure doctrine acts as a constitutional safeguard against excessive concentration of power. Separation of powers and federalism are recognised components of the basic structure.

Judicially deeming assent arguably violates both principles. By granting assent through judicial declaration, courts encroach upon executive functions. Simultaneously, by bypassing the Governor—a federal constitutional office—the judiciary risks altering the federal equilibrium.

From a basic structure perspective, deemed assent may therefore be constitutionally impermissible, regardless of its pragmatic appeal.

14. Conclusion

The doctrine of deemed assent represents an instructive episode in Indian constitutional law. It illustrates how judicial creativity, though motivated by constitutional necessity, can collide with structural limitations embedded within the constitutional framework.

The ultimate rejection of deemed assent does not signify judicial retreat but constitutional maturation. It reaffirms that the legitimacy of judicial power lies not in its ability to resolve every constitutional impasse but in its commitment to preserving institutional balance.

India's constitutional future depends on reinforcing accountability, cultivating constitutional morality, and fostering inter-institutional dialogue. Courts play a vital role in this ecosystem—but as guardians, not governors, of the Constitution.

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Constitution of India

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