



## India and America: A Constitutional Dialogue

Tuesday, January 25, 2022

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**[00:00:00] Jeffrey Rosen:** Friends, I am Jeffrey Rosen, the President and CEO of this wonderful institution. As many of you know, we have a crowdsourcing campaign to support our... We the People podcast and also the Live at the NCC podcast, which will run the audio of our program today. And thanks to our friends at the John Templeton Foundation, there's a one to one match for every dollar you donate.

**[00:00:22]** I'm pleased to report that we have, uh, donations from 47 states, the Northern Mariana Islands and several countries from around the world. Friends, right now if you're in India listening please go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople) and make a donation of any amount, \$5, \$10 or more to show your support for the great programming that you're about to hear today.

**[00:00:56] Lana Ulrich:** Welcome to Live at the National Constitution Center. The podcast sharing live constitutional conversations and debates, hosted by the center in person and online. I'm Lana Ulrich, Senior Director of content. January 26, marks Republic Day in India, when the country celebrates the day on which the Constitution of India came into effect in 1950.

**[00:01:16]** This week, the Constitution Center hosted a program comparing the US and Indian constitutions in partnership with the VD center for legal policy. The panel discussed how each constitution protects fundamental rights, like the right to privacy and equality. Whether freedom of speech exists in India as it does in America. How the Supreme Court of India differs from the Supreme Court of the United States and more.

**[00:01:38]** Our guests were Indian constitutional law experts and senior advocates at the Supreme Court of India, Arvind Datar and Menaka Guruswamy, and American comparative law expert Tom Ginsburg of the University of Chicago Law School, Jeffrey Rosen, President and CEO of the National Constitution Center moderates. This conversation was streamed live on January 25th, 2022. Here's Jeff to get the conversation started.

**[00:02:02] Jeffrey Rosen:** Thank you so much for joining us, uh, Arvind Datar, Menaka Guruswamy and Tom Ginsburg. Let's set the stage with a concrete example to help us understand, uh, the similarities and differences between US and Indian constitutionalism. The Indian Supreme Court, not long ago, issued an important decision involving the right to privacy.

[00:02:28] And each of you has written about this, uh, important decision, including Menaka Guruswamy, you wrote an op-ed in the New York Times about the privacy decision, where you talked about, uh, the ruling which envisioned the right to privacy flowing through other crucial rights like equality, dignity, life expression, association and speech. Tell us, uh, Menaka Guruswamy about this important, uh, decision, which was issued in 2017. What was the constitutional foundation of it? And how is it, uh, similar and different to important privacy decisions of the US Supreme Court?

[00:03:08] **Menaka Guruswamy:** Thank you, Jeff. Thanks for having me. Wonderful to be here, uh, at the National Constitution Center. So the decision is, is named f... named for K. S. Puttaswamy, who is a 91 year old retired judge. Um, and he along with 22 other petitioners challenged, uh, the constitutionality of our... kind of like a data bank that we have, uh, which is just called Aadhaar in Hindu.

[00:03:32] Um, long journey, um, and the Supreme Court sitting in a large panel of judges, really, uh, give a, give a, give a series of judgments, um, which is, which is kind of our equivalent of Brown versus Board of Education. Because, you know, it's [inaudible 00:03:49] that critical of both as a constitutional decision as well as a, as a decision that influences social fabric.

[00:03:56] What does the Supreme Court say? The Supreme Court says that in the right to privacy, you have, you know, the ability to seclude yourself, you have a right to have freedom of choice, in terms of food, in terms of dress, in terms of sexual orientation, uh, in terms of ideology, uh, what you believe in.

[00:04:14] I think importantly, um, there's, there's just beautiful language in the decision. Uh, because the decision says, um, things that, you- you know, like it says the purpose of elevating certain rights is to insulate that exercise from the disdain of majorities. Whether legislative or popular, whether legislative or popular.

[00:04:37] Um, and I think it's, it's kind of sentiments such as that. Uh, judicial wisdom such as that, that, um, really has raised this decision to a different level because it sets itself up, it sets the court up, really as the arbiter of what we call constitution morality, which may be quite different from social morality, or popular morality or morality of the state, uh, of the gov... or the government of the time.

[00:05:03] Um, so it's an extraordinary decision, because the court also is introspective in the decision. It, it, um, kind of criticizes itself for its pre- previous decisions, uh, where it upheld, for instance, uh, the criminalization of homosexuality. Um, so it's really quite astonishing.

[00:05:21] Um, it's astonishing for its width, because, um, the judges navigate issues like, you know, lack of reproductive choices, or telephone tapping or, um, forced feeding. Um, so it's, it's quite extraordinary for both constitutionally the e- effect it's had, and it will continue to have on individual rights, individual freedoms, uh, be that against the state or be that within a

community. Um, and it's also extraordinary, because I think with it, it has become the foundation for many new freedoms that will be mapped onto this constitution.

**[00:06:03] Jeffrey Rosen:** Fascinating. Thank you so much for that wonderful introduction to the decision. Let me ask you Arvind Datar to tell us more about the text that the court relied on, uh, which included Article 21. One of our questioners, Sarah Evans says she'd love to hear all of your views on Article 21 and the substantive right to life and its relation to human dignity, that right to life, um, was read to include a right to privacy in the 2017 decision?

**[00:06:33]** So maybe tell us about the text of Article 21, and, and how its interpretation is similar and different to the due process clause, uh, an equal protection clause where, where the US Supreme Court has found rights of, of privacy and dignity.

**[00:06:49] Arvind Datar:** Thank you, Dr. Rosen for inviting me. And, uh, I have very pleasant memories of visit- visiting the National Constitution Center. And I was, uh... I still remember the wonderful lecture we heard there in the small amphitheater that you have inside the Center. Now on the law of privacy, as, uh, Menaka said, it's... it was... the main petitioner was a retired 91 year old judge. But you know, the, uh, entire case came by a completely unexpected turn of events.

**[00:07:15]** Uh, as she said, you, like, you got a social security number, we... the government introduced what is called the Aadhaar card. That is you have a card, and under the Act, you are entitled for basic, uh, amenities, like a ration card, or cooking gas for poor people, and so on. So once you produce that card, you could get entitled for these welfare benefits.

**[00:07:35]** But the government started expanding this card thing that if you want to file your income tax return, you give the Aadhaar card, you want a school admission, you produce the Aadhaar card. And then we had, we had no idea where the data was being recorded, how it was being used. So in the course of the arguments, we raised the point, I was appearing for one of the petitioners, we raised the point that, "Look, it's violating our right to privacy. I mean, what are you doing with our data? How do we know what's happening?"

**[00:07:59]** So the then Attorney General, he said that India doesn't... our Constitution does not recognize the right to privacy. And it so happened that there was a judgment of 1954, where a bench of six judges held that India doesn't recognize a law of right to privacy. And then there was a bench of eight judges in 1964, 10 years later, which again, reiterated that there is no law, nor fundamental right to privacy under the Indian constitution, unlike what you have in the Fourth Amendment where you say that all people will be safe and secure in their homes. I don't know the exact language. But I think it's the Fourth Amendment, which say that you like... you're entitled to be safe and secure in the... in your home, and so on.

**[00:08:38]** So, now, the Supreme Court was faced with a jud... bench of six judges, a bench of eight judges, as you know, the Indian Supreme Court doesn't sit on bank, they sit in different benches. So the Supreme Court said, "Look, this is an important point. Why do you say we don't

have the right to privacy, it's about time we tested this proposition." And then they constitute a bench of nine judges.

**[00:08:59]** And there was a wonderful dissenting jud... uh, opinion of a judge in the eight judges bench which said that right to privacy is there. He did refer to a number of US cases like Munn versus Illinois, Wolf vs Colorado and various other cases, and said that a man's home is his... absolutely, it has to be protected.

**[00:09:17]** And that was a case of surveillance where the police could ask you to report to the police station, they could come to your house and knock at midnight. He says then the entire country is a prison, there is no right to privacy. And that's how it went to nine judges. And then, uh, as you see, as I got the law report with... they're totally... the Supreme Court considered 256 judgments of the Indian Supreme Court, and a large number of judgments of the US court, and then they held the right to privacy.

**[00:09:42]** Now one question the judges asked us, India has part three of the Constitution which contains fundamental rights. It starts with Article 12 and ends with Article 36. Now we have the right to equality under 14 as a right, put it Article 21 as the right to life and liberty. We have the freedom of speech, right to religion, et cetera, in 1924, '25, and so on.

**[00:10:03]** So they asked the question, "Where will you put this right to privacy? There is no right to privacy? Yes. If you're going to read it into... Does it, does it form part of what they call the silences of the constitution? Is it going to be the interstices of the constitution? Where do you put it in? Is it going to be in the right to equality, right to life, and liberty, and so on?"

**[00:10:23]** And then they said that there's a concept of core rights. And there's a, a number around the core rights. And finally, the Supreme Court said, "The right to privacy cannot be located in any one particular right." And most significantly, they said, "It permeates through the entire chapter on fundamental rights, right to privacy in- inherent in all the fundamental rights of the constitution."

**[00:10:46]** And finally, they said that you have three rights of privacy. They have delineated them. One is physical privacy, privacy of your body prediction, information privacy, and decision autonomy. As Menaka said, your right to your career, right to choose your partner, and so on. So these are the three rights they recognized.

**[00:11:03]** And this was the... this has become perhaps one of the most important judgments in recent times, where we didn't have a right of privacy as recognized by the Supreme Court. But almost 50 years later, the Supreme Court itself overturned all the judgments and said, we have a fundamental right to privacy, though not written, it is implied in the entire chapter on fundamental rights, it's an... a very fascinating judgment.

**[00:11:28]** And I must say that we did take a lot of advantage of the US supreme court judgments, the wiretapping case in Katz versus United States, and so on and so forth. Uh, there's

no time, but we did a lot of research into the US law, and it is very useful, the famous sentence of a judge who said the right to be left alone, and so on. Yes. [crosstalk 00:11:45]. Louis Brandeis who said that, Louis Brandeis who said that. Yes.

**[00:11:48] Jeffrey Rosen:** It was indeed Lu... Justice Brandeis is a great-

**[00:11:51] Arvind Datar:** Yes.

**[00:11:51] Jeffrey Rosen:** ... great friend of the Constitution, uh, Center. And it's wonderful that, uh, the Indian Supreme Court involved him as well as US judgments like, uh, Mapp and Katz, as well as, as you've both written in your scholarship, US constitutional scholars, such as Laurence Tribe and Mark Tushnet.

**[00:12:09]** Um, now, Tom Ginsburg, as I listened to your wonderful colleagues, thi- this landmark privacy decision seems to embrace the methodology of Griswold versus Connecticut and Roe v. Wade, in kind of penumbral reasoning, as, as we just heard, um, that invokes different sources to, to find a fundamental right that has textual grounding in different places. But, but, but is not perhaps originally intended by the Constitution makers.

**[00:12:38]** Uh, this suggests that the Indian Supreme Court is quite, uh, strong in its ability to make, uh, judgments like this. And you've written in judicial reputation a comparative theory that judges in South Asia are among the most respected figures in government, the judges in India have headed the Press Council, which serves as a press watchdog, and that the Indian Supreme Court is, is quite, uh, strong and respected because of the, the, the status of its judges.

**[00:13:04]** So give us a sense, if you could of how the Indian Supreme Court operates in comparative perspective. Is it, is it, is it a strong constitutional court, uh, compared to others? Um, and how would you situate it, uh, among the constitutional courts of the world?

**[00:13:21] Tom Ginsburg:** Thanks so much, Jeff. And before I begin, let me just say what an honor it is to be here with, um, these two super lawyers. For those who are not familiar with India, these are really two of the best lawyers in the entire country. So it's a real honor for me.

**[00:13:35]** Um, yes, I mean, Arvind Datar, was mentioning that the wrecked privacy was granted in this kind of penumbral right. And Jeff rightly points out that sounds very much like very famous 1965 case of Griswold v. Connecticut, which is kind of the foundation doctrinally for Roe v. Wade. And, of course, um, you know, this is very controversial in the United States, right?

**[00:14:12]** It's not actually written in the constitution, we have this very textualist Supreme Court now. And many people think, in fact, Roe is at grave risk this very term, in the case of, uh, Women's Health Collective, uh, versus Jackson. So, you know, it's really controversial here. And I guess, in response to Jeff's question, I say, it's not so controversial in India, because the Supreme Court has established itself as just one of the major institutions of the country.

**[00:14:57]** And it has done so using precisely this methodology of, I wouldn't say inventing, but building space for itself, um, beyond the written text of the Constitution. And actually, I'll just highlight two institutional features of the Indian Supreme Court that make it so powerful. So one of those is that the courts, and all courts in India are basically self replicating.

**[00:15:20]** The President of India appoints the judges but must do so the judges say, on the basis of recommendation from the Collegium, which is the five... in the Supreme Court, which is five most senior judges. And so that means you don't have the same level of politicized, uh, appointments. The jud... the Supreme Court is fairly autonomous and that such is able to remain somewhat insulated from the, the, the daily grind of politics, because it's self appointing.

**[00:15:20]** And that's not written anywhere in the Indian constitution. That's something that judges have invented. Similarly, the Indian Supreme Court has expanded access to itself. You know, whereas our Supreme Court is always very concerned with standing issues and trying to get the narrowest possible grounds and really, you know, shut out a lot of cases.

**[00:15:31]** The Indian Supreme Court, very famously in the 1980s, um, created a category of public interest litigation, where if you are trying to make a claim based on a fundamental right, you basically just write something on a piece of paper and send it to the court. And they may hear the case.

**[00:15:47]** And so, they've been very open, whereas our supreme court has been very pinched, I suppose in the access to the public. So that's those two things, which, again, not written in the constitution have made it a really central institution. I'll just say the courts in South Asia, including the Indian Supreme Court will sometimes take on cases without even a formal claim. It's a suo motu jurisdiction is what it's called.

**[00:16:09]** And so you'll see like... Well, you know, we just think this is a social problem, we're gonna go, and we're gonna order some institution to do something about it. So quite activist, and generally speaking, from my perspective, quite respected. So it's quite almost a very nice, um, counterpoint with the US Supreme Court, which also lacks the textual basis, but hasn't, uh, you know, necessarily... and it's done different things with that, in trying to build up it's path.

**[00:16:35] Jeffrey Rosen:** Thank you so much for that wonderful comparison of the US and the Indian Supreme Court. You are indeed, uh, super lawyers. Menaka Guruswamy and Arvind Datar, And Menaka, if I may, I'm gonna ask you to share with our audience as concisely as you can, the kind of founding story of the Indian Supreme Court. You have a wonderful article, uh, which describes how the court identify as not only negative, uh, liberties, but also positive ones.

**[00:17:10]** The preamble talks about, uh, we the people of India, having resolved to constitute India into a sovereign socialist, secular democratic republic, that is a pure justice, social, economic and political, um, is a kind of rights articulator. But it's a, it's a, it's a big and important story about how this court, uh, the, the constitution adopted in 1950, gave rise to such a powerful court.

**[00:17:35]** And you've also noted that the rise of the court is connected to the rise of the ruling political party in India, and that the court and the parliament have worked in tandem. So if you could tell us the story of how the Indian Supreme Court interpreting the Indian Constitution came to be the powerful institution that it is today.

**[00:17:55] Menaka Guruswamy:** Um, so you're right, Jeff. Um, you know, India's constitution is adopted in 1950. Um, the precursor to the Indian Supreme Court was, in fact, the Federal Court. I'm sure you know, India's history includes that of colonization, the British colonized us for 200 years, culminates towards the end of their rule, the last 20 years or so we have a federal court.

**[00:18:16]** And that federal court continued after independence before the Constitution was adopted, and then the Supreme Court came to be. And, you know, when India's constitution was being written, um, obviously, the framers of this constitution, many of whom had some time in prison, you know, and, you know, and kind of, um, you know, fought against the British was skeptical of courts and judges, obviously, right? Uh, because they had been in prison by many judges, um, when, when, when India was a colony.

**[00:18:45]** So there's, there's a wonderful line in, in the Constituent Assembly debates where, you know, one of the members are saying to the other one, you know, "We can't expect much from judges in the Supreme Court." And, um, the Prime Minister Nehru responds by saying that, "Well, as long as they don't get in the way of this country that we're gonna build."

**[00:19:05]** Um, you know, fast forward, we're in 2017, you went to... you, you, you've heard about the privacy judgment, but the court has really become a people's court. Um, and Tom Ginsburg has written about this, that when you open up access, that's how you sort of, you know, become... or you, you, you take upon yourself a role of a, you know, muscular court, which is gonna wade into political issues, which is gonna create light, which is gonna hear everyone, which is gonna set the terms, uh, of constitutionalism if you will, in a country. Not just the constitutional texts and interpreting the constitutional texts, but setting the terms of this constitutional conversation in a country of what? 1.7 billion.

**[00:19:47]** Uh, we're diverse, we have different opinions, we're from different religions, different caste, different orientations. Um, and, and we're really a people who, you know, have a lot of opinions and lots of movements. So imagine this court, right? And it's very different in terms of texture and in terms of its institutional reality from the... from SCOTUS, from the Supreme Court of the United States, which in a year, we'll hear anything between 20 to 60 cases a year.

**[00:20:15]** Indian Supreme Court will dispose off on average between 50 to 70,000 cases every year. So it's most similar to Brazil. Brazil, Stockport. It doesn't sit on bank, as Thomas already told you. So at present, you know, we have 34 positions in the court. Um, these judges will sit in, in panels of two, three, five, seven, uh, bigger if you have something as critical and seminal as a privacy judgment.

**[00:20:42]** But they hear all kinds of cases. And this is the burden of being an Indian Supreme Court judge, right? Or a high court judge, you will hear everything from the service law team, to a big constitutional challenge in the same day. Uh, Mr. Datar and I were in court in different cases today, just today, right? In, in virtual court. You know, I had an arbitration appeal, uh, he had a very, very important case.

**[00:21:06]** And the same day the court is also hearing, uh, complex commercial cases, other panels are hearing constitutional challenges to attacks. All of this is happening in one day. This is the docket of the average judge, right? Who is servicing a clientele of 1.7 billion people, while also saying at the same time, that I will not be governed by social or popular morality. I will be governed by the values of this constitution.

**[00:21:35]** And it does take... You know, it's not just that you expect independence and courage, but you also expect diligence, because it is also a huge burden to navigate the spectrum of cases where you have both original jurisdiction and appellate jurisdiction. So you can go to the Supreme Court in the first instance. Or you can go to the Supreme Court on appeal from the various high courts.

**[00:22:00]** Um, and that is quite different from the American Supreme Court, which decides to grant search, and which decides to hear a small selection of highly important cases. So you don't have unfettered access to the court. And when courts allow it, allow themselves to have unfettered access, sometimes they'll give the suo motu.

**[00:22:19]** Then they're also saying we are going to wade into this business of building a country. And that is what the Supreme Court has done. Sometimes it gets it right, and sometimes it gets it wrong, sometimes it's deeply introspective, it goes back and corrects its mistakes. And it is, you know, open to doing that.

**[00:22:38]** And I think that's what distinguishes it, you know, it's, it's unique in South Asia, and it's unique... Uh, and, and Tom will know this. It is unique, but because you have had one constitution from 1950 to now, we celebrate Republic Day tomorrow. Uh, it's a big day. I think, for me, it's my favorite day of the year. It's the day the Constitution of India was adopted. It's a big day.

**[00:23:00]** You know, uh, this is the constitution that gave Arvind Datar the language to argue against criminalization of homosexuality. It's the same constitution that gives us the language to argue commercial cases, the language to argue social economic rights cases.

**[00:23:15]** Um, so, you know, it's been one uninterrupted constitution. Tom knows that's pretty rare. Tom's work will show you that the average constitution won't last 16 years, Tom, it's, it's like being a teenager, and then you're out, you know. Um, but in this constitution, will, will turn, you know, uh, 175 soon-ish. It's in June, much like America's has and it caters to and services very different constituencies. That's the point.



[00:23:44] And it does so because these judges interpret for this vast, diverse, tumultuous country, which is also having a major moment, like your country is, with democracy and democratic constitutionalism. These are important political moments in the United States, as is in India. I mean, I noted, Jeff, that the two voting right bills didn't clear the Senate.

[00:24:09] Um, you've had this, you know, really interesting vaccine mandate decision, twin decisions coming out of the Supreme Court. You know, these are pandemic era challenges that SCOTUS is facing. Similarly, India Supreme Court is facing pandemic era challenges. And that's what great courts do. They endure crisis, but they keep the terms of the constitutional conversation going. And the Supreme Court has done in India, a very good job of that.

[00:24:37] **Jeffrey Rosen:** Thank you for that inspiring intervention. It is great that January 26th is your favorite day, Constitution Day. At the, the National Constitution Center, our favorite day is September 17th. So we will look forward to celebrating with you tomorrow. And as you say the central role of both of our courts in these challenging times is crucial to understand. Thanks, thanks for that phenomenal introduction.

[00:25:07] Friends, as you know, we're a nonprofit, and we rely on your support to put on wonderful programs like this. We are launching an exciting crowdsourcing, uh, campaign. Thanks to our friends at the John Templeton Foundation. Every dollar that you give to support the We the People and Live at the NCC podcasts will be matched a one to one up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the Constitution.

[00:25:36] Uh, you can go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople) and it would be wonderful, if you could give any amount \$5, \$10 or more to signal your membership in this meaningful community of lifelong learners, and your support for, uh, the programming that makes it possible.

[00:25:54] Arvind Datar, a friend, Colin [Tubo 00:26:06] asked the basic question, what are some major differences between the US and Indian constitution? And can you give us a sense of the fundamental rights in the Indian Constitution versus the US Bill of Rights? How do they compare? And also this important question of how politics affect judicial independence in India?

[00:26:23] **Arvind Datar:** Well, it's a long question, I'll try to pack as much as I can in a few minutes. But the first important difference is the length. India is perhaps the longest, uh, constitution in the world. And as Menaka pointed out, that our constitution was not a completely freshly drafted document. I think U- US students will know that we had the government of India Act of 1935, where for the first time, you had the concept of a federal government and the provincial government, and you had the union list and the state list and so on, which is basically patterned on the Canadian Constitution.

[00:26:56] So when, when the Constituent Assembly was formed, to create a Constitution of India, there're two choices, either to have a short constitution, like the US Constitution, where the terms are very broad, simple, broad terms, and you leave it to the judges to interpret it. Or you

have a long, detailed constitution, which is a very lengthy constitution, but then provides for every possible thing in, in terms of governance.

**[00:27:19]** And Dr. Ambedkar, who was the president of the assembly, and was called one of the founding fathers of the Constitution. He, he was criticized for adopting a large, long constitution. They said that, "Look, this is a huge constitution, a constitution must just be a few articles. Here we got a whole forest." That was the criticism laid on at that point of time.

**[00:27:38]** And he made an outstanding speech, which is about 11 pages in the Constituent Assembly debates, and I think all of you... if I can share with all of you, it will be nice. He says that, "Look, India is a nascent democracy." As Menaka said, we have different caste, different religions. People don't know that when we became independent, we had 555 princely states, 555 princely states who were sovereign in their own right.

**[00:28:01]** They were as independent as the US or India. They all got together, they were integrated into one long country. So they were different religions, different race, different official languages. So he said that, "Look, we don't have what they call the UK model of constitutional conventions, where they have got the House of Commons for 300, 400 years, they got basic conventions, they may not have a, a written constitution, but they got everything in convention which are followed."

**[00:28:25]** So he called that as constitutional morality, adopting the words of Professor Dicey. And he justified the long constitution. So to my friend, I'll say, the first thing is our length. Our constitution contains several chapters. We have basically one chapter on citizenship, then we have, as you read, the most important chapter on fundamental rights, where fundamental rights was not there in the government of India Act.

**[00:28:47]** Two important chapters were added. One was on fundamental rights. And one was on Directive Principles of State Policy. So fundamental rights are the rights given to citizens and people, some rights are only for citizens, some rights are for citizens and persons. So Jeff, if you come to India, as a citizen, you don't have the right of freedom of speech. But you have the right to equality, because article 14 applies to persons, but freedom of speech applies to citizens.

**[00:29:12]** So there's a distinction between some rights given to citizens, some rights given to persons. Then these rights have been made very, very clear, you have the right to equality. And then you have exception to that right, you have right to equality. But 15 and 16 enables you to make affirmative action, you can reserve, make quotas for Backward Classes, socially, educationally Backward Classes.

**[00:29:34]** Then we have the 19, which contains the seven freedoms, free speech and expression, right to form associations, to travel throughout the country, to practice propagate religion, to carry on business. So these are the seven freedoms in Article 19. Then 21 is the right to life and liberty.

**[00:29:50]** You know, we had the emergency where fundamental rights were suspended. So after the emergency, we had amended the constitution and said, that no matter what happens, emergency or no emergency, the right to life and liberty cannot be touched at all. So that's completely untouchable, you can't touch the right to life and liberty, no court can amend it. So we got that particular provision.

**[00:30:10]** Then we got Directive Principles of State Policy. And then we have the various articles pertaining to the central government, the President, the Vice President, the Supreme Court, similar provisions for the states. Then you have the Election Commission of India, that's in the Constitution, you have the Auditor General of India that's in the Constitution, then you have Commissions for Backward Classes, for Scheduled Castes, that's again in the constitution.

**[00:30:33]** So we have all these provisions in the constitution, which ultimately goes on to almost 400 articles, and 10 schedules. So it's a massive document. But I think it's a wonderful document. And as Menaka said, I share her sentiments about the Indian Supreme Court, somebody rightly put it, it is not the Supreme Court of India, but it's the Supreme Court for India.

**[00:30:52]** And it is this institution which has kept and preserved democracy. And one most important thing which I'll tell the gentleman who asked the question. In 1973, we had what I call the golden moment of our constitution where the, the deluded judgment by a, vo- voting majority of seven is to six. And they said that parliament can amend the constitution, but they cannot alter its basic structure.

**[00:31:18]** What is basic structure? Again, was left undecided. They said the Supreme Court will decide what basic structure is. It's almost like a Marbury vs. Madison moment for India, where they said that the basic structure of the Constitution cannot be altered. Now what is basic structure? Later Supreme Court has said secular nature of the country, tomorrow, they can't make the country into a Christian state or a Muslim state or a Hindu state. It's a secular country.

**[00:31:42]** The republican form of government is part of basic structure, the right to equality is part of basic structure. So we have got the concept of basic structure, which again, is not there in the constitution, but has been read into it like privacy. And this is what the Israeli author Yaniv Roznai calls, uh, declaring an unconstitutional constitutional amendment.

**[00:32:01]** So a constitutional amendment which alters the basic structure is an unconstitutional amendment. Recently, I appeared in the case for the National Judicial Appointments Commission, the Supreme Court struck it down saying that this power of changing the appointment of judges is completely unconstitutional.

**[00:32:15]** So these are the basic differences between the US Constitution. But I must, uh, thank the US Constitution for giving us so many new concepts, the right to privacy, the due process in Article 14, then you have the human dignity from the 8th Amendment and so on and so forth. So I must tell the audience that we have borrowed very heavily from the US Constitution in many, many important cases.

**[00:32:35] Jeffrey Rosen:** That is so fascinating, thank you for sharing all of that for that central idea that there could be an unconstitutional constitutional amendment. Um, not an idea that the US Constitution has explicitly countenanced, although there have been some who have suggested that a constitutional amendment that violated natural law might be unconstitutional.

**[00:32:55]** That's a, that's an exotic view in the US, but in, in India, it's been embraced. And that, uh, as you describe it makes the Indian Supreme Court a central actor against what Tom Ginsburg, you have called democratic backsliding. And in your important work, uh, Tom Ginsburg, you've described how democracies can suffer near fatal deterioration in the, in the quality of their democratic institutions. And that constitutional courts can provide a backstop against that effort.

**[00:33:27]** You've given an example like Columbia in 2010, showing how a constitutional court can play a role in protecting rule of law norms in the face of a civil war. So tell us, Tom Ginsburg about the Indian Supreme Court and democratic backsliding and how it plays a central role in protecting fundamental rule of law values in the face of threats.

**[00:33:49] Tom Ginsburg:** Terrific. And Mr. Datar, actually, you know, was just touching on this in a way. And most Americans don't realize the big crisis that Indian democracy was facing in the 1970s when Indira Gandhi declared this emergency, sort of spuriously and was trying to take over the political system.

**[00:34:04]** What happened? That's kind of a case of a near miss is what Professor Hacker and I call it, when democracy looks like it's about to fall apart, and then something happens. And what happened is that, um, you know, the opposition got together, and they ran an election. And they won, surprisingly.

**[00:34:24]** And one of the points that, Professor Hacker and I in our article make in regard to this is that when democracy is saved in these circumstances, is often institutions which are not themselves democratically legitimate, that play the critical role. So in that case, it was the Supreme Court saying, wait a minute, you, you know, that we have this doctrine of unconstitutional constitutional amendments, it was also the election commission, right? Which was running, uh, you know, operated, and can... It's really quite an amazing thing, the Indian... an Indian election, you know, an election with a billion something people participating, um, requires an incredible bureaucracy, and incredibly effective, you know, institution that is not democratically legitimated.

**[00:35:09]** And, and that's what saved the day. And when you look in country after country, you see this. And so, I think that's one of the lessons we can take. And I think it was true after January 6th here in the United States that you had... Well, first of all, in November 2020, you had, you know, tens of thousands of local electoral officials, sometimes very faceless, right? Who ended up count... making sure votes were counted. Uh, Secretaries of State, Military that did not intervene and indicated it would not, um, and judges who upheld the rule of law rejected, you know, basically spurious claims by the, the Trump campaign in that case.

[00:35:47] So we, we were also saved by non democratically legitimated institutions. Now, I think India is really important in the global history of this phenomenon, because not only was that an important early case, but also this doctrine, which Mr. Datar was talking about, unconstitutional constitutional amendments, turns out to be a really important weapon, and it's spread all over the world. It's been borrowed by many, many constitutional courts.

[00:36:12] And in fact, as we sit here, there's a really important case going on in Kenya, um, where this is precisely an issue, that basically what's happening is the Kenyan political elites are trying to kind of catalyze the political system, so that they'll just be in power forever. And they're doing it, you know, in ways that appear on their surface to be democratic.

[00:36:31] And the court, lower courts, the Court of Appeals, and, uh, uh, District Court, High Court said, "Wait a minute, you know, if we let you pass this constitutional amendment, it's procedurally legitimate. But if we let that happen, you're gonna have total control over the system. And our democracy won't, in fact, be a democracy, there won't be substantive possibility of losing power."

[00:36:53] We see this, of course, in some American states, what's remarkable is that Kenya borrowing from India, you know, the courts may end up disallowing them. Now, our Supreme Court doesn't have such a doctrine. Um, but we do, at least at the state level, have, of course, the national constitution to make sure that there isn't that kind of lockup at the states. So it's just a really important doctrine and really, one that I think is gonna be spreading in many other countries around the world, um, in order to... if, if and where democracy is to survive.

[00:37:23] **Jeffrey Rosen:** Fascinating to learn about this doctrine of unconstitutional constitutional amendments, uh, spreading in Kenya, and, uh, embraced by other countries like India, and, uh, as a central protection against democratic backsliding. Dr. Guruswamy, tell us if you would about the values underlying the US and Indian constitutions. Uh, [Bonnie Zedek 00:37:42] asked what constitutions has the Indian Constitution taken inspiration from? Did the US Constitution and Declaration of Independence influence the Indian Constitution which has a strong equality clause? Or was the Indian experience in equality central because of the anti colonial struggles out of which the Indian Constitution grew? And then connect that, if you would, to current cases before the Indian Supreme Court involving race and caste.

[00:38:11] Uh, the US Supreme Court just yesterday agreed to take up what may be the most important affirmative action case of, uh, a generation and Indian Supreme Court has decided important affirmative action cases involving race and caste. Uh, give us a sense of what the court has decided and what sort of race issues are, and caste issues are on the horizon in India.

[00:38:31] **Menaka Guruswamy:** That's a great set of questions, Jeff. So I think, you know, we have to understand that equality as it's practiced constitutionally, uh, in India and the United States is quite different in terms of constitutional doctrine. And I've said this before, um, the text of constitutions are interesting, and, and they influence doctrinal development. Uh, but you can often have identical texts and very different, um, conclusions, um, very different interpretations.

**[00:39:02]** So, you know, India's commitment to equality is, is really one of substantive equality, which means that, you know, it does take into account historical disadvantage, historical discrimination. So caste as a marker in India, the constitutional text initially provided for special provisions for, um, heavily historically discriminated, uh, castes of people what we call Scheduled Caste, Scheduled Tribes, that has, you know, from the original Constitution document been expanded.

**[00:39:32]** You now have, um, reservations, as we call it, which is similar to but also slightly different from affirmative action. So you have reservation of seats in, you know, public institutions, educational institutions, uh, political constituencies for Scheduled Castes, Scheduled Tribes and other Backward Classes, which is, you know, in fact, a majority, uh, of, of the population often.

**[00:39:57]** Um, so the development of, you know, what started out from the text and the development of that doctrine, and that implementation, uh, is, you know, is actually secured by the Supreme Court. So the idea being that we do take historical disadvantage into account when we... and then we make reparations.

**[00:40:14]** So our substantive equality doctrine is one that actually makes reparations. Um, you know, one can contrast that with the treatment of race in American Constitutionalism. Um, so slavery is abolished, of course, uh, but no reparations are made. I think, you know, my friend Katherine Franke has a great book called, called, you know, Reparations. Um, that you ought to make reparations for slavery to African American people.

**[00:40:39]** So I think it's a formal equality concept. It treats you know, x and y alike. It will treat Tom and me alike, which is fine. Um, but constitutionally, while in India, you take historical discrimination account in America, you pretty much don't. Like you said, um, you know, there's that very important case is coming up, which will test affirmative action, as its, you know, policies and as it's practiced in elite institutions, education institutions in America.

**[00:41:09]** So it's going to be interesting to see how the court rules. Now, the court is also, uh, interestingly, divided in, in, in the United States. Uh, you know, you have Republican appointed judges, who often will rule a certain way, and you have Democrat administration appointed judges who will often rule, uh, somewhat differently what you call the conservative and liberal, and right now you have six conservatives to three liberal judges.

**[00:41:34]** So that will have some bearing. But be that as it may, you do have very different doctrines in terms of, um, commitments to equality. You know, what is that threshold? And how do you look back into history? Uh, which I would argue does shape your present opportunities, or do you not? So recent caste is, is treated quite differently and provides an insight into how equa... these equality doctrines in, you know, the world's oldest constitutional democracy and the world's largest constitutional democracy, um, as it's practiced.

**[00:42:12] Jeffrey Rosen:** Fascinating, thank you so much for that. Arvind Datar, your thoughts about the affirmative action cases because you've, uh... you know them so well, and the contrast is interesting. There was the 2005 Chinnaya decision where the Court adopted the minority view and Gratz versus Bollinger and struck down affirmative action by a state legislature concluding that once the Scheduled Castes are included in the lists, then any division of them would amount to tinkering with the presidential list.

**[00:42:42]** Help us unpack that fascinating, um, and, and also tell us about the affirmative action cases on the docket. And then there are several questions in the chat about cases coming up. Uh, Mr. Chetan Gandhi asks you Arvind Datar, does India need to borrow from the US the ethos of the First Amendment? It was so fascinating to learn from you that, uh, free, free speech rights only go to citizens, not all persons. Do you think they should be expanded? And then put on the table, if you will, what do you think are the most significant constitutional cases on the horizon for the Indian Supreme Court?

**[00:43:16] Arvind Datar:** Yes, there are three parts to your question. One is about the affirmative action. The Constitution said that there could be reservation, uh, you can just take affirmative action as synonymous with reservation for our discussion. The Constitution say that you could make reservation for socially and educationally Backward Classes of citizens. It never used the word caste.

**[00:43:37]** As Menaka said, she's talked to recent caste, the Constitution never use the word caste. It's so happened for political reasons. Uh, there was a commission formed in 1950, and again in 1970, which had gone into the, what are the Backward Class? What are the Backward, uh, Castes in India? And so they identified certain number of castes on certain parameters as Backward Castes, as Backward Castes.

**[00:44:02]** The government made a reservation. Now under our Constitution, there is already a reservation for Scheduled Castes and Scheduled Tribes. Scheduled Caste are those people who are unfortunately called The Untouchables in the days of Mahatma Gandhi, and then we abolished the untouchability concept. It's constitutionally prohibited now.

**[00:44:17]** So the Scheduled Castes, and you have Scheduled Tribes, India has a large tribal population also in different parts of the country. So Scheduled Castes and Scheduled Tribes gets a reservation of 15%, and seven and a half percent, 15 for Scheduled Castes, and seven and a half percent for Scheduled Tribes.

**[00:44:35]** The government made a reservation of 27 and a half percent for Scheduled... for Backward Classes, because earlier, there were some cases on reservations. And then the Supreme Court said that "Look, reservations cannot normally cross 50%." There's nothing magic about 50. They just said that, "Look, you can have affirmati- affirmative action to the extent of 50%. And merit will play a role in the la... remaining 50%. So that's called the open category or the open quarter. And you got the reserved category, which is the first 50%.

[00:45:00] One major challenge in what is called the, uh, Indrasani case, in fact, she's a lawyer in Delhi. Her name is Indrasani. Now, the case takes after her name. So Indrasani case was, could you have reservations on the basis of caste? And the Supreme Court answered in the affirmative, they said that basically in India, very often the caste itself represent Backward Classes.

[00:45:19] So the equated caste is equal to class, which some scholars say was wrong decision, but nevertheless that has now come to stay. So, Backward Classes, and now they got Backward Classes, most Backward Classes in this division, they get 27 and a half percent. So, this is the rule of affirmative action. Now, recently we did a case in Maharashtra where they tried to add new 16% more for the Maratha community.

[00:45:45] And I had occasion to appear in the Bombay High Court where I lost there. And when we came to Supreme Court, we succeeded. Supreme Court said that, "Look, you can't cross the 50% limit. And that can be done by parliamentary legislation." Now, the next important case, which is gonna come maybe in mid June, as soon as the pandemic is over, is, what is the significance of this 50% limit?

[00:46:05] Because the government, the... I mean, the ruling party here has amended the Constitution. The 103rd amendment to the Constitution of India. And the other difference between what my friend asked was, do you have far more amendments than you have? I don't know, I think you have 40 amendments? I'm not very sure. 40, 41 amendments to your constitution. 27, Okay, okay.

[00:46:25] Yeah, so we have already come to 103, so 103 amendments to the Constitution. And there, they have said that for economically weaker sections, there's going to be a reservation of additional 10%. So you got 22 and a half for Scheduled Castes, Scheduled Tribes, 27.5% for Backward Classes, and 10% for the poorer sections of it's communities which, uh, belong to the poor community.

[00:46:47] So among the open category, the non Backward Classes has never caught off 10%. The... Sorry, it's a bit confusing, but the question before the Supreme Court now is gonna be, will it be unconstitutional to make a constitutional provision exceeding 50%? Can you cross the 50% limit? Because the question is, if you can make it 60, why not 70? Where do you draw the line?

[00:47:10] So that's gonna be an interesting question that comes up. But today, the affirmative action is, you got, today a 60% quota system for different reservation, for different categories. And that's very standard affirmative action. And, uh, a- as soon as the Chief Justice constitutes a bench of five or seven judges, uh, will be arguing the case whether we should cross 50% or not. So that's the important question. Yeah. And I think he asked one last question about I missed that, uh... I-

[00:47:39] **Jeffrey Rosen:** There wa... there was a question about free speech, but, uh, I, I think-

[00:47:42] **Arvind Datar:** Yes, yes.



[00:47:42] **Jeffrey Rosen:** ... maybe just quickly, your, your-

[00:47:44] **Arvind Datar:** Okay.

[00:47:44] **Jeffrey Rosen:** ... your thoughts about-

[00:47:45] **Arvind Datar:** Yeah.

[00:47:45] **Jeffrey Rosen:** ... whether, whether the, the, the right should be expanded beyond citizens and whether the US should be a model. That was the question.

[00:47:50] **Arvind Datar:** Uh, no, actually what happened is, they've reserved this free speech only for citizens.

[00:47:54] **Jeffrey Rosen:** Yes.

[00:47:54] **Arvind Datar:** And the difference between the First Amendment and us is that, the First Amendment is always absolute. Whereas our right to free, free speech, speech and expression can be regulated, it can be regulated in terms of security of the country, defense of India and so on and so forth. But I must say that the Supreme Court of India has been very, very, very possessive about this free speech.

[00:48:14] In a case where they impose customs duty on newsprint, they told the government, reconsider it because if newspapers become more expensive, the right to free expression is affected. And the government said that, to... uh, for the purpose of quota system, they said, papers can't be more than 10 pages, they struck it down. They said, you can't get a free speech.

[00:48:34] So the Indian Supreme Court has been extremely jealous and possessive about the right of free speech and expression. And the only thing is, you know, whether it should go for all persons, I think it should, anybody who's staying in India should have a right of free speech and expression. But as of now, it's only for the citizens.

[00:48:49] **Jeffrey Rosen:** Thank you very much for that fascinating on both scopes. Thanks for, uh, helping us understand the affirmative action on free speech cases. Tom Ginsburg, the, the last word, uh, in this absolutely wonderful discussion will be to you. Listening to all that you've heard and drawing on your deep knowledge of comparative constitutionalism, would you say that the Indian Supreme Court is strong and independent among global constitutional courts? And if that is the case, why is it the case? To what would you attribute its independence? Help us understand the Indian Supreme Court's success in the global context.

[00:49:29] **Tom Ginsburg:** It's a wonderful way to sum up, uh, a lot of what we've heard. And I think we have heard, you know, many examples in which the Supreme Court is being looked to by people in the society to resolve the deepest and most fundamental questions of the day. You

know, of course, um, the United States Constitution doesn't mention judicial review. And so, some people say that's the source of our eternal, um, sort of, uh, hand wringing about the counter majoritarian difficulty.

**[00:49:58]** But this is an explicitly, you know, counter majoritarian difficulty which I... a court which is, you know, legitimate and is being called on to decide the major questions of the day. And you don't hear the same kind of discourse. Now, there is a lot of criticism of the court. I don't want to, um, sort of whitewash that.

**[00:50:14]** But it tends to be about, you know, a lot of criticism about particular decisions, a lot of criticism about the self replicating nature of the court, which I referred to before. And I think that is one reason, that the court has managed to remain so independent is that attempts by politicians to manipulate the bench have been put aside, uh, and had been rebuffed.

**[00:50:36]** And so that's what gives it a sense that it is, uh, you know, a major institution in Indian society. And, of course, it's generating doctrines, as I also said, which have been spreading around the world. The creativity of the court is renowned. And we've heard many examples, I wanna go back actually to one of the very first questions, which was the question about the right to life, and how that's been interpreted.

**[00:51:00]** And, of course, the language is very simple. It's very short. But in fact, that right to life has been a wellspring of different decisions by the Supreme Court. Just one example is the Supreme Court interpreted the right to life, to say, there's actually a right to food in India. And I believe it was in one of that line of cases, I could be co... wrong about the, the doctrinal basis, um, you know, ordered every school in India to provide, uh, uh, food to kids, you know, which is incredible, if you think about it.

**[00:51:28]** That's a court implementing a major administrative program, a welfare program, through an order based on the right to life. So, you know, I can't overstate its impact. Um, and that's true in India as well as abroad. Now, I, I do wanna say, the criticisms do amount and the government of India, of course, which has been dominated now for, uh, you know, quite a while by the, the BJP, you know, doesn't see the court as its friend, and is at times trying to, you know, have more influence on it to pressure the judges in various ways and has had some success.

**[00:52:05]** And so there's a very active discourse about the optimal level, I suppose, of judicial independence in India. But there's no doubt that as a positive matter, it's a very central institution, and a very powerful one, and a very independent one.

**[00:52:20] Jeffrey Rosen:** Thank you so much to our wonderful panelists for a, a, a comparative constitutional discussion at the highest level. I... It spreads so much light to compare our different but related constitutional traditions. And I want to share a great quote that my colleague, Sam Desai, found when President Truman welcomed, uh, Prime Minister Nehru, one of the founding fathers of India to America in 1949.

**[00:52:48]** He said, "Destiny willed it that our country should have been discovered in the search for a new route to yours." And this kind of discussion of the similarities and differences between our constitutions is very much in that spirit. Thank you to the Vidhi Center for having suggested this great collaboration. And it certainly has whet my appetite, uh, for more conversations about the important similarities and differences between, uh, the Indian and American constitutions.

**[00:53:18]** On behalf of the National Constitution Center, Menaka Guruswamy, Arvind Datar, and Tom Ginsburg, thank you so much for a wonderful discussion, and thanks to all for joining. All right.

**[00:53:34] Lana Ulrich:** This episode was produced by Tanaya Tauber, John Guerra and Melody Rowell. It was engineered by David Stotz. Special thanks to the Vidhi center for Legal Policy for partnering with us on this program. Visit [constitutioncenter.org/debate](https://constitutioncenter.org/debate) to see a list of resources mentioned throughout this episode.

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**[00:54:11]** If you like the show, you can help us out by rating and reviewing us on Apple podcast or by following us on Spotify. Find us back here next week. On behalf of the National Constitution Center, I'm Lana Ulrich.