
WHO GETS A CONSTITUTION? A COMPARATIVE STUDY OF CONSTITUTIONAL SILENCE AND THE ROLE OF JUDICIARY - INDIA, SOUTH AFRICA AND THE EUROPEAN UNION

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ABSTRACT

The Constitution is the backbone of modern governance in any jurisdiction. It defines the powers and limits of state governance while safeguarding the rights and freedoms of people. However, even constitutions cannot foresee every possible scenario, and many intentionally or inadvertently contain areas of silence which can be in the form of gaps, ambiguities, or vagueness in broadly worded provisions left open to interpretation. Despite these weaknesses, the silences often empower the judicial system to interpret the meaning and application of constitutional principles, ensuring that the Constitution remains adaptable to dynamic social, political, and legal settings. This generates a crucial question: who truly “gets” a constitution the legislature, the citizenry, or the judiciary that interprets it?

The paper analyses this question through a comparative study of three different jurisdictions: India, South Africa, and the European Union. It highlights how judicial interpretation interacts with constitutional silences across different legal systems. In India, the Supreme Court has over time interpreted vague or open-ended provisions of the Constitution to uphold fundamental rights and preserve checks on state authority, as seen in *Kesavananda Bharati v. Kerala*¹ and *Maneka Gandhi v. Union of India*.² South Africa has a post-apartheid Constitution of 1996,³ which was diligently designed to be transformative, yet still leaves certain areas deliberately broad to allow the Constitutional Court to give tangible effect to aspirational rights. It is exemplified in instances like *Minister of Health v. Treatment Action Campaign*.⁴ In the European Union, where constitutional authority arises from treaties rather than a single unified document, the Court of Justice of the European Union (CJEU)⁵ plays an important role in bridging

¹ *Kesavananda Bharati v State of Kerala*, (1973) 4 SCC 225 (SC)

² *Maneka Gandhi v Union of India*, (1978) 1 SCC 248 (SC)

³ Constitution of the Republic of South Africa 1996

⁴ *Minister of Health v Treatment Action Campaign* (No 2), 2002 (5) SA 721 (CC)

⁵ Court of Justice of the European Union (CJEU)

gaps and resolving ambiguities, as illustrated in *Van Gend en Loos*⁶ and *Costa v. ENEL*.⁷ The study demonstrates that constitutional silence is a deliberate feature that enables judiciaries to maintain the Constitution's relevance and effectiveness through interpretation. By comparing these three distinct jurisdictions, the paper brings to the forefront the judiciary's vital role in shaping constitutional governance, harmonising rights, and reinforcing democratic principles. The analysis argues that while constitutions are formally adopted by the legislatures and ratified by the people, the judiciary subsequently becomes the key guardian of constitutional meaning in areas left silent or vague.

The study seeks to answer how constitutional silences empower or limit judicial authority across these diverse jurisdictional systems. It explores whether courts merely interpret the constitution or proactively shape constitutional governance and rights protection. Moreover, it examines what lessons can be drawn from comparative analysis about judicial roles, the balance of power, and the realisation of constitutional principles in changing historical and institutional contexts.

Keywords: Constitutional Silence, Judicial Interpretation, Fundamental Rights, Comparative Constitutionalism, Constitutional Courts.

Research Objectives

This comparative study has the following objectives:

1. To examine the nature and function of constitutional silence in India, South Africa, and the European Union, and how it operates as a deliberate feature of constitutional design.
2. To analyse the role of judiciary in interpreting constitutional silences and filling gaps left by vague, ambiguous, or broadly worded constitutional provisions.
3. To compare judicial approaches across three distinct constitutional systems to identify patterns of reactive, proactive, and structural interpretation.
4. To assess the implications of judicial interpretation of constitutional silence for governance, rights protection, and the balance of power among state institutions.

⁶ *Van Gend en Loos v Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1

⁷ *Flaminio Costa v ENEL*, Case 6/64, [1964] ECR 585

Research Questions

This research seeks to answer the following questions:

1. What is the nature and scope of constitutional silence in India, South Africa, and the European Union?
2. How have the highest courts in these jurisdictions responded to constitutional silences, and what interpretive approaches have they adopted?
3. Do courts merely interpret constitutional provisions, or do they actively shape constitutional governance and create new constitutional norms?
4. What are the comparative differences in judicial engagement with constitutional silence between reactive (India), proactive (South Africa), and structural (European Union) approaches?
5. Who truly “owns” a constitution in practice—the legislature that drafts it, the people who ratify it, or the judiciary that interprets and enforces it?

Research Methodology

This research employs a doctrinal and comparative legal methodology. The study is based on an extensive analysis of constitutional texts, judicial decisions, and scholarly literature from three distinct jurisdictions: India, South Africa, and the European Union.

Introduction

Constitutions are not merely legal texts but living instruments that explain the architecture of governance, allocate powers among institutions, and articulate the rights and duties of people. They define the structure within which a state or governance system operates and provide the legal basis for resolving disputes, protecting liberties, and ensuring social justice. No constitution anticipates every feasible circumstance which may arise in an evolving society. Recognizing this, many constitutions contain fields of silence or gaps left open for interpretation. These silences are not flaws but rather deliberately designed functional regions that allow constitutional meaning to evolve through judicial interpretation. The question of “who gets a constitution” is more nuanced than mere adoption by legislature and ratification

by citizens. It involves understanding who interprets, enforces, and gives life to constitutional principles, particularly in matters where the text is silent or ambiguous. H.M. Seervai in the book “Constitutional Law of India” noted that judicial interpretation is essential where constitutional provisions are vague, especially in areas like fundamental rights and emergency powers. He argues that the Supreme Court becomes the guardian and co-creator of constitutional meaning.⁸

The paper studies this question through a comparative lens, focusing on three distinct constitutional systems: India, South Africa, and the European Union (EU). Each represents a diverse model of constitutional design and judicial practice. India, with its Constitution, is one of the most detailed written constitutions in the world. While it provides extensive rights, structures, and duties, it also deliberately leaves some areas vague, such as the precise scope of fundamental rights, the limits of state power during emergencies, and the balance between individual freedom and public interest. The Indian judiciary, particularly the Supreme Court, has traditionally assumed a pre-eminent role in interpreting these silences, ensuring that constitutional principles remain dynamic and responsive to social change. Landmark judgments such as *Kesavananda Bharati v. State of Kerala* (1973),⁹ which founded the Basic Structure Doctrine, and *Maneka Gandhi v. Union of India* (1978),¹⁰ which extended the scope of personal liberty under Article 21, exemplify how the judiciary navigates ambiguities to safeguard constitutional ideals. Likewise, *SR Bommai v. Union of India* (1994)¹¹ illustrates the Court’s vital role in maintaining federal harmony by interpreting the Constitution in the context of executive action.

In contrast, South Africa’s post-apartheid Constitution of 1996 represents an intentional exercise in transformative constitutionalism. Drafted to redress historical injustices and promote equality, dignity, and socio-economic rights, it intentionally left certain provisions broad to allow judicial interpretation to provide practical effect. The Constitutional Court of South Africa has embraced this interpretive mandate to translate constitutional silences into enforceable rights and obligations. For example, in *Minister of Health v. Treatment Action Campaign* (2002),¹² the Court held the state accountable to implement policies regarding access

⁸ HM Seervai, *Constitutional Law of India: A Critical Commentary* (4th edn, Universal Law Publishing 2013)

⁹ *Kesavananda Bharati*, supra note 1

¹⁰ *Maneka Gandhi*, supra note 2

¹¹ *S R Bommai v Union of India*, (1994) 3 SCC 1 (SC)

¹² *Treatment Action Campaign*, supra note 4

to essential medicines, demonstrating its proactive role in realising socio-economic rights. Similarly, in *Economic Freedom Fighters v. Speaker of the National Assembly* (2016),¹³ the Court reinforced parliamentary accountability, illustrating how constitutional silences can empower courts to fill gaps where legislative or executive action is insufficient. South Africa thus exemplifies how constitutional silence can be harnessed to achieve transformative social objectives, with the judiciary functioning as a central agent of constitutional realisation.

The European Union provides a different model altogether. Unlike India and South Africa, the EU does not possess a single constitution. Instead, its constitutional order emerges from treaties, regulations, directives, and the jurisprudence of the Court of Justice of the European Union (CJEU).¹⁴ Constitutional silences are an essential part of this framework, as the treaties often leave broad principles or ambiguity in provisions that require judicial interpretation to operationalise. The CJEU has consistently stepped into this domain to establish doctrines such as the direct effect of EU law (*Van Gend en Loos*, 1963)¹⁵ and the supremacy of EU law over conflicting national legislation (*Costa v. ENEL*, 1964).¹⁶ These rulings demonstrate how courts can address structural and substantive vagueness in supranational governance while ensuring the consistent application of constitutional principles across member states. Unlike national courts, the CJEU interprets law in a multi-state context to balance member state sovereignty with the need for uniformity and legal certainty.

By studying these jurisdictions comparatively, the study highlights the judiciary's vital role in defining the practical aspects of constitutions where texts are silent. In India, courts often act as reactive guardians, interpreting provisions in response to litigation, public interest, or executive overreach. In South Africa, the judiciary proactively enforces transformative rights to bridge the gap between constitutional ideals and societal realities. In the EU, the CJEU functions as a structural interpreter, filling gaps in treaty provisions to ensure congruity and uniformity across diverse legal systems. The differences in approach reflect not only historical and socio-cultural settings but also the design of the constitutional framework itself. While India and South Africa rely on national courts embedded within sovereign states, the EU demonstrates how judicial authority can transcend national boundaries to enforce collective

¹³ *Economic Freedom Fighters v Speaker of the National Assembly*, 2016 (3) SA 580 (CC)

¹⁴ Court of Justice of the European Union, *supra* note 5

¹⁵ *Van Gend en Loos*, *supra* note 6

¹⁶ *Flaminio Costa*, *supra* note 7

constitutional norms. Constitutional silence is central to debates over sovereignty, interpretation, and the role of the judiciary.

Constitutional silence is not merely a technical matter but has significant implications for democracy, governance, and rights protection. How courts interpret these silences affects citizens' access to rights, the distribution of power among institutions, and the adaptability of constitutional systems in the face of social, political, and economic change. This study demonstrates that ownership of a constitution is not absolute or singular. Legislatures enact the text, citizens ratify it, but it is the judiciary that enforces, interprets, and even extends constitutional meaning, specifically where the text is silent or broadly worded. The judiciary, therefore, emerges as a co-creator of constitutional reality, shaping governance and protecting rights in ways that textual provisions alone cannot.

Chapter I: India Judicial Interpretation of Constitutional Silence

Introduction

The Constitution of India, adopted in 1950, is celebrated as one of the most detailed and ambitious constitutional texts in the world. It lays out the powers of the legislature, executive, and judiciary. It encompasses the fundamental rights and duties of citizens. Despite being expansive, the Constitution is not exhaustive. Certain provisions are deliberately broad, ambiguously worded, or silent on procedural and substantive details. These silences may arise from the drafters' consciousness of an unpredictable future, from compromises during framing, or from a conscious decision to leave interpretive space.

These areas of silence pose both a challenge and an opportunity. Ambiguity could enable arbitrary action by state authorities or create uncertainty about rights. Yet these silences empower the judicial system to actively interpret the text, filling gaps and shaping constitutional meaning to ensure the Constitution remains dynamic and relevant. In the Indian context, the Supreme Court has in many ways assumed this role, especially in safeguarding fundamental rights, maintaining federal balance, and mediating tensions between individual liberties and state power.

This chapter explores how constitutional silence manifests in India and examines the judiciary's response to these gaps while highlighting landmark matters that illustrate the

Supreme Court's interpretive function and its role as a co-creator of constitutional meaning.

S.P. Sathe in "Judicial Activism in India" emphasised that the Court has historically transformed textual interpretation of silences into enforceable rights, particularly in the domains of social justice and personal liberty.¹⁷ B.P. Singh in "Protection of Fundamental Rights" argues that Article 21 has evolved to include privacy, environment, and health rights through judicial interpretation, demonstrating the Court's dynamic engagement with constitutional silence.¹⁸

Key Areas of Constitutional Silence

Article 21 – Right to Life and Personal Liberty

Article 21 provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁹ The broad phrasing of the provision leaves much unspecified: What constitutes "procedure established by law"? How extensive is "personal liberty"? Does the term "life" encompass the right to health, environment, or dignity? The text itself does not answer these questions, leaving space for judicial elaboration.

Emergency Provisions (Articles 352–360)

While the Constitution sets out conditions for declaring a national or state emergency,²⁰ it is largely silent on the exact parameters of executive power during such periods. Questions regarding judicial review, individual safeguards, and proportionality remain open-ended. The framers likely anticipated that emergencies would introduce unprecedented situations, requiring judicial interpretation to prevent misuse.

Federal Structure and State Autonomy

Articles 245–255 and 356 deal with the relationship between the centre and states,²¹ yet ambiguities remain regarding the scope of central intervention. The Constitution does not

¹⁷ S.P. Sathe, *Judicial Activism in India* (Oxford University Press 2002)

¹⁸ B.P. Singh, *Protection of Fundamental Rights* (Eastern Book Company 2013)

¹⁹ Constitution of India 1950, art 21

²⁰ Constitution of India 1950, arts 352–360

²¹ Constitution of India 1950, arts 245–255, 356

provide exact criteria for what constitutes a “breakdown of constitutional machinery” in a state, leaving potential for executive overreach.

Directive Principles versus Fundamental Rights

The Constitution lists Directive Principles of State Policy (DPSPs) along with Fundamental Rights²² but is largely silent on how conflicts between them should be adjudicated. Should socio-economic rights take precedence over civil liberties or vice versa? Judicial interpretation is necessary to reconcile these tensions, especially in matters of land reform, labour rights, and environmental protection.

Judicial Response to Constitutional Silence

Kesavananda Bharati v. State of Kerala (1973)

In this historic case,²³ the Supreme Court addressed ambiguity regarding Parliament’s power to amend the Constitution. The Constitution did not expressly limit amendments, leaving a potential gap that could allow total legislative control over fundamental rights. The Court filled this silence by articulating the Basic Structure Doctrine, holding that certain essential features including judicial review, federalism, and fundamental rights cannot be altered by constitutional amendments. The ruling highlights how the judiciary can protect the Constitution’s foundational principles when the text is silent on limits.

Maneka Gandhi v. Union of India (1978)

Article 21’s term “personal liberty” was vague. The Court interpreted it expansively,²⁴ ruling that any law depriving a person of liberty must satisfy principles of fairness and due process of law.²⁵ By reading procedural protections into the otherwise silent text, the Court ensured that the Constitution could adapt to evolving social and political contexts.

SR Bommai v. Union of India (1994)

The Constitution’s silence on the scope of Article 356²⁶ (dismissal of state governments)²⁷

²² Constitution of India 1950, Part IV, arts 36–51

²³ *Kesavananda Bharati*, supra note 1

²⁴ *Maneka Gandhi*, supra note 9

²⁵ Constitution of India 1950, art 21, supra note 19

²⁶ *S R Bommai*, supra note 11

²⁷ Constitution of India 1950, art 356, supra note 21

created the possibility for misuse by the central government. The Supreme Court established clear boundaries, stating that proclamations under Article 356 are subject to judicial review and must conform to constitutional principles. This case illustrates how judicial intervention transforms silence into enforceable standards, preventing arbitrary concentration of power.

Recent Examples – Privacy and PILs

The Court continues to interpret constitutional silences in modern society. In *Justice K S Puttaswamy v. Union of India* (2017),²⁸ the right to privacy, though not explicitly mentioned in the Constitution, was recognised as part of Article 21.²⁹ Public Interest Litigation (PIL) cases that allow courts to address gaps in legislative action have expanded the scope of fundamental rights to include environmental protection, workers' rights, and access to education.

Analysis: Role of the Judiciary When Constitution is Silent

The Indian judiciary's interventions demonstrate that constitutional silence is not a vacuum but a space of interpretive authority. Courts assume multiple roles: as co-creators of constitutional meaning, by interpreting ambiguous provisions courts effectively shape how citizens experience rights and duties; as guardians against overreach, judicial review fills gaps where the legislature or executive might exceed their powers; and as adapters to social change, silence allows courts to respond to emerging issues that the framers could not have anticipated.

However, this approach gives rise to debates about judicial activism. Critics argue that courts may usurp the legislature's role or overreach democratic boundaries. Supporters contend that interpretation is essential in a vast, complex, and changing society like India, where the Constitution must remain a living document.

Implications

Constitutional silence in India has allowed the judiciary to expand and protect fundamental rights in response to societal needs, maintain federal and institutional balance through proactive review, and act as the paramount custodian of constitutional norms when the text provides insufficient guidance. Effectively, the Constitution is formally adopted by the legislature and ratified by the people, but the judiciary emerges as the proactive actor giving meaning to silent

²⁸ Justice K S Puttaswamy v Union of India, (2017) 10 SCC 1 (SC)

²⁹ Constitution of India 1950, art 21, supra note 25

or ambiguous provisions. The Indian experience demonstrates that such interpretive authority is essential for upholding the Constitution's meaning and ensuring democratic governance while protecting individual liberties. In India, constitutional silence is a deliberate and functional feature that allows the judiciary to operate as a dynamic interpreter. Landmark cases show how courts translate ambiguity into effective rights and responsibilities.

Chapter II: South Africa Transformative Constitutionalism and Judicial Interpretation of Silence

Introduction

The Constitution of the Republic of South Africa was enacted and adopted in 1996.³⁰ It represents one of the world's most purposeful attempts at social justice-oriented constitutionalism. Arising from decades of apartheid, it aims not only to prevent discrimination but also to actively create conditions for equality, dignity, and socio-economic justice. Unlike India's highly detailed Constitution, the South African Constitution thoughtfully leaves notable areas broad or vaguely defined. This creates constitutional silences gaps and semantic uncertainties that the framers intentionally left for judicial interpretation.

In South Africa, these silences are not merely interpretive oversights but opportunities for the judiciary to translate constitutional values into practice. The Constitutional Court has consistently acted as an active mechanism in giving substance to rights, obligations, and institutional mandates, explicitly where the Constitution is silent or ambiguous.

Constitutional scholars have highlighted this dynamic. Chaskalson & Langa in "Constitutional Law of South Africa" noted that the Constitutional judiciary interprets aspiring and broad provisions proactively, particularly in socio-economic rights, turning silence into enforceable obligations.³¹ Currie & De Waal in "The Bill of Rights Handbook" observed that the Constitution's broad phrasing of rights is intentional, empowering courts with discretion to balance transformative goals with practical governance.³² Brand & Heyns in "Socio-Economic Rights in South Africa" emphasised that the judiciary has been critical in filling the gap

³⁰ Constitution of the Republic of South Africa 1996

³¹ P Chaskalson & M Langa, *Constitutional Law of South Africa*

³² I Currie & J de Waal, *The Bill of Rights Handbook*

between constitutional ideals and state implementation, notably in cases like *Grootboom* and *Treatment Action Campaign*.³³

Key Areas of Constitutional Silence

Socio-Economic Rights

Sections 26 to 29 guarantee rights to adequate housing, healthcare, food, water, social security, and education.³⁴ The Constitution, however, does not precisely specify the mechanisms or enforceable standards for their realisation. Questions such as: How much housing must the state provide? What constitutes “reasonable measures” for socio-economic rights? remain unresolved in the text. This deliberate silence allows courts to define standards and hold the state accountable for progressive realisation of these rights.

Equality and Non-Discrimination

Section 9 guarantees equality and prohibits discrimination on grounds including race, gender, and disability.³⁵ While aspirational, it does not prescribe adequate remedies for historical or structural inequalities. Judicial interpretation is crucial in addressing systemic disadvantage and ensuring meaningful equality in practice.

Institutional Accountability and Separation of Powers

The Constitution outlines the powers of Parliament, the executive, and the judiciary but is silent on procedural norms for institutional accountability, oversight, and checks when one branch is not effective. Courts have interpreted these silences to reinforce democratic governance and prevent abuse of power.

Judicial Response to Constitutional Silence: Landmark Judgments

Minister of Health v. Treatment Action Campaign (2002)

One of the most landmark cases in South African constitutional jurisprudence,³⁶ this judgment

³³ D Brand & C Heyns, Socio-Economic Rights in South Africa; Government of the Republic of South Africa v *Grootboom*, 2001 (1) SA 46 (CC); *Treatment Action Campaign*, supra note 4

³⁴ Constitution of the Republic of South Africa 1996, ss 26–29

³⁵ Constitution of the Republic of South Africa 1996, s 9

³⁶ *Treatment Action Campaign*, supra note 4

addressed the right to access healthcare (Section 27).³⁷ The Constitution is silent on specifying measures to ensure the right to medication. The Constitutional Court ruled that the government must take adequate measurable steps to provide essential medicines. The ruling effectively filled the gap left by legislative or policy silence. This case illustrates the proactive role of the judiciary in operationalising socio-economic rights.

Government of the Republic of South Africa v Grootboom (2001)

In this case,³⁸ the Court interpreted Section 26(1), which provides the right to adequate housing,³⁹ where the Constitution does not define in detail what constitutes “reasonable measures.” The Court established that the government must implement programmes that are reasonable, integrated, and responsive to immediate housing needs. The judgment demonstrates how judicial interpretation converts constitutional silence into enforceable standards.

Economic Freedom Fighters v Speaker of the National Assembly (2016)

Sections 55 and 92 outline the powers of Parliament and the executive, but questions arise about accountability when officials act unlawfully or neglect duties.⁴⁰ In this case (the Nkandla judgment), the Constitutional Court addressed the binding nature of the Public Protector’s remedial action under Section 182(1)(c) of the Constitution, President Zuma’s failure to comply with it, and the National Assembly’s failure to hold the President accountable under Section 55(2).⁴¹ The Court held that the Public Protector’s remedial action is legally binding unless set aside by a court, and that neither the President nor Parliament may treat it as having no legal effect. By filling procedural and normative silences, the Court reinforced checks and balances in governance and confirmed that Chapter Nine institutions enjoy constitutional independence whose determinations carry binding legal force.

Minister of Finance v. Van Heerden (2004)

Section 9’s commitment to equality is silent on remedies for historical disadvantage.⁴² In this

³⁷ Constitution of the Republic of South Africa 1996, s 27

³⁸ *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC)

³⁹ Constitution of the Republic of South Africa 1996, s 26(1)

⁴⁰ *Economic Freedom Fighters v Speaker of the National Assembly*, supra note 13

⁴¹ Constitution of the Republic of South Africa 1996, ss 182(1)(c), 55(2)

⁴² *Minister of Finance v Van Heerden*, 2004 (6) SA 121 (CC)

case, the Court upheld affirmative action policies aimed at redressing systemic inequalities.⁴³ The Court interpreted the equality provision to allow targeted interventions that the text itself did not explicitly prescribe.

Other Examples

Doctors for Life International v. Speaker of the National Assembly (2006)⁴⁴ demonstrates how the judiciary intervened when legislative procedures were silent on public participation in lawmaking.

Analysis: The Judiciary as Co-Creator

The Constitutional Court's interventions demonstrate that when the text is silent, the judiciary:

- Translates aspirational provisions into enforceable rights. Social and economic rights and equality measures gain practical effect through judicial interpretation.
- Fills procedural and normative gaps. Courts define guidelines for government accountability, institutional conduct, and policy implementation.
- Maintains constitutional balance. The judiciary, by interpreting silence, ensures separation of powers, checks executive excesses, and reinforces parliamentary responsibility.
- Acts proactively. Unlike India's largely reactive approach, the South African courts often initiate remedies or outline frameworks that guide legislative and executive action.

However, this expansive role invites debate. Critics argue that courts may overreach their mandate, effectively "legislating from the bench." Supporters maintain that without judicial intervention, the transformative promises of the Constitution would remain largely aspirational and unfulfilled in practice.

⁴³ Constitution of the Republic of South Africa 1996, s 9, *supra* note 35

⁴⁴ *Doctors for Life International v Speaker of the National Assembly*, 2006 (6) SA 416 (CC)

Implications

The South African experience presents several implications of constitutional silence and judicial interpretation: Courts can compel state action to address socio-economic inequalities. Judicial innovation allows creative remedies, from conditional orders to detailed implementation frameworks. The judiciary keeps the constitution responsive to societal evolution. While the Constitution is ratified by people and enacted by the legislature, the Court is a principal custodian of rights and governance where the text is silent.

South Africa thus exemplifies how constitutional silence can be a medium for progressive social change, with the judiciary acting not merely as an interpreter but as a proactive architect of constitutional reality.

In South Africa, constitutional silence is both intentional and functional, allowing the judiciary to fulfil the transformative goals of the post-apartheid Constitution. Landmark cases like *Treatment Action Campaign*, *Grootboom*, and *Economic Freedom Fighters*⁴⁵ show that courts transform broad, vague, or silent provisions into enforceable obligations, protecting rights, enforcing accountability, and shaping governance. The Constitutional Court's role underscores that in societies confronting historical injustice and socio-economic disparities, the judiciary is not only a guardian of the Constitution but also a co-creator of its practical meaning.

Chapter III: European Union Judicial Interpretation of Constitutional Silence in a Supranational Framework

Introduction

Unlike India and South Africa, the European Union (EU) does not have a unified constitution. Its constitutional order arises from treaties, regulations, directives, and judicial jurisprudence. It forms a supranational legal system that binds member states while respecting national sovereignty. The absence of a codified constitutional text creates constitutional silences, as treaties usually establish broad principles without specifying exact mechanisms, leaving questions of implementation, scope, and enforceability unanswered.

In this context, the Court of Justice of the European Union (CJEU) assumes an interpretive

⁴⁵ *Treatment Action Campaign*, supra note 4

role. It resolves vagueness, fills gaps in the treaty framework, and ensures the uniform application of EU law across diverse legal systems. The CJEU's function differs from national courts – it operates in a supranational context, harmonising the rights of individuals, the obligations of member states, and the need for coherent governance.

Constitutional scholars have noted this dynamic. Joseph H.H. Weiler in “The Constitution of Europe” argued that the CJEU creates constitutional meaning by interpreting silent or broad treaty provisions to ensure uniformity and effectiveness of EU law. Chalmers, Davies & Monti in “European Union Law: Text and Materials”⁴⁶ discuss doctrines like supremacy and direct effect as judicial mechanisms for filling structural gaps left by treaties. Kumm in “The Cosmopolitan Turn in Constitutionalism” noted that EU courts, through interpretation, operationalise rights in a multi-state context where treaty language is intentionally broad.

Key Areas of Constitutional Silence in the EU

Direct Effect of EU Law

The treaties created principles but were often silent on the implementation of EU law by individuals in national courts. Questions such as whether individuals can invoke EU treaty provisions directly against member states or private actors were left requiring judicial clarification.

Supremacy of EU Law

The treaties are silent on conflicts between EU law and national constitutions. Ambiguity arises regarding whether EU law automatically overrides national law, including constitutional provisions, creating space for judicial interpretation.

Fundamental Rights

Though later codified in the Charter of Fundamental Rights, the EU treaties initially contained broad, aspirational language regarding human rights. Silences included which rights are enforceable, how conflicts with national law are resolved, and what remedies are available for violations.

⁴⁶ D Chalmers, G Davies & G Monti, *European Union Law: Text and Materials*

Institutional Powers and Accountability

The treaties outline the roles of the Commission, Council, European Parliament, and CJEU but leave procedural mechanisms regarding checks, remedies, and enforcement often open, especially in disputes between institutions or between EU law and member states' domestic law.

Judicial Response to Constitutional Silence: Landmark Judgments

Van Gend en Loos (1963)

In *Van Gend en Loos*,⁴⁷ the CJEU addressed whether individuals could directly invoke Article 12 of the Treaty of Rome (regarding customs duties)⁴⁸ in national courts. The treaties did not expressly provide for individual enforceability, creating constitutional silence. The Court ruled that EU law can have direct effect, allowing individuals to enforce rights granted by the Treaties. This landmark decision demonstrates how the CJEU transforms textually ambiguous treaty provisions into actionable legal obligations.

Costa v ENEL (1964)

The treaties were silent on the hierarchy between EU law and national constitutions. In *Costa v. ENEL*,⁴⁹ the Court articulated the doctrine of supremacy, holding that EU law prevails over conflicting national legislation. By filling this silence, the CJEU ensured uniformity and integration in the application of EU law across nations.

Kadi v Council (2008)

The Court examined the tension between EU law and fundamental rights.⁵⁰ The treaties provided broad autonomy for the EU to implement UN Security Council sanctions but were silent on how such actions interact with human rights obligations. The CJEU held that EU institutions must respect fundamental rights even in implementing international obligations.

⁴⁷ *Van Gend en Loos*, supra note 6

⁴⁸ Treaty establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957) art 12, [1957] 298 UNTS 11

⁴⁹ *Flaminio Costa*, supra note 7

⁵⁰ *Kadi v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351

This case illustrates judicial interpretation as a tool to harmonise competing legal obligations in areas of textual silence.

Francovich v Italy (1991)

In this case,⁵¹ the treaties did not specify remedies for member state failure to implement EU directives. The CJEU recognised a state liability principle, adjudicating that individuals could claim compensation for damages caused by non-implementation. This judgment fills a procedural gap, ensuring enforceability of EU law where the text is silent.

Other Examples

Simmenthal (1978) clarified procedural activity for national courts when EU law conflicts with domestic legislation. *Opinion 2/13* (2014)⁵² addressed the compatibility of the draft agreement for the EU's accession to the European Convention on Human Rights (ECHR) with the EU Treaties. The CJEU, sitting as a full court, held that the draft accession agreement was incompatible with Article 6(2) TEU and Protocol No. 8, primarily because it failed to preserve the autonomy and specific characteristics of EU law. This ruling was significant for understanding the relationship between the CJEU and the European Court of Human Rights, and the limits of EU integration with external human rights frameworks.

These cases show that constitutional silence in the EU is structural treaties provide principles, but the Court's role is essential in operationalising those principles, resolving ambiguities, and ensuring the effectiveness of the EU legal order.

Analysis of the CJEU as Co-Creator of Constitutional Meaning

The CJEU's jurisprudence demonstrates several patterns:

- Filling Structural and Substantive Gaps. By interpreting treaty provisions in ways not explicitly detailed, the Court ensures the enforceability of rights and the supremacy and sovereignty of EU law.

⁵¹ *Francovich v Italy*, Cases C-6/90 and C-9/90 [1991] ECR I-5357

⁵² *Opinion 2/13*, ECLI:EU:C:2014:2454 (Full Court, 18 December 2014)

- Balancing Member-State Sovereignty. Judicial interpretation reconciles national autonomy with supranational obligations.
- Operationalising Broad Principles. Fundamental rights, free movement, and internal market provisions attain practical effect through Court rulings.
- Proactive Interpretation. The Court anticipates and remedies ambiguities by creating doctrines like direct effect, supremacy, and state liability, which were not explicit in the treaties.

The CJEU's role contrasts with national courts. Unlike India's reactive Supreme Court or South Africa's proactive Constitutional Court, the CJEU transforms silent treaty provisions into binding norms across multiple sovereign states. It effectively acts as a supranational constitutional architect.

Implications

The EU experience highlights various key implications of constitutional silence and judicial interpretation: The CJEU establishes principles and rights where treaties are silent, demonstrating that courts can be architects of supranational constitutional order. By resolving ambiguities, the Court ensures coherent application of EU law across member states. Silence allows treaties to adapt to unpredictable challenges, with judicial interpretation giving effect to evolving principles. In the concept of shared constitutional ownership, treaties are negotiated by member states and citizens ratify their membership, yet the CJEU actively operationalises constitutional meaning in areas of silence. This illustrates that constitutional silence is not a weakness but a mechanism for judicial empowerment, allowing flexible, adaptive governance in a complex multi-state legal system.

In the European Union, constitutional silence is inherent in the treaty-based system. Landmark judgments such as *Van Gend en Loos*, *Costa v. ENEL*, *Francovich*, and *Kadi v. Council*⁵³ reveal that the CJEU fills gaps, resolves ambiguities, and creates enforceable norms. The Court acts as a co-creator of constitutional meaning, ensuring that broad, silent provisions translate into

⁵³ *Van Gend en Loos*, supra note 6; *Flaminio Costa*, supra note 7; *Francovich v Italy*, supra note 51; *Kadi v Council and Commission*, supra note 50

effective rights, obligations, and institutional frameworks.

Comparative Analysis of Who Gets a Constitution?

Across diverse constitutional systems, the question of “who gets a constitution” becomes particularly relevant in areas of constitutional silence. While legislatures enact constitutional texts and citizens ratify them, it is often the judiciary that interprets, enforces, and extends the Constitution’s meaning where the text is vague, ambiguous, or silent.

The comparative study of India, South Africa, and the European Union demonstrates that constitutional silence is not a flaw but a deliberate or functional feature, designed to allow constitutions to adapt to evolving social, political, and legal contexts. Each system presents a distinct model of judicial engagement, shaped by historical circumstances, constitutional design, and societal needs.

Patterns of Judicial Interpretation Across Jurisdictions

India: Reactive and Rights-Centric Interpretation

The Indian Supreme Court often responds to litigation arising from ambiguities, particularly in fundamental rights and federal structures. Landmark judgments like *Kesavananda Bharati*, *Maneka Gandhi*, and *SR Bommai*⁵⁴ illustrate how courts convert textual vagueness into enforceable norms. The judiciary acts as a guardian of constitutional principles, ensuring that executive or legislative action does not undermine rights or the federal balance. While reactive, the Court exercises significant discretion, particularly in emerging rights issues such as privacy, environmental protection, and socio-economic entitlements.

South Africa: Proactive and Transformative Interpretation

The Constitutional Court actively fills silences, translating aspirational socio-economic rights and equality provisions into enforceable obligations. Cases such as *Grootboom* and *Treatment Action Campaign*⁵⁵ illustrate proactive judicial engagement, compelling state action to realise rights in practice. South Africa demonstrates transformative constitutionalism, where courts do

⁵⁴ *Kesavananda Bharati*, supra note 1; *Maneka Gandhi*, supra note 9; *S R Bommai*, supra note 10

⁵⁵ *Treatment Action Campaign*, supra note 3; *Government of the Republic of South Africa v Grootboom*, supra note 38; *Van Gend en Loos*, supra note 5

not merely interpret law but shape governance structures and policy frameworks. Judicial intervention is necessary in a society marked by historical injustice, where silence in the text reflects intentional flexibility for future adaptation.

European Union: Supranational and Structural Interpretation

The CJEU interprets treaties lacking a codified constitution, ensuring uniform application of EU law across member states. Landmark cases like *Van Gend en Loos*, *Costa v. ENEL*, and *Francovich* show how the Court fills structural and procedural gaps, including enforcement, supremacy, and remedies. Judicial interpretation is institutionally central, balancing member-state sovereignty with supranational coherence. Unlike national courts, the CJEU operates in a multi-state context, making it both an interpreter and a co-creator of constitutional order at the supranational level.

Comparative Insights

Judicial Ownership of Silence

In all three systems, constitutional silence enables the judiciary to assume a co-creative role. In India, courts safeguard rights and maintain institutional balance; in South Africa, courts advance social justice; in the EU, courts ensure a uniform legal order.

Nature of Silence and Judicial Response

India exhibits ambiguities in rights, federalism, and emergency powers, leading to reactive, case-driven interpretation. South Africa features broad aspirational language, resulting in proactive, transformative judicial intervention. The EU has treaty gaps and procedural silences, prompting structural, supranational judicial creation of enforceable norms.

Scope and Limits of Judicial Intervention

India and South Africa operate within sovereign frameworks but have discretion to interpret broadly. The EU CJEU operates across member states, creating principles applicable universally within the Union. In all cases, judicial interpretation is essential for operationalising constitutional principles, especially where the text is silent.

Implications for Constitutional Ownership

Legislatures formally adopt the Constitution; citizens legitimise it through ratification. Judicial bodies often effectively “own” the meaning in areas left ambiguous. Constitutional ownership becomes shared and dynamic, reflecting the interplay between text, society, and judicial interpretation.

Implications for Governance, Rights, and Democracy

Adaptability and Resilience

Constitutional silence allows systems to adapt to evolving social, political, and economic realities. Judicial interpretation ensures that constitutions remain living documents, responsive to contemporary challenges.

Protection of Rights and Justice

In India and South Africa, courts translate vague or silent provisions into enforceable rights, ensuring citizens’ access to justice. In the EU, the CJEU guarantees uniform application of rights and resolves conflicts between supranational and national legal orders.

Balancing Power

Judicial intervention mediates tensions between branches of government (India and South Africa) or between member states and supranational authority (EU). Silence in the text becomes an instrument of judicial oversight, reinforcing checks and balances and strengthening democratic governance.

Integration of Constitutional Theory

The comparative analysis would benefit from engagement with broader theoretical literature on constitutional interpretation. Ronald Dworkin’s concept of “law as integrity”⁵⁶ provides a framework for understanding how judges interpret constitutional silences not merely as gaps to be filled, but as opportunities to articulate principles that maintain the coherence and moral integrity of the legal system. Dworkin’s approach suggests that judicial interpretation of

⁵⁶ Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986)

constitutional silence should aim to present the constitutional order in its best light, consistent with its fundamental values.

Similarly, Mark Tushnet's distinction between "weak-form" and "strong-form" judicial review⁵⁷ illuminates the varying approaches across jurisdictions. India's reactive approach and the EU's structural interpretation might be characterised as forms of strong judicial review, where courts have substantial authority to shape constitutional meaning. South Africa's transformative constitutionalism represents an even stronger form, where courts not only interpret but actively direct government policy. This theoretical framework helps explain the different degrees of judicial authority exercised in filling constitutional silences across the three jurisdictions studied.

Suggestions and Recommendations

Based on the comparative analysis of constitutional silence and judicial interpretation across India, South Africa, and the European Union, the following suggestions and recommendations are offered for constitutional designers, judiciaries, legislatures, and scholars:

1. **Embrace Strategic Silence:** Constitutional drafters should recognise that silence, ambiguity, and broadly worded provisions can serve as functional features rather than flaws. Strategic silence allows constitutions to adapt to unforeseen social, political, and economic changes. However, such silence should be intentional and balanced with sufficient clarity to prevent arbitrary exercise of power.
2. **Establish Clear Interpretive Principles:** Constitutions should include interpretive clauses or preambles that guide judicial interpretation of silent or ambiguous provisions. South Africa's Constitution, for example, includes values of dignity, equality, and freedom that guide the Constitutional Court's interpretation of socio-economic rights.
3. **Create Mechanisms for Institutional Dialogue:** Constitutional design should facilitate dialogue between the judiciary, legislature, and executive when addressing constitutional silences. This could include provisions for advisory opinions, legislative

⁵⁷ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008)

responses to judicial interpretations, or sunset clauses for judicially created doctrines pending legislative action.

Conclusion

Constitutions, regardless of their form, context, or jurisdiction, are never intended to serve as complete blueprints for governance. They are not rigid manuals that foresee every possible challenge, scenario, or societal shift. Rather, they are designed with deliberate spaces areas of ambiguity, broadly framed principles, and sometimes even silent provisions. These deliberate silences are not flaws or oversights; on the contrary, they reflect a conscious recognition that human societies are dynamic, that governance is complex, and that the protection of rights requires flexibility. By leaving room for interpretation and evolution, constitutions allow themselves to remain relevant across generations while adapting to unforeseen challenges and maintaining their foundational principles. In essence, a constitution is a living document precisely because it does not attempt to dictate every detail of governance or social life.

One of the most fascinating aspects of constitutional design is how these silent spaces invite engagement from a variety of actors, particularly the judiciary. Courts are often called upon to breathe life into these provisions, to resolve ambiguities, and to translate aspirational or broadly drafted principles into actionable legal norms. A comparative study of India, South Africa, and the European Union reveals that the judiciary frequently emerges as a central architect in interpreting and operationalising constitutional meaning, making tangible what the text leaves open-ended. These examples highlight not only the power of courts but also the layered ownership of constitutional authority in modern governance. While legislatures draft and adopt the legal text and citizens legitimise it through ratification or participation, it is the judiciary that frequently determines how constitutional principles are realised in practice, especially in spaces left intentionally silent.

In India, the Supreme Court has long been a pivotal institution in interpreting the Constitution and navigating its ambiguities. The Indian Constitution contains provisions that are intentionally broad or vaguely worded, particularly in areas concerning fundamental rights, state powers, and federal relations. Rather than seeing these as weaknesses, the Supreme Court has treated them as invitations to engage in thoughtful, purposive interpretation. Over decades, the Court has developed doctrines such as the “basic structure” of the Constitution, which protect fundamental constitutional principles even against parliamentary amendments.

Through such judgments, the Court delineates the limits of state power, safeguards individual rights, and maintains a delicate federal balance. The Indian experience demonstrates how judicial interpretation can bridge the gap between constitutional ideals and the complex realities of governance, thereby ensuring that the Constitution remains a living, evolving instrument rather than a static, unchanging document.

A similar dynamic is evident in South Africa, where the Constitutional Court has played an active role in shaping the nation's post-apartheid reality. The South African Constitution, adopted in 1996, is widely celebrated for its aspirational language and commitment to socio-economic equality. Yet many of its provisions are deliberately broad, reflecting the challenges of transitioning from a deeply divided society into a democratic system. The Constitutional Court has embraced this challenge, transforming aspirational language into enforceable rights and policies. For instance, through its interpretation of socio-economic rights, the Court has required the government to take concrete steps to provide housing, healthcare, and social welfare to historically marginalised communities. In doing so, the judiciary does not merely apply the law but actively shapes the contours of social justice and equality. South Africa thus exemplifies how constitutional silence can empower courts to mediate between lofty ideals and the practical necessities of societal reconstruction.

The European Union presents yet another compelling example of judicial influence in shaping constitutional meaning, albeit in a supranational context. The Court of Justice of the European Union (CJEU) operates in a unique legal ecosystem, where treaty provisions rather than a single written constitution form the foundational legal framework. The treaties contain broad obligations and goals, but their translation into enforceable rights and norms often depends on judicial interpretation. The CJEU has repeatedly exercised its authority to interpret treaty provisions in ways that ensure consistency, enforce rights, and maintain integration across member states. In effect, the Court functions as a supranational architect of constitutional law, giving coherence and force to provisions that might otherwise remain abstract or unevenly applied. Across the EU, this judicial creativity ensures that the collective constitutional framework remains both operational and adaptable even as the political and social landscape evolves.

The comparative insights from India, South Africa, and the EU underscore a central truth: that the ownership and operation of a constitution are multilayered and dynamic. While elected

legislatures may draft and formalise legal provisions and citizens may confer legitimacy through ratification or adherence, it is often the judiciary that enforces, clarifies, and operationalises these principles. Constitutional silence is not a weakness but a feature. It is a mechanism through which courts can intervene, interpret, and fill gaps that no framers could have anticipated. In this sense, the judiciary emerges not only as an interpreter of law but as a co-author of constitutional life, shaping the practical realities of governance, rights protection, and societal values.

This interplay between silence and judicial interpretation ensures that constitutions remain living documents. They are not inert texts confined to legal libraries or historical archives; they are active frameworks guiding the operation of state power, protecting human rights, and fostering justice. Through interpretation, courts mediate between idealised principles and complex social realities, ensuring that governance is both accountable and adaptable. Moreover, this process reflects the dynamic relationship between law, society, and institutions, illustrating that a constitution's meaning is continuously negotiated and co-created over time.

Ultimately, constitutions cannot be understood solely as legal texts or formal instruments of government. They are dynamic, evolving frameworks whose principles gain substance and significance through interpretation, application, and enforcement. By leaving space for judicial creativity and engagement, constitutions remain resilient in the face of societal change, unforeseen crises, and evolving human expectations. The judiciary's role in this process cannot be overstated. Courts translate abstract language into enforceable rights, delineate the boundaries of power, and ensure that governance aligns with constitutional ideals. In doing so, they make constitutional principles tangible, operational, and relevant to the lived experiences of citizens.

In conclusion, the study of constitutional silence and judicial interpretation illuminates a profound reality about modern governance: that constitutions are not static blueprints but living instruments, and their effectiveness depends on ongoing dialogue among legislators, citizens, and courts. Silence within the text is not a void but an opportunity—an invitation for creativity, adaptation, and interpretive engagement. Through this ongoing process, constitutions continue to fulfil their core purposes: to protect rights, maintain checks and balances, and guide governance in an ever-evolving society. The judiciary, in this context, emerges not just as a guardian of the law but as a co-author and custodian of constitutional life. The question of who

“owns” a constitution thus extends far beyond its adoption. It is answered in the continuous, collaborative interplay between law, society, and the courts, ensuring that constitutional principles remain meaningful, practical, and transformative across generations.