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Concept of Privacy in India: A Socio-Legal Critique

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ABSTRACT

This article provides an incisive view on how the concept of privacy has evolved in India despite being a collectivist society. It has been observed that the notion of privacy co-existed with collectivist tradition even in ancient India. However, the collectivist approach was too dominant to allow an open discussion on the concept of privacy in the country. However, constitutional activists started vouching for privacy towards the fag end of 19th century which continued till the making of the constitution in independent India. However, the right to privacy remained outside the purview of fundamental rights till Supreme Court of India declared it as intrinsic to the fundamental right of life and liberty inherently protected under Article 21 of the constitution. Earlier judgements of the Supreme Court of India on various cases revolving around protection of privacy of individuals make strong case laws for privacy in the country culminating in the landmark judgement of privacy in 2017. This article adds value to the existing discourse on privacy by critiquing the issue from a socio-legal perspective.

KEYWORDS: Collectivist Society, Privacy, Case Laws, Fundamental Rights, Supreme Court, India

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INTRODUCTION

India had traditionally been a collectivist society. Hence, the concept of privacy had been a bit remote in the academic discourses as well as usual neighbourhood conversations. The complex and interconnected nature of the country's social milieu sustained the varied communities through mutual support for centuries. The scenario in India was simply contrary to the western notion of individualism wherein the issue of privacy is sacrosanct and intertwined with a sense of inalienable entitlement. However, the social setting changed gradually after India adopted liberalization, privatization, and globalization in 1991 as a response to an impending economic crisis. The western media, especially the television channels, brought fresh content imbued with individual aspirations that immediately caught the attention of audience both in rural and urban India who had almost become jaded by the likes of 'Hum Log' –an iconic series on family values telecast on state-run *Doordarshan*. Thus, the worldview of the people regarding the role of families and societies in controlling their choices changed drastically. They became more expressive in terms of protecting their own interests at the risk of undermining the authority of the family or society. Thus emerged a movement for privacy in India. It was further amplified by gradual dismantling of the institution of joint family and higher incidence of female in the workforce, especially in the knowledge-based organizations. While the movement for privacy in India grew by leaps and bounds, the notion of collectivism continued to thrive simultaneously leading to juxtaposition of individual and social needs. Hence, evolution of the privacy laws in India amidst collectivist social milieu looks quite interesting.

WHAT IS PRIVACY?

As with most concepts, there are no universally accepted definitions of privacy which makes it even more challenging for academics, social activists, lawmakers, and others to interpret its nuances. However, lack of unanimity on the notion of privacy provides leeway to all the stakeholders to bring forth their own interpretations. Yet, it would be exciting to look at some of the definitions of privacy to contextualize the concept. To begin with, Merriam-Webster Dictionary defines privacy as “freedom from unauthorized intrusion: state of being let alone and

able to keep certain especially personal matters to oneself”¹ American scholar Tom Gerety views privacy as “the control over or the autonomy of the intimacies of personal identity”² The University of California Privacy and Information Security Steering Committee Report of January 2013 described privacy as two intertwined concepts of autonomy and information privacy wherein “autonomy is an individual’s ability to conduct activities without concern of or actual observation, and Information privacy is the appropriate protection, use, and dissemination of information about individuals”.³

True, the notion of privacy has evolved from mere secrecy to a human need. “Privacy is not just about confidentiality, but also about having control over our domains and knowledge about what is done with those domains. Privacy is integral to free speech, openness in research, and the ethical treatment of individuals and institutional assets. Beyond compliance with laws, *privacy is trust!*”⁴ The term “privacy” is a widely used word in everyday conversations as well as in philosophical, political, and legal discourses. The idea of privacy has deep historical roots in discussions within sociology and anthropology, exploring how different cultures have valued and preserved it. It also originates in prominent philosophical dialogues, such as Aristotle’s differentiation between the public realm of political engagement and the private domain linked to family and domestic life. Nevertheless, the historical usage of the term varies, leading to ongoing uncertainty regarding the concept’s meaning, significance, and scope of privacy.

¹“Meaning of privacy” Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/privacy#:~:text=1> accessed on 2 Sep, 2023

²Gerety, T.: Redefining Privacy. Harvard Civil Rights-Civil Liberties Law Review Vol. 12, No. 2. (1977) p. 281

³University of California, 2013, Privacy and Information Security Steering Committee Report of January, <https://ucop.edu/privacy-initiative/uc-privacy-and-information-security-steering-committee-final-report.pdf> accessed on 3 Sep, 2023

⁴“What is privacy” UCSanDiego, <https://privacy.ucsd.edu/privacy/index.html> accessed on 3 September 2023.

Although privacy has existed for as long as there have been people, it has not always been a legal right. There may be a difference between what is regarded as private and what is legally protected as confidential. One of the most significant problems with legal privacy protection is that the concept of privacy protection cannot be fully defined legally. The significance of privacy can be explained by the fact that it is increasingly threatened in the age of the information society's rapid technological growth and has a very tight relationship to human dignity, freedom, and independence.

EVOLUTION OF PRIVACY

The concept of privacy has a rich history that predates its formal recognition in the 19th and 20th centuries. It traces back to ancient societies, including references in the Bible such as Adam and Eve's covering of their bodies for privacy. From a legal perspective, early legal codes like the Code of Hammurabi and Roman laws addressed intrusions into people's homes, reflecting the importance of privacy. The notion of privacy arises from the fundamental distinction between 'private' and 'public,' stemming from humanity's innate need to separate oneself from the external world. It is worth noting that the boundaries between private and public have evolved over time and across different societies, contributing to the shifting understanding of what constitutes private matters throughout history.⁵

In the latter half of the 20th century, numerous international legal documents officially recognized the right to privacy as a fundamental human right of the first generation. This recognition led to incorporating privacy protection into the national legislation of countries that ratified these documents. However, these international agreements do not provide detailed definitions of what privacy entails. Instead, it is the judicial decisions in courts that enforce these regulations which determine the precise scope of privacy and identify which aspects of life can be classified

⁵ Lucas, A., What is Privacy? History and evolution of Privacy. January, 2016, Doktoranduszok Országos Szövetsége

as private.⁶ The European Convention on Human Rights was one of the first international documents which underlined the importance of Privacy in an Individual's life.⁷

PRIVACY IN INDIAN SOCIO-LEGAL CONTEXT

The notion of privacy is not unfamiliar to Indian society. The distinction between public and private realms, known as "*baahar*" and "*ghar*," has existed since the beginning of Indian civilization. The concept of privacy can be traced back to ancient Indian texts like the "*Dharmashastras*" and "*Hitopadesha*," where it is specified that certain matters related to worship, family, and intimate aspects should be shielded from disclosure. During that era, lawmakers often articulated the famous saying: "*sarvas swe swe grihe raja*" (every man is a king in his own house), reinforcing the distinction between the public and private spheres. This saying emphasizes an individual's autonomy within their household and the importance of being left alone.⁸

In modern India, the historical roots of the concept of privacy might be traced to the Constitution of India Bill (1895)⁹ representing one of the initial endeavours by Indians in constitution-making. This bill underscored that every citizen possesses an inviolable sanctuary within their home. Subsequently, the Commonwealth of India Bill (1925)¹⁰ reinforced this idea by advocating non-

⁶ Ibid

⁷ European Convention of Human Rights, 1953.

⁸ Ashna Ashesh, Bhairav Achary, "Locating Constructs of Privacy within Classical Hindu Law", December, 2014, The Center for Internet and Society, <https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law>

⁹The Constitution of India Bill, 1895, <https://www.constitutionofindia.net/historical-constitution/the-constitution-of-india-bill-unknown-1895/>

¹⁰ Commonwealth of India Bill (1925), <https://www.constitutionofindia.net/historical-constitution/the-commonwealth-of-india-bill-national-convention-india->

interference in an individual's dwelling, emphasizing the importance of adhering to due legal processes before any intrusion. These developments reflect the evolving recognition of privacy as a fundamental right in India's legal and constitutional history. During the formulation of the Indian Constitution, numerous thinkers debated on issues revolving around privacy. However, Dr. B. R. Ambedkar's words on the matter certainly stand out, "*The right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized in the state and Minority Report.*"¹¹ Privacy has been established as a fundamental right by an expansive legal interpretation by the nation's courts. However, the right to privacy is not absolute. All fundamental rights are reasonably restricted for the greater good of the public.

CASE LAWS FOR ESTABLISHING PRIVACY AS A FUNDAMENTAL RIGHT IN THE COUNTRY

M. P. Sharma and Others vs. Satish Chandra, 15 March 1954 AIR 300, 1954 SCR 1077: In this case, a search warrant was issued under section 96(1) of the Code of Criminal Procedure to search the premises of the Dalmia group, who were facing allegations of fraud and related offences. The Dalmia group challenged the search warrant, claiming it violated Article 20(2) of the constitution, which protects against self-incrimination. However, the court ruled that a search cannot be considered an act of self-incrimination. The court emphasized that the power of search and seizure is a fundamental tool for the state to safeguard social security and is subject to legal regulation. The court pointed out that the Indian Constitution does not include an absolute right to privacy comparable to the American Fourth Amendment. Therefore, there was no justification to introduce such a right through strained interpretation into a different fundamental right. As a

[1925/#:~:text=The%20Commonwealth%20of%20India%20Bill%201925%20was%20first%20drafted%20by,a%20Constitution%20framed%20by%20Indians.](#)

¹¹ Matthan R, "Even if Privacy is not a fundamental right, we still need a law to protect it." August, 2014. The Wire, <https://thewire.in/law/privacy-is-not-a-fundamental-right-but-it-is-still-extremely-important>

result, the court upheld the authority of search and seizure and concluded that privacy could not be invoked as a defense against search and seizure in this context.¹²

Kharak Singh vs. the State of U. P. & Others, 18 December 1962, 1963, AIR 1295, 1964 SCR (1)

332: In the case involving Kharak Singh, who had been charge-sheeted for dacoity but was later released due to lack of evidence, the police subjected him to surveillance under Chapter XX of the UP police regulations. This surveillance included secret monitoring of his house and approaches, nighttime visits, and inquiries into various aspects of his life. The petitioner challenged these provisions, arguing that they violated his fundamental rights under Article 19(1)(f) and Article 21 of the Indian Constitution. The court ruled against domiciliary visits permitted by the police regulations but controversially held that there is no explicit right to privacy enshrined in the constitution. However, Justice Subba Rao dissented from this opinion and contended that privacy is an integral part of personal liberty, protected under Article 21 of the Constitution. This dissenting view argued that privacy is indeed a constitutional right. Therefore, the Supreme Court's decision conveyed mixed interpretations regarding privacy, with the majority suggesting it was not a constitutional right while Justice Subba Rao's dissent asserted that it was. This case left room for future legal developments on the concept of privacy in India.¹³

Selvi & Others vs. State of Karnataka & Another, 5 May 2010: In this case, techniques like narco-analysis, polygraph examinations, and the Brain Electrical Activation Profile (BEAP), which compel individuals to incriminate themselves, were legally challenged. It marked the first instance where the court established a link between Article 20(3) of the Indian Constitution and the concept of privacy. The court ruled that while criminal law permits authorities to intrude into the physical privacy of individuals through interrogations, individuals have the choice to respond to questions posed by investigators voluntarily. However, the same cannot be permitted when an individual

¹² M. P. Sharma And Others vs Satish Chandra, District 15 March, 1954 AIR 300, 1954 SCR 1077

¹³ Kharak Singh vs The State Of U. P. & Others on 18 December, 1962 1963 AIR 1295, 1964 SCR (1) 332

cannot consent during tests like narco-analysis, polygraph examinations, and brain mapping techniques. The court held that the state should not be allowed to access the thoughts and mental processes of individuals. Therefore, it upheld the right to mental privacy and prohibited the state from utilizing these techniques, emphasizing the importance of protecting an individual's mental privacy from unwarranted intrusion.¹⁴

R. Rajagopal vs. State Of T.N on 7 October 1994, AIR 264, 1994 SCC (6) 632: In this case, the petitioners sought to publish the autobiography of Auto Shankar, a serial killer incarcerated in prison, which revealed his connections with several state authorities. The Inspector General of Police warned that the convict had not written his autobiography, and legal action would be taken if it were published. The central issue revolved around whether writing a biography of a person without their consent would violate their right to privacy. The court held that posting something related to an individual's private affairs without permission would infringe upon their right to privacy. However, the court established an exception: if the information published is derived from the public record concerning an individual, it would not be considered an infringement of their privacy. This ruling aimed to balance the right to privacy with the public's right to access information in the public domain.¹⁵

Mr. 'X' vs. Hospital 'Z', 21 September 1998: In this case, the hospital disclosed confidential information that the petitioner had AIDS, resulting in the cancellation of his marriage. The court acknowledged that the petitioner had the right to confidentiality regarding his health records. However, the court determined that in this particular instance, the right to confidentiality was not violated because the information was disclosed in the public interest. The disclosure was made to ensure that the petitioner's fiancée was informed about the communicable disease her

¹⁴ Selvi & Ors vs State Of Karnataka & Anr on 5 May, 2010

¹⁵ R. Rajagopal vs State Of T.N on 7 October, 1994, AIR 264, 1994 SCC (6) 632

prospective partner was suffering from. Therefore, the court found that the disclosure served a legitimate public health purpose, justifying the breach of confidentiality in this specific case.¹⁶

Justice K.S. Puttaswamy (Retd) vs. Union of India, 2017: In a significant and landmark judgment delivered in 2017, the Indian Supreme Court resolved the ambiguity surrounding the right to privacy by establishing it as a fundamental right stemming from Article 21 of the constitution. The court's ruling broadened the scope of privacy to encompass the privacy of one's body, mind, decisions, and information. However, it also emphasized that this right is not absolute and can be subject to intrusion by the state, provided it passes specific tests outlined by the court. These tests include the test of legality, a test of a legitimate aim, and an examination of proportionality, as articulated in this judgment. This development marked a crucial milestone in the evolution of privacy as a fundamental right in India, opening new avenues and facets in the legal landscape as privacy gained constitutional recognition and protection. It laid the foundation for discussions and legal interpretations related to various aspects of privacy in the country.¹⁷

DATA PROTECTION LEGISLATION IN INDIA

The Digital Personal Data Protection Act (DPDP)¹⁸ in India has finally become law after a lengthy period of discussions, postponements, and negotiations. The law was officially published on 11 August 2023, following a remarkably swift journey through both houses of Parliament, and receiving approval from the President. This development marks India as the 19th member of the G20 to establish comprehensive personal data protection legislation.¹⁹ This significant milestone

¹⁶ Mr. 'X' vs Hospital 'Z' on 21 September, 1998

¹⁷ Justice K.S. Puttaswamy (Retd) vs Union Of India on 26 September, 2018

¹⁸ Digital Personal Data Protection Act (DPDP), <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>

¹⁹ "News of the day: PM hits out at Opp at G20 meet, Digital Personal Data Protection bill now an act and more", The Telegraph, September 2023, <https://www.telegraphindia.com/gallery/news->

arrives six years after the groundbreaking Justice K.S. Puttaswamy vs. Union of India case.²⁰ In that landmark decision, India's Supreme Court recognized the fundamental right to privacy, including informational privacy, within the context of the "right to life" provision in India's Constitution. This ruling prompted the Indian government to embark on a mission to create a robust framework for personal data protection, ultimately resulting in the DPDP Bill.

The DPDP is expansive in scope, drawing inspiration from the European Union's General Data Protection Regulation (GDPR). It applies broadly to all entities, regardless of their size or private/public status, that are involved in processing personal data. Notably, the law also possesses significant extraterritorial reach. This legislation introduces stringent requirements for lawful data processing. It places a strong emphasis on purpose limitation, meaning that personal data can only be used for specific, predefined purposes. Additionally, it grants individuals various rights, including the right to be informed, access their data, and have their data erased. To oversee compliance with these rules, the law establishes the Data Protection Board of India (Board), which holds the authority to investigate complaints and impose fines. However, it's important to note that the Board does not have the power to issue guidance or regulations.²¹

While the DPDP sets rigorous standards for data protection, there are notable exceptions. Government bodies, depending on their functions (such as law enforcement), enjoy certain exemptions. There are also exceptions for publicly available personal data, data processing for research and statistical purposes, and the processing of foreigners' personal data by Indian companies under contracts with foreign entities, such as outsourcing companies. Some startups

[of-the-day-prime-minister-narendra-modi-hits-out-at-opposition-at-g20-meet-digital-personal-data-protection-bill-now-an-act-and-more-photogallery/cid/1958598?slide=1](https://www.pib.gov.in/Press-Release-Details.aspx?prid=1958598)

²⁰Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018

²¹Digital Personal Data Protection Act (DPDP), <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>

may also benefit from exemptions if notified by the government. The DPDP Act grants extensive powers to the central government, including the ability to request information from entities processing personal data and to issue a wide range of "rules" that specify how the law should be applied, somewhat like regulations under US state privacy laws. It is important to underscore that the law won't be in effect until the government announces an effective date. Unlike the GDPR, which had a two-year transitional period between enactment and enforcement, the DPDP Act empowers the government to determine the dates on which different sections of the law become effective, including those governing the formation of the new Data Protection Board.²²

CONCLUSION

The concept of privacy has been ever evolving in the country. It is heartening to note that the lawmakers have earnestly recognized the importance of individual autonomy over time. The Western world, mainly Europe, has been proactive in managing personal data, drawing from their insights and the growing volume of data. They've implemented data privacy regulations for many years to protect their citizens' personal information. The European Union's General Data Protection Regulation (GDPR) has emerged as the benchmark for privacy legislation in many countries due to its comprehensive framework. In contrast, India's approach to privacy has been somewhat distinct. Privacy protections in the corporate sphere have primarily relied on contractual obligations or requirements imposed by processing data from countries with established privacy and data protection laws. Additionally, rapid digitization has heightened the importance of organizations focusing on information and cyber security.

²² Roy R., Zafir-Fortuna G., The [Digital Personal Data Protection Act](https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/#:~:text=The%20DPDP%20Act%20requires%20that,must%20be%20free%20to%20give) of India, Explained, August 2023, Future of Privacy Forum. <https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/#:~:text=The%20DPDP%20Act%20requires%20that,must%20be%20free%20to%20give>

While Europe has taken a legislative route to safeguard personal data, India's approach has involved a blend of contractual and legislative measures, with an increasing emphasis on cybersecurity in response to digital transformation. The Digital Personal Data Protection Act (DPDP) shares a fundamental structure with many global counterparts like GDPR, but it also features unique aspects. These include more limited reasons for processing data, broad exemptions for government entities, government regulatory powers to refine the law and grant exemptions to certain parties, the absence of a predefined or heightened safeguard for special data categories, and an unusual provision allowing the government to request information from fiduciaries, the Data Protection Board, and intermediaries, as well as the ability to block public access to specific data on computer resources.²³ It's worth noting that numerous specifics of the Act will become clearer once India establishes its Data Protection Board and formulates additional rules to specify the law, which will then be officially communicated.

Government initiatives through laws and the efforts by businesses to protect data are driven by rapid digitization, the embrace of new technologies like data analytics and artificial intelligence, and the automation of processes for profiling consumers. India's Data Protection Act has been under development for a considerable period, and its recent passage represents a positive stride, especially following the recognition of privacy as a fundamental right by India's Supreme Court in the landmark Puttaswamy case.²⁴ Although we might encounter some initial challenges, the pace of adoption will accelerate when the citizens of India recognize the benefits of protecting their data. From perspective of common people, the future looks promising.

²³ Roy R., Zafir-Fortuna G., The Digital Personal Data Protection Act of India, Explained, August 2023, Future of Privacy Forum. <https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/#:~:text=The%20DPDP%20Act%20requires%20that,must%20be%20free%20to%20give>

²⁴ Justice K.S.Puttaswamy (Retd) vs. Union Of India on 26 September, 2018