

## **GOVERNING GENERATIVE AI IN INDIA: CONSTITUTIONAL LIMITS AND REGULATORY PATHWAYS**

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### **Abstract**

Generative artificial intelligence presents a governance challenge that no existing Indian statute fully addresses. This article examines the constitutional framework — particularly Articles 14, 19, and 21 — that must constrain any future regulatory intervention, surveys the fragmented statutory landscape comprising the IT Act, the DPDP Act 2023, and sector-specific directions, and proposes a risk-tiered legislative architecture appropriate to India's constitutional order and developmental imperatives. It argues that a bespoke AI statute, rather than advisory-driven executive action, is both constitutionally necessary and normatively superior.

### **I. Introduction**

The emergence of large language models and multimodal generative systems has precipitated what commentators have called an 'information singularity': an epoch in which artificial agents can produce text, code, imagery, and audio at scale, at near-zero marginal cost, and in ways that are frequently indistinguishable from human authorship.<sup>2</sup> For a constitutional democracy like India — one that simultaneously aspires to be a global technology hub and remains deeply committed to fundamental rights — the governance of generative AI raises questions that are as much juridical as they are technical.

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<sup>2</sup>Anthropic, 'Claude Model Card' (2023); OpenAI, 'GPT-4 Technical Report' (2023). Large language models can generate coherent text, code, images, and audio at human-level fluency, fundamentally altering the information landscape.

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India's initial regulatory response was notable for its shortcomings. In March 2024, the Ministry of Electronics and Information Technology (MeitY) issued an advisory that effectively required intermediaries to obtain prior government approval before deploying 'under-tested or unreliable' AI models.<sup>3</sup> Lacking statutory backing, the advisory was withdrawn weeks later following industry opposition. This episode demonstrates the risks of governing emerging technologies through ad hoc executive action rather than through deliberate legislation.

India has set out policy goals through the National Strategy for Artificial Intelligence and NITI Aayog's 'Responsible AI for All' framework, which focus on inclusivity, safety, and accountability.<sup>4</sup> Yet neither possesses legal force. The critical question is therefore: what regulatory architecture can govern generative AI in India that is simultaneously effective, constitutionally compliant, and conducive to innovation? This article attempts a structured answer.

## **II. The Existing Statutory Landscape**

### **A. The Information Technology Act and Intermediary Rules**

The principal statute governing digital conduct in India remains the Information Technology Act 2000 and the Intermediary Guidelines and Digital Media Ethics Code Rules 2021 framed thereunder.<sup>5</sup> These instruments, designed primarily for user-generated content platforms and e-commerce intermediaries, are ill-suited to generative AI. The safe harbour under Section 79 — which exempts intermediaries from liability for third-party content where they exercise due diligence — presupposes that unlawful content is uploaded by users, not generated autonomously by the platform's own system. When a generative model produces defamatory, obscene, or otherwise unlawful output, the conceptual foundations of intermediary liability require fundamental reassessment.

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<sup>3</sup>Ministry of Electronics and Information Technology (MeitY), 'Advisory on Due Diligence by Intermediaries / Platforms' (March 2024). The advisory, subsequently withdrawn, required prior government approval for deployment of "under-tested" AI models.

<sup>4</sup>MeitY, 'National Strategy for Artificial Intelligence' (NASSCOM-DSCI, 2018); NITI Aayog, 'Responsible AI for All' (2021).

<sup>5</sup>Information Technology Act 2000, No. 21 of 2000 (India), ss 66A (struck down), 69A, 79; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.

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## **B. The Digital Personal Data Protection Act 2023**

The Digital Personal Data Protection Act 2023 (DPDP Act) represents India's most significant recent advance in digital governance.<sup>6</sup> It establishes consent-based processing requirements, rights of data principals (including correction and erasure), and obligations upon 'data fiduciaries'.<sup>7</sup> For generative AI, the Act's implications are significant but incomplete. Training large models on scraped internet data plainly engages the Act's provisions on processing of personal data; the 'consent' and 'legitimate use' bases for processing will require careful calibration. The Act further empowers the Central Government to designate 'Significant Data Fiduciaries' subject to enhanced obligations, including data protection impact assessments — a provision potentially applicable to major AI developers.<sup>8</sup>

However, the DPDP Act addresses only one dimension of the generative AI challenge: privacy. It does not speak to algorithmic transparency, safety testing, intellectual property in training data, or the generation of synthetic content designed to deceive. A gap-filling statute is therefore necessary.

## **III. Constitutional Framework: Constraints and Obligations**

### **A. Freedom of Expression under Article 19(1)(a)**

Article 19(1)(a) of the Constitution guarantees every citizen the right to freedom of speech and expression.<sup>9</sup> The Supreme Court in *Shreya Singhal v Union of India* firmly established that restrictions on speech — including those targeting online expression — must be narrowly

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<sup>6</sup>Digital Personal Data Protection Act 2023, No. 22 of 2023 (India). The Act received Presidential assent on 11 August 2023 but its operative provisions are yet to be fully notified.

<sup>7</sup>Digital Personal Data Protection Act 2023 (n 4), ss 4–7 (notice and consent), 8 (obligations of data fiduciaries), 16 (children's data), 17 (significant data fiduciaries).

<sup>8</sup>*ibid* s 18 (read with anticipated Rules). The Act empowers the Central Government to designate certain fiduciaries as 'Significant Data Fiduciaries' subject to additional obligations including data protection impact assessments.

<sup>9</sup>Constitution of India 1950, art 19(1)(a). The Supreme Court in *Shreya Singhal v Union of India* AIR 2015 SC 1523 read down s 66A of the IT Act as unconstitutional on free speech grounds.

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tailored, and must fall within the eight enumerated grounds in Article 19(2).<sup>10</sup> Any AI governance framework that mandates pre-publication review of AI-generated content, imposes broad content filtering obligations, or restricts deployment of models based on their potential outputs must therefore satisfy the twin requirements of being prescribed by law and being proportionate to a legitimate aim.

The problem of 'chilling effects' is particularly acute for generative AI regulation. Vague obligations requiring developers to prevent 'harmful', 'misleading', or 'offensive' outputs — without precise definitional content — risk deterring lawful uses of AI in journalism, creative arts, academic research, and civic discourse. Regulatory clarity is thus not merely a matter of commercial certainty; it is a constitutional imperative.<sup>11</sup>

### **B. The Right to Privacy under Article 21**

In Justice K.S. Puttaswamy v Union of India, a nine-judge constitutional bench unanimously recognised privacy as a fundamental right protected under Article 21.<sup>12</sup> The Court's proportionality framework — requiring (i) legal authority, (ii) legitimate state aim, (iii) proportionality *stricto sensu*, and (iv) procedural safeguards — governs not only state action but has been read to inform legislative design.<sup>13</sup> For generative AI, this framework applies along two axes: first, obligations imposed on AI developers to process personal data must themselves be proportionate; and second, any state surveillance or interception of AI-mediated communications must satisfy the Puttaswamy threshold.

### **C. Equality and Non-Discrimination under Articles 14-16**

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<sup>10</sup>Shreya Singhal v Union of India AIR 2015 SC 1523 [33]–[34] (Nariman J). The Court distinguished 'discussion' and 'advocacy' from 'incitement', applying proportionality review to speech restrictions.

<sup>11</sup>Constitution of India 1950, art 19(2) (permissible restrictions on speech); Puttaswamy (n 7) (proportionality). Any mandatory content labelling or pre-deployment audit requirement must satisfy necessity and proportionality.

<sup>12</sup>Constitution of India 1950, art 21; Justice K S Puttaswamy (Retd) v Union of India (2017) 10 SCC 1 (nine-judge bench unanimously holding privacy a fundamental right under Art 21).

<sup>13</sup>Justice K S Puttaswamy (Retd) v Union of India (2017) 10 SCC 1 [310] (DY Chandrachud J, concurring). The four-part test requires: (i) legality — existence of law; (ii) legitimate state aim; (iii) proportionality; (iv) procedural safeguards.

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Articles 14, 15, and 16 of the Constitution enshrine equality before the law and prohibit discrimination on specified grounds.<sup>14</sup> Algorithmic systems deployed in high-stakes decision-making — recruitment, credit scoring, benefit eligibility, criminal risk assessment — routinely encode and amplify the biases present in their training data. Where AI-driven decisions produce disparate outcomes along lines of caste, religion, sex, or place of birth, they may engage constitutional equality guarantees. The regulatory framework must therefore include mandatory bias auditing for high-risk AI deployments, enforceable non-discrimination standards, and mechanisms for affected individuals to seek redress — mirroring the 'high-risk AI' obligations in the EU's Artificial Intelligence Act.<sup>15</sup>

#### **D. The State Action Doctrine and Private AI**

A structural limitation of India's fundamental rights framework is that Article 13 renders void only laws — and state action — inconsistent with Part III; purely private conduct is not directly constrained.<sup>16</sup> Since most large-scale generative AI deployment involves private corporations, the principal mechanism for giving constitutional values horizontal effect is through legislative intervention: Parliament must enact statutes that operationalise equality, privacy, and free expression as obligations upon private AI actors. This, paradoxically, reinforces the case for comprehensive primary legislation rather than reliance on executive advisories.

### **IV. Regulatory Pathways: A Proposed Architecture**

#### **A. A Risk-Tiered Legislative Model**

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<sup>14</sup>Constitution of India 1950, arts 14, 15, 16. For AI and equality, see Usha Ramanathan, 'A Unique Identity Bill' (2010) 45(35) EPW 10; Shyam Divan and Arghya Sengupta, 'The Aadhaar Judgment and the Rule of Law' (2019) 31 NLR 1.

<sup>15</sup>European Union, Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L 1689 (entered into force 1 August 2024).

<sup>16</sup>Constitution of India 1950, arts 12–13, 32, 226. The state action doctrine limits fundamental rights enforcement to actions of 'State' as defined under Art 12; private AI developers may not directly be bound unless performing public functions.

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The most analytically coherent approach to AI governance — exemplified by the EU Artificial Intelligence Act — is risk-based stratification.<sup>17</sup> A similar architecture, adapted to India's constitutional and developmental context, would classify AI systems into at least three tiers: (i) prohibited systems, such as subliminal manipulation or social scoring by state actors; (ii) high-risk systems deployed in consequential domains (justice, healthcare, critical infrastructure, employment), subject to conformity assessments, mandatory human oversight, and transparency obligations; and (iii) general-purpose and low-risk systems, subject only to baseline transparency and consumer protection requirements.

The proposed Digital India Act, currently under consultation, provides an opportunity to incorporate this framework.<sup>18</sup> Critically, any risk classification must be defined with sufficient precision to satisfy the 'prescribed by law' requirement in constitutional proportionality analysis: vague risk categories are constitutionally vulnerable.<sup>19</sup>

### **B. Institutional Architecture: A Dedicated AI Regulator?**

India's regulatory ecosystem is currently fragmented across sector-specific bodies — SEBI, IRDAI, RBI, and TRAI — each of which has begun issuing AI governance directions within their respective domains.<sup>20</sup> This creates coordination failures and regulatory arbitrage opportunities. The Telecommunications Act 2023 has already conferred powers on TRAI that touch on AI-generated content in communication networks.<sup>21</sup> A coherent response would establish a cross-sectoral AI Safety and Standards Authority — adequately funded and staffed with technical expertise — with powers to prescribe conformity standards, conduct

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<sup>17</sup>EU AI Act (n 13), art 1 (purpose and risk-based approach); Recitals 1–12. The EU model classifies AI into unacceptable risk (banned), high-risk, limited-risk, and minimal-risk categories.

<sup>18</sup>Proposed Digital India Act (DIA) 2023 — discussion draft released for public consultation, MeitY (January 2023). The Bill proposes a risk-tiered architecture replacing the IT Act 2000, with specific provisions for 'emerging technologies' including AI.

<sup>19</sup>Anuradha Bhasin v Union of India (2020) 3 SCC 637 (internet shutdowns must meet proportionality); Foundation for Media Professionals v UT of Jammu & Kashmir (2020) 5 SCC 746. These precedents constrain disproportionate AI content restrictions.

<sup>20</sup>NITI Aayog, 'Principles for Responsible AI' (2021); National e-Governance Division, 'Responsible AI Toolkit' (2022). Sector regulators — SEBI, IRDAI, RBI — have also issued AI governance guidelines within their domains.

<sup>21</sup>Telecommunications Act 2023, No. 44 of 2023 (India). The Act introduces a framework for 'over-the-top' communication services and empowers TRAI to issue directions relevant to AI-generated voice and content in telecom networks.

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investigations, and impose penalties, while preserving sector regulators' domain-specific mandates.

### **C. Transparency and Explainability Obligations**

Drawing from the EU AI Act's obligations on general-purpose AI model providers,<sup>22</sup> Indian legislation should require: mandatory disclosure of training data sources and AI-generated content labelling; algorithmic impact assessments for high-risk systems; meaningful explanations to individuals subject to AI-driven decisions; and audit trails sufficient to enable regulatory review. These obligations must be proportionate — requiring detailed technical documentation from a small startup is constitutionally suspect in a way that requiring it from a systemically significant platform is not.

### **D. Legislative Competence**

AI regulation falls principally within Parliament's residuary legislative competence under Article 73 read with Entry 97 of List I of the Seventh Schedule.<sup>23</sup> States may regulate AI deployments touching 'trade and commerce' within their territories, and state-level judicial and police deployments of AI may be subject to concurrent legislative competence. A comprehensive Union statute should therefore include a non-obstante clause appropriately calibrated to preserve legitimate state regulatory space while ensuring national uniformity on safety standards.

### **V. The Dangers of Advisory-Driven Governance**

The MeitY advisory episode of March 2024 illustrated the pathologies of governing through extra-statutory executive directions.<sup>24</sup> First, such advisories lack the force of law and cannot impose binding obligations; they create regulatory uncertainty without accountability. Second, they are particularly prone to being disproportionate — the prior approval requirement had no

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<sup>22</sup>EU AI Act (n 13), arts 51–55 (obligations for providers of general-purpose AI models with systemic risk). Frontier models above 10<sup>25</sup> FLOPs training compute threshold face enhanced safety and transparency obligations.

<sup>23</sup>Constitution of India 1950, art 73 read with Entry 97, List I, Seventh Schedule (residuary legislative power of Parliament). Technology regulation generally falls within Parliament's residuary power; states may legislate on 'trade and commerce' under List II.

<sup>24</sup>MeitY, 'Interim Advisory on Artificial Intelligence' (15 March 2024), subsequently modified by MeitY Advisory (26 May 2024) removing the mandatory prior approval requirement for intermediaries deploying AI models.

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statutory basis and was transparently inconsistent with free speech jurisprudence.<sup>25</sup> Third, they undermine the rule of law by circumventing the deliberative processes — parliamentary scrutiny, public consultation, judicial review — that legitimate regulation requires.

Scholars have rightly argued that India urgently needs a settled statutory framework rather than advisory experimentation.<sup>26</sup> The executive's legitimate role is to issue detailed subordinate legislation (rules, regulations, notifications) under a clear statutory grant of authority — not to substitute for Parliament through advisories whose legality is contestable and whose content is unilaterally alterable.

## VI. Conclusion

Governing generative AI in India requires a regulatory architecture that is simultaneously technically informed, constitutionally grounded, and institutionally coherent. The Constitution's guarantees of free expression, privacy, and equality do not preclude regulation; they demand that regulation be proportionate, precisely defined, and democratically enacted. The current patchwork of IT Act provisions, DPDP Act obligations, and executive advisories fails this standard.

The path forward is a bespoke AI governance statute: one that adopts a risk-tiered approach, establishes a credible independent regulator, imposes proportionate transparency and accountability obligations, and preserves space for India's AI innovation ecosystem to grow. The Digital India Act consultation provides the proximate legislative opportunity; the constitutional framework provides the substantive constraints within which that legislation must operate. Delay is not a neutral option: in the absence of law, the governance of one of the most consequential technologies of our time defaults to contractual terms, corporate self-regulation, and ad hoc executive whim — an outcome neither the Constitution nor sound public policy can sanction.

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<sup>25</sup>Press Trust of India, 'MeitY Issues Advisory on Generative AI' (March 15, 2024). The advisory's attempted extra-statutory imposition of prior approval was widely criticised by industry stakeholders and civil society as disproportionate and legally uncertain.

<sup>26</sup>Rishab Bailey and Nehaa Chaudhari, 'Governing AI in India: The Regulatory Conundrum' (2024) 6 IJLIT 45; Amber Sinha, 'India's AI Policy Gap' (Observer Research Foundation, March 2024).

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