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Constitutionalism and Interpretative Process: A Revisit

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ABSTRACT

The recent judgment of the apex court in the State of Tamil Nadu v. The Governor of Tamil Nadu and others pronounced on April 8, has occasioned the necessarily of a revisit of doctrine of constitutionalism vis-à-vis interpretative process. The court which published its much-anticipated judgment late on Friday, declared Tamil Nadu Governor R.N. Ravi's months-long delay, with holding consent, and subsequent reservation of the 10 re-passed bills to President Droupadi Murmu for her consideration on November 28, 2023, 'erroneous in law and non-est."

In any event, in this case, the Court found that there was no discretion available to the Governor.

The dissenters of this judgement refer to rule of CASUS OMISSUS. Which says that "A Case or situation overlooked, omitted and not provided for in a ded or statute, where it appears that there is a casus omissus a court is not entitled to supply the lack or fill the gap?[1]

F.J. Mocaffrey is of the view that-[2] *"It is a rule of statutory construction that a casus omissus (i.e. a case omitted from the language*

[1]. The oxford comparison to law, D.M. Walker, Calarandon Press, Oxford 1980 p. 192.
[2]. Statutory Construction, p. 25.

of the statute, but within the general scope of the statute, and which appears to have been omitted by inadvertence of because it was overlooked or unforeseen) cannot be supplied by the courts.

The Privy Council has held that-[3] *This principle says that a matter which should have been provided, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction.*

The Supreme Court has opined that-[4] *Even if there is any omission or defect it is not for the Court to rectify it by making its own addition, especially when literal meaning produces and intelligible result.*

Maxwell has opined that-[5] *Omission should not be inferred it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.*

However, there are many dictas in which the role of judiciary in adding or altering the sentence or filling the Gap by judiciary has been accepted as proper cannon of interpretation. It was observed by Byles J in Copper v. Wards worth Board of Workers. That 'Justice of common law will supply the omission of the legislature.[6] *It has been held in Smith v. The Queen*[7] *that the commission was not bound by procedure of evidence but he had to conduct his inquiry according to the requirements of substantial justice. D. Vertecuil v. Venages*[8] *echoes the same about*

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[3]. Hansaraj Gupta v. D.D. Mussoorie Electric Tram way Company Ltd., AIR 1933 PC 63 at 65.
[4]. P.K. Unni v. Nirmala Industries, AIR 1990 SC 933.
[5]. On the Interpretation of the Statute 11th edition p.
[6]. (1863) 14 CBNS 180
[7]. (1978) L.R. 3 Appeal cases 614 PC.
[8]. (1918) AC 557.

the role of governor. The other cases in this regard are Fisher v. Keane,[9] *Wood v. Wood,*[10] *Nakeda Ali v. MF de S Jayantne,*[11] *Ridge v. Bald Win.*[12] *In fact, all these cases have approved the role of the court to supply the omission.*

Constitutionalism is an achievement of the modern world. It is a very recent achievement, and it has by no means become stabilized. Indeed, it is a complex system of providing for orderly change, and there is no reason for assuming that the need for change will come to an end in the immediate future.

Constitutionalism denotes that if any thing is to be Supreme it should be constitution which embodies the will of the people as the 'fundamental law of the land'.

Constitutionalism is a relative concept which envisages a constitutional order wherein powers and limits on the exercise of those powers are duly acknowledged. It is a tool which is used to reach up to the ultimate goal of constitutionalisation of governance and it cannot be deployed to present an alternative model of governance.

Every body, who is any body in this context has to remember that- *The power of the Supreme Court to command acceptance and support not only for its decisions but also for its role in government seems to depend upon a sufficiently widespread conviction that it is acting legitimately, that is, performing the function assigned to it, and only those functions, in the manner assigned.*[13]

[9]. (1878) 11 CHD 353.
[10]. (1874) LR 9 EX
[11]. (1951) AC 66 T.L. R. 274 PC
[12]. (1963) WLR 935
[13]. The Role of the Supreme Court in American Government, Archibald Cox, Oxford University Press, London, Oxford, Newyork, 1977, p. 104.

The Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature we cannot declare a limitation upon the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority.

- A.K. Gopalan v. State of Madras, AIR 1950 SC 27-42.

The recent judgement of the apex court in the State of Tamil Nadu v. The Governor of Tamil Nadu and others pronounced on April 8, has occasioned the necessarily of a revisit of doctrine of constitutionalism vis-à-vis interpretative process. The court which published its much-anticipated judgment late on Friday, declared Tamil Nadu Governor R.N. Ravi's months-long delay, with holding consent, and subsequent reservation of the 10 re-passed bills to President Droupadi Murmu for her consideration on November 28, 2023, 'erroneous in law and non-est."

The court equally set aside consequential steps taken by President Murmu on the Bills were kept pending by him, his ultimate declaration of withholding of assent coupled with the scant respect shown by him to judgments of the Supreme Court for adherence to aid and advice of the State's Council of Ministers showed 'other extraneous considerations' writ large in the discharge of his functions.

'We are left with no other option but to exercise our inherent powers under Article 142 of the Constitution for the purpose of declaring these 10 Bills as deemed to have been as deemed to have been assented on the date when they were presented to the Governor after being reconsidered by the State legislature i.e., on November 18, 2023' the court declared.

Tinkering with ideals- The apex court reminded constitutional authorities occupying high offices that they must be guided by the values of the Constitution.

These values that are so cherished by the people of India are a result of years of struggle and sacrifice of our forefathers.

'When called upon to take decisions, such authorities must not give in to ephemeral political considerations but rather be guided by the spirit that underlies the constitution,' Justice Pardiwala wrote.

If the authorities attempt to deliberately by pass the constitutional mandate, they are tinkering with the very ideals revered by its people upon which this country has been built, the Apex Court cautioned.

'We take this opportunity to quote Dr. B.R. Ambedkar's concluding speech in the Constituent Assembly, which is as relevant today as it was in 1949. However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be a good lot.' Justice Pardiwala said in his judgment.[14]

The court has also opined that- we are if the considered view that although the option to refer a Bill to the Supreme Court under Article 143 may not be mandatory, yet the President, as a measure of prudence, ought to seek an opinion with respect to Bills on grounds of perceived unconstitutionality.[15]

The judges emphasized that any exercise of gubernatorial discretion must be amenable to judicial review to prevent any 'disregard' for the will of the people, as expressed through their elected representatives. Invoking its inherent powers under Articles 142 of the Constitution, the court deemed the 10 pending bills to have received assent. Justice Pardiwala reasoned that the exercise of such extraordinary powers was warranted, given the Governor's 'scant respect' for prior rulings. He was particularly critical of the Governor's decision to return the Bills without providing reasons, in clear violation of the court's binding directive in State of Punjab versus Principal Secretary to the Governor of Punjab (2024).[16]

The court rejected the constitution of Union of India. That the first proviso to Article 200 provided the Governor an independent, fourth course of action : he could simply withhold his assent to a Bill, without referring it back to the Assembly. In other words, he could perform a pocket-veto.

But this argument had expressly been rejected by the Court in State of Punjab vs Principal Secretary to the Governor of Punjab (2023). There, it found that the proviso to Article 200 contains no

[14]. The Hindu, April 13, 2025, p. 8.
[15]. Ibid
[16]. The Hindu, April 13, 2025, p. 12.

independent power. Once an ordinary Bill is passed by the Assembly, the Governor has only one of three options available: to either assent to it, or reserve it for the President's consideration, or withhold the assent, in which case, the Governor must also refer it back to the Assembly for reconsideration.

It was also the Union's case that in deciding whether to reserve a Bill for the President's assent, the Governor could exercise an autonomous discretion. That is, he had the independent ability to decide what course of action to follow. In answering this argument, the Court harked to the debates in the constituent assembly. In noted that the draft version of Article 200 (then Article 175) had explicitly stated that the Governor 'may, in his discretion' reserve a bill for the consideration of the President. This phrase was consciously omitted in the adlopted version. Its removal, the Court held, was deliberate, aimed at ensuring that the Governor's role was constrained by the advice of the elected executive.[17]

This judgement has got many takers and a few dissenters. Thus Suhrith Parthasarathy writes-[18]

In any event, in this case, the Court found that there was no discretion available to the Governor. Having chosen to withhold assent, he could not plausibly have then referred the Bills to the President, on their being re-presented to him. There was no trace of executive advice backing his decisions nor were his acts grounded in any identifiable, let alone defensible, constitutional rationale. Having found the Governor's actions unconstitutional, the Court could no doubt have considered issuing what the law describes as a writ of mandamus, compelling him to grant his assent to the Bills. But given the substantial time that had lapsed and given that previous Court decisions had been overlooked, the Court chose the ostensibly extreme option. With a view to achieving complete justice a power available to it under Article 142-it declared that these 10 Bills would be deemed to have been assented to on the date when they were re-presented to the Governor.

Some might see this as judicial overreach, but issuing a mandamus might well have been rather more unworkable. Should the Court's orders be breached, it cannot plausibly hold the Governor in contempt. Therefore, the ultimate direction must be seen as a logical sequitur to the Court's findings: on the Bills being passed anew by the State Assembly, and on the Council of Ministers recommending their assent, the Governor was left with no discretion in the matter.

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17. The Hindu, April 14, 2025, p. 6.
18. A Governor's conduct and a judgement of significance, The Hindu, April 14, 2025, p. 1

The larger message

The significance of the judgment for the specific Bills, which were at stake, is plain to see. But the verdict also carries with it a larger message. It upholds a fact intrinsic to our Republic: that the Governor, though appointed by the Union government, functions on the aid and advice of the State executive; the office is meant to serve not as a source of political disputes, but as a constitutional sentinel, upholding the values of representative democracy.

Kaleesram Rai has opined that-[19]

The recent judgment by the Supreme Court of India, in The State of Tamil Nadu vs Governor of Tamil Nadu, was a historic one. But it has also led to another development - the passing of laws without the assent of the Governor or President, which is an unprecedented event in the history of the republic. The Court invoked Article 142 of the Constitution to do "complete justice" in the case and fixed a time limit for the gubernatorial and presidential responses to the Bills passed by the State legislature. It interpreted Articles 200 and 201 of the Constitution dealing with the powers and functions of the Governors and the President and laid down principles governing these provisions. It emphatically said that the Governor cannot torpedo the laws made by the legislature that reflects the people's will.

This scheme indicated in the constitutional text is not comprehensive. The Court, while deciding the illustrative instance of the Tamil Nadu Governor dragging the Bills, had occasion to scan the intent and the content of the constitutional provisions. One major deficit of the provisions is a lack of a time limit for the Governor or the President to carry out their prescribed function. Again, provisions imply a great element of trust in the constitutional functionaries, which, however, stands betrayed over a period, especially in the recent past. A textual reading of the provisions can only perpetuate these deficits, which in turn, cannot resolve the issue placed by Tamil Nadu in the given case. This realisation has constrained the Court to fix the time limit for gubernatorial and presidential decisions on the Bills. This again has led to the judicial assertion that certain actions or inactions by the constitutional functionaries under these provisions cannot escape judicial scrutiny. In the given scenario, the idea of deemed assent by the President was a constitutional synthesis, for which Article 142 of the Constitution provides a formidable foundation.

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[19]. A Proclamation of Democracy in Legislative Process, The Hindu, April 16, 2025, p. 6.

Therefore, the criticism that the Court has exceeded in its jurisdiction in the given case is clearly misconceived. It is erroneous to think that the Court has 'amended' the Constitution only because it supplemented (not supplanted) the constitutional provisions to meet the exigencies. It does not amount to legislation either, as the conclusions in the judgment only rest on a thorough presidential survey on the issue. It quoted Justice V.R. Krishna lyer in Shamsher Singh & Anr vs State of Punjab (1974), a seven-judge Bench judgment, which is still regarded as the locus classicus on gubernatorial functions under our constitutional scheme. The present verdict imported the people's right to enact laws while Shamsher Singh was more on the binding nature of the decision of the cabinet chosen by the voters. The Court could reject the idea of "unfettered discretion" in referring the Bills to the President, as laid down in B.K. Pavitra vs Union of India (2019), based on larger Bench decisions such as the one in Shamsher Singh. It is promising to see the judiciary in an assertive mode, after a long interval, that too in a case where it directly confronted the political executive at the Centre.

The learned author has offered the positive suggestions when he writes that two suggestions may be useful for the time to come. The first is that in critical constitutional adjudication, instead of rendering huge verdicts after a long time, the Court needs to resort to the practice of delivering shorter judgments within a shorter span of time. The judgment of the U.K. Supreme Court in the Brexit-related case, R(Miller) vs The Prime Minister (2019), was just 24 pages. Brevity and promptness in the judicial process could be of great support for a nation in trouble.

Second, when matters of the similar nature are pending adjudication, the Court must have a system to club them together so that the same Bench hears the cases together. A lack of proper internal management in the Court was felt when after the Tamil Nadu judgment, a request had to be made on behalf of the State of Kerala to place its petition seeking similar relief before the same Bench. Propriety demands that such a request is heeded to forthwith, to ensure certainty, predictability and clarity, which are essential facets of constitutional adjudication.

P.D.T. Achary is of the view that the ruling upholds the principles of federalism and provides Opposition-ruled State governments a clear constitutional remedy against inordinate delays by Governors in granting assent to Bills passed by the legislature. "The Supreme Court has been reining in the discretionary powers of Governors for some time now. However, what sets this judgment apart is its

articulation of definitive timelines for both the Governor and the President, ensuring that the enactment of crucial legislation is not indefinitely stalled.[20]

Senior advocate Shadan Farsat has welcomed the judgement and write that the top court court has rarely invoked its inherent powers to create a legal fiction of deemed assent. "By recognising automatic assent in cases where the Governor fails to adhere to the prescribed timelines, the court has instituted a crucial safeguard against abuse of the office," he said. He added that the ruling could pave the way for similar judicial intervention in cases where the Union government delays acting on collegium recommendations. "Extending such powers to judicial appointments would help prevent an executive veto over the collegium's decisions.[21]

Mr. Achary has also made in clear that[22]- Three crucial points have been decided by the Court which make this judgment truly historic. The first relates to the time limit fixed within which the Governor as well as the President of India should decide the issue of assent. The minimum period is one month and the maximum, three months. If the Governor or the President does not adhere to this time limit, the aggrieved State can seek the intervention of the constitutional court. Obviously, the Court went to the extent of fixing a time limit in this case because of the fact that the Governor sat on the Bills for years without taking any decision. The Court has said that the Governor does not have the power to exercise a pocket veto or an absolute veto while exercising his power under Article 200.

Following the judgment, questions have been raised on the legality of a time limit under Article 200. The Court has clarified it in the judgment- it has stated that it is guided by the inherent expedient nature of the procedure prescribed under Article 200 and the well-settled legal principle that where no time limit for the exercise of a power is prescribed, it should be exercised within a reasonable period. The Court has viewed the deliberate inaction on the part of the Governor in assenting to the Bills or reserving them for the consideration of the President as a serious threat to the federal polity.

Most crucial, point is about judicial review of the decision of the Governor and the President. The basic proposition laid down by the Court after reviewing a catena of cases is that "no exercise of power under the constitution is beyond the pale of judicial review". So, it has held that there is no reason to

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[20]. The Hindu, April 13, 2025, p 12
[21]. Ibid p. 12
[22]. A Restoration of Sanity to the Constitutional System. The Hindu, April 19, 2025, p. 8.

exclude the discharge of functions by the Governor or the President under Articles 200 and 201, respectively, from judicial review.

In a lengthy judgment, the top court found that the Governor had no locus standi in refusing to act on the bills passed by elected representatives of the State Legislature Assembly.

Laying down the law, the court laid down timelines for Governors and Presidents to act on Bills, and in this specific case, involved its power to do complete justice and held that these Bills were deemed to have been passed.

The court's decision can be understood as an attempt to correct defective constitutional design, which left several aspects of the Governor's powers to unwritten conventions.

The renowned constitutional expert Gautam Bhatia is of the view that-[23]

In a lengthy judgment, spanning 415 pages, the Supreme Court found that there was no justification for the Governor's actions. Under the Constitution, Governors were entitled neither to exercise a veto nor a pocket veto over the State Legislative Assembly's Bills. Nor could Governors first return a Bill to the State Legislature, and then refer it to the President; it had to be one or the other (and the second, only under certain specific conditions).

Critics argue that in prescribing timelines where none existed in the Constitution, and by taking it upon itself to "enact" the pending Bills, the court overstepped its remit, and engaged in functions that, constitutionally, are within the remit of other branches of government. Defenders of the court, on the other hand, point to the fact that the Governor's years-long, unjustified delay had backed the court into a corner, where there was no other realistic option before it. What, then, are we to make of what the court did?

He has suggested that one way of resolving these tensions would have been to adopt a strategy that we see elsewhere in the Constitution: extensive codification and detailed rules setting out how power would be exercised, and how it would be limited. However, when it came to the structures of government- the legislature, the executive, and the Governor - the framers did not codify, instead, they left the issue to be decided through unwritten constitutional conventions.

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[23]. Diving in to SC's Verdict on Governors, The Hindu, April 21, 2025, p. 8.

This choice was not neutral: the refusal to expressly limit the exercise of power meant that the Constitution contained silences where it mattered the most-silences that could, and were, exploited by actors who had no respect for constitutional conventions.

The problem before the Supreme Court, thus, was a problem of constitutional design. By design, the Constitution placed no express check on Governors engaging in pocket-vetoes. At the same time, without such a check, the system was entirely reliant on good faith: the moment a Governor chose to exploit constitutional silences, the entire federal structure could - and would - be undermined.

The Supreme Court's decision, therefore, is best understood as a judicial attempt to correct defective constitutional design. The choices made at the time of the framing were playing out in a way that would reduce the principles of federalism and representative democracy to a farce unless there was external intervention. In our system, the only body capable of such intervention is the court.

Of course, the court's judgment is not free of problems. In doing what it did, the court granted itself further and greater powers: to enforce timelines (as well as decide exceptions to those timelines), and judge intra-State organ conflicts. This should tell us that, ultimately, such intervention is not sustainable in the long-term, as piecemeal attempts to correct defective constitutional design will lead to lop-sided results elsewhere.

What is needed, then, is an urgent conversation about the Constitution's centralising drift, and whether the centralising choices made in 1949 still hold today. A starting point for this could be questioning why it is, in 2025, that we need the office of the Governor in the first place.

In the meantime, however, the court's judgment, thus, is not gratuitous overreach, it is best understood as a temporary salve a band-aid-on a wound that needs deeper, and more longer-term treatment.

The Dissenters of the view that are prescribing time timers, which is not in the constitution and by taking is upon it self to enact the pending bills, the court has over stepped is times and has acted against the doctrine of constitutionalism. Thus the Governor of Kerla has opined that. This is a case of judicial overreach and that it is the job of Parliament, and not the Court, to amend the Constitution.[24]

[24]. The Hindu, April 19, p. 8.

While it is true that Parliament alone has the right to amend the Constitution, it is the job of the judiciary to explain and interpret the constitutional provisions.

Another issue that has been raised by a section of lawyers is that the issues decided by Justice Pardiwala's Bench can be decided only by a Constitution Bench under Article 145(3). In fact, the Constitution Bench under Article 145(3) decides substantial questions of law as to the interpretation of the Constitution.[25]

Vice-president of India has emerged as most vocal critic of this judgement. He remarked about the recent judgment of the Supreme Court, in which the court had prescribed time timers for the President and Governors to take action on State legislations. The court had ruled that it could issue a writ of "Mandamus' to these high constitutional offices in the event of inaction or inordinate delays.

He has raised concerns about lack of accountability of judiciary towards the public at large, unlike the legislature and executive. It was in the context of judicial review of legislation by Constitutional Benches as well as orders passed that encroach upon the executive domain. The provisions of Article 145(3), which require a minimum of five judges for adjudicating on constitutional validity in any matter, were made in 1950 when the total strength of the court was eight judges. He suggested that it may need to be revisited as the present strength is 34.

Finally, he opined that the top court has been utilising its extraordinary power under Article 142 (to provide complete justice in any case), in a way that undermines representative democracy.[26]

He has also said that Supreme Court has been using is power under Article 142 of the Constitution as a 'missile' This statement has been criticized by the Chief Justice of India designate. He has said that, it is quite unwarranted.[27]

We are quite in agreement with Rangarajan R.[28] That one of the underlying root causes for various issues concerning the judiciary is lack of accountability and transparency in appointments through the collegium process. A broad-based National Judicial Appointments Commission, with the CJI being provided a veto

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[25]. The Hindu, April 19, p. 8.
[26]. The Hindu April 22, 2025. p. 8
[27]. The Hindu, May 12, 2025, p. 10
[28]. Judiciary's place atop the pyramid, The Hindu, April 22, 2025, p. 8.

to have final say in the appointment process, would make the selection process more transparent and inclusive without compromising on the independence of the judiciary.

However, the recent order of the Supreme Court prescribing timelines to the President and Governors was well within its powers of upholding the constitutional principles. The two judges in this case had arrived at their conclusions based on various Constitution Bench judgments decided earlier. It is pertinent to note that similar timelines have also been provided in the Office Memorandum prepared by the Home Ministry in February 2016.

Similarly, 'judicial activism' by the courts, including its use of Article 142, has contributed significantly to providing, justice to the needy as well as holding the executive accountable. Some notable orders under Article 142 include compensation for victims of Bhopal gas tragedy (1989), guidelines against sexual harassment at work place (1997), cancellation of coal-block licenses that were allegedly improperly allocated (2014), permanent commission of women officers in armed forces (2024), and directives to public officials with respect to demolitions (2024).

Further, considering the precedence developed in the past seven decades and pendency of cases in the Supreme Court, the current requirement of five judges for a Constitution Bench may be optimum.

Judicial review and its independence Parliamentary democracy works on the principle that the executive is accountable to the legislature, which in turn is answerable to the people in every election. However, it is the judiciary which is the independent branch that upholds the Constitution and its principles in governance.

The doctrine of Parliamentary sovereignty is associated with the British Parliament. This is because there is no written constitution in the U.K. and Parliamentary laws are supreme for governance of the country. On the other hand, the concept of judicial supremacy is associated with the U.S. It is because the American Supreme Court has wide powers in interpreting their constitution as per 'due process of law'.

The Indian Constitutional scheme is a synthesis of Parliamentary Sovereignty and Judicial Supremacy. 'Judicial review has been declared as a 'basic structure' of the Constitution in various judgments of the Supreme Court that has reinforced "Constitutional sovereignty'. All the branches of

governance should uphold the constitutional values through healthy separation of powers rather than confrontation.

The fact remains that the political establishments have always been in opposition to judicial interference in the executive and legislative functions. It has been rightly pointed by Professor Faizan Mustafa that-[29]

True, Opposition is well within its right to criticise the Vice-President but it must remember its tallest leader, Pandit Jawaharlal Nehru, too had spoken in almost identical language in the Constituent Assembly on September 10, 1949: “Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament. If we go wrong here and there, it can point it out, but in the ultimate analysis where, the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately, the whole constitution is a creature of Parliament.”

He went on to observe on the possibility of picking up pro-government judges: “If courts proved obstructive, one method of overcoming hurdle is… the executive which is the appointing authority of judges begin to appoint judges of its own liking for getting decisions in its own favor.” His daughter, as a strong Prime Minister, gave full effect to this policy by twice indulging in the supersession of judges. It is a different story that even the collegium routinely indulges in supersession in the name of diversity and merit.

The greatest criticism against the judicial review is in the name of democracy, as unelected judges ideally should not have power to quash laws passed by democratically elected governments. Of course, the government would be formed based on the majority in popular House, yet the constitution does not permit it to become majoritarian. Similarly, the Governor or the President cannot exercise their discretionary powers arbitrarily in assenting Bills because they too should respect the will of the democratically elected State Assemblies.

In fact, most scholars reject this democratic objection in cases of judicial review on questions pertaining to federal provisions, legislative procedure or fundamental rights, as democracy can be the best means of resolving political disputes except in issues of fundamental rights and preservation of

[29]. Is India witnessing judicial despotism? The Hindu, April 24, 2025, p. 8.

constitutional supremacy. Unlike the United Kingdom, we do not have the supremacy of the Parliament but the supremacy of the constitution. Our parliamentarians must keep it in mind. The Vice-President too should not assert supremacy of the Parliament.

The learned author has further written that-[30] In the constitutional law debates, there have always been lovers and haters of judicial review. At times, they do change their stand depending upon whether they are in government or Opposition. Thus, Congress leaders when in power were against the judicial review but are its strongest votary today. However, to term Article 142 as nuclear missile is too strong a statement and is basically criticism of the constitution and should have been avoided by the Vice-President of India, who himself being a senior advocate is familiar with the seminal contribution of the Supreme Court in saving our democracy. This provision was used in the Babri judgment, in issuing guidelines on mob lynching and in granting divorces in failed marriages on the ground of ‘irretrievable breakdown’. True, the court should not use this power too often.

The Supreme Court has neither used judicial activism nor its constitutional power under Article 142 as an unguided missile. As a repository of people’s trust in it, it has, barring few exceptions, lived up to their expectations and not betrayed their trust. Had the court ordered restoration of the Babri mosque, probably there would have been a situation of religious war but looking at the sentiments of the millions of people, the court preferred peace over justice.

The constitutional fiction of political questions beyond judicial remit cannot tie the hands of judges in exceptional situations like the one in Tamil Nadu. Its Governor’s action being found *mala fide* warranted such timelines. The timelines suggested by the court do not amount to amendment of the constitution at all. No court in future is going to initiate contempt proceedings against the President or even the Governors for not strictly complying with these timelines. If there is undue delay without any reason, timelines can be used to evaluate arbitrary or non-arbitrary nature of the Governor’s action/inaction.

In *Qaiser e Hind* (2001), Justice Dorairajan had observed that “the assent of the President envisaged under Article 254(2) is neither an idle or empty formality not an automatic event” (Paragraph 73). It is an exercise of constitutional power. The Indian President too is under the constitution and not

[30]. Ibid

above it. Her actions too are amenable to judicial review. Even the Supreme Court is not supreme despite its nomenclature; it too must work under and within the constitutional limits.

The dissenters of this judgement refers to rule of CASUS OMISSUS. Which says that "A Case or situation overlooked, omitted and not provided for in a ded or statute, where it appears that there is a casus omissus a court is not entitled to supply the lack or fill the gap.[31]

F.J. Mocaffrey is of the view that-[32] "It is a rule of statutory construction that a casus omissus (i.e. a case omitted from the language of the statute, but within the general scope of the statute, and which appears to have been omitted by inadvertence of because it was overlooked or unforeseen) cannot be supplied by the courts.

The privy council has held that-[33] This principle says that a matter which should have been provided, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction.

The Supreme Court has opined that-[34] Even if there is any omission or defect it is not for the Court to rectify it by making its own addition, especially when literal meaning produces and intelligible result.

It was held in Petron Engineering Construction Pvt. Ltd. v. Central Board of Direct Taxes[35] the omission can not be called a defect of the nature which can be cured or supplied by recourse to the mode of construction.

Our Supreme Court has observed in V.J. Rao v. State of A.P.[36] In other words, there should be no attempt to substitute or paraphrase of general application. The courts cannot reframe the legislation for the very good reason that it has no power to legislate. The courts always presume that the legislature inserted every part in a statute for a purpose and the legislative intention is that every part of the statute should have an effect.

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[31]. The oxford comparison to law, D.M. Walker, Calarandon Press, Oxford 1980 p. 192.
[32]. Statutory Construction, p. 25.
[33]. Hansaraj Gupta v. D.D. Mussoorie Electric Tram way Company Ltd., AIR 1933 PC 63 at 65.
[34]. P.K. Unni v. Nirmala Industries, AIR 1990 SC 933.
[35]. AIR 1989 SC 508 at 509
[36]. AIR 2001 SC 77

The same has been held in Balwant Kaur v. Charan Singh[37] long ago Lord Praker has observed that 'the judge may not wrest the language of Parliament. It is safer to presume that the omission is deliberate than it is due to forget ….. fullness.[38] There are numerous cares which have held the says.[39]

In all these cases it has been held that no case can be found to authorize any court to alter a word so as to produce a casus omissions. To do so would be to usurp the function of legislature. If the language used is incapable of a meaning, we can not supply are.

In his nature and sources of law.[40] Professor Gray points out that it has been said over and over again that the courts must not undertake to make the legislature say what it has not said; but he asks whether the true rule is not 'that the judge should give to the words of a statute the meaning which they would have had, if he had used them himself, unless there be something in the circumstances which makes him believe that such was not the actual meaning of the legislature."

Maxwell has opined that-[41] Omission should not be inferred it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said : "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. "We are not entitled," said Lord Loreburn I.C., "to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself." A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional.

According to Justice G.P. Singh-[42] "Some judges proclaim that they perform creative function even in interpretation. But such an attitude may lead less disciplined amongst them to conclusions which

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37. AIR 2000 SC 1908

38. R. v. Oahes (1959) 2 Q.B. 350.

39. Re Williams Jones v. William (1887) 36 Ch. D. 573 at 582; Mercy Docks v. Handream (1888) 13 Appeal cases 595 at 602; Crawford v. Spooner (1846) 6 Moors P.C.P.; Lord Howard de Walden v. IRC (1948) 2 All ER 825 at 830; Magor and St. Mellons RDC v. New Port Corporation (1952) AC 189; Green v. Wood (1845) 7 Q.B.D. 178 at 185; Whitley v Chappell (1968) QB 147 at 149; Jones v. Semart (1784) Iterms Rep. 44; R. Munvs (1964) 1 QB 304; Fisher v. Bell (1961) 1 QB 394; Sussex Peerage Card (1844) 11 Cal and Fin 85 at 143; R. v. Ellis (1844) 6 QB 501; R. v. Dyott (1882) QB 47; Hans Cochs and Company v. Lablache (1878) 3 CPD 197; R. v. Thorton (1964) 2 QB 176; R. v. Davis (1870) 11 Cox CC 578; Felix v. Thomas (1967) 1 A 282.

40. Second edition, 1921, p. 179.

41. On the Interpretation of the Statute 11th edition p.

42. Principles of Statutory Interpretation, 8th edition, p. 9-10

have a strong legislative flavour. So it is wise to adhere to the traditional expression and to call every process of construction a search for 'intention' express or implicit in the statute, since the metaphor 'by setting a goal to which the judge aspires' has a tendency while present in his mind to reduce judicial law making to its necessary minimum."

However, there are many dictas in which the role of judiciary in adding or altering the sentence or filling the Gap by judiciary has been accepted as proper cannon of interpretation. It was observed by Byles J in Copper v. Wards worth Board of Workers. That 'Justice of common law will supply the omission of the legislature.[43] It has been held in Smith v. The Queen[44] that the commission was not bound by procedure of evidence but he had to conduct his inquiry according to the requirements of substantial justice. D. Vertecuil v. Venages[45] echoes the same about the role of governor. The other cases in this regard are Fisher v. Keane,[46] Wood v. Wood,[47] Nakeda Ali v. MF de S Jayantne,[48] Ridge v. Bald Win.[49] In fact, all these cases have approved the role of the court to supply the omission.

Lord Denning's innovation of the rule. Lord Denning, one of the most activist judges of the 20th century has rightly observed in Seaford Court Estate Ltd. v. Asfter[50] that 'when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of findings the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

This approach of Lord Denning has been approved by our Apex Court in the following cases.[51]

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[43]. (1863) 14 CBNS 180
[44]. (1978) L.R. 3 Appeal cases 614 PC.
[45]. (1918) AC 557.
[46]. (1878) 11 CHD 353.
[47]. (1874) LR 9 EX
[48]. (1951) AC 66 T.L. R. 274 PC
[49]. (1963) WLR 935
[50]. (1949) 2 All ER 155 at 164.
[51]. M. Pentiah v. Muddala Veeram Allakka, AIR 1961 SC 115; Benglore Water Supply v. A. Rajappa, AIR 1978 SC 548; Siraz-ul-Haq v. Sunni Central Board of Wakf, UP, AIR 1959 SC 1060.

The constitutional court has gone beyond the textual contexts and has expanded the ambit of contextual contexts. Following are the important cases in this regard.[52]

Conceptual aspect of the Doctrine of Constitutionalism

In his Constitutional Government and Democracy, Theory and Practice in Europe and America,[53] Carl J. Friedrich says that- Constitutionalism is an achievement of the modern world. It is a very recent achievement, and it has by no means become stabilized. Indeed, it is a complex system of providing for orderly change, and there is no reason for assuming that the need for change will come to an end in the immediate future. Both nationally and internationally, we are confronted with gigantic tasks. Changes are taking place which rival in magnitude any the world has seen. Constitutionalism has provided a setting for these changes in some cases, and it has failed to do son in others.

He is of the view that there are two specific formal aspects of constitutionalism. The first is that a constitution must be written in order to be a constitution and the second is that it must be embodied in a document.[54]

The nineteenth century saw the adoption of a written Constitution in almost all leading countries of Europe, such as Sweden (1809), Spain (1812), Norway (1814), Netherlands (1815), Belgium (1831), Liberia (1847), Switzerland (1848, 1874), Denmark (1849), Prussia (1850), Luxembourg (1868).

Thus emerged the concept of a written Constitution as an organic instrument which establishes the principal organs of the State, defines their powers and thus becomes the source of their authority ad respective jurisdictions or relationship inter se as well as a shield against the assumption of arbitrary power.

Today, England is the only country still having as unwritten constitution. But even in the absence of a written Constitution, there have been instances since 1450 when an English Court of law has acted

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[52]. Kesava Nand Bharti v. State of Kerla, AIR 1973 SC 1461; Indira Nehru Gandhi v. Raj Narayan, AIR 1975 SC 2299; Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789; Waman Rao v. Union of India, AIR 1981 SC 271; Kishoto Halls Han v. Zachielha, AIR 1993 SC 412; I.R. Colho v. State of T.N., AIR 2007 SC 861; P. Sanbha Murthy v. State of A.P., AIR 1987 SC 663; L Chandra Kumar v. Union of India, AIR 1997 SC 1125; Union Bank of India v. Seppo Rally, AIR 1999 SC 62 at 66; Ram Krishna Dhanuka v. Satya Charan Lal, AIR 1950 PC 81 at 83.

[53]. Oxford & IBH Publishing Co. Calcutta, 1966, p. 6.

[54]. Ibid, In this context please see the following. – James Brial- Constitutions (1905) Howard Le Mc Bain ‘Constitutional’, H.W. Hoswill, The usage of American Constitution (1925), H.L. MC Bain ‘The living constitution (1927), A Cox, The Role of Supreme Court in American Government (1977).

upon the supposition that there were certain fundamental principles which could not be violated by any authority.[55]

It has been make clear in Rous v. the Abbat[56] and in the prior of Castleacre v. The Dean of St. Stephens (1506) C.P.

The reason of this constitutionalism of unwritten constitution has been explained by Professor MCILL Wain in the following words.[57] The true reason why England, probably the most constitutional of modern European nations, has also remained the only one whose constitution has never been embodied in a formal document is … that limitations on arbitrary rule have become so firmly fixed in the national tradition that no threats against them have seemed serious enough to warrant the adoption of a formal code.

The Constitution being the supreme law of the land by which is created and limited all the power that be, it must command respect from all members of the nation whose aspirations and ideals are embodied in it. This does not mean that the Constitution as it exists for the time being is ideal from the standpoint of ideology. But, at any given moment, and so long it is not changed, the people and all the organs of government must have respect for it, because, institutionally, it is the fundamental law of the land and it would be meaningless to have a written constitution if it is not regarded as the fundamental law.[58]

Constitutionalism denotes that if any thing is to be Supreme it should be constitution which embodies the will of the people as the 'fundamental law of the land'. Our Government is limited and limited government involves the supremacy of constitution and not the supremacy of the any organ of the Government our Apex Court has made it clear in B.P. Singhal v. Union of India.[59] That constitutionalism denotes limitations on the power of the authorities and institutions created under the Constitution. Thus, all public powers including constitutional powers should be exercised in tune with constitutional ethos. However, the existence of a written Constitution does not necessarily ensure existence of constitutionalism. In fact, judiciary plays a significant role in this regard.

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[55]. Tagore Law Lectures on Limited Government and Judicial Review, 1972, SC Sarkar and Co., Calcutta, K.P. 80-81
[56]. (1450) C.P. 5.
[57]. Constitutionalism, Ancient and Modern, 1958, p. 15.
[58]. Op.cit. p. 9.
[59]. (2010)6 SCC 331.

It has been observed in Rajeswar Singh v. DDA[60] that constitutionalism is a relative concept which envisages a constitutional order wherein powers and limits on the exercise of those powers are duly acknowledged. It is a tool which is used to reach up to the ultimate goal of constitutionalisation of governance and it cannot be deployed to present an alternative model of governance. It would not only be absurd but also fraught with dangers of overreach and ambiguity if subjective principles of interpretation are applied by detaching them from the textual scheme of the Constitution, particularly when the textual scheme lays down an elaborate structure of administration. For, to do so would be to drag a duly elected Government on the edges as it would be under a constant fear of being adjudged wrong on the basis of undefined principles which appeal to 'three gentlemen or five gentlemen sitting as a court'. And what will suffer is public interest in the form of public exchequer including sovereignty of the nation. A court of law has to gather the spirit of the Constitution from the language of the Constitution. For, one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

I.R. Coelho v. State of T.N.[61] The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making. Under the controlled constitution, the principles of checks and balances have an important role to play. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism.

There is a difference between parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law-making power by the Constituent Assembly that we have a controlled Constitution.

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[60]. (2022) 11 SCC 1.
[61]. AIR 2007 SC 861

Professor C.J. Fried Rich[62] has concluded true constitutional government does not exist unless procedural restraints are established and effectively operating. Such restrains involve some division of power; for evidently some considerable power must be vested in those who are expected to do the restraining. Such a division of governmental power under a constitution has largely taken two forms; the functional division such as that into legislative executive, and judicial, and the spatial (territorial) division of federalism.

In short, the doctrine that the making of rules and their application and the adjudication of controversies regarding the applicability of such rules in the main should be entrusted to different bodies is still valid. We have shown that it rests upon a broad logical and psychological foundation. At any rate, governmental powers in a constitutional system should be divided between several relatively independent bodies or persons.

The difficulties resulting from divided powers are great. But the consequences of concentrating power are disastrous.

It will be pertinent to quote Professor MC Lough. He has written that – In theory any court may exercise the power of holding acts invalid; in doing so, it assumes no special and peculiar role; for the duty of the court is to declare what the law is, and, on the other hand, not to recognize and apply what is not law. This authority then in part arose … from the conviction that the courts were not under the control of a coordinate branch of the government but entirely able to interpret the constitution themselves when acting in their own field. If our constitutional system at the present time includes the principle that the political departments must yield to the decisions of the judiciary on the whole question of constitutionality, such principle is the result of constitutional development, and … of the acquiescence of the political powers, because of reasons of expediency. Yet at the same time it is conceded that the political departments must 'accept as final' 'the decision of the court in the particular case.' Finally, it is urged that 'no one is bound by an unconstitutional law.'[63]

He sets himself the task of refuting the idea that the courts claim a superiority over the other departments in relation to the constitution.

[62]. Op.Cit., p. 173-188.
[63]. The Courts, The Constitution and Parties, pp. 6-56.

In order to make clear that true constitutional position the president has used her power under Article 143[64] to refer to the Supreme Court on the scope and contours of Article 142.

Article 143 of the Constitution empowers the president to seek advice from the Supreme Court on questions of law or fact, present or future, of public importance. The important questions referred to are-

(1) If any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

(2) The President may, notwithstanding in the proviso to article 131, refer a dispute of the kind mentioned in the to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit report to the President its opinion thereon.[65]

Can SC impose timelines and dictate the manner of exercise of powers by Governors and the President under Article 200, 201 respectively? Can deemed consent to Bills be given through a judicial order.

Seervai is of the view that[66]- The second proviso to Art. 200 requires that '... the Governor shall assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill.' If the Council of Ministers sponsors a Bill which in the Governor's opinion requires to be reserved under the above proviso, then it would be his duty to reserve the Bill for the consideration of the President irrespective of any advice from the Council of Ministers, for otherwise Art. 200 would be a dead letter.

Let us hope that presidential reference to Supreme Court will give a check and balanced spirit to the letter of the law. Every body, who is any body in this context has to remember that- The power of the Supreme Court to command acceptance and support not only for its decisions but also for its role in

[64]. 143 Constitution of India, p. 49.

[65]. A.K. Gopalan v. State of Madras, AIR 1950 SC 27-42.

[66]. Constitutional Law of India, Vol. II, Third edition, 1984, p. 1721.

government seems to depend upon a sufficiently widespread conviction that it is acting legitimately, that is, performing the function assigned to it, and only those functions, in the manner assigned.[67]

[67]. The Role of the Supreme Court in American Government, Archibald Cox, Oxford University Press, London, Oxford, Newyork, 1977, p. 104.