

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 3**

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**2021**

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# Constitutional Challenges and Rule of Law

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## ABSTRACT

*Through the course of this research paper, the authors aim to draw out the significance of rule of law and present it as a framework within the domain of constitutional legality in decision making that restricts the fundamental abuse of power. The research paper starts with the introduction followed by the challenges faced by the Constitution of India along with the meaning of rule of law. Further the sub topics like constitutional challenges faced by religious minority, secularism in India, the fundamental freedom provided by Constitution of India, and the citizenship provisions are also discussed. This paper also deals internet shutdown as an important challenge of Indian constitution. The objective of this research paper is to find out the implication of rule of law and to analyse the challenges faced by Constitution of India.*

**Keywords:** *Constitutional Challenges, citizenship, legislature, law commission*

## I. INTRODUCTION

Constitution of a country represents the ideals and aspirations of a society. Indian Constitution was framed after long struggle for freedom and the values people sought throughout that struggle is collectively enshrined in the Constitution of India.

Indian Constitution was a result of Constituent assembly debates carried on over 2 years 11 months 18 days involving diverse views of members about where to put a certain idea as a right or directive principle depending on the geographical, political, social, economic and cultural spectrum<sup>3</sup>. A detailed study of these debates suggests that some of these views became part of the Constitution while others did not.

Over the years, the Indian society has evolved economically and politically. While economic progress has brought about prosperity to the people, their lives have also been equally evolved. The levels of education and literacy has improved with people becoming aware of their rights. Also, with the fast paced information technology revolution the ways of interacting in the society and public delivery of services have changed drastically. In these changed times some

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<sup>3</sup> Transcripts of the Constituent Assembly Debates, B. Shiva Rao, The framing of India's Constitution, in 5 volumes (New Delhi: Indian Institute of Public Administration, 1968).

laws become inconsistent with the smooth working of the society. Rather than a regulation they become hindrance which we are termed as challenges to the rule of law.

## II. RULE OF LAW AND CONSTITUTION

“The rule of law is the life-wire of every successive democratic society; without it the society becomes lifeless.” The Constitution of India proclaims that we are a Democratic, Secular and a Socialist Republic. The Rule of law administers our nation that ‘equality before law’ and ‘equal protection of law’ are the most basic right presented on its citizens.

Rules of law contain three principles as expressed beneath:

1. Supremacy of Law
2. Balance under the watchful eye of Law
3. Predominance of Legal Spirit

The Constitution of India has been made the incomparable law of the nation and different laws are required to be in conformity with the Constitution. Any law which is found infringing upon any arrangement of the Constitution is declared invalid.

In India, the significance of rule of law has been greatly extended and is viewed as a part of the essential structure of the Constitution and, subsequently, it can't be revoked or crushed even by Parliament. It is additionally viewed as a part of natural justice.

In *KeshavandaBharti vs. State of Kerala*<sup>4</sup>, Supreme Court articulated the standards of law as one of the most significant viewpoints of the doctrine of basic structure.

In *Menaka Gandhi vs. Union of India*<sup>5</sup>, Supreme Court declared that Article 14 strikes against arbitrariness.

### (A) Constitutional Viewpoint

The Constitution of India guarantees equality before the law, as an aspect of the rule of law, under Article 14 providing equality before law and prohibits unreasonable discrimination between persons<sup>6</sup>. Under Article 32, the Supreme Court has power to issue writs in the nature of Habeas Corpus, mandamus, prohibition, quo warrantor and certiorari. Article 15 and 16 of right to equality and Article 19, 20 and 21 in form of right to life and liberty are provisions of our Constitution to this affect.

From a poor person to the president, be it a police constable or a collector, are treated by law.

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<sup>4</sup> KeshavandaBharti vs. State of Kerala, AIR 1973 SC 1461

<sup>5</sup> Menaka Gandhi vs. Union of India, AIR 1978 SC 597

<sup>6</sup> Article 14, The Constitution of India, 1949

Thus, the Indian Constitution effectively applies the rule of law. The Supreme Court in the case of *Indira Nehru Gandhi vs. Raj Narain*<sup>7</sup> held that the rule of law embodied in Article 14 is the 'basic structure' of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the constitution.

### **(B) Citizenship and Rule of Law**

Constitution is the supreme law of the land determining who are its citizens. In India Article 5 to 9 of the Indian Constitution determine who are Indian Citizens at the commencement of the Constitution and Article 10 provides for their continuance as such citizens subject to the provisions of any law that may be made by the Parliament. The Citizenship provisions provided in the Constitution of India were enacted post-independence and the subject of citizenship was addressed to those times and future provisions were left for the parliament to decide. The recent Citizenship amendment act 2019<sup>8</sup> is one such addressing to the challenges giving the Indian citizenship to the persecuted minorities in the neighbouring religious states. While it's the prerogative of the legislature to decide who is to be given citizenship, the topic has become much debated given the lack of objective criteria in choosing how to single out the people from these countries to be given Indian citizenship<sup>9</sup>.

### **(C) Free Speech, Dissent and Rule of Law**

Article 19 of the Constitution provides the fundamental freedoms to every individual<sup>10</sup>. These, inter alia, include the Right to freedom of speech and expression. While the fundamental liberty of thought remains intact, the mode of delivery and transmission of information to person and public(masses) have undergone a sea change. While the traditional means of print media and TV channels still command audience, the Information Technology revolution has led to a new mode of information flow at a supersonic speed, many a times source untraceable. While this enhances free speech, on the flip side it reduces the authenticity of information and leads to an 'Infodemic' often comprising of Fake News, Propaganda News, Targeted news, etc. Thus, new methods bring new challenges.

#### **1. Internet Shutdown**

Another important challenge is on the question of Internet shutdown. While on one hand internet has become so essential that access to internet be declared as fundamental right by

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<sup>7</sup> Indira Nehru Gandhi vs. Raj Narain, AIR 1975.

<sup>8</sup> Bhat, M. (2019). The constitutional case against the Citizenship Amendment Bill. Economic and Political Weekly.

<sup>9</sup> Tiwari, S. G. (2020). The Issue of Citizenship Amendment Act, Human Rights and Democracy in India. Studies in Indian Place Names, 40(1), 1175-1184.

<sup>10</sup> Article 19, Constitution of India, 1949

courts, on the other hand governments choose internet shutdown as the first response in law and order situation<sup>11</sup>. In response to the plea against the suspension of internet providers in Jammu and Kashmir since last August, a three-judge bench of the Court insisted that the privilege to the right to freedom of speech and expression as ensured to all citizens under the first section of that article, covers the option to go online. The challenge is to decide how essential is access to internet and if it is secured under article 19 of the constitution.

## **2. Sedition**

The Sedition Law under section 124A of IPC is a British era provision and gives government the power to use it to ensure security of state, it has often been alleged to be misused in the daily course of public dealings<sup>12</sup>. While the courts and law commissions have recommended deletion of this provision from statute books for long, the sensitivity of security establishments and the lack of alternate legal backing to make preventive arrests in cases of suspicion requires this provision to stay. Another related term is Preventive detention, which is provided under Article 22 of the Constitution but faces similar issues.

### **III. COURTS AND RULE OF LAW**

Charles Evans Hughes said, “We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution”.

The presence of an independent Judiciary is the bulwark of democracy. India being the biggest democracy, our Constitution envisages the establishment of an independent and integrated Judiciary. The independence of the judiciary has been ensured by providing judges a security of tenure, provision for not demising their salaries, allowances and other emoluments while they hold the office and an elaborate process for removal which reinforces the principle of rule of law. These safeguards for judges have been provided because separation of judiciary from executive is one of the essential features of our Constitution as is also envisaged by Article 50. There have been some challenges in interpretation of the provisions relating to appointment and transfer of Judges to higher judiciary due to some ambiguities present therein.

First and foremost, while Article 124 provides for appointment of judges to the Supreme Court by the President after consultation with the Chief Justice of India, the Article is silent about the process to be followed for the appointment of Chief Justice itself. This void was being filled

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<sup>11</sup> Damania, F. (2001). The internet: Equalizer of freedom of speech-A discussion on freedom of speech on the internet in the United States and India. *Ind. Int'l & Comp. L. Rev.*, 12, 243.

<sup>12</sup> Section 124A of Indian Penal Code, 1860

by following the convention of appointing the senior most judge of the supreme court as the Chief Justice of India since the time of Independence. In the year 1957 that the seniority convention came into contention when Law Commission headed by M.C. Setalvad in its report recommended that seniority should not be the sole criterion for appointment as the Chief Justice of India and 'merit' should be taken into account but the recommendation of the Law Commission was not accepted. It was only after the delivery of the landmark judgment in the case of *Keshavananda Bharati v. UOI*<sup>13</sup> which didn't go down well with the Executive when the convention was first broken. Three seniors most judges- Justices Shelat, Hegde, Grover who gave the majority judgment in Keshavananda were superseded to appoint Hon'ble Justice A.N. Ray as the CJI who was one of the judges delivering the minority opinion. This is also known as the **first instance of supersession**.

But the question remains, can we say that all the challenges are over when the convention of appointment of the senior most judge of the supreme court as the CJI is followed? Is there nothing which threatens the rule of law now? The answer to this became evident when we saw 4 puisne judges of the SC holding a public press conference against the CJI. Therefore, the challenges to the independence and efficient working of the courts of country and consequently, the rule of law still remain.

Second constitutional challenge concerning the Judiciary is the appointment and transfer of judges to the constitutional courts. While Article 124 provides for the appointment and transfers of the Judges of the SC by the President after "consultation" with the CJI, the word consultation has been interpreted by the Hon'ble SC as "concurrence"; thereby giving birth to the Collegium system starting from the First Judges case (*S.P. Gupta v. UOI*<sup>14</sup>) leading upto the Fourth Judges case (whereby NJAC was struck down as being unconstitutional). A robust Memorandum of Procedure for appointment and transfer of judges to the Constitutional Courts needs to be put to addresses the concerns of transparency and upholds rule of law. It is the need of the hour to muster the faith of the people in the organs of the State and thereby meet our Constitutional ideals and aspirations.

#### **IV. CONSTITUTIONAL CHALLENGES FACED BY RELIGIOUS MINORITIES IN INDIA**

One great objective of the Constitution was to restrain majority from oppressing minority or encroaching upon their just rights, so does India's Constitution encompass provisions that emphasize complete legal equality of its citizens regardless of their religion and creed, and

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<sup>13</sup> Keshavananda Bharati v. UOI (1973) 4 SCC 225: AIR 1973 SC 1461

<sup>14</sup> S.P. Gupta v. UOI, AIR 1982 SC 149, 1981, 1982 2 SCR 365.

prohibits any kind of religion-based discrimination<sup>15</sup>. In one of the cases it was stated that “whatever the attitude of the State towards religions, religious sects and religious denominations; the religion cannot be mixed with any secular activity of the State.”<sup>16</sup> However:

#### **(A) Minorities - A term undefined in the Indian Constitution**

The concept of minority and minority rights is not much settled even after 70 years. The foremost challenge is how to define the term Minority<sup>17</sup>. Articles 29, 30, 350A, and 350B of the Constitution use the word ‘minority’ and its plural forms, but don’t define it completely<sup>18</sup>. The Supreme Court of India in *TMA Pai Foundation & Ors v. State of Karnataka & Ors (2002)*<sup>19</sup> has held that for the purpose of Article 30 of the Indian Constitution, a minority, whether linguistic or religious is determinable with reference to a state and not by taking into consideration the population of the country as a whole. The Jain’s demand was endorsed by the National Commission for Minorities in India, but the SC without making a clear decision and left the matter to the central government of India<sup>20</sup>.

While the topic of minority is politically sensitive and technically complex, it requires indomitable political will to make even slightest changes in the minority legal structure. Also, classification into minorities has issues based in criteria, levels, state wise, time period, etc. Thus, more than minority rights, the challenge is who are the minority.

## **V. CONCLUSION**

“Constitution is a vehicle of life for the citizens of the country and its spirit is always the spirit of all ages.” The Constitution of India carefully tailored by Constituent assembly which was carried on over 2 years 11 months 18 days to suit the needs of the Indian people.

Before the formation of constitution, during World War II, for instance, the right to free speech was reduced – British installations were plastered with a poster that read, “Careless talks costs lives”.

After the formation of the Constitution of India borrowed and inspired from the Constitution of various countries lead it to have many distinctive features of its own. Despite having many characteristics, there are some challenges as well. These are significant difficulties looked by the Indian Constitution. Our Constitution makers were farsighted and given numerous answers

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<sup>15</sup> Balaji v. State of Mysore, AIR 1963 SC 649; Indra Sawhney v. Union of India, AIR 1993 SC 447

<sup>16</sup> S. R. Bommai v. Union of India (1994) 2 SCR 644: AIR 1994.

<sup>17</sup> Jain, R. (2005). Minority rights in education: Reflections on Article 30 of the Indian Constitution. *Economic and Political Weekly*, 2430-2437.

<sup>18</sup> The Constitution of India [India], 26 January 1950

<sup>19</sup> TMA Pai foundation v. state of Kerala, 2002 8 SCC 481: AIR 2003 SE 355

<sup>20</sup> Case no: appeal (civil) 4730 of 1999, Bal Patil & Anr v. Union of India & Ors (8 august, 2005).

for future circumstances, which is the reason that India is performing as a democratic country.

Some of the major challenges faced in Constitution are: -

- Difference in interpretation of Constitution by the judiciary and the government
- Balance between fundamental rights and directive principles
- Stability of governments
- Relations between Centre and States
- Internal Emergency

Nonetheless, the Indian Constitution isn't simply violated de facto by legal practice, yet additionally by law and by means of the religious arrangement of law that has endured from pre-colonial era. Though India was set up as “sovereign socialist secular democratic republic,” it relies on Article 26 of the Constitution which guarantees the freedom to manage religious affairs for every recognised religious denomination or sect to govern domestic policy. Despite the fact that the Directive Provision of Article 44 legislates to set up a uniform civil code in India, strict networks keep on being administered by their very own laws for more than 70 years after the reception of the Constitution.

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