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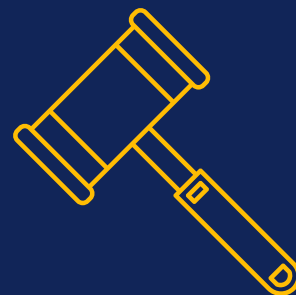
Volume III - Issue I

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[anirvan@uniquelaw.in](mailto:anirvan@uniquelaw.in)



>> **Arka Biswas**

Head of Operations

[arka@uniquelaw.in](mailto:arka@uniquelaw.in)



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**EDITOR'S NOTE****Volume III Issue I of Journal of Unique Laws and Students (JULS)**

The journal's current issue aims to present merit papers in the form of research paper analysis on numerous legal issues related to constitutional law divided into foundational constitutional principles, rights and liberties, comparative constitutional law, constitutionalism in historic context, constitutional laws and international relations, emerging technologies, social justice, political systems, global challenges and these topics are authored by various groups of individuals that have been reappraised and emended by our team of editors to attend the highest possible excellence. We feel privileged to have been able to act as editors.

We thank all authors for their obedient submission to this journal and for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our profound gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Volume III Issue I a success.

**Prof. Disha Nayak Saedesai***Editor-in-Chief***Hon'ble Justice Dr. Saleem Marsoof***Chief Patron***Hamda Arfeen***Senior Editor*



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# CONSTITUTIONAL EVOLUTION: EXAMINING THE PROCESS OF DRAFTING AND AMENDING CONSTITUTIONS IN VARIOUS COUNTRIES

*Authored by Shubhangi Sinha\**

## **ABSTRACT**

The constitution plays an important role in addressing how the country would work and function. It is a set of rules and regulations and acts as a base on how the future of a country will play. Different countries have taken different courses on how to draft their constitution suiting their society and circumstances. The constitution plays an important role in making the future of the country and thus it is very important to understand the origin and its history to understand the ongoing politics, development, economic status and social structure of the country.

*Keywords: India, America, Africa, Constitution, Authoritarian*

## **INTRODUCTION**

*DEMOCRACY.* The word has become self-explanatory these days. Democracy, as hailed by most of the people, has become one of the best forms of ruling where the people elect the leaders, by whom they want to be represented and the form of electing this representation is done by free and fair elections. The biggest part of any democracy is that no one is the actual power holder in this form of ruling. Rather it is the laid down principles on which the whole institution of democracy runs. These core principles or the list of how the functioning of the state will take place is what we call the “constitution”. Constitution is the base of any democracy. No one is above the Constitution for each, and every law comes from this core itself. Even the functioning of the state and the formation of government is based on the constitution. Thus, the possibility of having a democracy

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\* 1<sup>st</sup> year B.A. LL.B student at Institute of Law, Nirma University, Ahmedabad, available at: [shubhangishubs@gmail.com](mailto:shubhangishubs@gmail.com).

without any constitution is equal to NIL. Now the question arises whether it is possible to have a form of government which is not democratic, yet it has a constitution.

Well, the answer is simply yes. The Constitution is a guidebook on how the nation would run. If the constitution were to be written with an authoritarian viewpoint, then the constitution would simply state the principles that would work in the authoritarian country. Simply put, a constitution is not a guarantee of democracy. Constitutions like laws, were brought into existence and for some countries, there has been a long history of constitutional evolution.

### **Definition of Constitution ~**

The constitution has been defined as the “system of laws and basic principles that a state, a country or an organization is governed by your right to vote under the constitution” in the Oxford learner's Dictionary. Accordingly, in simple words, it means a pre-decided set of rules and regulations which govern further law-making in the country with the opinion of the public. The constitution acts as the base law in almost 188 countries at present, all these countries are not necessarily purely democratic. Constitution is what one calls the Grund norm i.e. the base from where further laws generate. Different countries have different historical backgrounds regarding constitutional development. For some, it was an easy way to get to democracy while some had to and even now, amend it again and again to suit the societal structure of the country.

## **CONSTITUTION AND ITS HISTORICAL EVOLUTION IN VARIOUS COUNTRIES**

### **1. Indian Constitution**

The Indian Constitution<sup>1</sup> is the ultimate law of the land. It establishes the framework outlining basic political principles, as well as the fundamental rights, guiding principles, and responsibilities of citizens. It also defines the organization, methods, powers, and duties of government agencies. On November 26, 1949, the Constituent Assembly enacted the Indian Constitution, which became operative on January 26, 1950. The Dominion of India became the Republic of India, superseding

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<sup>1</sup> Vivek Rajshekara, Indian Constitution: Historical Underpinnings, Evolution, Features, Amendments, Significant Provisions and Basic Structure, Clear IAS, <https://www.clearias.com/indian-constitution-historical-underpinnings-evolution-features-amendments-significant-provisions-basic-structure/>, (last visited 25.02.2024, 7:30PM).



the Government of India Act 1935 as the primary law governing the nation. The Indian Constitution is the world's longest-written constitution for a sovereign nation. It establishes the people's fundamental rights and embodies the laws and regulations of the nation. Since it was first ratified in 1950, the Indian constitution has undergone numerous revisions and improvements. It is a living document. The Indian Constitution is a singular text that captures the hopes, principles, and rich cultural diversity of the Indian populace. With the founding of the Indian National Congress and the call for self-governance in the 1930s, the Constitution was drafted.

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On November 26, 1949, the Constituent Assembly enacted the Indian Constitution, which became operative on January 26, 1950. The Dominion of India became the Republic of India, superseding the Government of India Act 1935 as the primary law governing the nation. The Indian Constitution is the longest-written constitution for a sovereign nation. It establishes the people's fundamental rights and embodies the laws and regulations of the nation.

Since its first adoption in 1950, it has undergone multiple revisions and refinements, making it a dynamic document. The Indian Constitution is a singular text that captures the hopes, principles, and rich cultural diversity of the Indian populace. It has been essential in determining how India has developed into a modern, democratic, and pluralistic country. It serves as a source of inspiration and guidance for all of its residents.

India's colonial heritage and the fight for freedom from British rule are the sources of the country's Constitution. With the founding of the Indian National Congress and the call for self-governance in the 1930s, the Constitution was drafted. Several constitutional frameworks were presented during the liberation movement, including the Karachi Resolution of 1931, the Nehru Report of 1928, and the Bombay Plan of 1944. The 1946 election of the Constituent Assembly, which was tasked with drafting a new Constitution for the newly independent country, was based on these propositions.

Together with delegates from the princely states, elected officials from every province in British India made up the Constituent Assembly. Dr. B. R. Ambedkar, who was instrumental in the Constitution's formulation, served as its chair. After convening for the first time on December 9, 1946, the Constituent Assembly spent the following three years debating and discussing the various clauses of the Constitution. The Republic of India was established on January 26, 1950, when the Constitution, which had been officially enacted on November 26, 1949, went into force.

Several changes have been made to the Indian Constitution since it was first ratified in 1950. Article 368 of the Constitution lays out the procedure for modifying it. It calls for the ratification of at least half of the states in the union as well as a special majority in both chambers of Parliament. Since its ratification, the Constitution has undergone more than 100 amendments. The changes have been made to consider new laws and policies as well as the nation's evolving demands and goals.

## 2. American Constitution

*"The Idea of Revolution in America<sup>2</sup> Emerged after The Great American Revolution."*

They brought written constitutions into the mainstream of government operations. They demonstrated to the world how written constitutions could be made genuinely fundamental, set apart from ordinary legislation, and regularly interpreted and modified as needed. They also provided the world with practical and workable governmental institutions to fulfil these fundamental obligations.

A constitution was rarely distinguished from the government and its functions before the American Revolution. In the English tradition, a constitution refers to both the basic rights and the structure or composition of the government.

"By the constitution," said Lord Bolingbroke in 1733, "we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good that compose the general

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<sup>2</sup> Gordon S. Wood, American Revolution and Constitutional Theory, Encyclopedia.com, <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/american-revolution-and-constitutional-theory>, (last visited 26.02.2024, 3:10PM).

system, according to which the community hath agreed to be governed." Put another way, the English constitution encompassed the established system of laws, customs, and institutions of governance in addition to basic principles and rights. But by the end of the Revolutionary War, American and English conceptions of the Constitution had diverged significantly. It was now believed that a constitution had no place in the government. A written document that was superior to and apart from all governmental actions was known as a constitution. In 1791, Thomas Paine stated that it was "a thing antecedent to a government, and a government is only the creature of a constitution." Furthermore, Paine stated that it was "not a thing in name only; but in fact." Every family and every government official owned a constitution, which was considered by Americans to be equivalent to a Bible.

Every family and every government official owned a constitution, which was considered by Americans to be equivalent to a Bible. "It is the body of elements, to which you can refer, and quote article by article; and which contains everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound."

Thus, according to James Wilson, one of the main Framers of the federal Constitution in 1787, "in their hands it is clay in the hands of a potter; they have the right to mould, to preserve, to improve, to refine, and furnish it as they please," a constitution could never be an act of a legislature or a government. If the English perceived this new concept of a constitution as similar to "a pudding made by a recipe," as Arthur Young argued caustically in 1792, the Americans had come to believe the English had lost all constitutional authority.

In a brief amount of time, there occurred a significant shift in meaning. It involves a revolution not only in the political lexicon of the Americans but also in their entire political culture. The most visible point of divergence between the constitutional traditions of the United States and Great Britain during the Revolution was this distinction between "legal" and "constitutional". Americans naturally aimed to make them fundamental and to put them in writing when they came to draft their constitutions for their newly independent states in 1776.

To change the composition of the federal government, those seeking to do so in 1787 knew just what to do: they called a constitutional convention in Philadelphia and sent the draft document

straight to the states for approval. A few years later, the American model was even embraced by the French in their own revolution. A few state courts began to gradually impose limitations on the laws that the assemblies were passing in the 1780s as the idea that a constitution was a fundamental law that was immune to legislative incursion gained momentum.

They essentially told the legislators, "*This is the limit of your authority; and hither shall you go, but no further*" as Chief Justice George Wythe of Virginia noted in 1782.

### 3. African Constitution

The colonialists' power was transferred to the national elites who had spearheaded the independence movement in the late 1950s and early 1960s thanks to the foundation provided by the first generation of African<sup>3</sup> constitutions. The Belgians, the British, and the French—the departing colonial powers—drafted these constitutions mostly in Brussels, London, and Paris, with very little input from the continent's growing political leaders and very little from the average African. Because of this, they were essentially forced, and because the populace—aside from a small group of elites—had not participated in the process of creating the constitution, they hardly represented the will of the people.

However, these constitutions brought liberal democracy and constitutionalism to Europe for the first time, including crucial elements like limited government, checks and balances, power diffusion, and protection of individual and minority rights. However, despite the introduction of these significant Western liberal democratic ideals, the colonial authoritarian regime was allowed to continue into the post-colonial era because of the relatively weak foundations on which it was built.

The Western specialists who drafted these first-generation constitutions were largely focused on preserving the status quo ante, which effectively protected the interests of the former colonial powers and the white settlers who remained in Africa. They had little understanding of the local realities of the continent. Therefore, it came as no surprise that Ghana (formerly known as the Gold

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<sup>3</sup> Charles M. Fombad, Evolution of the African Constitution, Oxford Constitutional Law, <https://oxcon.oup.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-2?prd=OXCON>, (last visited 01.03.2024, 7:15 PM).

Coast) was ready for independence after the British government rejected the proposed constitution, which contained seven provisions protecting fundamental rights.

As a result, there was no bill of rights in the 1957 Ghanaian constitution. At the start of the 1960s, there was a significant shift. It is plausible that a contributing factor was the British government's expectation that a fundamental rights guarantee, encompassing the proscription of discrimination, would shield the British nationals who had established themselves in significant quantities in certain African nations like Kenya, Uganda, and Tanzania. Nigeria was the first former British colony in Africa to receive a bill of rights in its constitution in December 1959.

Subsequently, the Nigerian model of a bill of rights became the norm for the constitutions of other British colonies in Africa. The exercise of power received greater attention than its constraints because the primary goal of the independence constitutions was to give authority to the national elites. Thus, no attempt was made to guarantee a peaceful transfer from the harsh and oppressive colonial administrative system to constitutional governance governed by the rule of law in a condition of liberty.

Because of this, even with the abundance of liberal ideas about political freedom and human rights included in these new constitutions, the new elites had been too accustomed to the authoritarian and repressive practices of colonialism to abruptly abandon them.

Soon after African politicians and the ruling class began to doubt the fundamental tenets of the independence constitutions, the continent's second generation of constitution-building got underway. There was a perception that ideas like democracy, multiparty politics, and the division of powers did not sufficiently address the pressing issues facing the recently independent nations. Many of the liberal principles found in the independence constitutions were gradually repealed under the guise of fostering national unity among the disparate communities that had been forcibly united as states following the continent's partition in 1884, as well as to foster a sense of political identity and thereby facilitate nation-building and development.

The strong control by a single leader over laws and courts led many countries to switch to a presidential style of government. Even though colonial rulers set up different systems, the focus on giving power to one person made dictatorships more likely. The colonizers didn't really bother

to build up the courts or train judges to handle problems, especially in places like the old Belgian and Portuguese colonies.

The colonial administration consistently violated human rights, even in the face of the Bill of Rights and other laws that claimed to uphold and safeguard human rights.

The 'third wave' of democratization that hit African coastlines in the early 1990s aligned with the third generation of constitution-building. This resulted in a constitutional change fever that doesn't seem to be going away. Through a process of constitution-building that is guided by the difficult lessons learned from the mistakes of the first two generations of constitutions, it is meant to have ushered in a new era of constitutionalism in Africa and for many good reasons, this new period started full of promise.

Ordinary citizens participated in the process of establishing constitutions for the first time in numerous nations in both Anglophone and Francophone Africa. In the case of the latter, this was made possible by the phenomena of national conferences, which started in Benin and spread to many other Francophone countries. However, there were significant national variations in the type and volume of public participation.

While foreign specialists were involved in numerous cases, they were no longer in charge of the proceedings or the decisive force that they had been in the past. Rather, African specialists have not only gained prominence within their nations but have also been extensively employed in other African nations, particularly South African constitutional experts. Thus, from this angle, there's no reason these constitutions can't be called "made in Africa." About these new constitutions, the main goal has been to try and solve some of the fundamental flaws that had almost guaranteed the establishment of authoritarian and oppressive governments throughout Africa.

Human rights protection and acknowledgement, the acceptance of multipartyism, the dispersal of power, the decentralization of power structures, and the establishment of institutions to further accountability and transparency have come to be seen as commonplace trends. In summary, the fundamental tenets of contemporary constitutionalism are now ingrained in the majority of African constitutions drafted after 1990. Nevertheless, the last ten years have been characterized by



worrying indications of a resurgence of the old dictatorships, following a positive start that saw several of the old tyrants overthrown in the early multi-party elections.

### **COMPARATIVE ANALYSIS**

Comprehensive examination of their historical contexts, key provisions, governing structures, challenges, and impacts on their respective societies. Each constitution reflects unique historical trajectories, political philosophies, and socio-cultural contexts, shaping the governance frameworks of their respective nations.

The Indian, American, and African constitutions each offer unique insights into the governance structures, rights protections, and socio-political contexts of their respective nations. The Indian Constitution, born out of the struggle for independence from British colonial rule, stands as a testament to the diversity and pluralism of India. Enshrining fundamental rights, parliamentary democracy, and federalism, it seeks to uphold principles of equality, secularism, and social justice. However, challenges such as caste-based discrimination, regional conflicts, and bureaucratic inefficiencies continue to test its efficacy in ensuring inclusive development and harmony among diverse communities. Meanwhile, the American Constitution, forged in the crucible of revolution, embodies principles of separation of powers, checks and balances, and individual liberties. The Bill of Rights, with its guarantees of freedom of speech, religion, and due process, serves as a bulwark against government encroachment on civil liberties. Yet, the American system grapples with challenges such as partisan polarization, campaign finance issues, and questions of federalism versus state authority, underscoring the ongoing struggle to balance competing interests within a complex federal system. In contrast, African constitutions, shaped by colonial legacies, independence movements, and post-colonial struggles, reflect a diverse array of governance structures and legal traditions. From presidential to parliamentary systems, these constitutions seek to navigate the complexities of ethnic diversity, authoritarianism, and socio-economic disparities across the continent. While some African nations have made strides in protecting human rights, promoting democratic governance, and fostering socio-economic development, others face challenges such as weak institutions, political instability, and entrenched corruption. Despite these differences, the Indian, American, and African constitutions share a common aspiration to uphold the rule of law, protect individual freedoms, and promote the welfare of their citizens. Through

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their respective frameworks, they embody the ongoing quest for democratic governance, social justice, and inclusive development in a rapidly changing world.

### **CONCLUSION**

The constitution of any country is a product of many historical events going on around it. It is the constitution of any country which makes sure that a certain balance and regulation is maintained in society. Behind every constitution lies the aspirations of millions of populations of that country and their expectations of the same. The constitution is the result of the sweat of so many people for the betterment of the rest of the population that in a way it automatically becomes the most respected in any country. Countries like India and Africa were colonized by the British as discussed above. However, for India, the people who constituted the constitution were Indians and, therefore knew of the needs and demands of the people in India. Therefore, they were able to draft the perfect constitution which could suit the Indian context post-independence. The British influence over the formation of the constitution was less as compared to what Africa had to face while drafting the constitution. The British influence on African constitution-making initially overlooked the needs of the locals, leading to later amendments. In contrast, America, as the oldest democracy, faced internal debates and diverse perspectives, independent of foreign influence, complicating the constitution-making process. Hence, each country, shaped by its unique societal context, pursued distinct agendas in crafting its constitution.

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# DATA PROTECTION AND CONSTITUTIONAL RIGHTS: THE INTERSECTION OF PRIVACY AND INFORMATION SECURITY

*Authored by Shweta Nair\**

## **ABSTRACT**

In today's digital world, successful governance is impossible without well-deployed digital services and the active participation of individuals who are aware of innovations and their rights. With the continuous advancement of technology, the concept of data protection and information security has become a major source of debate because every corporation has digital services that are tasked with protecting the data of its employees from various third-party interventions.

Privacy has now developed as a human right across the world, and it is recognized as a basic right by the Constitution. The courts of law have issued significant decisions, including recommendations and verdicts. This article addresses the legal trends related to data protection.

*Keywords: Data Protection, Privacy, Breach, Security.*

## **INTRODUCTION**

Privacy has been defined as the capability of an individual or group of persons to keep certain information confidential and secluded. Privacy has two aspects to it, the first is concerning the information or personal data and the second is the extent to which it has been shared with other parties. The meaning of the concept has been understood and interpreted at large through literature, bookkeeping newspapers and by the internet as well. The exposure of the internet across the globe

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\* 4<sup>th</sup> year B.B.A. LL.B student at Symbiosis Law School, Nagpur, available at: [shwetanair.student@slnagpur.edu.in](mailto:shwetanair.student@slnagpur.edu.in).

and the advent of mass collection and retention have changed the meaning of privacy in the modern world.

Privacy has been recognized as a Human Right under Article 12 of the UDHR states that no one has the liberty to interfere with an individual's privacy, correspondence & family or be permitted to defame their reputation or honor<sup>1</sup> It has been recognized as a fundamental right also by the ICCPR, the UN Convention on Migrant Workers and the UN Convention on Protection of the Child, and several other international human rights covenants, conventions, and human rights courts give specific references to privacy being a right.<sup>2</sup> The right to privacy was mentioned by the UN Special Rapporteur in his initial report, which was released on March 8, 2016. His report is based on two principles:

- (1) Privacy protections should be accessible across national borders;
- (2) There must also be access to remedies for privacy abuses beyond these boundaries.<sup>3</sup>

This concept of privacy is essentially a part of human rights that has been inherent since birth which includes the right to be confidential about certain information and communications, however, it does not include within it that such information be made of public interest or in the form of public record. For an individual to lead a dignified life, this privacy is of utmost importance and the violation of it is threatening to any human being and their social dignity in the society. With the current advancing and innovations in technology and the wide use of the internet across the globe, people's information and data have become easy to access and share with the public or a third party which is likely to be prone to misuse. Several cybercrime attacks are seen in today's world which include phishing, viruses, ransomware, hacking, spamming, video morphing, etc. Therefore, to avoid or prohibit this, data protection is essential.

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<sup>1</sup> Universal Declaration of Human Rights, 1948.

<sup>2</sup> A/RES/45/158 25 February 1991, Article 14.

<sup>3</sup> Report of the United Nations Special Rapporteur on the right to privacy, (A/HRC/31/64), 8th March 2016.

## What is Data Protection?

Data protection can be defined as a set of privacy laws, policies, and procedures that aim at minimizing interference with an individual's privacy by the action of storing, compiling, and disseminating personal data.<sup>4</sup>

This information may be related to the appropriate management of personally identifiable information, such as names, addresses, credit card numbers, social security numbers, and other confidential information. This idea also applies to other private information, such as financial records, intellectual property, and private health information. Thus, this mechanism is talking about the protection of private data from any unauthorized access.

Despite the fact that there are no exhaustive laws in India dealing with data protection, it has been enforced under the Constitution of India, IT Act 2000, Indian Contract Act, Intellectual Property Laws, etc. with respect to the IT (Amendment) Act 2008, it passed to cover all the matters which the original act failed at doing and it inserted two important provisions i.e. Section 43A & section 72A that state the liability a body corporate has and sanction for revealing data by infringement of a legal agreement. other simultaneous efforts have been made taken with respect to data protection like amendment of the IT Act, Data Protection Commission of India, Information Technology (reasonable security practices and procedures and sensitive personal data and information) rules of 2011, the Data (Privacy and Protection) Bill, 2019, etc.

In 2009, a member of parliament named Baijayant Jay laid down a bill called The prevention of unsolicited telephonic calls and protection of privacy that intended to restrict of unwanted telephone calls of individuals or business promoters made to persons who explicitly showed unwillingness to receive them Other individuals such as Om Prakash Yadav (2016) and Rajeev

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<sup>4</sup> Vijay Pal Dalmia, Partner Vaish Associates, India: Data Protection Laws In India - Everything You Must Know, Mondaq.com, <https://www.mondaq.com/india/data-protection/655034/data-protection-laws-in-india---everything-you-must-know>, (last visited 01.03.2024, 10:30 AM).



Chandrasekhar (2010) have introduced bills relating to citizen's data privacy, however, the bill of 2019 has not been enacted yet.

Data protection is becoming more and more important every day because, whether the information is sensitive or highly confidential, it has started to be used as a means of generating revenue for those who illegally share it with unauthorized parties all over the world over the internet. This is a serious threat to society at large in any business or service sector as well as an individual's personal life. Thus, the growth of data protection in Indian law and the issues that must be resolved shall be discussed in this research paper.

## **LEGAL FRAMEWORK OF DATA PROTECTION**

Firstly, the Constitution of India discovers the development of the right to privacy in the 1950s in the background of police supervision of the accused and domiciliary visits to a person's house at midnight. In the famous case, *M.P Sharma vs Satish Chandra*<sup>5</sup>, the Supreme Court stated that although seizure and search are a part of a police officer's responsibility, being conducted at midnight is violative of Article 19 (1) (f) of the Constitution. The court also added that just a search done by a police officer does not affect the right to property and seizure with respect to that is just temporary in nature therefore acting as a reasonable restriction on the right to privacy. Furthermore, in *R. Rajagopal v. State of Tamil Nadu*<sup>6</sup> the petitioner being an editor, printer, and publisher of a Tamil weekly magazine published in Tamil Nadu wanted an order limiting the State of Tamil Nadu from prying with the authorized publication of an autobiography of Shankar who was a prisoner awaiting the death penalty. It was explained in the case of *Kharak Singh v. Union of India*<sup>7</sup>, that the right of liberty comes under Article 21 and hence Justice Jeevan Reddy in another case, explicitly stated the right of privacy being implicit in Article 21.

Secondly, with respect to the Indian Penal Code, of 1860, it does not fully satisfy the need for Data Protection in the country. The country's criminal laws do not exclusively deal with the breach of

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<sup>5</sup> AIR 1954 SCR 1077.

<sup>6</sup> (1994) 6 SCC 632.

<sup>7</sup> AIR 1963 SC 1295.

data privacy. Under this code, the legal responsibility for a breach should depend on the related crime. Section 403 states the penalty for dishonest misappropriation or converting “movable property”<sup>8</sup> for someone’s use. Section 409 & 405 mention the punishment for misappropriating someone’s property under the breach of trust concept. Then Section 378 does talk about theft but not specifically theft of data or information. When these provisions act necessary to a matter, they are in reality a crime done against the state as a whole. Thus, the right of the state to maintain law and order is a severe concern. There must be a connection made in the provisions of the Indian penal code with respect to Data protection so that the state can protect individual privacy from being violated.

Thirdly, the Indian Parliament made several efforts to bring in the concept of data privacy under the IT Act, of 2000. It has been amended several times to meet advanced challenges faced due to the development of the cyber world. The latest one is the 2008 Amendment Act. Accordingly, in the Data Protection & Information Technology (Amendment) Act 2008, the words ‘data protection’ and the ‘Information Technology’ have their own connotation mentioned. The main objective of this act is to mention the protection of cyber related rights and it includes provisions that prevent illegal usage of computers, computer systems, and data stored within such devices. The newly inserted provisions i.e. Section 43A and Section 72A also talk about the protection of data. The main downside of this legislation is that the present provisions that mention data security and the right to confidential information do not cover the diversification of currently emerging cybercrimes.

Fourthly, after the establishment of the Right to Information Act, of 2005, the security of an individual’s information comes under the control of public authorities to promote transparency and accountability. Section 2(j) of this act states the very definition of ‘right to information’<sup>9</sup>. In

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<sup>8</sup> ‘Movable property’ has been defined as property which is not attached to anything and is not a land.

<sup>9</sup> "Right to Information" means ‘the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to: (i) Inspection of work, Documents, Records; (ii) Taking notes, Extracts or Certified copies of documents or records; (iii) Taking certified samples of material; (iv) Obtaining information in the form of Diskettes, Floppies, Tapes, Video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device’.

the case *Bannett Coleman v. Union of India*<sup>10</sup>, the court stated that ‘it is non-negotiable that by the meaning freedom of the press, it entails the right of all people to speak, publish and express their views, ideas, etc & freedom of speech and expression includes the right to every citizen of reading and being informed. In the case *PUCL v. Union of India*, the right to information was superior to the status of a human right and it is essential for building transparent governance and accountability. The Supreme Court mentions the right to information being built in the Article 19 of the constitution, thus concluding that there is a link between both the concepts and they are right-based.

## **CHALLENGES FACED IN DATA PRIVACY AND ITS PROTECTION IN INDIA**

It is to be noted that the general criminal law nor the telecom and information technology sector contain specific laws mandating the necessity for judicial approval before accessing a user’s information. The Supreme Court, in 1997 observed with context to a phone tapping case, that “in the absence of a provision in the statute, it is impossible to provide for prior judicial scrutiny as a procedure for safeguard. The court further laid down a suggestion for the administration to give an oversight mechanism where every data request would need the approval of the home secretary or joint secretary in the central or relevant state government. This is an acceptable legal process under certain rules adopted by the Telegraph Act and the IT Act. However, it is apparent that these mechanisms become insufficient due to the volume of data access requests that need approval by designated officials and besides the insufficient oversight in this matter, the present laws have been criticized for being broadly termed with respect to powers and no mention of necessary restrictions and limits.

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<sup>10</sup> AIR 1973 SC 60.

*Some of these challenges include:-*

### **1. Conflict of Laws**

There is a possibility of conflict between different laws when there exist several legislations that could pose different challenges to organizations that have users across various continents and this indirectly affects the ability to adequately comply with each country's data privacy laws. Topics like data subjects' consent, the definition of certain terms like data privacy, withdrawal of consent, right to erasure etc, these differ among the laws of several countries and can affect the organizations decision to determine what privacy laws are to be applied to the users.

### **2. Massive Data Expansion**

organizations need to make sure that a user's personal data needs to be adequately protected from any sort of breach and with the increasing nature and volume of data in this technology driven globe it is difficult to keep up with billions of user's data.

### **3. Expense In Maintenance of Data Privacy and Protection**

Rectification of data breaches is extremely expensive which causes loss to an organization as they face regulatory penalties. Hence organizations must make sure that necessary steps are taken and specific security data protection technology is given to users i.e. data backups and archiving for keeping data confidential, safeguarded, and restored.

### **4. Complications in Human Error**

It is one of the biggest challenges faced in the field of data privacy which primarily occurs when employees lack awareness that directly affects the organization's data security and protection system. Weak passwords and phishing scams result in an individual's data becoming vulnerable to getting leaked and lost.

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## 5. Inadequacy in the Legal Framework

The amendments made in the IT Act i.e. Section 48A and Section 72A did not make any new alterations to the original Act as the comments made by the standing committee to the Ministry of Parliamentary Affairs were just received and it was not applied. The amendment does not state the necessary issue of managing personal sensitive data and the preventive methods that need to be embraced for processing and collection of data. The rules publicized by the MCIT<sup>11</sup> i.e. the 2011 rule under Section 87(2) (6) read with Section 43A talks about sensitive data and information which apply to body corporates and persons only located within India and state authorities are not taken into consideration. Apart from that fact, the statute only provides for liability and compensation that is necessary to be paid, but the limit to it is not fixed.

In the 2011 rules, Rule 4 mentions that Private sector service providers such as Vodafone India Limited are supposed to mention their privacy policies on their websites. However, some state-owned body corporates have allegedly not published these privacy policies. This indicates the weak approach of service providers and hence enforcement of principles becomes extremely important.<sup>12</sup>

The rules deal with sensitive data or information (SPDI) i.e. passwords, medical records, and biometric information thus there is less regulation on non-sensitive information in India.

Indian laws are limited with respect to extraterritorial jurisdictions and their application is still uncertain in many situations. For instance, it is ambiguous whether the IT Act will apply to an international company that has Indian citizens SPDI when this citizen travels to the respective country<sup>13</sup>.

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<sup>11</sup> Ministry of Communication and Information Technology.

<sup>12</sup> Ibid.

<sup>13</sup> Atul Singh, "Data Protection: India in the information Age," Volume 59 JILI, 78-84 (2017).



## **PRAGMATIC APPROACHES TO DEAL WITH CHALLENGES THAT HAMPER DATA SECURITY**

There is a dire need for the introduction of comprehensive legislation that governs the function of intelligence and law enforcement agencies related to lawful data access that covers the inadequacies in the present legal system. The primary objective of the legal substitution is to make appropriate separation of powers in the operation of contemporary data access procedures.

In order to constructively guarantee that an individual's privacy and their data are being safeguarded, organizations that are responsible for the collection and processing of data and the users must take appropriate and crucial steps.

1. Making sure an organizations network and systems are being constantly under surveillance so as to identify any suspicion in activities conducted in the organization or any cyber-attacks at an early stage
2. Enactment of data loss prevention and securing tools that help prevent employees from leaking any sensitive data and reduce of risk of attack & setting up zero trust models that restrict any access to organizational information by outsiders or unauthorized parties
3. Creating awareness regarding the need for data protection amongst employees via training programs in order to prevent the risk of confidential data getting leaked
4. Making certain that enforcing policies and mechanisms of the organization are made easy via devices and applications for all employees to implement and stay connected. That includes getting familiar with scanning devices periodically with trusted antivirus software to remove any malicious threat, being familiar with privacy tools that manage safe passwords, and being on guard with respect to strange clickbait content which could result in phishing, users must have knowledge of their legal rights to privacy and legal responsibilities of the organizations towards their employees for ensuring proper protection to their personal data.
5. The National Crime Records Bureau must be tasked with the duty of guaranteeing transparency and reporting requirements with respect to the number and nature of data

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- requests that are made along with reporting of figures by law enforcement agencies that overall are responsible for compiling the statistics on state and agency level data requests.
6. Privacy or data protection principle officers must be appointed within each law enforcement agency that is responsible for ensuring that data protection norms are being complied with.
  7. Data needs to be appropriately governed in this digital age because it is valued as a resource. For this reason, further laws and regulations ought to be proposed. Thus, a constitutional amendment should be made to include data protection rights as a fundamental right, and also a national policy on data protection law must be developed that ensures individuals have the freedom to control their own information collection and transmission. A National Level Data Privacy and Protection Commission must be established in order to safeguard and provide grievance redressal.
  8. It is necessary to revise the Personal Data Protection Bill, 2019 to ensure that user rights and privacy are prioritized.
  9. When reinforcing the right to information, governments must exercise great caution and take into account people's right to privacy.

## **CONCLUSION**

Data protection primarily entails the right of an individual to freely exist in one's space without intrusion into their privacy and it is an important way to ensure that organizations and companies are complying with laws that guarantee information privacy.

In India, though privacy has been recognized as an integral part of personal liberty, like most fundamental rights, the right to an individual's privacy is not an "absolute right" and in today's world of technology becoming a major part of our lives, it has benefitted as to a large extent but is also a threat at times. A number of organizations using computers to keep and process information of several people always have a forthcoming danger of the data being leaked, misused, or misrepresented. Given the challenges the country is facing with respect to increasing economic growth, foreign investments, and the ever-changing digital era. There is an unprecedented need for

updating privacy and data protection laws and standards in line with global initiatives. Even though the Supreme Court has elaborated on the concept of data protection and made it a fundamental right of every Indian citizen, the current existing related laws are not enough to safeguard the complete enjoyment of the fundamental right. Therefore, data protection aims at not only ensuring a user's protection but also the companies and organizations are responsible for protecting the user's personal data and held liable for any breach in data security.

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# DUE PROCESS: EVALUATING ITS APPLICATION IN CRIMINAL AND CIVIL PROCEEDINGS

Authored by Zehra Khan\*

## **ABSTRACT**

In every country of the world with people residing in it and an official government body of any kind be it a Democracy, a Monarchy, a Dictatorship, or any other form of Government certain rights are given to people by **the law of the land** no matter what is the form of the governing body. These rights as mentioned earlier are the legal rights that are often needed by people when they find themselves in the middle of certain criminal or civil proceedings. It's an attempt to make sure that even the condemned are not treated wrongly or illicitly.

*Keywords: Due Process, Government, Law, Legal Rights, Fourteenth Amendment, Fundamental Rights.*

## **INTRODUCTION**

Due process is the principle that the government must respect all of the legal rights that are owed to a person according to the law. The due process holds the government subservient to the law of the land, protecting individual persons from the state. Due process of law is a constitutional principle that safeguards governments from abusing citizens' rights. In its current version, the due process involves both procedural norms that courts must maintain to defend people's liberty and a set of liberty interests that statutes and regulations must not violate. This procedure of safeguarding the rights of citizens from the lawmakers can be traced back to the 13<sup>th</sup> century Magna Carta. King John's Magna Carta was signed in 1215, Clause 39 of the Magna Carta states, "*No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do*

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\* 2<sup>nd</sup> year B.A. LL.B student at Aligarh Muslim University, UP, available at: [zehrak2028@gmail.com](mailto:zehrak2028@gmail.com).

*so, except by the lawful judgment of his equals or by the law of the land*". This clause established the notion that persons should not be deprived of life, liberty, or property without fair judicial proceedings.

## **HISTORY OF THE TERM IN UNITED STATES**

The concept of due process evolved, particularly with the development of English common law and the adoption of values like the right to a fair trial, the presumption of innocence, and protection against arbitrary government action.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process. The Fifth Amendment declares that no person shall be deprived of life, liberty, or property without due process of law, and the Fourteenth Amendment expands this protection to state governments as well. Due process in the United States includes both procedural due process (fair legal procedures) and substantive due process (protection from arbitrary government actions that violate fundamental rights). The Fifth Amendment of the United States Constitution, passed in 1791, states that "No person shall...be deprived of life, liberty, or property, without due process of law." Because this amendment was deemed inapplicable to state actions that may violate an individual's constitutional rights, it was not until the Fourteenth Amendment was ratified in 1868 that the various states were subjected to a federally enforceable due process restraint on their legislative and procedural activities. These constitutional clauses have been interpreted and applied over time through various legal precedents and court judgments, defining the concept and application of due process in American law.

The case that established due process was **In re Gault**<sup>1</sup>. In this case, the U.S. Supreme Court held that juveniles facing delinquency prosecutions must be afforded the due process protected by the Fourteenth Amendment. This case is viewed as a turning point in the constitutional rights of juveniles.

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<sup>1</sup> 387 U.S. 1(1967).



## **Beilan v. Board of Public Education**<sup>2</sup>

This matter involved Isaac Beilan, a Philadelphia public school teacher dismissed for refusing to testify about alleged communist ties. The Supreme Court ruled in 1958 that his termination violated due process, emphasizing the need for procedural fairness in administrative actions. This decision underscored the right to a fair hearing before significant rights or interests are deprived and impacted jurisprudence on due process, especially in employment and education contexts.

## **Roe v. Wade (1973)**<sup>3</sup>

"Roe v. Wade" established a woman's right to choose to have an abortion as protected by the Due Process Clause of the Fourteenth Amendment. In 1973, the Supreme Court struck down Texas laws criminalizing most abortions, ruling that a woman's decision to terminate her pregnancy is a private matter protected by the Constitution. This landmark decision has had a profound impact on abortion rights, shaping legal, political, and social debates in the United States. Despite ongoing controversy and challenges, "Roe v. Wade" remains a fundamental precedent for reproductive rights. This case recognized a woman's constitutional right to privacy under the Due Process Clause of the **Fourteenth Amendment**, allowing for the legalization of abortion.

These cases and many more cases illustrate the evolving interpretation and application of due process rights in various legal contexts throughout U.S. history.

## **INTRODUCTION OF DUE PROCESS IN INDIA**

In India, under the Constitution, Part III enshrines The Fundamental Rights which are given to citizens of India. These are a set of essential rights and freedoms guaranteed to all citizens are considered crucial for the development, dignity, and well-being of individuals. But 3 rights hold as light upper ground in the Fundamental Rights and they are known as the "**Golden Trio**". The "**Golden Trio**" of fundamental rights under the Indian Constitution refers to three fundamental

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<sup>2</sup> Sun, J. C. "Beilan v. Board of Public Education." Encyclopedia Britannica, June 23, 2023.

<https://www.britannica.com/event/Beilan-v-Board-of-Public-Education>, (last visited 2<sup>nd</sup> March 2024, 1<sup>st</sup>10 PM).

<sup>3</sup> 410 U.S. 113 (1973).

rights that are considered particularly significant and essential for the protection of individual liberties and the functioning of a democratic society. These rights are:

**Right to Equality (Articles 14-18):** This includes the right to equality before the law, prohibition of discrimination on various grounds, equality of opportunity in matters of public employment, abolition of untouchability, and prohibition of titles of nobility. It ensures that all citizens are treated equally under the law and have equal access to opportunities.

**Right to Freedom (Articles 19-22):** This encompasses several freedoms such as freedom of speech and expression, freedom to assemble peacefully and without arms, freedom to form associations or unions, freedom to move freely throughout India, and freedom to reside and settle in any part of the country. It also includes protection against arbitrary arrest and detention.

**Right to Constitutional Remedies (Article 32):** This right empowers individuals to move the Supreme Court for the enforcement of their fundamental rights through constitutional remedies such as writs of habeas corpus, mandamus, prohibition, certiorari, and quo warranto. It acts as a safeguard against violations of fundamental rights by the state or any other authority. These three fundamental rights form the core principles of individual liberties and freedoms in the Indian Constitution. They are considered fundamental pillars of democracy and are crucial for ensuring the protection and promotion of the rights and freedoms of Indian citizens.

Article 21 of the Indian Constitution protects the fundamental right to life and personal liberty. It prohibits individuals from being deprived of their life or liberty except under established legal procedures. This encompasses the right to a decent life that extends beyond simple existence, as well as the freedom from arbitrary arrest and incarceration. The Supreme Court of India has extensively construed Article 21, including rights such as privacy, livelihood, health, and education. It applies to both government and private institutions, ensuring legal scrutiny and fair procedures in activities impacting people's lives and liberties. Overall, Article 21 is critical for protecting fundamental rights and preserving life and personal liberty for all people in India.

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## **APPLICATION OF DUE PROCESS**

To understand the application of due process firstly we have to understand what type of due process is available to people in India.

There are 2 types of due process available in India which are:

- Substantive Due Process
- Procedural Due Process

### **Substantive Due process**

The focus of substantive due process is on the actual content or substance of laws and government activities. It has to do with the idea that, no matter how the government goes about things, some basic rights remain shielded from meddling. The government cannot deny someone their fundamental rights without a good reason or explanation, according to substantive due process. To ensure that fundamental rights like the right to privacy, the right to liberty, or the property rights are not violated, the courts frequently examine the content of laws and government actions as part of this sort of due process.

### **Procedural Due Process**

Procedural due process refers to the fair procedures and safeguards that must be followed by the government when it seeks to deprive a person of life, liberty, or property. It ensures that individuals are given notice and an opportunity to be heard before any adverse action is taken against them. Procedural due process includes various legal safeguards such as the right to a fair and impartial hearing, the right to present evidence and witnesses, the right to confront and cross-examine witnesses, and the right to appeal a decision. The focus of procedural due process is on the fairness of the procedures used in government actions.

The procedure applied in Criminal and Civil cases all come under the Procedural Due Process.

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## **Application of Due Process in Criminal Cases**

Due process ensures that those who are accused of crimes are treated fairly and that their rights are protected along the whole judicial procedure in criminal cases. This entails maintaining the assumption of innocence until proven guilty beyond a reasonable doubt, giving defendants access to legal counsel, and making sure they are fully informed of the charges against them. Defendants are entitled to a fair trial by an unbiased jury, which allows them to cross-examine and challenge witnesses, offer evidence, and avoid admitting guilt. Defendants can also appeal convictions, defences against harsh and unusual punishment, and protection against double jeopardy. In general, the preservation of justice, procedural integrity, and the defence of constitutional rights in criminal proceedings depend heavily on the implementation of due process norms.

There are several maxims like the Audi Alteram Partem, Double Jeopardy, Nemo Judex In Causa Sua, etc which safeguard the legal rights of the person charged for the crimes committed by him.

### **Maqbool Hussain v. State of Bombay, 1953<sup>4</sup>**

In this case, the petitioner, an Indian citizen, was found to have violated Indian government regulations by not declaring the gold he brought from Jeddah to Bombay's Santa Cruz Airport. The Customs Authorities seized the gold under the Sea Customs Act of 1878. The petitioner had the option to pay a fine within a specified time frame. However, the gold remained unclaimed, leading to legal proceedings. The issue before the Supreme Court of India was whether the earlier detention under the Sea Customs Act could be considered double jeopardy in subsequent proceedings under the Foreign Regulation Act of 1947. The court ruled that it could not, as the previous detention did not constitute a judgment or order of a court or judicial tribunal. Therefore, the prosecution under the Foreign Regulation Act was upheld.

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<sup>4</sup> 1953 AIR 325.

### *Other Landmark Cases*

#### **Maneka Gandhi v. Union of India (1978)<sup>5</sup>**

Maneka Gandhi was the petitioner in *Maneka Gandhi v. Union of India* (1978), where the Indian government impounded her passport without giving her a chance to be heard or an explanation for the action. She contested this move because it violated Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, and hence her fundamental right to travel abroad. In a momentous ruling, the Indian Supreme Court greatly broadened the definition of Article 21, stating that the freedom to go overseas is a fundamental aspect of one's right to life and personal liberty. The court stressed that natural justice and procedural fairness must be upheld by any legislation that takes away someone's life or personal freedom. The court decided that any law that denies someone their fundamental rights must pass the reasonableness test and that the procedure set forth by the law must be just, fair, and reasonable. The ruling in the *Maneka Gandhi* case proved that the right to life and personal freedom includes substantive elements like fairness and reasonableness in addition to procedural ones. This historic ruling had a big impact on how Article 21 was interpreted later on and how India's fundamental rights were safeguarded.

#### **Kartar Singh v. State of Punjab (1994)<sup>6</sup>**

The Supreme Court of India considered the constitutionality of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) in the case of *Kartar Singh v. State of Punjab* (1994). The Act was contested by the petitioner on several grounds, including constitutionally protected fundamental rights being violated. The Court maintained TADA's constitutionality while emphasizing the need to observe specific rules to prevent abuse of authority and provide due process. The presumption of innocence, the right to counsel, and the necessity of a prompt trial are crucial protections that must be upheld in TADA cases, the Court decided. The ruling made clear how individual rights and national security considerations should coexist, emphasizing how crucial it is to preserve due process rights even in cases involving terrorism.

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<sup>5</sup> AIR 1978 SC 597.

<sup>6</sup> AIR 1994 SC 1.

## **Arnab Ranjan Goswami v. Union of India (2020)<sup>7</sup>**

While not a criminal case per se, this case addressed issues related to freedom of speech and the due process rights of individuals facing arrest. The Supreme Court emphasized the importance of following procedural safeguards and ensuring that individuals are not subjected to arbitrary arrest or harassment by law enforcement agencies.

### **Application of Due Process in Civil Cases**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

On the other hand;

In India, under civil law, there are two types of remedy and remedies available: monetary terms and non-monetary terms, or both. Compensation to the harmed party and placing them ahead of the other party who is at fault are the main goals of any form of relief. The aggrieved party may get these remedies and relief from the civil courts or from other forums and tribunals that have been specifically established for the relevant statute. Relief declarations are always optional.

Defendants, sometimes known as the accused, in civil trials, have specific rights intended to guarantee a just legal process even in the absence of state criminal prosecution. The right to sufficient notice, which guarantees defendants are aware of the action and its charges, is at the center of these rights. Defendants also enjoy the right to legal representation, similar to that in criminal proceedings, through the use of legal aid agencies or retained counsel. Defendants also maintain the right to present their defence, which includes calling witnesses, providing evidence, and cross-examining witnesses for the other side. By the principles of due process, defendants must have a fair trial presided over by an unbiased judge or jury. Defendants typically can appeal

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<sup>7</sup> Writ Petition (Criminal) No. 130 of 2020, Supreme Court of India.



to a higher court for a review of the ruling given by the Trial Court. Defendants are also protected from intrusive inquiries and intimidation, guaranteeing their privacy during the legal proceedings. Finally, to settle the disagreement outside of formal court processes, defendants may choose to pursue settlement talks with the plaintiff. Even though civil cases differ from criminal cases in terms of the nature of the legal dispute, these rights together contribute to maintaining fairness and justice in civil trials.

### **Where is Due Process available in Civil Cases?**

In India, due process in civil cases guarantees fair treatment and procedural safeguards for individuals involved in legal disputes, even though these cases primarily revolve around conflicts between private parties. Essential examples of civil cases where due process is paramount include property disputes, contractual disagreements, tort claims, family law matters like divorce or child custody battles, consumer protection cases concerning faulty products or unfair trade practices, and intellectual property disputes over patents, trademarks, or copyrights. In each instance, the due process ensures that parties receive adequate notice, an opportunity to present their case, access to legal representation, and a fair and impartial resolution. Upholding these principles is vital for maintaining the rule of law, safeguarding individual rights, and preserving the integrity of India's legal system.

## **CONCLUSION**

Even while due process allows procedural deviations that are "appropriate to the nature of the case," its fundamental objectives and prerequisites can still be determined. First, "Procedural due process rules are meant to protect persons from the mistaken or unjustified deprivation of life, liberty, or property, rather than from the deprivation itself." Therefore, to "minimize substantively unfair or mistaken deprivations," due process must have certain features that allow people to challenge the grounds on which a state seeks to deny them their protected rights. The notice and hearing requirements, conducted before an impartial tribunal, serve as the cornerstone of due process obligations. To adhere to due process principles, parties must also have the opportunity to be represented by legal counsel, engage in face-to-face questioning and cross-examination,

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participate in discovery processes, and receive decisions based solely on presented evidence. These rights are fundamental safeguards, ensuring fairness and upholding the integrity of the legal system for all individuals, even those accused of wrongdoing.

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# JUDICIAL REVIEW: EXPLORING THE ROLE OF JUDICIARY IN CONSTITUTIONAL INTERPRETATIONS

*Authored by Ayushi Pandey\**

## **ABSTRACT**

This research paper offers a thorough analysis of the Indian Constitution's judicial review system. The study examines the historical development, scope, and constraints of judicial review in India through a thorough examination of key constitutional clauses, significant court rulings, and academic commentary. It assesses the judiciary's contribution to maintaining fundamental rights, guaranteeing the separation of powers, and defending constitutional ideals critically. The purpose of the study is to shed light on the special characteristics and difficulties of judicial review within the Indian constitutional framework by drawing comparisons with judicial review systems in other jurisdictions.

*Keywords: Interpretations, Judiciary, Fundamental, Powers*

## **INTRODUCTION**

The Indian Constitution's concept of judicial review is a fundamental component of the country's democratic system. India's approach to judicial review reflects a complex interaction of legal, political, and social variables, formed by the aspirations of a nascent democracy and born out of a historical struggle against colonial control.

India's path towards judicial review begins with its colonial past, when there was minimal opportunity for judicial involvement due to the lack of a written constitution and the predominance of British parliamentary supremacy. But even during colonial authority, Indian courts periodically

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\* 3<sup>rd</sup> year B.A. LL.B student at Kes' Shri Jayantilal H. Patel Law College, available at: [ayuship112002@gmail.com](mailto:ayuship112002@gmail.com).

contested governmental decisions that they believed to be excessive or in violation of fundamental rights, sowing the seeds of judicial activism.

The culmination of India's struggle for independence in 1947 brought with it the monumental task of drafting a constitution that would serve as the guiding light for a diverse and pluralistic nation. The framers of the Indian Constitution, led by luminaries such as Dr. B.R. Ambedkar, sought to craft a document that not only enshrined the principles of justice, liberty, and equality but also provided robust mechanisms for their enforcement. Central to this vision was the concept of judicial review, which empowered the judiciary to serve as the guardian of the Constitution and the protector of individual rights against arbitrary state action.

Considering this, the Indian Constitution's ratification on January 26, 1950, signalled the start of a new chapter in the country's political and legal history. A thriving democracy founded on the rule of law was made possible by the Indian Constitution, which established an intricate system of checks and balances, the division of powers, and fundamental rights. Fundamental to it was the idea of judicial review, which gave the courts the power to overturn executive orders and legislation that did not comply with the Constitution.

In the decades that followed, the Indian judiciary embarked on a remarkable journey of constitutional interpretation and adjudication, shaping the contours of judicial review through a series of landmark judgments. From Kesavananda Bharati to Maneka Gandhi, from Indira Gandhi to S.R. Bommai, the Supreme Court of India has consistently reaffirmed its role as the ultimate arbiter of constitutional disputes, wielding the power of judicial review with a delicate balance of activism and restraint.

## **HISTORICAL EVOLUTION OF JUDICIAL REVIEW IN INDIA**

### **Pre-Independence Era**

The inception of judicial review in India dates back to the pre-independence era, when the Indian judiciary, albeit being governed by colonial powers, started to demonstrate its power as a restraint on the authority of the government and legislature. The British Indian legal system integrated

aspects of judicial review by means of common law principles and legislative interpretation, even in the lack of a written constitution. Sometimes legislative or executive activities were declared ultra vires or against established legal norms by courts, especially the Privy Council and the High Courts.

During this time, the Privy Council rejected an executive order restricting the right to assemble, claiming procedural flaws and lack of statutory authority. This case, *Raja Ram Pal v. Emperor* (1924), is notable for its judicial activism. Similar to this, the Federal Court of India, which predated the Supreme Court, invalidated parts of the 1950 Preventive Detention Act on the grounds that they infringed upon the basic right to personal liberty in *A.K. Gopalan v. State of Madras* (1950).

### *Constituent Assembly Debates*

Discussions about the function of the judiciary and the parameters of judicial review in an independent India flourished during the Constituent Assembly deliberations that preceded the ratification of the Indian Constitution. Prominent figures including M. Ananthasayanam Ayyangar, Jawaharlal Nehru, and Dr. B.R. Ambedkar expressed differing opinions about how the legislative, the judiciary, and the executive branch interact in a democratic society.

Some members voiced concerns about judicial activism and the possibility of judicial tyranny, while others argued for a strong system of judicial review to protect individual rights and avoid state overreach. After much discussion, Article 13 of the Indian Constitution was adopted, establishing the concept of judicial review and giving the judiciary the authority to overturn laws that were unconstitutional.

### *Incorporation into the Indian Constitution*

The legal and political history of India underwent a significant shift when the country's Constitution went into effect on January 26, 1950. The Indian Constitution established the framework for a democratic and pluralistic society ruled by the rule of law through its complex system of fundamental rights, guiding principles for state policy, and division of powers.

Fundamental to it was the idea of constitutional supremacy, which gave the courts the power to interpret the Constitution and decide cases involving it.

The Indian Constitution's Article 13, sometimes called the "Constitutional Magna Carta," established the legal foundation for judicial review by stating that any legislation that contradicts or limits basic rights is unconstitutional. This clause enabled the court to act as the defender of individual liberties and the guarantor of the Constitution, in conjunction with the broad writ authority granted to the Supreme Court and the High Courts under Articles 32 and 226, respectively.

All things considered, the historical development of judicial review in India shows a trajectory characterized by resilience, flexibility, and both continuity and change. Judicial review has developed into a fundamental component of Indian democracy, representing the country's dedication to constitutionalism, the rule of law, and individual rights, from its early beginnings during colonial rule to its codification as a constitutional norm in independent India.

## **CONSTITUTIONAL PROVISIONS GOVERNING JUDICIAL REVIEW**

### **Article 13: Doctrine of Judicial Review**

The fundamental basis of judicial review in India is found in Article 13 of the Indian Constitution, which upholds the principle of constitutional primacy. It states that any central or state legislation that restricts or violates the fundamental rights outlined in Part III of the Constitution is null and void to the degree that it does so. This clause gives the judiciary the authority to examine legislative actions and overturn those that don't comply with the Constitution.

Not only does Article 13 cover laws that have been passed into law, but it also covers legislation that existed prior to the constitution and changes made after it. The Supreme Court's expansive reading of the Constitution, which it clarified in the historic 1967 decision of *Golak Nath v. State of Punjab*, reinforces the judiciary's position as the last interpreter and defender of the document.

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Moreover, Article 13 includes delegated and procedural laws in addition to substantive laws. Thus, the courts have the authority to scrutinize and declare void any executive action or subordinate legislation that infringes against basic rights.

### **Article 32: Writ Jurisdiction of the Supreme Court**

The Supreme Court of India is authorized by Article 32 of the Indian Constitution to use writs, including habeas corpus, mandamus, prohibition, quo warranto, and certiorari, to uphold basic rights. Article 32, sometimes called the "heart and soul" of the Constitution, gives people the ability to petition the Supreme Court directly to have their fundamental rights upheld. This acts as a check on the abuses of power by the executive branch and the legislature.

The Supreme Court has preventative as well as remedial writ jurisdiction under Article 32, which allows the court to step in as soon as possible to stop the violation of fundamental rights. The protection of individuals' rights and the maintenance of the rule of law have been made possible by the Supreme Court's proactive involvement in defending fundamental liberties.

### **Article 226: Writ Jurisdiction of High Courts**

Comparably, the Indian Constitution's Article 226 grants the High Courts the authority to grant writs for any reason, including the enforcement of basic rights. Even if the High Courts' writ jurisdiction is restricted to the borders of their individual states, it is nevertheless important for guaranteeing access to justice and encouraging judicial accountability at the local level.

Similar to the Supreme Court, the High Courts' writ jurisdiction is unrestricted by procedural formalities and is instead governed by the values of substantive justice and constitutional morality. High courts have been essential in defending the values of good governance, keeping an eye on the activities of the government, and defending the rights of marginalized populations.

### **Legislative and Executive Powers Subject to Judicial Review**

The Indian Constitution implicitly grants the judiciary the authority to judicially evaluate legislative and executive activities, in addition to the particular provisions delineated in Articles 13, 32, and 226. The Constitution's separation of powers doctrine stipulates that the legislative,



executive, and judicial branches of government must each function within their respective areas of authority and not intrude on one another's territory.

Therefore, every legislative act or executive decision that goes beyond the scope of the constitution, transgresses natural justice principles, or erodes the rule of law is subject to judicial review. By ensuring that governmental actions are in line with constitutional principles and respect for individual rights and liberties, the judiciary serves as a check on tyranny through the use of its power of judicial review.

All things considered, India's constitutional provisions pertaining to judicial review offer a strong foundation for the defense and upholding of basic rights. These clauses support the concepts of constitutional supremacy, separation of powers, and rule of law by giving the court the right to overturn laws and actions that are in conflict with the Constitution. This promotes a dynamic and inclusive democracy.

### **VALIDITY OF LAWS VIS-À-VIS FUNDAMENTAL RIGHTS**

Ensuring that legislative acts comply with the fundamental rights protected by Part III of the Indian Constitution is the main purpose of judicial review. As a sentinel on the qui vive, the judiciary examines legislation enacted by the legislature to make sure that individual liberties and rights are not violated. The judiciary is essential to maintaining the rule of law and averting the tyranny of the majority because of this process.

Nonetheless, there are some restrictions that apply to the extent of judicial review, making it non-unlimited. Judges have the authority to overturn laws that are obviously illegal or violate fundamental rights, but when it comes to social and economic policy, they must use caution and yield to the wisdom of the legislature. Maintaining the separation of powers and democratic governance depends on this finely balanced mix of judicial activism and restraint.

#### **Legislative Competence**

The judiciary not only reviews the content of legislation but also assesses the legislature's ability to enact them. This involves determining whether the law is within the legislative authority granted

by the Constitution to the relevant legislative bodies. The concept of ultra vires, which forbids passing legislation beyond the legislature's constitutional jurisdiction, protects the supremacy of the Constitution by acting as a check on parliamentary overreach.

### **Substantive and Procedural Due Process**

Laws' substantive content as well as the processes used to enact them are subject to judicial examination. The judiciary examines legislative procedures to make sure that natural justice principles and procedural safeguards are being followed. This entails upholding constitutional principles that promote accountability, openness, and public involvement in the legislative process. The judiciary protects the integrity of democratic institutions and advances the rule of law by supervising legislative processes.

### **Administrative Decisions**

Apart from scrutinizing legislative acts, the judiciary also performs judicial review over executive actions, encompassing governmental authorities' administrative decisions. The reasonableness, proportionality and fairness standards of administrative law act as benchmarks when assessing the legitimacy and legality of administrative activities. By serving as a check on executive authority, the judiciary makes sure that administrative decisions are not made arbitrarily, unfairly, or dishonestly.

### **Exercise of Discretionary Powers**

When carrying out their duties as governors, executive authorities have extensive discretionary powers at their disposal. In order to guard against abuse or misuse of such authority, judicial review functions as a check on how those powers are used. Courts evaluate executive decisions for legality, reason, and procedural fairness. When required, they step in to correct legal errors or violations of fundamental constitutional principles. By monitoring the executive branch's discretion, the judiciary encourages transparency and accountability in government.

### **Non-Justiciability of Policy Decisions**

Although administrative acts are subject to judicial review, it's critical to understand the boundaries of the court's authority when it comes to concerns of governance and policy. In general, courts are

hesitant to make decisions on matters involving difficult political or policy decisions. The concept of non-justiciability acknowledges the authority of the legislative and executive branches to create and carry out public policy. This does not, however, relieve the judiciary of its responsibility to guarantee that laws respect fundamental rights and are in line with constitutional precepts.

### **Judicial Activism vs. Restraint**

Judicial activism proponents and judicial restraint advocates frequently disagree on the extent of judicial review in India. Judicial activism refers to the judiciary's proactive role in promoting social justice, defending fundamental rights, and defending constitutional ideals. Judicial activism proponents contend that the court must step in when legislative or executive acts violate constitutional rights or neglect to address urgent social issues.

Advocates of judicial restraint, on the other hand, stress the necessity of judicial deference to legislative and executive judgements on areas of policy and governance, and thus call for a more deferential approach. They contend that overbearing judicial interference can jeopardize democratic institutions and make it more difficult for elected officials to carry out their duties. The conflict between judicial activism and restraint highlights the necessity for a nuanced and context-specific approach to judicial review and is reflective of larger discussions about the proper function of the judiciary in democracies.

To sum up, the extent and constraints of judicial review in India demonstrate a careful balancing act between institutional deference and judicial supervision. The judiciary must be cautious and respectful of the political process even though it is essential to maintain constitutional principles and defend individual rights. The judiciary can carry out its constitutional responsibility as the defender of the rule of law and the guardian of the Constitution by wisely and prudently navigating these issues.

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## **LANDMARK JUDICIAL DECISIONS SHAPING JUDICIAL REVIEW**

### *A. Kesavananda Bharati v. State of Kerala (1973)*

A significant turning point in Indian constitutional jurisprudence, the case of *Kesavananda Bharati v. State of Kerala (1973)* significantly altered the parameters and character of judicial review. The Supreme Court addressed the important subject of how much the Parliament might change the Constitution in this historic ruling, especially with regard to its essential design.

In a landmark 7–6 ruling, the Court determined that although the Parliament had the authority to change the Constitution under Article 368, this authority was limited. Rather, the Court maintained that the Constitution had a "basic structure" that included all of its fundamental elements, including judicial review, federalism, democracy, and secularism, all of which were unaffected by constitutional revisions.

This led to the establishment of the basic structure doctrine in the *Kesavananda Bharati* case, which offers judicial review of proposed constitutional revisions and acts as a check on arbitrary amendments. This historic ruling highlighted the significance of constitutional principles in determining the course of Indian democracy and reinforced the judiciary's role as the protector of the Constitution.

### *B. Maneka Gandhi v. Union of India (1978)*

Significant ground was covered by judicial review in India after the *Maneka Gandhi v. Union of India (1978)* case, especially when it came to procedural due process. The Supreme Court applied a broad and expansive interpretation of the right to life and personal liberty under Article 21 of the Constitution in this historic case, covering both procedural safeguards and substantive rights.

Significant ground was covered by judicial review in India after the *Maneka Gandhi v. Union of India (1978)* case, especially when it came to procedural due process. In this landmark decision, the Supreme Court interpreted the right to life and personal liberty under Article 21 of the Constitution broadly and expansively, encompassing both procedural protections and substantive rights.

Thus, the Maneka Gandhi case highlighted the judiciary's responsibility to protect procedural due process and acted as a spur for the development of India's rights-based judicial review system. Through highlighting the significance of procedural justice in administrative proceedings, the Court broadened the purview of judicial review to include procedural protections in addition to substantive rights.

*C. Indira Gandhi v. Raj Narain (1975)*

The judiciary's function as a restraint on executive abuses and a guardian of election integrity is best illustrated by the 1975 case of Indira Gandhi v. Raj Narain. The election of Prime Minister Indira Gandhi to the Lok Sabha was declared unlawful by the Supreme Court in a historic ruling due to electoral fraud and corruption.

The Court ruled those corrupt activities, including the misappropriation of government property and the commission of electoral offences, tainted Indira Gandhi's election. The ruling shook the political establishment and demonstrated the judiciary's dedication to protecting the rule of law and guaranteeing the fairness of elections.

The judiciary's readiness to step in on highly political issues and hold even the highest executive office responsible for adhering to constitutional standards was made clear by the Indira Gandhi case. The Court underlined its role as a protector of democracy and a check on executive excess by upholding the rule of law and the electoral integrity concept.

*D. S.R. Bommai v. Union of India (1994)*

In terms of federalism and the division of powers, the 1994 ruling in S.R. Bommai v. Union of India is a seminal case. In this landmark decision, the Supreme Court overturned the application of Article 356 of the Constitution to impose the President's Rule in some states, upholding the fundamentals of parliamentary democracy and federalism.

The Court decided that the President's authority to enforce President's Rule was subject to judicial review rather than being unrestricted. The President's Rule could only be imposed in the event that

the state's constitutional machinery broke down, and any decision to do so had to be supported by convincing arguments and objective standards.

The S.R. Bommai case upheld the judiciary's position as the defender of state autonomy and the bulwark of federalism. The Court made sure that federal principles were maintained and that states were not arbitrarily deprived of their constitutional rights by holding the executive branch accountable to the judiciary.

*E. Minerva Mills Ltd. v. Union of India (1980)*

A seminal ruling in the area of judicial review of constitutional modifications is the Minerva Mills Ltd. v. Union of India (1980) case. In this landmark decision, the Supreme Court overturned a number of sections of the 42nd Amendment Act, 1976, which aimed to weaken the fundamental framework of the Constitution and limit the authority of the courts.

The Court decided that although Article 368 gave Parliament the authority to amend the Constitution, no changes could change the fundamental framework of the document. Any attempt to alter or destroy the fundamental framework would be null and void. The ruling upheld the primacy of the Constitution and the court's duty to protect it.

All things considered, the aforementioned seminal court rulings have profoundly influenced the character and extent of judicial review in India. These examples demonstrate the judiciary's critical role in maintaining constitutional values and advancing the rule of law, from defending electoral integrity to clarifying the concept of basic structure and extending the reach of procedural due process.

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## **COMPARATIVE ANALYSIS OF JUDICIAL REVIEW MECHANISMS**

### **United States: Judicial Review under Marbury v. Madison (1803)**

The idea of judicial review was created in the United States, which is frequently recognized as the birthplace of contemporary judicial review, in the historic Marbury v. Madison case (1803). Chief Justice John Marshall affirmed the Supreme Court's jurisdiction to interpret the Constitution and deem acts of Congress illegal in this landmark ruling. The ruling created the basis for the use of judicial review in the US and established the concept of judicial supremacy.

The following are important aspects of judicial review in the US:

- **Supremacy of the Constitution:** The judiciary has the final say over how to interpret and apply the Constitution's provisions, making it the highest law of the land.
- **Written Constitution:** The written United States Constitution establishes a definite and unambiguous framework for judicial scrutiny.
- **Judicial Independence:** The US judiciary adjudicates constitutional disputes impartially since it is not subservient to the legislative or executive departments.
- **Judicial Activism:** In order to preserve civil freedoms and broaden the definition of constitutional rights, the US Supreme Court has participated in judicial activism.

### **United Kingdom: Judicial Review vs. Parliamentary Sovereignty**

Unlike the US, the UK upholds the idea of parliamentary sovereignty, which holds that the legislature is supreme and has unrestricted power to enact laws. As a result, the UK lacks a codified constitution, and statutory interpretation and common law concepts serve as the foundation for judicial review.

The following are important aspects of judicial review in the UK:

- **Parliamentary Sovereignty:** Due to constitutional reasons, Parliament is the ultimate legislative body, and its laws are not susceptible to judicial review.



- **Common Law Tradition:** Rather than being founded on a written constitution, judicial review in the United Kingdom is based on common law principles and legislative interpretation.
- **Limited Judicial Activism:** The UK court is not overly radical when it comes to interpreting and enforcing the law, but it does show restraint when it comes to scrutinizing legislative acts and upholding parliamentary sovereignty.
- **European Convention on Human Rights (ECHR):** The Human Rights Act of 1998 incorporated the ECHR into UK law, enabling citizens to file human rights lawsuits in domestic courts against actions of public agencies.

### **South Africa: Transformative Adjudication and the Constitutional Court**

The formation of a revolutionary constitutional order and the country's transition from apartheid to democracy make South Africa's experience with judicial review exceptional. The post-apartheid Constitution of 1996 established the Constitutional Court of South Africa, which is tasked with resolving constitutional issues and advancing equality and social justice.

Important components of South African judicial review are as follows:

- **Transformative Constitutionalism:** Transformative constitutionalism seeks to right historical wrongs and advance social and economic change. Its tenets are embodied in the South African Constitution.
- **Constitutional Supremacy:** The Bill of Rights and other articles of the Constitution are the ultimate rules of the land, and they must be followed by all laws and actions.
- **Broad Remedies:** To address systemic inequalities and advance substantive equality, the Constitutional Court may grant a broad variety of remedies, such as structural interdicts and decisions of constitutional invalidity.
- **Public Interest Litigation:** A thriving tradition exists in South Africa concerning the use of public interest litigation to challenge governmental decisions and further the public interest by individuals and civil society organizations.

## **Australia: The Function of the High Court in Constitutional Interpretation**

In Australia, the High Court, which upholds federalism, the separation of powers, and individual rights, is principally responsible for judicial review. Australia does not have a formal Bill of Rights, in contrast to the United States, but via its interpretation of the Constitution, the High Court has established a strong body of case law pertaining to implied constitutional rights.

In Australia, some salient characteristics of judicial review are:

- **Implied Constitutional Rights:** As restraints on the authority of the legislative and executive branches, the High Court has recognized implied constitutional rights such the freedom of political communication and the right to procedural fairness.
- **Federalism:** The High Court interprets the Commonwealth's and the states' respective authorities and makes sure that each level of government operates within the bounds of the constitution.
- **Separation of Powers:** In Australia, judicial review is governed by the ideas of separation of powers, whereby the court serves as a check on executive and legislative activity to prevent abuses of authority.
- **Interpretive Function:** The High Court has a crucial interpretive function in interpreting the text and intent of constitutional provisions, especially in cases where the text is unclear or silent.

Altogether, the comparative examination of judicial review processes reveals the various strategies and institutional structures that various jurisdictions have chosen. Other nations, like the United Kingdom, South Africa, and Australia, rely on common law principles, statutory interpretation, and transformative constitutionalism to uphold the rule of law and protect individual rights, while the United States has a written constitution and a strong tradition of judicial review.

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## **CRITIQUE AND CHALLENGES OF JUDICIAL REVIEW IN INDIA**

### **Judicial Overreach vs. Legislative Supremacy**

The apparent danger of judicial overreach, wherein the judiciary may infringe upon the authority of the legislature and executive in its eagerness to uphold constitutional ideals, is one of the principal criticisms directed towards judicial review in India. Opponents contend that the judiciary has substantial authority to invalidate constitutional modifications due to the broad interpretation of the basic structure concept established in *Kesavananda Bharati*, thereby weakening the idea of legislative supremacy.

There are concerns regarding the appropriate function of the judiciary in a democratic society due to the conflict between judicial activism and the idea of parliamentary supremacy. Critics argue that although the court plays a vital role in protecting fundamental rights, it should refrain from meddling excessively in questions of governance and policy in order to prevent interfering with the ability of elected officials to carry out their duties.

### **Delay and Backlog in Judicial Adjudication**

The problem of backlog and delay in case adjudication is another major obstacle to judicial review in India. The efficacy of judicial review as a tool for swift justice has been impacted by the significant delays in case disposition caused by the excessive backlog, complicated procedural issues, and resource shortages.

The goal of judicial review, according to critics, is undermined by drawn-out legal proceedings, particularly when it comes to instances concerning basic rights where a prompt conclusion is crucial. In addition to impeding access to justice, the backlog lessens the judiciary's ability to discourage constitutional infractions.

The creation of specialised tribunals, the use of technology to expedite court procedures, and other alternative dispute resolution procedures are some of the judicial changes being implemented in an effort to address this difficulty. Nevertheless, there hasn't been much progress in ensuring prompt justice and drastically cutting the backlog with these techniques.

## **Executive Compliance with Judicial Orders**

Although the executive branch must obey judicial orders for judicial review to be successful, the judiciary has the power to examine and overturn legislative and executive decisions that violate the Constitution. When the executive willfully delays or neglects to carry out court orders, a problem results.

Opponents contend that non-compliance with court orders compromises the integrity of judicial rulings and erodes public trust in the effectiveness of the legal system. The absence of efficient procedures to carry out court orders and hold the executive branch responsible for non-compliance has drawn criticism.

The creation of contempt of court procedures and the possible application of penalties for noncompliance are efforts to solve this issue. However, a mix of institutional and legal considerations determine how effective these efforts will be.

## **Public Perception and Legitimacy of Judicial Review**

The public's opinion of the judiciary's place in the democratic process is a major factor in determining the legitimacy of judicial review. Skepticism regarding the judiciary's legitimacy as a constitutional arbiter can result from criticisms that frequently centre on worries about judicial activism and seeming judicial overreach.

A lack of trust in the judiciary may be attributed to the public's comprehension of complicated legal problems as well as possible media misinterpretations of court rulings. Public opinion can also be influenced by discussions about judicial nominations and the judiciary's influence on social and economic policy.

Addressing these issues requires increased public knowledge and comprehension of court rulings, procedures, and the judiciary's constitutional function. Effective communication techniques in conjunction with accountable and transparent court procedures can help to increase public confidence in the judiciary.

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In conclusion, judicial review is a crucial tool for safeguarding fundamental rights and preserving constitutional ideals in India, but it also has serious drawbacks and difficulties. Important issues that need ongoing attention and reform include finding the ideal balance between judicial activism and restraint, eliminating adjudication delays, guaranteeing executive compliance with judicial rulings, and building public faith in the judiciary.

## **RECOMMENDATIONS FOR JUDICIAL REVIEW IN INDIA**

### **Strengthening Judicial Independence and Accountability**

- **Judicial Appointments Commission**: Creating an open and responsible system for judicial appointments, such a Judicial Appointments Commission, will guarantee merit-based judge selection while promoting judicial independence and diversity.
- **Judicial Performance Evaluation**: Putting in place a system of routine performance reviews for judges can help to increase efficiency and accountability in the legal system by making sure that they follow moral guidelines and provide prompt, well-reasoned decisions.
- **Transparency and Disclosure**: Enhancing the transparency of judicial proceedings, which encompasses disclosing judicial assets and liabilities, helps cultivate public confidence in the judiciary and advance accountability.

### **Enhancing Access to Justice and Reducing Backlog**

- **Specialised Courts and Tribunals**: By creating specialised courts and tribunals to handle particular case types, such intellectual property rights, business disputes, and environmental issues, ordinary courts can handle a greater volume of cases more quickly and with less burden.
- **Mechanisms for Alternative Dispute Resolution (ADR)**: Encouraging the use of alternative dispute resolution procedures like conciliation, arbitration, and mediation can open up quick and affordable options for settling conflicts outside of the established legal system.
- **Leveraging Technology**: Especially in rural and underserved areas, utilizing technology to its full potential can expedite court procedures, enable remote hearings, and enhance access

to justice. Examples of this technology include case management systems, e-filing, and video conferencing.

### **Ensuring Executive Compliance with Judicial Orders**

- Strict Enforcement of Contempt of Court: To guarantee the efficient execution of court decisions and preserve the rule of law, it is necessary to bolster the enforcement of contempt of court rules in order to make the executive branch responsible for non-compliance with judicial orders.
- Judicial Monitoring Mechanisms: More oversight and accountability can be ensured in upholding judicial decisions by establishing judicial monitoring mechanisms to monitor the execution of court orders and assess the state of executive compliance.
- Public Awareness Campaigns: Raising public support for preserving the judiciary's authority can be accomplished by running public awareness campaigns that inform the public about the significance of executive compliance with judicial orders and the repercussions of non-compliance.

### **Promoting Judicial Education and Training**

- Continuing Mandatory Legal Education: Programmes can help judges and judicial officers become more knowledgeable and proficient in areas of the law that are still developing, procedural reforms, and judicial ethics.
- Specialized Training Programmes: Judges and judicial officers can be given the skills and knowledge necessary to carry out their duties efficiently by providing them with specialized training in subjects like judicial ethics, case management, and alternative dispute resolution.
- International Exchange Programmes: Judges and judicial officials can be exposed to best practices, a variety of viewpoints, and cutting-edge approaches to judicial administration by facilitating international exchange programmes and partnerships with judicial institutions from other countries.

## **Fostering Public Confidence and Trust in the Judiciary**

- Community Outreach Programmes: By holding interactive workshops, public lectures, and legal aid clinics, among other events, one can increase public awareness of legal rights, demystify the legal system, and cultivate confidence in the courts.
- Media Engagement: It is possible to combat misinformation and raise public awareness and confidence in the court by proactively interacting with the media to give accurate and easily accessible information regarding judicial decisions, processes, and initiatives.
- Ethical Standards and Integrity: Preserving the highest ethical standards and integrity within the judiciary is crucial for preserving public faith in the legal system. This can be done by implementing measures like conduct codes, judicial ethics training, and disciplinary procedures.

In conclusion, coordinated efforts to uphold judicial independence, improve access to justice, guarantee executive compliance with court orders, advance judicial education and training, and cultivate public confidence in the judiciary are critical to the future prospects of judicial review in India. India can fully realize the potential of judicial review as a pillar of democracy and the rule of law by putting these recommendations into practice and embracing a culture of accountability, transparency, and innovation.

## **CONCLUSION**

A trip through the complexities of India's judicial review process demonstrates a dynamic interaction between societal issues, court rulings, and constitutional principles. This part concludes with a thorough summary of the main conclusions, an analysis of the consequences for the constitutional democracy of India, and recommendations for future research.

### **Recapitulation of Key Findings**

Several important discoveries have been made during the investigation of judicial review in India:

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1. **Defender of Constitutional Values:** According to Bakshi (2017), the judiciary has continuously defended constitutional principles, interpreting the document to safeguard fundamental rights and preserve the delicate balance of powers.
2. **Problems and Critiques:** Although judicial review is a crucial check on the authority of the government, problems including judicial overreach, adjudication delays, and executive non-compliance create serious obstacles (Ghosal, 2018).
3. **Prospects for Reform:** Proactive actions and structural reforms are required in order to strengthen judicial independence, improve access to justice, and cultivate public confidence (Singh, 2020).

### **Implications for Indian Constitutional Democracy**

The research's conclusions have significant ramifications for India's constitutional democracy:

1. **Preservation of Constitutional Values:** Maintaining India's democratic culture requires respecting the Constitution's integrity and defending fundamental liberties (Shukla, 2016).
2. **Judicial Activism and Restraint:** Maintaining the separation of powers and upholding democratic governance requires striking a careful balance between judicial activism and restraint (Sharma, 2019).
3. **Increasing Public Trust:** Building public trust in the court and encouraging civic engagement requires bolstering accountability, openness, and public engagement programmes (Chand, 2018).

### **Areas for Further Research**

Even while this study offers insightful information about the state of judicial review in India, there are still a number of areas that might use more research:

1. **Comparative Analysis:** Research on other jurisdictions might provide important information about different judicial review models and how well they work in India (Patil, 2020).
2. **Impact of Technological advances:** Researching how advances in technology, including virtual courtrooms and e-filing systems, affect legal procedures might provide insight into

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how effective these technologies are at improving access to justice and cutting down on case backlogs (Sinha, 2021).

3. **Socio-Legal Perspectives:** Examining the socio-legal effects of court rulings on social justice, gender equality, and marginalized communities might help us better understand how the law and society interact (Kumar, 2019).

The analysis of judicial review in India concludes by highlighting the critical role that it plays in maintaining individual liberty, guaranteeing state responsibility, and defending constitutional ideals. India can enhance its democratic institutions and create a more fair and just society by tackling issues, welcoming changes, and cultivating an inclusive and transparent culture.

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# RIGHTS OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

*Authored by Prerna Shikha\**

## ***ABSTRACT***

The Preamble of our Constitution aims at securing the unity and integrity of the nation. To maintain justice and freedom of opinion, belief, faith, and worship, minority populations enjoy religious and cultural protections guaranteed by the Constitution. Treating unequal as equals is as bad as treating equals as unequal.

Everyone has the right to equality and the same possibilities under our Constitution, yet treating people equally means treating those differently who weren't born alike. Because minorities in India have faced such terrible discrimination and are not treated equally with others, our Constitution's founders guaranteed special rights to minorities under Articles 29 and 30.

The idea of granting minorities some special rights is to make them feel secure. The purpose of special rights for minorities is to ensure the preservation of minority institutions and to ensure autonomy in the management of these institutions, not to foster inequality but to promote equality. Education empowers and enlightens society. An essential component of human development is education. The preamble to the constitution states that the golden goals of Justice, Liberty, Equality, and Fraternity, including social, economic, and political justice, must be attained for the Indian polity to succeed.

*Keywords: Constitution, Minorities, Rights, Educational Institutions, Establish*

## **INTRODUCTION**

The preservation of the culture, language, and script of minorities is crucial for the harmonious development of children who belong to this community and for the nation at large. These elements

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\* LL.M student at Chanakya National Law University, Patna, available at: [prernashikha@gmail.com](mailto:prernashikha@gmail.com).

must remain intact. Without education, community development is impossible. The minority's educational rights were protected by the founding fathers of the Constitution to fulfil their aspirations and desires. Minorities' rights are respected by India's democratic system and constitutional safeguards, and they are outlined in Articles 29 and 30 of Part III of the Indian Constitution.

### **The Term Minority: Meaning**

There is no definition for the term minority in the Constitution. The definition of a minority, according to the Cambridge Dictionary, is any small group in society that is excluded from the rest due to their race, religion, or political beliefs; it also refers to an individual who is a member of such a group or a group of people who share a characteristic by birth that makes their group smaller than some other companies in society and may lead to others treating them unfairly.

Article 29 of the Indian Constitution mentions minorities in the marginal heading, but the text itself says that "any section of the citizens inhabiting the territory of India or any part of the country should have the right to protect their language, script, or culture which is different and varied." It further says that regardless of the facility's distinctions in terms of caste, language, race, or religion, inhabitants should be entitled to enroll in any educational program administered by the government or receive financial assistance from it. According to Section 2, Subsection (c) of the National Commission for Minorities Act, 1992, which was established by the Union Government, six communities are recognized as minority communities. Sikhs, Jain, Muslims, Christians, Buddhists, and Zoroastrians are among them.<sup>1</sup>

India, which is ruled by the constitution, is the largest secular democracy in the world. By granting particular rights to those who constitute a religious or linguistic minority in India under Articles 29 and 30, the founding fathers of the Indian Constitution sought to guarantee minorities a sense of security and trust. The Constitution's "Cultural and Educational Rights" section contains Articles 29 and 30. To assist minorities in preserving their unique languages, faiths, and cultures,

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<sup>1</sup> Ministry of Minority Affairs, National Commission for Minorities, [https://www.minorityaffairs.gov.in/show\\_content.php?lang=1&level=0&ls\\_id=216&lid=221#:~:text=The%20Union%20Government%20set%20up,communities%20by%20the%20Union%20Government](https://www.minorityaffairs.gov.in/show_content.php?lang=1&level=0&ls_id=216&lid=221#:~:text=The%20Union%20Government%20set%20up,communities%20by%20the%20Union%20Government).

these two Articles both preserve and uphold some collective rights for them. In addition to giving minorities a sense of protection, these rights help preserve the rich diversity of the country.

In the case of the Re Kerala Education Bill<sup>2</sup>, the Supreme Court declared that a community that makes up less than 50% of the total population of the state is considered a minority. S.R. Das, CJ, who suggested the arithmetic tabulation techniques, delivered this ruling. The Court decided that, for the Constitution, any community whose population is numerically less than 50% of the state's total population may be considered a minority when a state legislature's act applies to the entire state. In states where there exist linguistic or religious divides among the populace such that each group represents less than half of the state's total population, this formula becomes irrelevant. In the case of A.M. Patroni vs. Kesavan<sup>3</sup>, the Kerala High Court upheld this statistical criterion and classified the minority in the same way as the Supreme Court did.

The Supreme Court held that, since the disputed Act was a State Act, it was required to determine what constituted a linguistic or religious minority concerning the State and not about the entirety of India in the case of D.A.V. College, Bhatinda v. State of Punjab and others.<sup>4</sup> According to the court's decision in Stephen's College v. University of Delhi<sup>5</sup>, individuals who belong to an identifiable group of Indian nationals are inherently deemed to be a minority under Article 30.

The Ram Krishna Mission, established by Swami Vivekanda to propagate the Vedanta principles upheld by Ram Krishna, was ruled to be a religious sect or denomination of Hinduism rather than a minority religion in the case of Bramchari Sidheswari v. State of West Bengal<sup>6</sup>. Therefore, the Ram Krishna Mission is not able to assert that it has the fundamental right to create and run educational institutions as stated in Article 30(1) of the constitution.

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<sup>2</sup> A.I.R 1958 SC 956.

<sup>3</sup> A.I.R 1965 Ker 75.

<sup>4</sup> 1971 SCR 677.

<sup>5</sup> A.I.R 1992 SC 1630.

<sup>6</sup> 1995 4 SCC 464.

It was decided in the case of *T.M.A. Pai Foundation v. State of Karnataka*<sup>7</sup> that linguistic and religious minorities are included in the definition of "minority" under Article 30 of the Constitution. The State would be used as the unit of measurement for minorities instead of the entire country of India due to linguistic disparities.

In *Bal Patel v. Union of India*<sup>8</sup>, the court decided that the Central Government had to exercise its power to define minority groups, not only by the recommendations of the Commission but also in consideration of the social, cultural, and religious context of the State's population. It might not be necessary to inform them that they are a minority under the Act and that they might not be entitled to any special treatment or protection if statistical evidence is shown that the majority of the community is made up of wealthy industrialists, businesspeople, professionals, and property owners.

The judges in *State of Bombay v. Bombay Educational Society*<sup>9</sup> inferred that, in some situations, a minority had founded the organization in question. The idea that a right must first be established before it may be exercised and that the terms "establish" and "administer" should be interpreted interchangeably is at odds with the Court's position. The Supreme Court emphasized that specific admission limits cannot be imposed by the state. The Supreme Court made it clear that within a single minority institution, the state cannot restrict admission to a certain community.

In the case of the *State of Madras v. Champakam Dorairajan*<sup>10</sup>, the Supreme Court invalidated the Madras Communal Government Order, which had allowed reservations for different communities in educational institutions. It was explicitly stated that every single citizen, regardless of group or class, is entitled to the right of admission. In the case of *University of Madras v. Shantabai*<sup>11</sup>, the Madras High Court ruled that college administrators had the authority to regulate the entrance of female students to schools intended for boys, given that gender is not a prohibited factor under Article 29(2).

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<sup>7</sup> A.I.R 2003 SC 355.

<sup>8</sup> A.I.R 2005 SC 3172.

<sup>9</sup> AIR 1954 SC 561.

<sup>10</sup> AIR 1951 SC 226.

<sup>11</sup> AIR 1954 Mad 67.

Thus, the relationship between the dominant and non-dominant group is only rarely considered as the primary determinant of minority status; instead, the majority of the definitions presented above emphasize either certain shared characteristics shared by group members that serve as markers of distinction or such an objective test.

## **THE RIGHTS OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS**

The protection of religious and ethnic minority's rights is important to India's secular ideology. India has a long history of accepting different religions and has always espoused the ideal of equality. Article 30 of the Indian Constitution is one of the articles that ensures the preservation of minority rights. The right of minorities to create and run educational institutions is protected by Article 30.

Article 30 (1) guarantees the right to establish and administer educational institutions of their choice to all linguistic and religious minorities. Language and religious minorities are the two categories of minorities to which this clause extends rights. They are allowed to manage any kind of educational institution they like. The phrase establish refers to the authority to form an entity, as opposed to the right to successfully manage and carry out the operations of an institution, which is known as the right to administer. The management and operations of the institution are referred to as administration.

The State is prohibited by Article 30(2) from discriminating against any educational institution when offering assistance because the institution is run by a linguistic or religious minority.

### **Classification of Minorities under Article 30:**

- **RELIGIOUS MINORITIES:**

There are six community groupings in India: Muslims, Buddhists, Sikhs, Jains, Christians, and Zoroastrians. These communities have received minority status from the Union government. India is a country with many religions. The majority communities are those that comprise a greater

number of members than the other community groupings in these communities. The size of the group is the main factor used to classify it as a religious minority.

- **LINGUISTIC MINORITIES:**

A category or group of people whose mother tongue or mother language differs from that of the majority population is referred to as a "linguistic minority". The Indian Constitution protects the rights of these linguistic minorities. Article 350-A of the Indian Constitution mandates that states to endeavour to provide enough resources for elementary-level instruction in the mother tongue for children who are members of linguistic minorities.

The Constitution (Forty-fourth Amendment) Act of 1978 added Clause (1-A) to Article 30, which says that the State will make sure that any money set by or determined under such law for the acquisition of any property of an educational institution established and run by a minority, as mentioned in clause (1), is not such that would restrict or abrogate the right guaranteed unto the State.

In the case of the Re Kerala Education Bill<sup>12</sup>, the Supreme Court decided that Article 30(1) applies to institutions that offer comprehensive secular education. Giving children of linguistic and religious minorities the resources they need to thrive in the outside world is the aim of Article 30(1). The nation's integrity and unity are maintained and strengthened by the protection of minorities provided under Article 30. General secular education will bring the nation's students closer together. This is a real example of liberty, equality, and fraternity via the means of education. The minorities will feel isolated and separated if they are not granted the protections outlined in Article 30.

All minorities are mentioned in one clause in Article 30(1). Although the definition of a minority is not specified in the constitution, persons are classified as minorities based on their language or

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<sup>12</sup> Supra note 3.



religion. Even if they may make up the majority in a given area, those who practice a certain religion or language should nonetheless be treated as minorities.

The court in *St. Stephens College v. University of Delhi*<sup>13</sup> stated that to ascertain whether the college in question is a minority institution, the terms "establish" and "administrate," as used in Article 30(1), must be construed in concert. The minority community's claim to control over the educational institution must be backed by the documentation that the institutions were founded.

Additionally, the government can control the institution for minorities who are not receiving assistance. The Hon'ble Supreme Court of India attempted to interfere with the letter and spirit of the constitutional provision regarding the minority right to education in this postmodern and global era through their judicial dictum, in line with the emerging trend of unaided minority educational institutions and the recent socio-economical jurisprudential orientation.

To satisfy the new trend of liberalization, privatization, and globalization, the court in the *T.M.A. Pai Foundation* case has permitted educational institution to create a justified surplus to cover the expense of facility construction and augmentation that would not result in profit. In the case of the *Islamic Academy*<sup>14</sup>, the Pai Foundation has disregarded the minority's rights under Article 19(1)(g) read with Article 30 of the constitution, believing that the autonomy of an unaided, non-minority institution is an essential part of their entitlement.

The principles governing reservations, admissions processes, fee schedules, and capitation for unaided private institutions, both minority and non-minority, may be found in the case of *P.A. Inamdar v. State of Maharashtra*<sup>15</sup>.

Profiteering can be avoided by structuring fees appropriately. The constitution's Article 30(1) guarantees the freedom to establish and manage an institution, including the authority to charge reasonable fees. The court found that one group of educational institutions providing a comparable or identical program holding combined entrance tests is not improper. The list of successful applicants will be used to determine admissions without altering their initial merit. The State quota

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<sup>13</sup> Supra note 6.

<sup>14</sup> *Islamic Academy v. State of Karnataka* A.I.R 2003 SC 3724.

<sup>15</sup> A.I.R 2005 SC 3236.

system for minority and non-minority seat reservations in unaided private professional institutions is deemed to violate Articles 30 and 19(1)(g) by the Court. The autonomy of the institution is affected. Nonetheless, a 15% minor reservation may be made for Non-Resident Indians (N.R.I.) at the management's discretion, provided that two requirements are met: first, the seats reserved for N.R.I. wards; and second, the funds raised should be used to support students from economically disadvantaged backgrounds.

*Azeez Basha v. Union of India*<sup>16</sup> is a crucial decision regarding the capacity of linguistic and religious minorities to establish and manage educational institutions. The Aligarh Muslim University (Amendment) Act 1965, which modified the Aligarh Muslim University Act 1920 (the Act of 1920), was challenged in court because it unlawfully took away the Muslim minority community's authority to manage the university that they had established. Before the 1951 amending statute, which is under appeal, members of the Court had to be Muslims. The adjustment was not contested because the University's organizational structure did not change. The Court was no longer the university's top governing body as a result of the two modifications, and its composition did not have to be Muslim-only. The court held that the Muslim community did not find the Aligarh Muslim University. As a result, the Muslim minority is unable to claim sole control over the university.

In the case of *S.K. Patro v. State of Bihar*<sup>17</sup>, the Supreme Court rendered a decision holding that the school could not be denied Article 30(1) protection because it was founded by a minority in India, received funding from outside sources, or occasionally had non-Indian citizens in charge of its management. In the case of *State of West Bengal v. Guru Nanak Educational Trust*<sup>18</sup>, the court ruled that a single altruistic person can use their resources to serve a minority community.

Article 30(2) prohibits discrimination against any educational institution by the state because it is managed by a minority, irrespective of the minority's nationality or language. The legal entitlement to financial support for minority-managed educational institutions is equivalent to that of

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<sup>16</sup> A.I.R 1968 SC 662.

<sup>17</sup> A.I.R 1970 SC 259.

<sup>18</sup> A.I.R 1978 Cal 232.

institutions governed by communities with a majority population. When providing funds for educational institutions, the state must provide fair treatment for all.

In the Re Kerela Education Bill, the Supreme Court observed that even though they are not explicitly stated, the rights to recognition and aid are essential for the upkeep of educational institutions. Without recognition and, to some extent, support in modern times, the right to education would essentially become a paper right.

### **EXTENT OF GOVERNMENT CONTROL OVER MINORITY INSTITUTIONS**

Government oversight of minority institutions is necessary to prevent abuse of those institutions' rights and exploitation of other people or staff members who work there. Control is also used to monitor student performance and uphold the standards expected in educational settings. Conflicting interpretations of Articles 29 and 30 are another factor contributing to disagreements between the institution and the government. Abuse of the rights granted to minority populations under Articles 29 and 30 raises concerns for the State about those communities.

To keep an eye on staff members and make sure they follow the institution's policies, the management of the organization has the power to administer disciplinary actions. To protect the interests of the organization's academic and non-academic employees, the State has the authority to enact directive regulations and take appropriate action. It is the responsibility of the State to oversee these establishments and guarantee that they are run and administered appropriately. Nevertheless, it has often been decided that the government cannot restrict or meddle in the functioning of institutions since it would be a violation of the rights of minorities as guaranteed by Article 30 of the Indian Constitution.

Justice Faisal Ali summarizes three criteria to assess whether there has been interference in All Saints High School v. Government of Andhra Pradesh<sup>19</sup>:

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<sup>19</sup> 1980 AIR 1042.

1. The creators of the institution must be granted the freedom to shape the organization according to their vision, allowing the management to operate free from external influence.
2. The fundamental right protected by Article 30(1) could not be trampled upon by the government taking away a portion of management and giving it to another organization.
3. There exists one exception to this general rule: the government or a university may enact legislative measures aimed at elevating educational standards, provided such actions are politically motivated and serve the interests of the nation and its citizens. This ensures that minority institutions maintain the expected standards of excellence without compromising their autonomy.

Frank Anthony School Employees Public Association v. Union of India<sup>20</sup>, was the first instance in which the application of Article 30(1) was determined by a petition submitted by minority-affiliated employees rather than by the minority institutions themselves. Additionally, it was the first time an exclusion of minority institutions by the education court had been successfully contested. Unaided minority institutions were exempted from the provisions of the Delhi School Education Act, 1973 (Section 12), which covered employee conduct codes, disciplinary procedures, penalties for insubordinate employees, cases involving pay and benefits, and the establishment of a tribunal to hear appeals against disciplinary actions. The employees at the Frank Anthony Public School and the unaided school demanded from the administration the school parity in pay scales and benefits with the state-aided educational institutions. It was put on hold. For the Supreme Court, a petition was submitted. The Supreme Court dismissed the claim made by the Union of India and the school that Section 12 of the aforementioned act would violate Article 30(1), concluding instead that it violated Article 14 of the Constitution.

The Supreme Court maintained the constitutionality of Sections 9-A, 11-A, 12, and 33 of the Industrial Disputes Act, 1947 in Christian Medical College Hospital Employees Union v. Christian Medical College Vellore Association.<sup>21</sup> The Supreme Court concluded that as this Act is the country's primary law, minorities cannot request an exemption from it.

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<sup>20</sup> A.I.R 1987 SC 311.

<sup>21</sup> AIR 1988 SC 37.

The right to recognition and affiliation, which includes the right to financial support from the State, the freedom to choose the personnel, management structures, and students, as well as the freedom to choose the subject matter or educational content, is covered by Article 30. The rulings of the Supreme Court suggest that these rights are neither total nor absolute. The interpretation of Article 30(1) must take into account the State's authority over education, educational standards, and associated matters, even if it is phrased in absolute terms, which contrasts sharply with other fundamental rights in Part III of the Constitution.

In *Re Kerala Education Bill*, Das, C.J. stated that the terms of their choice are crucial to comprehending the true meaning and implications of Article 30 and that the choice and content of this Article are as broad as the particular minority community may make them. The caution that Das, C.J. had noted in the aforementioned case that the right to administer is not the right to mal-administer provided the later courts with both substance and support for making the distinction between matters that are protected and matters that the State can lawfully regulate.

### **CONCLUSION**

To allow for the greatest possible development of each individual's personality, special rights for minority groups should be allowed in a vast nation like India. Several provisions for this purpose are being developed in our Constitution. These clauses, which permit minorities to create and manage educational institutions as well as affiliate with prestigious universities, include Article 30(1) of the Constitution and the National Commission for Minority Educational Institutions Act of 2004.

It is claimed that, regardless of whether it constitutes a numerical majority in any given State, a group that asserts its status as a minority based on religion in a historical or national context must be defined and assessed in terms of the total population of the nation. Likewise, whether a language minority is a numerical minority in terms of the nation's total population or not, its status as a linguistic minority must be assessed in terms of that State's population.

According to Article 30(1) of the Indian Constitution, the State should create a body ideally the Minorities Commission with the necessary regulations to award a minority certificate to any group

claiming such status. It is recommended that the relevant authorities take into account several factors when granting these certificates: names of the institutions, the people who founded them, the funding source, the subjectivity of any institutions, the wording of the declaration, the degree to which the faculty and staff members are drawn from that particular community, and the degree to which the institution is intended to serve the specific minority.

The right to education is an important one. The right to create an educational institution is an addition to Article 30(1), which only applies to minorities. About article 19(1)(g), a new dimension has been added. To create the Right to Education, the Judiciary took the lead. In *Mohini Jain v. State of Karnataka*<sup>22</sup>, the Supreme Court stated that education had a humanitarian nature. It is vitally important for the general development of citizens. In the case of *Unnikrishnan v. State of Karnataka*<sup>23</sup>, the Supreme Court ruled that the right to education was a Fundamental Right under Article 21. The Supreme Court ruled that all children who are citizens of this nation are entitled to free education to the age of fourteen. This case makes it clear that the right to education is a fundamental right.

Minorities have a wonderful mechanism for the protection of their interests in the form of educational institutions established and managed by members of minority communities according to their preferences. Education is a national resource that needs to be distributed fairly and extensively to establish an egalitarian society that upholds social, economic, and political justice. In essence, education is not merely a privilege but a national resource that must be equitably distributed to foster an egalitarian society founded on principles of social, economic, and political justice. Through the collective efforts of minority educational institutions and the proactive stance of the judiciary, India moves closer to realizing the vision of a truly inclusive and enlightened society.

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<sup>22</sup> 1992 A.I.R 1858.

<sup>23</sup> 1993 A.I.R 2178.

# RIGHT TO PRIVACY IN INDIA: CONSTITUTIONAL BASIS AND IMPLICATIONS ON MODERN ISSUES

*Authored by Nitin Raj Singh\**

## **ABSTRACT**

The right to privacy stands as a fundamental pillar of individual autonomy within the constitutional framework of India. This paper undertakes a comprehensive exploration of the multifaceted landscape surrounding the right to privacy in India, delving into its historical roots, constitutional foundations, contemporary challenges, and future outlook. Commencing with an examination of pre-independence cultural and legal landscapes, the study unfolds the constitutional basis of the right, predominantly enshrined in Article 21, exploring its evolution through landmark judicial pronouncements such as *K.S. Puttaswamy v. Union of India* (2017). The paper critically analyzes the limitations placed on the right, considering the delicate balance between individual privacy and societal interests.

The research delves into the international dimension, conducting a comparative analysis with global standards and exploring the influence of international treaties and conventions on India's legal framework. Critiques of the right to privacy jurisprudence are discussed, alongside challenges in implementation and the nuanced task of balancing privacy with national security imperatives. The research concludes by underscoring the continued significance of the right to privacy in modern India and issuing a call to action for policymakers and stakeholders to fortify and adapt the legal framework in anticipation of emerging challenges

**Keywords:** Right to Privacy, Constitutional Law, Article 21, Surveillance Technologies, Aadhaar, Personal Data Protection Bill.

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\* 3<sup>rd</sup> year B.A. LL.B student at ICFAI Law School, Dehradun, available at: [nitinraj21062@gmail.com](mailto:nitinraj21062@gmail.com).

## **INTRODUCTION**

The right to privacy, an indispensable facet of individual freedom and autonomy, has undergone significant transformations over the years. In the context of India, this right has evolved as a fundamental pillar of constitutional jurisprudence. The constitutional framers, while envisioning a democratic republic, embedded the essence of personal liberty within the constitutional framework. However, the journey of recognizing privacy as a distinct and enforceable right has been marked by legal evolution and societal changes. This section will provide a historical overview of the conceptual foundations that laid the groundwork for the recognition of the right to privacy in India.

In recent times, the advent of technology, increasing government surveillance, and the proliferation of data-driven services have raised crucial questions regarding the scope, protection, and infringement of the right to privacy. The legal landscape has witnessed a series of cases and legislative interventions addressing these concerns. This paper seeks to critically and analyse the constitutional basis of the right to privacy in India and its contemporary implications, with a focus on addressing the complexities arising from modern challenges.

## **HISTORICAL DEVELOPMENT OF THE RIGHT TO PRIVACY IN INDIA**

### **Pre-Constitution Era**

The recognition of privacy rights in India can be traced back to ancient texts and societal norms. For instance, ancient Indian texts like the Manusmriti and Arthashastra delineated principles of "grihastha dharma," emphasizing the sanctity of the household and the individual's right to privacy within familial spaces. These texts prescribed guidelines for maintaining confidentiality within domestic affairs and highlighted the importance of personal autonomy and privacy.

However, instances of colonial intrusion into personal spaces during the British colonial rule also played a significant role in shaping the discourse around privacy rights in India. The colonial administration often employed intrusive measures such as domiciliary visits and surveillance to exert control over individuals and communities. These instances sparked debates and discussions



among Indian intellectuals and leaders about the need to safeguard individual privacy from unwarranted state interference.

### **Constitutional Provisions**

The framers of the Indian Constitution, inspired by principles of justice, liberty, and equality, sought to embed the right to privacy within the constitutional framework. This section will examine the explicit and implicit constitutional provisions that form the basis for the right to privacy. A particular focus will be given to Article 21, which has emerged as the cornerstone for recognizing and safeguarding the right to life and personal liberty.

### **Early Judicial Perspectives**

In the initial years post-independence, the Indian judiciary began to grapple with the interpretation and enforcement of the right to privacy. Early cases reflected a nuanced understanding of personal liberty, privacy, and the limitations of state intrusion. This section will delve into the evolving judicial perspectives during the formative years of the Indian Republic, highlighting key decisions that laid the groundwork for recognizing privacy as an inherent and enforceable right.

### **Landmark Judgments - The Right to Privacy**

Landmark judicial pronouncements have played a pivotal role in shaping the contours of the right to privacy in India. One of the watershed moments was the *Kharak Singh v. State of Uttar Pradesh* (1962)<sup>1</sup> case, where the Supreme Court deliberated on the scope of personal liberty and surveillance. Another significant milestone was the *Maneka Gandhi v. Union of India* (1978)<sup>2</sup> case, which expanded the interpretation of Article 21. However, it was the transformative judgment in *K.S. Puttaswamy v. Union of India* (2017)<sup>3</sup> that explicitly recognized the right to privacy as a fundamental right.

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<sup>1</sup> *Kharak Singh v. The State of Uttar Pradesh*, AIR 1963 SC 1295.

<sup>2</sup> *Maneka Gandhi v. Union of India* (1978 AIR 597, 1978 SCR (2) 621).

<sup>3</sup> *K.S. Puttaswamy v. Union of India*, (2015) 8 SCC 735.

# **CONSTITUTIONAL BASIS OF THE RIGHT TO PRIVACY**

## **Article 21: Right to Life and Personal Liberty**

The foundation of the right to privacy in the Indian Constitution lies within the expansive and visionary Article 21. This section will delve into the constitutional text and intent behind Article 21, exploring how the framers intended to safeguard the essential aspects of life and personal liberty. The constitutional debates and committee discussions that shaped Article 21 will be examined to provide insights into the framers' perspectives on individual rights.

## **Judicial Interpretation and Expansion of Article 21**

The Indian judiciary, through its interpretative prowess, has expanded the scope of Article 21 to encompass a wide array of rights, including the right to privacy. This section will analyse key judicial pronouncements that have contributed to the evolving understanding of Article 21. Cases such as *Gopalan v. State of Madras* (1950)<sup>4</sup> and *Maneka Gandhi v. Union of India* (1978)<sup>5</sup> will be discussed to trace the interpretative journey undertaken by the courts in recognizing the multifaceted nature of personal liberty.

## **Right to Privacy as an Intrinsic Part of Article 21**

The right to privacy, though not explicitly mentioned in the constitutional text, has been identified by the judiciary as an intrinsic part of the broader right to life and personal liberty under Article 21. This section will explore how the courts, through various judgments, have articulated the link between privacy and personal liberty. The Supreme Court's reasoning in cases such as *R. Rajagopal v. State of Tamil Nadu* (1994) and *District Registrar and Collector v. Canara Bank* (2005) will be analysed to understand the judicial rationale behind considering privacy as an inherent component of Article 21.

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<sup>4</sup> A.K. Gopalan v. State of Madras 1950 AIR 27.

<sup>5</sup> Maneka Gandhi v. Union of India (1978 AIR 597, 1978 SCR (2) 621).

# **MODERN CHALLENGES TO THE RIGHT TO PRIVACY**

## **TECHNOLOGY AND PRIVACY<sup>6</sup>**

### **Surveillance Technologies**

The advent of sophisticated surveillance technologies has posed a significant challenge to the right to privacy. This section will explore the implications of surveillance technologies such as closed-circuit television (CCTV) cameras, facial recognition, and drone surveillance on individual privacy. Relevant case studies and legal challenges against unwarranted surveillance practices will be analysed to illustrate the clash between technological advancements and the right to privacy.

### **Social Media and Privacy Concerns**

The widespread use of social media platforms has given rise to new dimensions of privacy concerns. The paper will examine the impact of social media on privacy, including issues related to data mining, profiling, and the unauthorized use of personal information. Landmark cases involving social media platforms and privacy violations will be discussed to highlight the legal responses to these emerging challenges.

### **Biometric Data and Aadhaar**

The implementation of Aadhaar, a biometric identification system, has sparked debates about the intersection of technology and privacy. This section will analyse the implications of collecting and centralizing biometric data, focusing on the Aadhaar project. Legal challenges, including the landmark judgment in Justice K.S. Puttaswamy (Retd.) v. Union of India (2018), will be explored to understand the judiciary's stance on the use of biometric data and its impact on the right to privacy.

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<sup>6</sup> Ankesh, Protecting Privacy in the Era of Targeted Advertising: Balancing Data Security and Marketing Effectiveness, Manupatra Articles <https://articles.manupatra.com/article-details/Protecting-Privacy-in-the-Era-of-Targeted-Advertising-Balancing-Data-Security-and-Marketing-Effectiveness>, (last visited 3<sup>rd</sup> March, 2:00PM).

## **LEGISLATIVE DEVELOPMENTS**

### **Right to Privacy and Aadhaar Act**

In response to the legal challenges surrounding Aadhaar and privacy concerns, the government enacted the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act in 2016.

### **Personal Data Protection Bill**

The proposed Personal Data Protection Bill aims to regulate the processing of personal data and address privacy concerns in the digital age. This section will provide an overview of the key provisions of the bill, comparing it with international data protection standards. The analysis will consider the potential effectiveness of the bill in safeguarding the right to privacy in the evolving digital landscape.

### **Cybersecurity Laws and Privacy**

As governments worldwide enact cybersecurity laws to protect national interests, concerns about their impact on individual privacy have intensified. This section will explore the intersection between cybersecurity laws and the right to privacy, assessing the balance between national security imperatives and individual rights. Relevant case studies and legal challenges against cybersecurity laws will be examined to gauge their implications on privacy.

## **JUDICIAL PRONOUNCEMENTS SHAPING THE RIGHT TO PRIVACY**

### **K.S. Puttaswamy V. Union of India<sup>7</sup> - Recognition of Privacy as a Fundamental Right**

The K.S. Puttaswamy case marked a historic turning point in the Indian legal landscape by affirming the right to privacy as a fundamental right under the Constitution. This section will delve into the background of the case, the legal arguments presented, and the Supreme Court's reasoning in recognizing privacy as an intrinsic part of Article 21.

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<sup>7</sup> (2015) 8 SCC 735.

## **Limitations on The Right to Privacy**

While recognizing the right to privacy, the Supreme Court in K.S. Puttaswamy acknowledged that this right is not absolute and may be subject to reasonable restrictions. This section will examine the limitations imposed by the court on the right to privacy, exploring the delicate balance between individual freedoms and societal interests. It will discuss the jurisprudential nuances introduced by the court to ensure that the right to privacy does not hinder legitimate state objectives.

## **Subsequent Cases and Judicial Trends**

**Right to be Forgotten:** The right to be forgotten emerged as a crucial aspect of privacy in the digital age. After K.S. Puttaswamy, individuals sought the right to have outdated or irrelevant information about them removed from online platforms.

**Surveillance and Privacy:** In the wake of technological advancements, challenges related to state surveillance and individual privacy have become more pronounced. This section will explore cases that deal with government surveillance practices and their compatibility with the right to privacy.

**Consent and Data Protection:** As data-driven technologies continue to proliferate, the issue of consent and data protection has gained prominence. This section will examine cases that have addressed the importance of informed consent in data processing and storage. It will also explore judicial trends regarding data protection laws and their role in safeguarding individual privacy in the era of digital information.

## **INTERNATIONAL PERSPECTIVES ON THE RIGHT TO PRIVACY**

### **Comparative Analysis with Global Standards**

This section will conduct a comparative analysis of India's approach to the right to privacy with global standards. Examining privacy laws and judicial precedents from other jurisdictions, particularly those in Europe and North America, will provide insights into common principles and divergent approaches. The analysis will explore how different legal systems balance privacy rights with competing interests and whether India's legal framework aligns with or diverges from these global standards.

## **Implications of International Treaties and Conventions**

International treaties and conventions play a crucial role in shaping countries' perspectives on the right to privacy. This section will explore India's engagement with international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). It will assess the implications of these treaties on India's legal framework and analyse how adherence to international standards influences the country's approach to privacy protection.

## **The Role of Global Privacy Initiatives**

In addition to treaties and conventions, various global privacy initiatives and frameworks contribute to the international discourse on privacy. This section will discuss the role of organizations such as the International Association of Privacy Professionals (IAPP), Privacy Shield, and global privacy standards developed by entities like the International Organization for Standardization (ISO). By examining India's participation in and alignment with these initiatives, the paper will assess the country's commitment to global privacy standards.

## **Cross-Border Data Flows and Privacy**

As digital interactions become increasingly globalized, cross-border data flows present unique challenges to privacy. This section will delve into the complexities arising from data transfers between countries and analyze how India addresses these challenges. The legal frameworks governing data transfers, including adequacy agreements and standard contractual clauses, will be discussed in the context of international privacy considerations.

## **CRITIQUE AND CHALLENGES**

**Criticisms<sup>8</sup> of the Right to Privacy Jurisprudence:** Despite the significant strides in recognizing the right to privacy in India, there have been criticisms and debates surrounding the jurisprudence developed by the courts. This section will critically examine the critiques, exploring arguments

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<sup>8</sup> Navya Bharaduj, PRIVACY POLICY 101: THE BASICS OF PRIVACY POLICY, Manupatra Articles <https://articles.manupatra.com/article-details/PRIVACY-POLICY-101-THE-BASICS-OF-PRIVACY-POLICY>, (last visited 13.03.2024, 13:46PM).

against certain judgments or legal principles. Common criticisms may include concerns about judicial overreach, ambiguities in the right to privacy, or potential conflicts with other constitutional rights. By addressing these criticisms, the paper aims to contribute to a nuanced understanding of the limitations and areas for improvement in the right to privacy jurisprudence.

**Challenges in Implementation and Enforcement:** While the right to privacy may be acknowledged in legal theory, its effective implementation and enforcement pose practical challenges. This section will discuss the hurdles faced in translating legal protections into tangible safeguards for individuals. Challenges such as lack of awareness, resource constraints, and gaps in law enforcement mechanisms will be explored. Case studies and real-world examples will be used to illustrate the difficulties encountered in ensuring the practical realization of privacy rights.

**Balancing Privacy with National Security:** One of the perennial challenges in the realm of privacy is striking the right balance between individual rights and national security imperatives. This section will delve into the complex interplay between privacy concerns and the need for robust national security measures. Analysing specific cases or legislative provisions related to surveillance, intelligence gathering, and counter-terrorism efforts, the paper will assess the challenges faced in maintaining this delicate equilibrium and avoiding undue infringements on individual privacy in the interest of national security.

**Future Challenges and Evolving Technologies:** As technology continues to advance rapidly, new challenges to privacy will inevitably arise. This section will anticipate and discuss potential future challenges posed by emerging technologies, including artificial intelligence, biometrics, and the Internet of Things (IoT). The paper will explore the legal and ethical implications of these technologies, considering their potential to reshape the privacy landscape and create novel challenges for policymakers, legal practitioners, and individuals.

## **FUTURE OUTLOOK AND RECOMMENDATIONS**

**Emerging Issues and Trends:** This section will explore the anticipated trends and emerging issues related to the right to privacy in India. It will analyse how technological advancements, changes in societal behavior, and evolving legal landscapes may impact the understanding and

protection of privacy. Topics may include the implications of artificial intelligence, the Internet of Things, biotechnology, and other cutting-edge developments. By identifying these emerging issues, the paper aims to contribute to proactive policymaking and legal adaptation to future challenges.

**Policy Recommendations:** Based on the analysis of historical developments, contemporary challenges, and emerging trends, this section will propose policy recommendations to strengthen the protection of the right to privacy in India. Recommendations may address gaps in existing legislation, propose amendments or additions to current laws, or suggest new policies to better safeguard individual privacy rights. The emphasis will be on ensuring a balance between the need for privacy and the legitimate interests of the state and other stakeholders.

**The Role of Civil Society and Technology Companies:** Civil society organizations and technology companies play a crucial role in shaping privacy norms and practices. This section will discuss the responsibilities and potential contributions of civil society organizations in advocating for privacy rights, raising awareness, and holding stakeholders accountable. Additionally, it will explore the role of technology companies in adopting privacy-preserving practices, ensuring data security, and collaborating with regulators to establish industry standards. The goal is to emphasize the importance of a collaborative approach involving non-governmental entities and the private sector in safeguarding privacy.

**Education and Awareness Initiatives:**<sup>9</sup> An essential aspect of protecting privacy is ensuring that individuals are aware of their rights and how to exercise them. This section will recommend initiatives aimed at educating the public about privacy rights, the risks of data sharing, and methods to enhance online privacy. This may include integrating privacy education into school curricula, conducting public awareness campaigns, and leveraging digital platforms for disseminating information.

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<sup>9</sup> WhatsApp v. Right to Privacy: New Data Protection Bill ready to be tabled in Monsoon Parliament Session, SCC Online Times <https://www.scconline.com/blog/post/2023/04/12/whatsapp-v-right-to-privacy-attorney-general-informs-sc-that-the-new-data-protection-bill-was-ready-to-be-tabled-in-monsoon-parliament-session-supreme-court-defers-hearing-legal-news-legal-research-up/>, (last visited 15<sup>th</sup> March 2024, 2:00PM).



**International Collaboration:** Given the global nature of privacy challenges, this section will advocate for increased international collaboration. Recommendations may include fostering cooperation with other countries on data protection standards, participating in international forums on privacy, and contributing to the development of globally accepted principles. Strengthening international partnerships can facilitate a harmonized approach to privacy protection in an interconnected world.

## **CONCLUSION**

In summary, this research paper has undertaken a comprehensive exploration of the right to privacy in India, tracing its historical development, examining its constitutional basis, and analysing its implications in the face of modern challenges. Judicial pronouncements, legislative developments, international perspectives, critiques, and challenges have been scrutinized to provide a holistic understanding of the right to privacy.

**Significance of the Right to Privacy in Modern India:** The right to privacy, recognized as a fundamental right under the Indian Constitution, holds profound significance in the contemporary socio-legal landscape. It serves as a bulwark against unwarranted state intrusion, technological overreach, and encroachments on personal autonomy. In the digital age, where information flows seamlessly across borders, the right to privacy acts as a safeguard against the potential abuses arising from rapid technological advancements.

**Call to Action for Future Developments:** As we navigate an era characterized by evolving technologies and complex legal challenges, there exists a compelling need for proactive measures to fortify the right to privacy in India. The findings of this research underscore several critical areas requiring attention:

- **Legal Refinement and Adaptation:** The legal framework surrounding the right to privacy needs constant refinement and adaptation to address emerging challenges. Policymakers should engage in a continuous process of reviewing and updating legislation to ensure its relevance and effectiveness.

- **Enhanced Enforcement Mechanisms:** Bridging the gap between legal theory and practical implementation is essential. Strengthening enforcement mechanisms, increasing awareness, and building capacity within law enforcement agencies will contribute to the effective protection of privacy rights.
- **International Cooperation:** Given the global nature of privacy challenges, fostering international cooperation is imperative. India should actively engage with international bodies, contribute to the development of global standards, and collaborate with other nations to address cross-border privacy issues.
- **Technology and Corporate Responsibility:** Technology companies play a pivotal role in shaping the privacy landscape. Advocating for responsible data practices, robust security measures, and transparency in data handling should be encouraged. Moreover, collaboration between technology companies and regulatory authorities is essential to strike a balance between innovation and privacy protection.

### **Empowering Civil Society**

Civil society organizations are vital advocates for privacy rights. Empowering these organizations, promoting civic education on privacy, and fostering a culture of privacy awareness will contribute to a more informed and vigilant citizenry.

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# RIGHT TO PRIVACY IN THE DIGITAL AGE: ADDRESSING CHALLENGES IN THE ERA OF TECHNOLOGICAL ADVANCEMENTS

*Authored by Ronit Palvia\**

## **ABSTRACT**

The term "digital age" refers to a grouping of various technological innovations such as virtual environments, digital services, intelligent applications, machine learning, knowledge-based systems, etc. that determine the particular features of the modern world, such as globalization, e-communications, information sharing, virtualization, etc. However, uncontrolled access to information and personal data kept in many global network nodes presents a chance for the technologies of the digital age to breach certain fundamental principles of information security and privacy. The rapid progress of technology has prompted both private and governmental organizations to gather personal data from individuals, often inadvertently left behind while browsing the internet. This collected information, obtained without explicit consent, is subsequently utilized to influence the behavior and decisions of citizens through persuasive technology. This practice infringes upon the liberty guaranteed to every Indian citizen by the Constitution.

*Keywords: Digitalisation, Privacy, Technology, Data*

## **INTRODUCTION**

With technology developing at a rate never seen before, the right to privacy in the digital era has grown to be a crucial and complicated topic. This idea, which has its roots in fundamental human rights, deals with people's rights to privacy protection and life autonomy, even in the face of quickly changing digital environments. There are serious worries about the degradation of privacy

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\* 3<sup>rd</sup> year B.L.S. LL.B student at Pravin Gandhi College of Law, Mumbai (Mithibai Campus), available at: [ronitpalvia4@gmail.com](mailto:ronitpalvia4@gmail.com).

as a result of the growing integration of technology into many facets of everyday life, from social media and online transactions to smart gadgets and surveillance systems.

Privacy has been recognized internationally as a Human Right under Article 12 of UDHR<sup>1</sup> which provides that everyone has the liberty not to interfere with his privacy, correspondence, or family, and also not to be permitted to defame their reputation or honour. Every individual has a right to get safeguards from such intrusion. Privacy is especially acknowledged as a right under international treaties of Human Rights.

In the digital age, individuals create enormous volumes of personal data through their interactions with smart gadgets, online activities, and involvement in digital ecosystems—often without realizing it. Numerous institutions, including companies, governments, and other organizations, gather, handle, and occasionally exchange this data, which can range from private preferences and behaviour patterns to sensitive information like financial details and health records.

The right to privacy in the digital age is a complicated and evolving notion that covers the problems and consequences of technological breakthroughs on individuals' personal information and autonomy. The conflict between technical progress and the right to privacy is visible in discussions about data breaches, mass surveillance programmes, targeted advertising, and the monetization of personal information. Finding a balance between utilizing the benefits of technology and protecting individual privacy has become a major concern for politicians, legal experts, and society as a whole.

As we traverse the digital era, recognizing and protecting the right to privacy is critical for safeguarding individuals' dignity and autonomy in an increasingly linked and data-driven society. The ongoing debate on this issue includes not only legal issues, but also ethical, social, and technological components, as society strives to strike a careful balance between innovation and the safeguarding of fundamental human rights.

In the legal environment, the right to privacy in the digital era faces issues brought on by technical breakthroughs. Legal frameworks, such as the General Data Protection Regulation (GDPR),

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<sup>1</sup> Universal Declaration of Human Rights, 1948.

attempt to regulate the acquisition, processing, and storage of personal data to give individuals more control. Striking a balance between national security and privacy remains a legal conundrum, particularly in determining the legitimacy of government monitoring programmes. The concentration on informed consent and data transparency is at the heart of these legal measures, ensuring that individuals are aware of how their information is used. As technology advances, legal systems must adapt to protect individuals from unwelcome intrusions into their personal lives.

In the digital era, the right to privacy, guaranteed by Article 21 of the Indian Constitution, confronts new difficulties as a result of fast technological breakthroughs. Individuals' personal information has become more vulnerable to exploitation and misuse as digital platforms, social media, and surveillance technologies have grown in popularity. From data breaches to government monitoring programmes, the erosion of privacy has prompted major concerns about civil rights and personal autonomy.

Taking on these difficulties demands a diverse strategy. Legislative frameworks must be revised to offer strong personal data safeguards, including openness, accountability, and user permission in data collecting and processing activities. Furthermore, technology solutions like encryption and data anonymization can strengthen privacy protections against unauthorized access.

Furthermore, increasing digital literacy and awareness is critical for empowering people to make educated decisions regarding their online privacy. By protecting the right to privacy in the digital arena, India can build trust in its digital infrastructure while also preserving core democratic and human rights values.

## **RIGHT TO PRIVACY- IS IT A MYTH IN THE DIGITAL ERA?**

There is no single definition, analysis, or meaning of the term "*privacy*", either in ordinary language or in philosophical, political and legal discourse. The concept of privacy has broad historical roots in legal, ethical, sociological and anthropological discourses.<sup>2</sup>

We all believe online privacy isn't something we have.

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<sup>2</sup> Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/privacy/>, (last visited 9<sup>th</sup> March 2024, 9:30PM).

First of all, when we go online, our internet service provider---whether that's a home internet connection or a cellular data connection---can see all the websites we're accessing. In the USA, they can even sell our browsing data. Our mobile carrier may even be tracking and selling our app usage activity. "The cloud" is just someone else's computer. If we upload our files to the cloud without using end-to-end encryption---something most services don't offer -our files can be viewed and accessed by the company that owns the cloud service. The same goes for messages and emails, which generally aren't encrypted either.<sup>3</sup>

In India, especially in the digital era, the idea of privacy is becoming a myth. The right to privacy is being undermined in reality by several circumstances, even in the face of constitutional protections and legal systems that recognize it. The notion that exists today is a result of widespread data breaches, widespread monitoring tactics, and the lack of comprehensive privacy regulations. Since the introduction of digital technology and the widespread use of social media, people frequently discover that they are always being watched by both governmental and private organisations. There are worries about exploitation and misuse since personal data is constantly gathered, examined, and commercialized without sufficient permission or security measures.

It is believed that privacy means the disclosure of sensitive personal information of an individual. It is not bound only by personal information, but also any other information, that the individual feels, is not to be disclosed in the public domain. It can involve information such as the name, email ID, password, details of financial instruments, etc.<sup>4</sup>

With more data becoming digitized, personal information becomes easily accessible to others and that is why there exists an inherent conflict between the two major Internet governance issues of today i.e., Privacy and data protection. Data protection is a legal measure aimed at safeguarding privacy, and ensuring that personal information is handled with care based on its significance.

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<sup>3</sup> Chris Hoffman, Online Privacy Is a Myth: What You Can and Can't Do About It, <https://www.howtogeek.com/819686/online-privacy-is-a-myth-what-you-can-and-cant-do-about-it/>, (last visited on 10<sup>th</sup> March, 2024, 3:00PM).

<sup>4</sup> Deepak Kumar Chausaria, Privacy a Myth in the Era of Digitalization, Jus Corpus Law Journal, <https://www.juscorpus.com/privacy-a-myth-in-the-era-of-digitalisation/>, (last visited on 10<sup>th</sup> March, 2024, 3:10PM).

Preserving individuals' data is essential to uphold their privacy and prevent any compromise. It is crucial to prioritize awareness of privacy rights when sharing personal information to mitigate various risks. This includes sensitive data such as credit card numbers, Aadhar or PAN cards, bank accounts, social security numbers, and more. History reminds us that the data should remain private, but if it gets into questionable hands, bad things might follow.<sup>5</sup>

People regularly produce enormous volumes of personal data through their online activities in today's linked world, from social media interactions to e-commerce purchases. These data, which are frequently gathered and used by businesses and governmental organisations, may provide a detailed picture of a person's tastes, habits, and even personal information. But the lack of transparency around data gathering methods, along with the risk of abuse and unauthorised access, raises serious concerns about the degradation of private rights.

The existence of surveillance is extremely good and beneficial for the nation, but it is not beneficial for the fundamental rights of our fellow citizens and it has been seen various times. The best example is Edward Snowden, who discovered the mass and global surveillance done by numerous agencies and governments across the world, by destroying this fundamental right. Surveillance has made the right to privacy difficult to operate, thus making the existence of this right a "MYTH."<sup>6</sup>

### **CHALLENGES IN DATA PRIVACY**

There are several obstacles to India's right to privacy, even with its legal structure and constitutional legitimacy. One big worry is that the State now has more capacity for monitoring, which might result in privacy abuses. An increasing number of surveillance initiatives, including mass surveillance programmes, the use of face recognition technology, and the requirement to link Aadhaar, a biometric identity system, to several services, have sparked worries about privacy violations.

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<sup>5</sup> Abhishek Das, Right to privacy and data protection in digital age: Possibility of myth? Lawyers Club India <https://www.lawyersclubindia.com/articles/Right-to-privacy-and-data-protection-in-digital-age-Possibility-of-myth--10682.asp>, (last visited on 12<sup>th</sup> March, 2024, 12:00PM).

<sup>6</sup> Jash k. Minosha, Academia. Edu Right to Privacy: A Myth [https://www.academia.edu/37626193/Right\\_to\\_Privacy\\_A\\_Myth](https://www.academia.edu/37626193/Right_to_Privacy_A_Myth), (last visited on 12<sup>th</sup> March, 2024, 12:05PM).

Converging private rights with those of national security and law enforcement, for example, presents another difficulty. Finding a middle ground between governmental interests and individual privacy is difficult. To maintain the protection of individual private rights and stop the abuse of surveillance authorities, strong legislative protections, supervision procedures, and judicial review are necessary.

The digital age presents several obstacles to the right to privacy, from accessible data gathering and monitoring to insufficient legislative safeguards and cybersecurity risks. Aspiring solicitors must investigate these issues carefully and support strong legal frameworks that protect people's right to privacy in the face of technological innovation. We may work to defend fundamental rights in an increasingly linked world and preserve privacy in the digital age by tackling these issues through law, enforcement, and public awareness.

A major obstacle to privacy in the digital age is the massive amount of personal data that is being gathered by public and commercial organizations. Every day, people produce enormous volumes of data due to the widespread use of social media, Internet of Things (IoT) devices, and online services. Without the express approval of the user, businesses frequently gather, examine, and profit from this data, which includes location data and browser history. Furthermore, governments monitor people's actions using surveillance technology like CCTV cameras and face recognition software, which raises worries about mass monitoring and invasion of privacy.

Privacy concerns are made worse in the digital era by opaque data-collecting methods. Many people are not aware of the scope of data collection or the purposes for which it is utilized. Furthermore, it can be challenging for consumers to give informed permission since digital businesses frequently hide the real nature of data collecting behind complicated terms of service agreements and privacy policies. Individuals' control over their personal information is constrained in the absence of effective transparency and consent methods, which undermines their right to privacy.

The digital age presents a serious risk to privacy due to the frequency of cybersecurity attacks and data breaches. Hackers are still able to access sensitive data without authorization by taking advantage of system flaws, even with the advancements in cybersecurity measures. These hacks

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undermine faith in digital platforms and organisations while also jeopardising people's personal information. Furthermore, because cyberspace is so linked, data breaches may have a significant impact because stolen data is frequently sold on the dark web or exploited for fraud and identity theft.

Because of the phenomena known as "surveillance capitalism," privacy is routinely sacrificed in the digital age on the altar of business. Tech corporations commoditize people's privacy by collecting enormous amounts of personal data that they use to power personalised services and targeted advertising. Because marginalised populations are disproportionately targeted by intrusive marketing tactics, this commercial exploitation of personal data not only violates privacy rights but also upholds inequality.

In the digital age, the legal and regulatory framework for privacy is frequently insufficient and disjointed. Although several nations have passed data protection laws and regulations—the California Consumer Privacy Act (CCPA) in the US and the General Data Protection Regulation (*GDPR*) in the EU—enforcement methods and jurisdictional concerns still pose serious obstacles. Furthermore, legislative attempts to address new privacy problems are sometimes outpaced by the quick speed of technological progress, creating gaps in the law's protection.

A nine-judge bench of the Supreme Court in *Justice K.S. Puttaswamy vs Union of Asian Nations* passed a historic judgment affirming the constitutional right to privacy.<sup>7</sup> It was declared that privacy is an essential part of Part III of the Indian Constitution, which outlines our fundamental rights, including equality rights (Articles 14 to 18), freedom of speech and expression (Article 19(1)(a)), freedom of movement (Article 19(1)(d)), and protection of life and personal liberty (Article 21). All legislation and executive acts must uphold these fundamental rights, which cannot be granted or taken away by the government.

The case primarily dealt with the constitutionality of the Aadhaar scheme, a bio-metric identification system implemented by the Indian government.

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<sup>7</sup> K.S. Puttaswamy v. Union of India, (2015) 8 SCC 735.

The court determined that, by Article 21 of the Indian Constitution (Right to Life and Personal Liberty), privacy is a fundamental right.

Even while the court maintained the Aadhaar scheme's legitimacy, it placed restrictions and safeguards in place to preserve citizens' right to privacy.

The court decided that Aadhaar could not be required to receive certain benefits and services, such as opening bank accounts, obtaining SIM cards, or registering for classes. Access to government subsidies and welfare programs, however, may demand it. The ruling underscored the need to safeguard data and instructed the government to implement a comprehensive data protection framework.

The ruling acknowledged the value of privacy rights in the digital era and attempted to strike a compromise between them and the goals of the government while putting Aadhaar and other similar programs into place.

Retired Justice K.S. Puttaswamy turned litigant for the first time in his legal career, spanning five decades, when he petitioned the Supreme Court against the linking of state benefits to the UID scheme, saying that much money had been wasted on the 'dangerous' project.<sup>8</sup>

The bench has overruled its decisions in *M.P. Sharma v Satish Chandra*<sup>9</sup>, District Magistrate, Delhi (1954), rendered by a bench of eight judges and, in *Kharak Singh v State of Uttar Pradesh* (1962)<sup>10</sup>, rendered by a bench of six judges, which contained observations that the Indian constitution doesn't specifically defend the correct to privacy.

The major privacy breaches in the world are:

## **1. Yahoo**

**Date: August 2013**

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<sup>8</sup> Damini Sharma and Nisarg Trivedi, Case Brief: Justice K.S. Puttaswamy (Retd) v. Union of India Law Bhoomi <https://lawbhoomi.com/case-brief-justice-k-s-puttaswamy-ret-d-v-union-of-india/> (last visited on 15<sup>th</sup> March, 2024, 10:05PM).

<sup>9</sup> 1954 AIR 300, 1954 SCR 1077, AIR 1954 SUPREME COURT 300, 56 PUN LR 366.

<sup>10</sup> *Kharak Singh v. The State of Uttar Pradesh*, AIR 1963 SC 1295.

**Impact: 3 billion accounts**

## **2. Aadhar Card**

**Date: January 2018**

**Impact: 1.1 billion Indian citizens' identity / bio-metric information was exposed**

## **3. Alibaba**

**Date: November 2019**

**Impact: 1.1 billion pieces of user data**

## **4. LinkedIn**

**Date: June 2021**

**Impact: 700 million users**

## **CONCLUSION**

As technology advances, the importance of the right to privacy grows more pronounced, prompting the legal system to adapt to safeguard this fundamental right amidst an increasingly interconnected and data-driven world. Technology offers both opportunities and challenges for privacy, enhancing connectivity and efficiency while also raising concerns about data security and individual freedom. The law plays a crucial role in addressing these issues, striking a balance between privacy rights and community interests through the interpretation and modification of legal concepts. Thorough data protection legislation, stringent security measures, and accountability in data processing procedures are essential for upholding privacy rights in the digital era. Additionally, international cooperation and standards-setting initiatives are necessary to address cross-border privacy concerns effectively. A multi-pronged strategy involving technological, judicial, legislative, and regulatory actions is required to protect privacy rights while fostering digital innovation. This includes establishing clear legal standards for data privacy, implementing strong data protection regulations, ensuring transparency and accountability in data handling practices, and continuously monitoring and updating laws to address evolving privacy issues. Moreover, recognizing the impact of privacy on youth growth and ensuring flawless, accountable surveillance systems are crucial steps in protecting privacy rights and promoting individual autonomy in the face of technological advancements.

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# FUTURE OF BLOCKCHAIN GOVERNANCE: EXPLORING DECENTRALIZED DEMOCRACY

*Authored by Akash Yadav\**

## **ABSTRACT**

Blockchain technology presents a paradigm shift in governance, offering decentralized frameworks that challenge traditional centralized systems. This paper delves into the concept of decentralized democracy within blockchain governance and its implications for the future. The paper outlines the foundational principles of blockchain, highlighting its ability to facilitate transparent, trustless transactions through distributed consensus mechanisms. The paper then examines various governance models, from centralized to decentralized approaches such as on-chain governance and decentralized autonomous organizations (DAOs), assessing their strengths and weaknesses. Moreover, the research explores the concept of decentralized democracy, elucidating how blockchain enables transparent, auditable voting systems for direct stakeholder participation in decision-making.

*Keywords: Blockchain, Technology, Democracy, Governance*

## **INTRODUCTION**

The evolution of governance styles has been a dynamic process influenced by historical, cultural, and political contexts. From the ancient city-states of Mesopotamia and Egypt to the modern era of globalization and digital governance, various forms of governance have shaped societies worldwide. The transition to constitutional governance marked significant milestones in history, with pivotal moments such as the establishment of democratic principles in ancient Athens and the drafting of the U.S. Constitution by the Founding Fathers. However, despite the advancements brought about by constitutional governance, challenges such as inefficiencies, lack of

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\* 4<sup>th</sup> year B.A. LL.B student at Dr. Ram Manohar Lohiya National Law University, available at: [akash00official@gmail.com](mailto:akash00official@gmail.com).

transparency, and centralization have emerged. These challenges have led to the rise of blockchain governance as a potential alternative, offering decentralized decision-making processes and enhanced transparency. Blockchain technology's ability to provide secure, transparent, and efficient governance solutions has sparked interest globally, with countries like Estonia, Ukraine, and Australia exploring its applications in areas such as identity verification, electronic voting systems, and land registrations.

## **PROGRESSION IN GOVERNANCE STYLE THROUGHOUT CIVILIZATION**

The majority of countries are currently governed by a constitution. Before the establishment of constitutional governance, various forms of governance prevailed, and those were often shaped by historical, cultural, and political contexts. These governance structures varied widely across different regions and periods. Here are some notable types of governance and timelines that existed before the advent of constitutional governance. This historical context will provide a rich foundation for exploring and understanding how governance has evolved throughout human civilization.

From the city-states of Mesopotamia and Egypt with rulers governing through divine authority<sup>1</sup> to the democratic elements in Greek City-States<sup>2</sup> and the representative governance in the Roman Republic<sup>3</sup>, each era brought forth unique approaches to governing societies. The transition to constitutional monarchies in Europe during the late 17th and 18th centuries, influenced by Enlightenment ideas, legal frameworks and protection of individual rights marked a significant progression towards structured and accountable forms of government<sup>4</sup>.

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<sup>1</sup> Brian Fagan, Ancient Egyptian Civilization, The First Civilizations: Egypt and Mesopotamia, <https://gohighbrow.com/the-first-civilizations-egypt-and-mesopotamia/>, (last visited 5<sup>th</sup> March 2024, 2:30PM).

<sup>2</sup> Greek city states: Examining the Political Landscape of Ancient Greece, Faster Capital, <https://fastercapital.com/content/Greek-city-states--Examining-the-Political-Landscape-of-Ancient-Greece.html>, (last visited 5<sup>th</sup> March 2024, 2:30PM).

<sup>3</sup> Alexander Meddings, How the Roman Republic became the Roman Empire (Jan 30, 2023), <https://alexandermeddings.com/history/ancient-history/how-roman-republic-became-roman-empire/>, (last visited 5<sup>th</sup> March 2024, 3:30PM).

<sup>4</sup> Joerg Knipprath, King vs. Parliament in 17th Century England: From Absolutism to Constitutional Monarchy, Influence on American Governing, <https://constitutingamerica.org/90day-aer-king-vs-parliament-17th-century-england-from->

The American Revolution in the late 18th century further exemplified this shift with the establishment of the United States based on democratic principles and a constitutional framework emphasizing the separation of powers<sup>5</sup>. In more recent history, the 20th century witnessed the spread of democratic governance alongside the rise and fall of authoritarian regimes, showcasing various experiments with hybrid models<sup>6</sup>. The Soviet Union's Communist governance system from 1917 to 1991 highlighted centralized control under the Communist Party.

As we move into the 21st century, globalization and digital advancements have brought about new challenges to traditional governance structures. The rise of international institutions and experimentation with digital governance, including blockchain technology, are shaping the landscape of governance in unprecedented ways. It offers decentralized decision-making processes, transparency, and security through distributed ledger technology, presenting a novel approach to governing systems that holds promise for enhancing accountability and trust in various sectors.

## **EVOLUTION OF CONSTITUTIONAL GOVERNANCE**

The evolution of constitutional governance has been shaped by various civilizations and epochal events. This section traces the origins of constitutional governance from ancient times to contemporary eras, highlighting pivotal moments and influential thinkers along the way.

**Antiquity-** The city-state of Athens, during the 5th century BCE, pioneered democratic principles under leaders like Cleisthenes. Although restricted to male citizens, the Athenian Constitution marked the beginning of participatory governance. Similarly, the Roman Republic, founded in the 6th century BCE, introduced the Roman Senate – a representative body of aristocrats – playing a central role in decision-making. Moreover, the Roman legal tradition, as embodied in the Twelve

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[absolutism-to-constitutional-monarchy-influence-on-american-governing-guest-essayist-joerg-knipprath/](#), (last visited 5<sup>th</sup> March 2024, 4:00PM).

<sup>5</sup> Articles of Confederation, 1777–1781, <https://history.state.gov/milestones/1776-1783/articles>, (last visited 5<sup>th</sup> March 2024, 4:10PM).

<sup>6</sup> The spread of democracy in the 20th century, <https://www.britannica.com/topic/democracy/The-spread-of-democracy-in-the-20th-century>, (last visited 5<sup>th</sup> March 2024, 4:30PM).

Tables, provided an early attempt at codifying laws for public access, laying the foundation for future legal systems.

**Middle Ages**- King John's reign in medieval England brought about tensions between the monarch and the nobility. As a result, the Magna Carta was sealed in 1215, establishing the principle that the king was not above the law. Though initially addressing the barons' concerns, the Magna Carta laid the groundwork for the idea that rulers should be subject to legal constraints, influencing later constitutional developments.

**Early Modern Period**-The English Civil War (1642–1651) and the subsequent Glorious Revolution (1688) played a crucial role in shaping constitutional governance in England<sup>7</sup>. The conflict between the monarchy and Parliament led to the shift towards constitutional monarchy and parliamentary supremacy.

**Enlightenment Era**-Philosophers like John Locke, Montesquieu, and Rousseau significantly influenced political thought during the Enlightenment era. They advocated for limited government, social contract theory, separation of powers, and the protection of individual liberties – ideas that would be foundational to modern constitutional governance.

**United States Constitution**-The Founding Fathers of the United States, inspired by Enlightenment ideals, drafted the U.S. Constitution in 1787. The Constitution established a federal system, with a division of powers among the executive, legislative, and judicial branches, as well as a Bill of Rights protecting individual freedoms.

**Independence Movements and Global Acceptance of Democracy**-The early 19th century saw a wave of independence movements in Latin America, leading to the emergence of newly independent nations. Many of these nations adopted constitutions influenced by European

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<sup>7</sup> THE ENGLISH CIVIL WAR AND THE GLORIOUS REVOLUTION, Press Books, <https://pressbooks.nsc.ca/worldhistory/chapter/the-english-civil-war-and-the-glorious-revolution/>, (last visited 6<sup>th</sup> March 2024, 10:30AM).

Enlightenment ideas and the U.S. Constitution, reflecting a growing global commitment to constitutional governance<sup>8</sup>.

**Post-World War II Developments** -The aftermath of World War II witnessed the establishment of new constitutions in several nations. The Universal Declaration of Human Rights (1948) and subsequent international agreements reinforced the global commitment to individual rights, further cementing constitutional governance as a benchmark for democratic legitimacy.

## **FAILURES OF CONSTITUTIONAL GOVERNANCE**

In constitutional governance, centralized vertical authority has become the main organizational model in society, simply because there has not been a better alternative so far. For the first time in history, citizens can now reach consensus and coordination at a global level through cryptographically verified peer-to-peer procedures without the intermediation of a third party.

The failures of constitutional governance that may necessitate a shift to blockchain governance include challenges such as inefficiencies, lack of transparency, centralization, and difficulties in decision-making processes.

- **Inefficiencies:** Constitutional governance systems can sometimes be slow and bureaucratic, leading to delays in decision-making and implementation.
- **Lack of Transparency:** Traditional constitutional governance lacks transparency in decisions, making it difficult for the public to track and verify actions taken by authorities.
- **Centralization:** Constitutional governance systems often rely on centralized authorities for decision-making, which can lead to power imbalances and potential corruption.
- **Decision-Making Challenges:** Constitutional governance structures face challenges in reaching consensus among stakeholders or resolving disputes efficiently.
- **Security Concerns:** Traditional governance systems may be vulnerable to security breaches or manipulation due to centralized points of control.

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<sup>8</sup> The independence of Latin America, Britannica.com <https://www.britannica.com/place/Latin-America/The-independence-of-Latin-America>, (last visited 8<sup>th</sup> March 2024, 8:15PM).



- Adaptability: Constitutional governance systems struggle to adapt quickly to ever-changing circumstances and technological advancements.

## **ERA OF BLOCKCHAIN GOVERNANCE**

In a thought-provoking interview with Sparkes in 2014, Daniel Larimer articulated a vision where governments become unnecessary, envisaging a scenario where the free market could autonomously provide essential products and services to uphold life, liberty, and property without coercion. He proposed that governments would gradually lose influence to free markets, suggesting that the free market could administer justice more effectively and efficiently than traditional government structures.

Larimer challenged the fundamental purpose of government as a mechanism for establishing global consensus on moral principles, guilt and innocence, and property ownership, foreseeing blockchain technology as a more open, transparent system capable of fulfilling these functions without reliance on force.

This section delves into the realm of blockchain-based decentralized governance, which challenges the established systems of state authority, citizenship, and democracy to varying extents. It explores the potential of blockchain and decentralized platforms as hyper-political technologies capable of managing large-scale social interactions while challenging traditional central authority.

Blockchain governance has the potential to catalyze much-needed reforms in the political and constitutional landscape by offering a secure transaction platform, fostering decentralization, streamlining bureaucratic processes, and promoting transparency. As a decentralized, distributed digital ledger, blockchain technology ensures that transactions are recorded across multiple computers in an immutable manner, preventing alterations to the record. This distributed ledger technology (DLT) maintains copies of transaction records across network nodes to prevent single points of failure.

Blockchain uses a consensus algorithm with human participation. Consensus algorithms are used every time the blockchain decides which data should be considered legitimate and hence stored on the blockchain. Blockchain has a structure in which all participants validate the data and save the

original version of the confirmed data. As a result, once the data is confirmed, which is the same on which consensus is being reached and data saved in blockchain, it can't be altered or fabricated<sup>9</sup>.

By providing an autonomous, transparent, and secure distributed system, blockchain has the potential to eliminate intermediaries in public administration and replace them with an algorithmic confidence system.

- The applications of blockchain extend across various public services such as digital currency/payments, land registration, corporate registration, supply chain traceability, identity management, notarization, healthcare, education, data management, auditing, energy markets, voting, taxation, and legal entities.
- Blockchain governance mechanisms like on-chain voting and Decentralized Autonomous Organizations (DAOs) offer innovative avenues for decision-making processes through community consensus. Citizens' direct involvement in decision-making processes can enhance democracy's efficacy by fostering inclusivity and transparency within governance structures.
- Blockchain governance's flexibility and adaptability enable it to effectively address future emerging challenges.
- Blockchain serves as an irreversible and tamper-proof repository for documents, contracts, properties, and assets.
- Digital ownership of assets stored in the blockchain can be transferred seamlessly through smart contracts- automated self-executing agreements between parties. The technology's automation capabilities coupled with transparency and auditability make it a cost-effective solution for various applications.
- Furthermore, blockchain facilitates the development of censorship-resistant decentralized domain name systems (e.g., Namecoin), decentralized voting systems with tamper-proof ballots (e.g., Bitcongress), and decentralized autonomous societies and organizations.

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<sup>9</sup> All Major Blockchain Consensus Algorithms Explained (Apr 2, 2023), Medium.com, <http://tiny.cc/702jxz>, (last visited 9<sup>th</sup> March 2024, 2:30PM).

- Blockchain promotes a more equitable distribution of power by empowering citizens to self-create their governance structures based on consensus rather than coercion or centralization.
- blockchain services transcend national borders to establish jurisdiction in a global cloud.

The limitations of constitutional governments – characterized by sluggishness, corruption, and limited benefits for the populace – have spurred the emergence of crypto nations that offer do-it-yourself governance services based entirely on blockchain technology (e.g., Bitnation). Through user-friendly apps on smartphones, individuals can engage in various activities such as choosing laws or arbitration processes and executing smart contracts for transactions like land sales or business setups efficiently at minimal costs. Supported by identity verification systems and dispute resolution mechanisms.

As blockchain governance continues to evolve and gain traction globally, it holds the promise of reshaping traditional power dynamics while empowering individuals to actively participate in shaping their collective futures.

This is undoubtedly a cultural shock that will take time for widespread adoption: as discussed, societal maturity in terms of personal responsibility will be achieved, with "authority floating freely" as education is spread and made available to all.

Using Lawrence Lessig's premise that "Code is law," the blockchain produces "absolute law" that cannot be disobeyed<sup>10</sup>. This feature of blockchain allows for the implementation of social science that can replace traditional social apparatuses, such as bureaucracy.

Five rules that should be followed when replacing bureaucracy with the blockchain governance system:

- There should be a statute on Blockchain,
- Transparently disclosing data and source code,

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<sup>10</sup> David G. Post, What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace (Dec 13, 2000), Stanford Law Review, Vol. 52, p. 1439, 2000, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=251014](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=251014), (last visited 10<sup>th</sup> March 2024, 7:30PM).

- There should be an autonomous executing administration,
- Establishing a direct democracy governance system, and
- Creating Distributed Autonomous organizations (DAO).

## **COUNTRIES USING BLOCKCHAIN**

Estonia is using blockchain technology to provide e-IDs to citizens for identity verification purposes. In addition, numerous countries, including Ukraine, Estonia, and Australia, are developing electronic voting systems based on blockchain technology. Honduras and Georgia attempted to use blockchain technology to manage their land registrations. The United States is working to use blockchain technology to record and distribute medical information, while the United Kingdom is conducting research and development to adapt blockchain technology to public services. China has revealed plans to establish a "blockchain city," based on blockchain technology. Australian government start-up in 2018, AgriDigital started using blockchain to simplify agricultural supply chains<sup>11</sup>.

Commodity supply chains, which face the inherent danger of stock and unfair trading, counterfeiting, corruption and financing duplication are seen as one of the domains where blockchain can be employed in its early stages.

It can also improve efficiency in an industry that typically operates in an antiquated manner. Creating a digital title and matching it to payment in an atomic transaction is important for farmers and all sellers because it allows them to keep ownership of their asset until they get payment from the buyer, thereby eliminating counterparty risk. Furthermore, the data recorded and maintained on the blockchain provides transparent visibility into commodity ownership, increasing asset security.

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<sup>11</sup> Roberto Mavilia, SCALING BLOCKCHAIN FOR AGRICULTURAL SECTOR: THE AGRIDIGITAL CASE, <https://www.itema-conference.com/wp-content/uploads/2020/08/ITEMA.2019.55.pdf>, (last visited 10<sup>th</sup> March 2024, 10:30PM).

## USE OF BLOCKCHAIN IN INDIAN GOVERNANCE

The Indian government has taken a keen interest in blockchain technology and its application in the public domain, as indicated by the release of the "**National Strategy on Blockchain**" by MeitY in December 2021, which revealed its vision for using blockchain in various sectors like medical services, agriculture, banking, voting, and e-governance, while laying the groundwork to set up a "**National Blockchain Framework**," under which it will make "Made in India" blockchain technology available for worldwide use by 2027<sup>12</sup>.

Despite the Reserve Bank of India having previously been critical to cryptocurrencies, it is currently working on its own **Central Bank Digital Currency (CBDC)**, the digital rupee, which it plans to issue in the near future.

The government is presently implementing blockchain technology for registration of land, providing digital certificates, and customs duty payments. The New Town Kolkata Development Authority of West Bengal has adopted NFTs, which represent one million property records. The NFTs give proof of land ownership, and all documents embedded with them are tamper-proof, making the land mutation process transparent and eliminating the need for human paperwork and record-keeping.

The municipal corporations of Durgapur and Bankura districts in West Bengal have also developed a blockchain-based platform for issuing legal papers such as birth certificates.

The Uttar Pradesh government, in collaboration with Polygon, has established the "Firozabad Public Grievance Management System," a digital platform based on blockchain technology that allows users to lodge and track complaints.

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<sup>12</sup> Prateek Tripathi, The growing role of Blockchain in Indian Governance, OrfOnline (Nov 27, 2023), <http://tiny.cc/x22jxz>, (last visited 11<sup>th</sup> March 2024, 1:30PM).

## **CHALLENGES**

In the realm of blockchain governance, various challenges exist that impede its effective implementation. These challenges encompass a range of issues such as the **absence of regulatory frameworks, concerns surrounding security and privacy, inadequacies in interoperable infrastructure, as well as inefficiencies and high energy consumption associated with transactions.**

Additionally, the establishment of transaction rules during the design phase poses a significant hurdle, as any subsequent modifications necessitate consensus among authorized users. Questions regarding who holds the authority to enact changes within the system and the protocols governing such modifications are pivotal considerations in blockchain-based systems. These challenges underscore the risks posed by the dominance of private entities within decentralized ecosystems. Vili Lehdonvirta has identified these inherent contradictions within blockchain governance as the '**governance paradox**<sup>13</sup>'. Addressing governance issues through reliance on trusted central parties, such as private oligarchies, can compromise the decentralized nature of blockchain, rendering it more centralized and less valuable compared to traditional governance structures.

Moreover, **complexity** within blockchain networks presents a barrier to comprehension and management, potentially hindering informed decision-making regarding network utility.

**Scalability** concerns persist despite blockchain networks being designed for scalability, leading to sluggish and costly operations that may limit their applicability in large-scale scenarios.

**Security vulnerabilities** also pose a significant threat, necessitating robust security measures to safeguard against fraudulent activities and criminal behavior.

Furthermore, the **absence of backup mechanisms** within blockchain systems leaves data and contracts vulnerable to disruptions in connectivity or transitions to better technologies, potentially

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<sup>13</sup> Vili Lehdonvirta, The blockchain paradox: Why distributed ledger technologies may do little to transform the economy (Nov 21, 2016), Oxford Internet Institute, <https://www.oii.ox.ac.uk/news-events/the-blockchain-paradox-why-distributed-ledger-technologies-may-do-little-to-transform-the-economy/>, (last visited 11<sup>th</sup> March 2024, 2:00PM).

jeopardizing their integrity and execution. There may be no paper-based backup to ensure the existence of data or the execution of contracts.

The **privatization of essential public services and citizens' rights** under market logic erodes protections traditionally provided by the state, transforming government services into profit-driven enterprises.

The emergence of oligarchies within mining corporations raises concerns about **moral hazard and necessitates antitrust measures** to regulate market participants effectively.

The **lack of accountability** stemming from market dynamics or technical deficiencies further compounds governance challenges within blockchain ecosystems.

Ultimately, the concentration of supervisory powers over critical global services within **a dominant techno-elite group without requisite formal legitimacy** underscores the complexities and risks associated with blockchain governance in contemporary contexts.

To make **amendments to the blockchain algorithm**, a distributed system with consensus from all network participants is necessary.

## **LEGAL ISSUES OF BLOCKCHAIN GOVERNANCE**

In common law, a contract is considered executed when two parties agree to exchange anything for consideration. The contract might be either oral or written. The written contract has expanded to include digital contracts, which are signed electronically by the parties involved.

Blockchain technology has enabled the large-scale creation and deployment of smart contracts. Smart contracts use code to describe traditional contract terms through if-then procedures. Transactions or data recorded on the distributed ledger might activate clauses in smart contracts that manage real-world assets such as insurance claims, real estate, etc.

There should be a statute on Blockchain services, but it remains to be seen how legal frameworks will evolve to incorporate smart contracts. However, computer codes cannot fully represent the

understanding between parties. Contracts are both social tools and legal instruments, therefore computer codes cannot account for implied agreements or understandings between parties.

To fully realize the benefits of blockchain technology in land transactions, the technology would be used not only to store land ownership information, but also to serve as a platform for title deed registration, stamp duty payment, utility payment, and other purposes. Land transactions in India are governed by a variety of government and state-specific laws. Interestingly, the central legislation, the Information Technology Act, does not grant legal sanctity to instruments (contracts) effecting a change in title of immovable property (for example, land). Furthermore, the Registration Act, which governs the registration of instruments, including those used in property transactions, requires the parties and witnesses to be present in the registration process<sup>14</sup>.

To deploy blockchain on a large scale, the law must be modified to eliminate the requirement for human presence as the entire process is digital.

## **CONCLUSION**

The emergence of blockchain governance presents a paradigm shift in traditional governance structures by offering innovative solutions to address the limitations of constitutional governance. By leveraging decentralized platforms and consensus algorithms, blockchain governance aims to enhance transparency, efficiency, and citizen participation in decision-making processes.

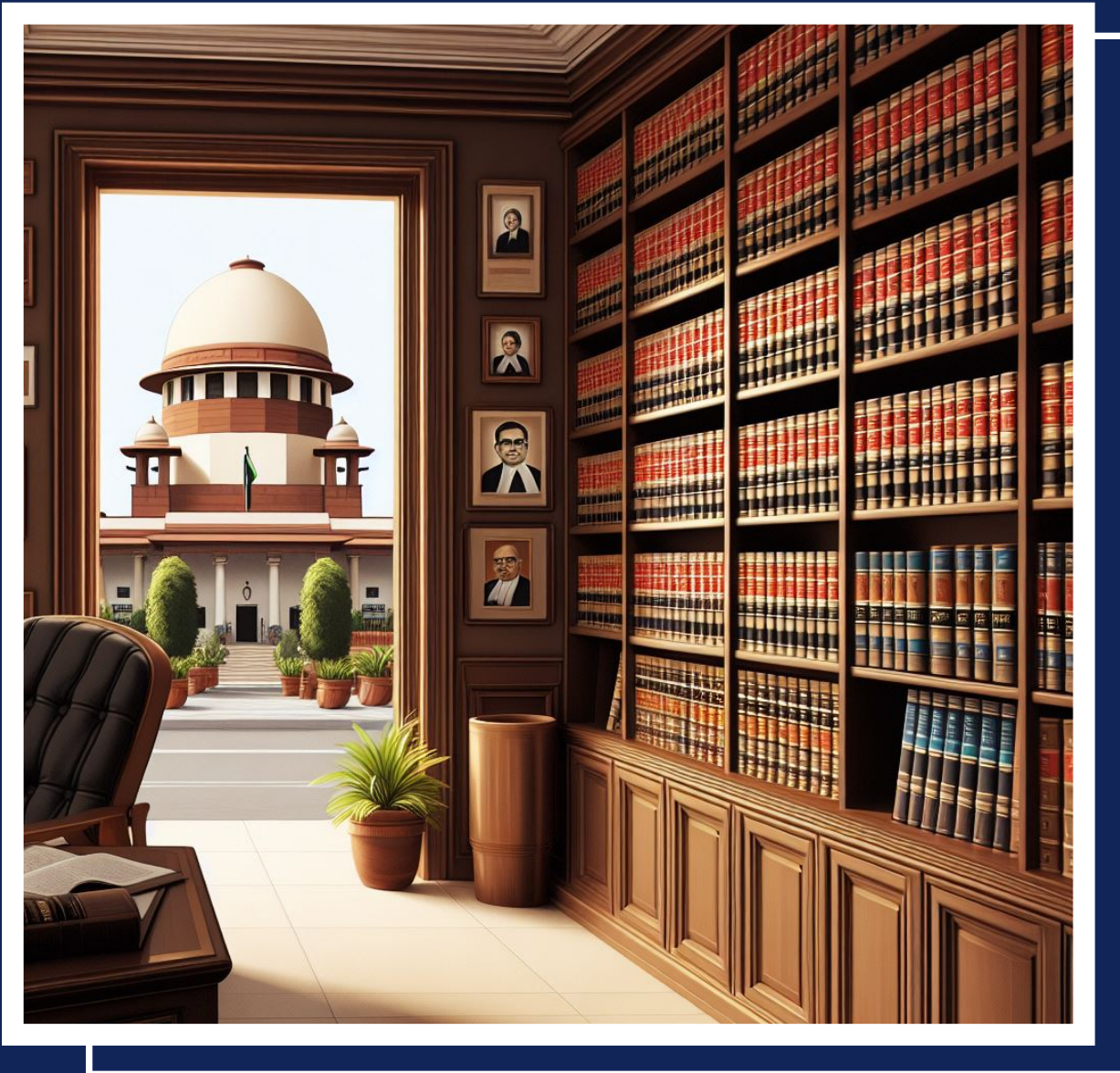
While challenges such as regulatory frameworks, security concerns, and scalability issues persist in blockchain governance, its potential to reshape power dynamics and empower individuals in shaping their collective futures is significant. As countries continue to explore blockchain technology for various public services and applications, the transformative impact of blockchain governance on global governance systems remains a topic of growing interest and debate.

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<sup>14</sup> The Registration Act (1908).





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