



# “Digital Constitutionalism: Protecting Fundamental Rights In The 21<sup>st</sup> Century”

VANDITA SHARMA

LLM STUDENT

AMITY UNIVERSITY, NOIDA

## ABSTRACT

Digital constitutionalism refers to the collection of legal doctrines, statutory regimes, institutional norms, and normative arguments that aim to defend constitutional principles within a context characterised by platforms, datafication, surveillance, and automated decision-making. This paper defines the concept, surveys global developments in the context of future digital constitutionalism systems, presents a comparative analysis of India, South Africa, and the United States, and also suggests doctrinal and institutional proposals for law and policy. The paper takes cognisance of the principal cases, such as *K.S. Puttaswamy v. Union of India* and *Carpenter v. United States*, as well as legislative evolution in the form of the European GDPR, the EU Digital Services Act (DSA), and India's Digital Personal Data Protection (DPDP) Act 2023. The chapter proposes three models of categorisation of the emerging scholarly approaches to digital constitutionalism and presents three categories of critical arguments that have been moved to the theories of digital constitutionalism. The chapter concludes with a personal counter-critique to these views.

This research aims to analyse the concept of Digital Constitutionalism as a spirit of law, to examine the impact of technology on fundamental rights, to conduct a comparative study, and to balance the digital innovation with human rights in the future perspective of governance. This research explores the evolving and dynamic concept of digital constitutionalism in India, while raising an important question regarding its potential outcomes and transformations over the next decade...

**Keywords:** Digital constitutionalism, DPDP Act 2023, transformative constitutionalism, digital governance, accountability, technology, human dignity.

## INTRODUCTION

The topic of digital constitutionalism is becoming increasingly important in the current debate on the effects of digitalisation. Almost every fundamental right is in one or more aspects genuinely affected by the changes triggered by digitalisation, old conflicts break out, and new conflicts arise.

Constitutions articulate fundamental rights and institutional arrangements aimed at limiting state power and protecting human dignity. The rise of digital platforms, pervasive data collection and algorithmic governance complicates the exercise and protection of those rights in at least three ways. The Internet will most probably transform in the coming decade. Through the Metaverse, traditional and new norm entrepreneurs are bringing into being a new structure of the Internet. The indiscriminate transformation of digital technologies, fuelled by 5G connectivity and artificial intelligence technologies, remakes the status quo of the infrastructure of the Internet as well as of its governance in ways that have never been seen before. At the back of technical issues, nonetheless, this tension conceals an interest in reconfiguring Internet governance from first principles, with implications for the general balance of power and ability to assert rights and liberties. The infospheric splitting of the global infosphere into digital spaces of national sovereignty, the heightening bifurcation of Internet-based technologies on ideological fault lines, and the conflicting dynamics facing both public and private powers can not only challenge the safeguarding of core rights but threaten traditional constitutional norms on a larger scale. As the Internet keeps developing with advancements in digital technologies, constitutionalism moves out of the state as well.

"Digital constitutionalism" is an umbrella for the legal, institutional and normative work to implement constitutional values like privacy, free expression, equality and due process in terms of rules and governance structures appropriate to a digital age. It includes judicial interpretation, statutory regulation, agency enforcement, and non-state governance. The key elements of digital constitutionalism might include: Digital Rights, Data Protection and Privacy, Internet Governance, Cybersecurity, Digital Economy, Access and Digital Divide, Content Regulation, Algorithmic Transparency and Accountability, International Cooperation and Digital Sovereignty.

Therefore, this Research unpacks how the charm of accommodating the promises of digital technologies has led to neglecting and forgetting the role of constitutionalism, and then constitutional law in protecting fundamental rights and limiting the rise and consolidation of unaccountable powers abusing constitutional values.

## CONSTITUTIONAL CROSSROADS: RIGHTS AT STAKE AND DOCTRINAL PATHS

This identifies the **Principal Constitutional Rights** at stake and summarizes doctrinal responses as follows:

- Privacy and self-determination-

By states and private firm that threatens autonomy, dignity and informational privacy. The doctrine includes privacy as a constitutional right and subjects state intrusions to proportionality tests. In India, the nine-judge bench of the Supreme Court in *K.S. Puttaswamy v/s Union of India (2017)*<sup>1</sup> held that privacy is inherent in life and personal liberty<sup>2</sup>, and that any invasion must pass the tests of legality, necessity, and proportionality. This decision provided the doctrinal basis for future regulation and judicial oversight of digital applications.

In support of case, *Shreya Singhal v. Union of India 2015*.<sup>3</sup>

- Freedom of Expression and Governance

Platforms ply control over speech through content temperance, which raises issues of private suppression, translucency in temperance practices, and whether indigenous speech norms apply. The attendant gap in regulation has created calls for procedural protection and translucency conditions.

- Equality and Algorithmic Bias

Automated decision-making systems can amplify and perpetuate bias, with discriminatory impact in credit, employment, policing and social benefits. Constitutional equality protections demand not just a non-discriminatory intent but also concern with disparate impact, explainable and remedial mechanisms, describe. Courts and regulators are now insisting on audits, data-provenance examination and impact assessments in settings where algorithmic systems generate consequential decisions.

- Access and Social - Economic Rights

The digital divide generates exclusion from citizenship and civic engagement. An increasing jurisprudence regards digital access as part of the enjoyment of other rights; recent Indian case law and writing signals toward the recognition of digital inclusion under Article 21's right to life and dignity.

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<sup>1</sup>K.S. Puttaswamy case is cited as (2017) 10 SCC 1 and also as AIR 2017 SC 4161 Case-  
[https://en.wikipedia.org/wiki/Puttaswamy\\_v.\\_Union\\_of\\_India](https://en.wikipedia.org/wiki/Puttaswamy_v._Union_of_India)

<sup>2</sup> Art. 21 of the Indian Constitution- <https://blog.ipleaders.in/article-21/>

<sup>3</sup>Shreya Singhal v. Union of India case is AIR 2015 SC 1523 and (2015) 5 SCC 1 Case-  
[https://en.wikipedia.org/wiki/Shreya\\_Singhal\\_v.\\_Union\\_of\\_India](https://en.wikipedia.org/wiki/Shreya_Singhal_v._Union_of_India)

## Fundamental Rights in Digital Constitutionalism in the 21<sup>st</sup> Century

Digital constitutionalism refers to the basic principles and normative framework that govern the digital realm and seeks to advance and protect individual rights, and the right to healthy and sustainable environments in the digital sphere. There are some essential rights associated to digital constitutionalism:

- Right to sequestration protects your particular data and provides you with control over how your information is collected, used, and participated online.
- Right to Freedom of Speech protects your speech and expression online, while balancing your freedom of expression against the capability to alleviate damages, for illustration proscribing hate speech, or intimation online.
- Right to Access provides indifferent access to digital technologies and the internet and promotes digital addition.
- Right to Data Protection protects abuse of your particular data, provides you with assurances about the translucency and responsibility of the running of your data.
- Right to Cybersecurity protects you, your association and the public from cyber pitfalls, and ensures your digital systems and data maintain their integrity and security.

Protection of these fundamental rights involved in the 21<sup>st</sup> century;

- Legislative Frameworks: Countries enact laws like the General Data Protection Regulation in the European Union for data protection.
- Technological Measures: Use of encryption system, secure protocols and privacy policy enhancing technologies.
- International Solutions: Global collaboration to address cross border digital challenges and to harmonize the regulations with supportive solutions.
- Digital Literacy and Awareness: Providing authorities to the users to navigate and protect themselves in the digital realm.
- Responsibilities: Technical co. and service providers look into the safeguard for the rights of digital world also respect to the authorities.

For instance,

“TODAY PEOPLE DO NOT CONSIDER THE GOVERNMENT AS AN OBSTRACLE. RATHER, PEOPLE SEE OUR GOVERNMENT AS A CATALYST FOR FEW OPPORTUNITIES”

These lines indicate that, Digital India is a programme to transform India into a digitally empowered society and knowledge economy. According to our Prime Minister Mr. Narendra Modi, started in 2015, its focus is on being transformative to realize as,

IT (Indian Talent) + IT (Information Technology) = IT (India Tomorrow) <sup>4</sup>

It's an Umbrella Programme that covers multiple Government Ministries and Departments. It weaves together a large number of ideas and studies into a single, comprehensive vision so that each of them is seen as part of a larger thing. Each individual element stands on its own, but is also part of the larger picture. Digital India is to be coordinated by Ministry of Electronics & Information Technology (MeitY) and enforced by the entire Government. The programme aim pulling together numerous being schemes. The schemes will be restructured and re-focused and will be implemented in a synchronized manner. Numerous rudiments are only process advancements with minimum cost counter accusations. The common branding of programmes as Digital India highlights their transformative impact.

This aims to nurture a Digital India thereby making every household and every individual digitally empowered... this manifesto has a major focus on the e-governance as BJP believes IT and constitution are the great enabler to empowerment, equity and efficiency.

They mainly focus on small sector villages, participated governance, digital learning, telemedicine, and healthcare and E-Bhasha. <sup>5</sup>

## COMPARATIVE ANALYSIS: INDIA, USA, SOUTH AFRICA

The question is not just about whether constitutional democracies could inject democratic values in the technological architecture. Technology is just a means for mediating the relationship of power between humans. Behind digital technologies, including artificial intelligence, there are actors defining the characteristics of these systems. These technologies are not autonomous or neutral but make decisions about human beings based on principles which are primarily shaped by other human beings. In order to face the challenges of 'algocracy'<sup>6</sup>, it is critical to find a way to preserve the role of human expertise.<sup>7</sup> Therefore, the primary challenge for constitutional law in the algorithmic society is not to regulate technology but to address the threats coming from the rise of unaccountable transnational private powers, whose global effects increasingly produce local challenges for constitutional democracies.

<sup>4</sup> Digital India- - <https://www.digitalindia.gov.in/>

<sup>5</sup> 'Digital India Movement'-

<https://www.cmai.asia/digitalindia/#:~:text=BJP%20Vision%20for%20Digital%20India,and%20every%20individual%20digitally%20empowered..>

<sup>6</sup> John Danaher, 'The Threat of Algocracy: Reality, Resistance and Accommodation' 29 Philosophy & Technology 245 (2016)

<sup>7</sup> Frank Pasquale, New Laws of Robotics: Defending Human Expertise in the Age of AI (Belknap Press 2020).

In a sense, the mission of modern constitutionalism is to protect fundamental rights while limiting the emergence of powers outside any control.<sup>8</sup>

There is a comparative analysis for the changing strategies of constitutionalism due to digital evasion in social society. For instance:-

Comparing India with US- Both India and US have written constitution in the world. While US constitution is one of the oldest constitution. Both countries practice federalism also shares powers between central and state authorities. In India, the Seventh Schedule includes Union, State and Concurrent Lists, whereas the US Constitution divided its power into the federal government and the states. Here, India has the Lok Sabha (House of the People) and Rajya Sabha (Council of States) while on the other side US has the House of Representatives and the Senate. For instance, India Preamble starts with “We the People of India...” similar to US Preamble which begins with “We the People...”

As Indian Constitution is the largest constitution that portrays of- 448 Articles, 25 parts and 12 Schedules with 101 amendments. Whereas, the US Constitution is the shortest, contains 7 Articles and 27 amendments. For the citizenship, in India provides Single Citizenship for all Indians under Art. 5 to 11. While US Constitution allows for Dual Citizenship with the US and another country.

Therefore, The US Constitution has a clear division of legislative powers, with both the federal government and states being sovereign within their respective spheres of governance. The U.S. addresses the digital divide through targeted programs and policies rather than establishing a broad constitutional right to digital access. Access is largely viewed as a market function.

The Supreme Court has adapted doctrine to digital contexts for e.g. *Riley v. California* recognized the distinct privacy interests in cell-phone contents; *Carpenter v. United States*<sup>9</sup><sup>10</sup> limited the third-party doctrine for cell-site location information. However, unlike many statutory regimes elsewhere, the U.S. lacks a comprehensive federal data protection statute; data protection is a mosaic of sectoral laws, state laws for e.g. California Privacy Rights Act, and judicially developed constitutional protections. This structural difference means that rights protection frequently depends on either judicial constitutionalism or piecemeal statutory initiatives rather than a single national data-protection act.<sup>11</sup>

Strengths of US: Strong speech protections and evolving privacy case law.

Challenges of US: Regulatory fragmentation and limited federal statutory coverage of data protection.

<sup>8</sup> András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017); Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (2012) NYU, Public Law Research Paper No. 10–87 November 2021

<sup>9</sup> *Carpenter v. United States*, 585 U.S. 296 (2018) Case-[https://www.supremecourt.gov/opinions/17pdf/16-402\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf)

<sup>10</sup> [https://en.wikipedia.org/wiki/Carpenter\\_v.\\_United\\_States#:~:text=The%20Court%20held%20that%20government,cellphones%20without%20a%20search%20warrant.](https://en.wikipedia.org/wiki/Carpenter_v._United_States#:~:text=The%20Court%20held%20that%20government,cellphones%20without%20a%20search%20warrant.)

<sup>11</sup> [https://www.supremecourt.gov/opinions/17pdf/16-402\\_h315.pdf?](https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf?)

Whereas, Compared to Indian digital constitutionalism, which is still evolving with the introduction of the Digital Personal Data Protection Act, 2023, South Africa's model is more firmly rooted in its Constitution of 1996, which emphasises human-centred security and social justice. The Protection of Personal Information Act (POPIA), enacted in 2013 and fully enforced from 2020 onward, establishes comprehensive data-protection rules and an independent information regulator. Inspired by the EU's GDPR, POPIA adopts a rights-oriented approach that aligns with South Africa's constitutional right to privacy and broader socio-economic rights, thereby harmonizing statutory protections with constitutional mandates.

It also controls cross-border data transfers by requiring equivalent protection levels, reflecting global data-protection trends. At the same time, the South African Constitutional Court has played a crucial role in checking governmental overreach, notably limits mass surveillance in the absence of unambiguous legal authorisation. However, challenges remain particularly regarding enforcement capacity and balancing competing social policy objectives within a context of ongoing socio-economic transformation, issues that India is only beginning to grapple with in its own digital constitutionalism framework.

Strengths of South Africa: A constitution steeped in dignity and equality; potential for expansive remedial orders.

Challenges of South Africa: Implementation capacity, uneven digital infrastructure and resource constraints.

In the end,

Indian courts, including the Supreme Court, have laboriously interpreted and expanded the compass of indigenous rights to encompass digital realities. India's DPDP Act 2023<sup>12</sup> constitutes an important statutory corner, securing a concurrence- concentrated statutory frame for digital particular data processing and constructing executive structures for enforcement. Indigenous justice in India acknowledges sequestration as a indigenous right for e.g., *Puttaswamy v. Union of India, 2017*,<sup>13</sup> not completely substantiated then but central to the statutory encouragement.

The DPDP Act operates within this indigenous frame, making sequestration rights functional while maintaining the central part of courts in resolving state intrusions and gruelling statutory boundaries. Challenges in perpetration involve nonsupervisory capability, supervision of state access, and administering private- sector compliance within a platform- dominant request.

Strengths of India: Robust constitutional text, an activist apex court willing to extend rights to the digital space, and recent legislation establishing baseline data obligations.

<sup>12</sup>Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1.-

[https://en.wikipedia.org/wiki/Puttaswamy\\_v.\\_Union\\_of\\_India](https://en.wikipedia.org/wiki/Puttaswamy_v._Union_of_India)

<sup>13</sup> DPDP ACT 2023 <https://www.meity.gov.in/static/uploads/2024/06/2bf1f0e9f04e6fb4f8fef35e82c42aa5.pdf>

Challenges of India: A lag between legislative policy and effective enforcement; technical and administrative capacity constraints; tensions between digital ID programs and privacy protections.

## PERSPECTIVE IN 21<sup>ST</sup> CENTURY AND FUTURE ASPECT

Towards a robust of Digital Constitutionalism –

### COMPARATIVE HIGHLIGHTS:

- Constitutional protection of digital rights: South Africa's implied constitutional privacy right is more normatively clear than India's or the U.S. India could opt for a constitutional amendment or judicial development to similarly embed digital rights.
- Independent regulators: Both DPDP and POPIA provide for regulators, but actual independence is essential. Insights from South Africa's Information Regulator could make India's Board stronger.
- Algorithmic accountability: New challenges require acknowledging a right to explanation and effective human oversight. This ought to be enshrined in law in India and debated in U.S. constitutional jurisprudence.
- Cross-border harmonisation: Convergence at the international level is required to balance constitutional safeguards against worldwide data flows. India's DPDP will need to transition towards adequacy frameworks like that of the EU.
- Platform constitutionalism: Private actors would have to be made to uphold constitutional norms of free expression, equality, and remedy. Transparency reports, notice-and-appeal processes, and oversight boards can inculcate these values.
- In the 21st century, Judicial recognition of digital inclusion, in 2024–2025, Indian courts and commentators emphasised the exclusionary effects of mandatory e-KYC and recognised digital access as core to exercising other constitutional rights, signalling the judiciary's concern for access and socio-economic equality in digital governance, [Internet Freedom Foundation].

Digital constitutionalism is the normative endeavour of making sure basic rights develop together with technology. India's Puttaswamy judgment and DPDP Act represent an improvement but expose holes in state responsibility and algorithmic regulation. The U.S. exemplifies the strength of constitutional adjudication but suffers from statutory fragmentation. South Africa, in its transformative constitutionalism and POPIA, provides the most complete model.

The future of constitutionalism of the digital era depends upon the instillation of constitutional values within statutory regimes, maintaining autonomous supervision, consolidating international safeguards, and advancing constitutional protection to governance on private platforms. Dignity, privacy, equality, and freedom only hold meaning in the 21st century through such a strategy.

## ANALYSIS OF DIGITAL PERSONAL DATA PROTECTION BILL, 2022:

As per the DPDP Act, the government analysed the Digital Personal Data Protection Bill, 2022:

The Digital Personal Data Protection Bill, 2022, introduces a new framework for personal data protection, making it paramount to comprehend and understand its applicability and functions. The Government of India sees this released bill as one of the parts of its larger vision of a Digital Economy. This vision will include a comprehensive “Digital India Act” that would, in due course of time, replace the existing Information Technology Act, 2000. Hence, it becomes crucial to take a closer look at its provisions, implications and shortcomings, considering its potential to impact our day-to-day lives.

It is important to note that the DPDP Bill, as compared to the earlier legislation, does not deem social media platforms that reach a certain user threshold to be SDFs automatically. This approach appears to be based on the same principles as the government's recent legislation, which requires corporations to take accountability for any grievances or wrongs perpetrated on their platforms.

**PENALTIES:**

It imposes few penalties,

The proposed DPDP Bill, 2022, establishes severe penalties for violations of any of the legislation's provisions, which will be determined by the Data Protection Board of India. It provides financial penalties with a cap of ₹500 crores, which proves to be a much higher quantity as compared to the PDP Bill, 2019. The bill does not allow data principals to seek compensation from data fiduciaries for damages incurred because of unlawful processing. In addition, the legislation imposes obligations on data principals, and if they fail to comply with the regulations, fines of up to ₹10,000 can be levied.

However, this effort appears to be aimed at establishing a hassle-free and quick justice delivery system.

**CONSTITUTIONAL ANALYSIS:**

The above Bill, while having important repetitions of data privacy, also has its own drawbacks.

According to the case of *Maneka Gandhi v. Union of India 1978*<sup>14</sup>, an approach that is 'fair, equitable, and reasonable' must be followed if there shall be a violation of Article 21. Similarly, Justice *K. S. Puttaswamy & Anr. V. Union of India & Ors* talked about the criteria of proportionality and added that establishing a delicate line between the state's interest and individual privacy is important, which can be made possible by a data regime.

<sup>14</sup> Maneka Gandhi v. Union of India is (1978) 1 SCC 248- <https://www.lloydlawcollege.edu.in/blog/maneka-gandhi-vs-union-of-india.html>

Thus, the age of the digital consent should be the same, it is the problematic issue consist of three reasons, they are-

- High threshold of 18 years ignores growing ability since it fails to recognize that a toddler's consent differs from that of a teenager.
- It would result in uneven access to the internet, and lastly,
- Needing parental agreement would impede children's independent growth since parents may not want their children exposed to opposing perspectives.

Therefore, these limitations violate India's commitments under the Convention on the Rights of the Child.

## CONCLUSION

Digital constitutionalism is not a single doctrinal turn but a multi-dimensional project: to preserve constitutional values (privacy, dignity, equality, free expression, accountability) in a society mediated by data and algorithms. Statutory frameworks like India's DPDP Act and South Africa's POPIA are essential building blocks for operationalising these values, while constitutional adjudication, as seen in U.S. cases like the Carpenter case that remains an indispensable corrective to both state and private overreach. The future will demand stronger institutions, clearer legal standards for algorithmic governance, cross-border cooperation, and sustained democratic engagement. Only through a combination of statutory clarity, judicial protection, institutional capacity, and civic participation can constitutionalism be meaningfully extended into the 21st-century digital domain.

'The constitutional effect of the digital revolution makes evident that the traditional model of rights, privacy, free speech, equality, and due process has to be reinterpreted to respond to technological intrusions and the regulation of data.' To answer the questions posed, Digital constitutionalism is therefore a normative and institutional response that carries constitutional guarantees into cyberspace, with the purpose of making state and private power answerable to constitutional principles. India's first concrete action in this direction is the Digital Personal Data Protection Act (DPDP), 2023, which puts individual data rights into code and provides an oversight mechanism. But its wide state exemptions and narrow regulatory autonomy challenge the robustness of India's pledge to privacy and autonomy. Research has shown that a comparative examination establishes that the United States essentially depends on judicial development via the Fourth and First Amendments, whereas South Africa incorporates express constitutional privacy safeguards through its POPIA and revolutionary jurisprudence. Both models represent a contrasting amount of liberty, regulation, and technological innovation. Together, these frameworks show that the future of digital constitutionalism is in combining basic rights with adaptive legal design, securing human dignity, accountability, and transparency in the architecture of the digital state.

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