



Privacy is a cultural issue in India: Can it be handled only by enacting a data protection law

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Abstract

The scope of privacy within a regulatory framework is a tension between privacy's determination as a societal value and its scope under a regulatory regime. A lot of the work on privacy is focused on people's psychological and socio-psychological perspectives. So far, cultural variables influencing privacy have received little attention. As this paper will demonstrate in the context of the culture of privacy in a varied society like India, which has traditionally and culturally been implicitly at odds with privacy, cultural effect on privacy is an important factor to consider. This paper examines privacy as a construct through the viewpoint of a cultural phenomenon and the several forms it might take. It discusses the evolution of privacy in the Indian cultural context and aims to address one key question: Is India's culture a barrier to privacy, and can enacting a Data Protection law fix the problem?

Keywords: privacy cultural issue, enacting, data protection

Introduction

Because the cultures in which privacy is born differ, the concept of privacy varies around the world. Privacy in layman terms is defined as a state of being alone and unbothered or monitored by others^[1]. If we are living in the Information Age, then privacy is a pressing concern of our time. Activities that were once private or only known to a select few now create data trails that reveal our interests, personalities, opinions, and intentions^[2]. So, what does privacy mean in a country like India? So far, there doesn't appear to be much. India, with its 1.3 billion inhabitants, has always been a diverse country in terms of culture, traditions, culinary habits, clothes, languages, dialects, religion, and caste. In Indian culture, communication and information have never been considered "private." There is a lack of awareness of private lives in India, since nearly every part of one's life is open to, linked with, and dependent on a family, a community, a village, or a society. It necessitates a grasp of India's holistic culture, which appears to encompass all relationships. Indian social and moral philosophy binds selves to social relations. These focus more on communication and openness intended to foster a sense of community^[3]. In a world where personal decisions matter little and family members live together, the concept of privacy has always been difficult to grasp. This is why many people identify 'privacy' with 'luxuries,' and 'security' is associated with the rich. India has a social evolutionary approach to privacy because of its character. An argument is that personal privacy cannot triumph because societal considerations outweigh individual ones^[4]. Privacy is often seen as in contention with the needs of wider society, as it may substantially reduce the opportunity to engage in collective action^[5]. Privacy rights, it is argued, might have detrimental consequences for societal demands. This argument can be found in a variety of sources, which claim that privacy would limit the breadth of integration and expansion^[6]. There is also a lack of awareness of what is personal and private, to the point where different personal and private topics are held at community gatherings across

the country^[7]. As a result, a number of protocols have been devised to guarantee that openness is maintained, including body language, verbal and written communications, cultural values, and customs.

The Culture Surrounding Privacy In India

Take a peek at India's mobile device penetration^[8] or the popularity of radio or television sets. In a situation in which large amounts of information are verbally communicated the term "privacy" has only a few applications. It is not considered "interference" or "breach of privacy" to seek sensitive and private information about an individual or a family. Despite the fact that arranged marriages may seem weird to many in the West, they are a common practice in India. It is still one of the most common routes to marriage, even in the most metropolitan and cosmopolitan of cities, where a person's marriage is not a personal decision but one reached after discussions and approvals from immediate family, extended family, and, in some cases, even the community and village, it is still one of the most prevalent paths to marriage, and community members are interested in not only who a person should marry, but also how much money is being spent on a wedding, when the couple will have children, and why they are not having children^[9]. And the intrusion into one's personal life starts at a young age. As children, Indians are taught not to close their bedroom doors, even when they go to bed. In many Indian houses, both rural and urban, locking your door is considered as an act of secrecy rather than privacy^[10]. India's social values are so diverse that it essentially creates a tug-of-war between 'individual vs. community and autonomy vs. heteronomy.'^[11]

Marital Rape, Privacy and a Rotten Law

Rape is defined as "non-consensual sexual intercourse with a woman" under Section 375 of the Indian Penal Code. It does, however, exclude the husband from any criminal penalties if he forces intercourse on his wife without her consent if she is over the age of 18. In India, marriage is

understood by the law as an irrevocable implicit consent. Courts have faced strong criticism in upholding this concept of law under the argument that *"When two people are living as husband and wife, however brutal the husband is, can the act of sexual intercourse between them be called rape?"*^[12] This in effect legitimizes violence of this nature, the opposite of which we hope to achieve. The best that the highest court in our country has done is to rule in 2017 that sex with a minor wife will amount to rape^[13]. It removed the exemption to section 375 of the Indian Penal Code, which stated that sexual intercourse between a man and his wife who is not under the age of 15 does not constitute rape^[14]. A man's sexual acts against a girl child in a marital relationship are classified as aggravated penetrative sexual assault under Section 3 of the POCSO^[15], which is similar to rape under Section 375 of the IPC and carries a minimum sentence of 10 years in prison. As a result, there is a glaring inconsistency between the two legislation, with a man's same crime against his underage wife punished under POCSO but not under the IPC.

The Court reasoned that Exception 2 legitimizes an act that would otherwise be considered a grave crime and creates an arbitrary and discriminatory distinction between minor girls between the ages of 15 and 18 based only on their marital status. The Supreme Court rejected the government's assertion that child marriage is a traditional practice and that criminalizing sex with minor wives would destroy the institution of marriage. Tradition cannot legitimize behaviour that violates the rights of children and the Constitution. *"Marriage is not institutional but personal and private in nature"*^[16], and child marriage amounts to a gross violation of the personal rights of the girl child. Marriage at a young age deprives her of a dignified life, and Exception 2 to Section 375 effectively destroys her right to bodily integrity by allowing her husband to have sexual relations with her without her consent.^[17] Exception 2 to Section 375, it was contended, infringes on the girl child's right to privacy by robbing her of her sexual autonomy inside marriage. Privacy also includes the concept of "autonomy," which encompasses a matter of choice and control^[18]. Hence, Feldman rightly characterizes privacy as freedom of choice^[19]. The Court, however avoided delving into the privacy debate since it would have ramifications on the subject of marital rape in respect to women above the age of 18, which, as the judgement explicitly states, was not the matter before the Court^[20].

Due to circumstances such as poverty, illiteracy, social norms, religious views, and the 'sanctimony of marriage,' the government told the Rajya Sabha the concept of marital rape was an international one that could not be applied in the Indian context^[21]. This has given the impression that we are a country where, among other things, an Indian woman hands over a never-ending, irrevocable, and permanent agreement to her husband, which should only be reversed until death separates them, sacrificing all aspects of privacy, consent, and personal space. In India, there have been occasions where judges have refused to amend the legislation and have accepted this heinous practice based on the tradition and perception of marriage in India. The Kerala High Court was one who voiced out a different opinion on the matter where it noted, *"Treating wife's body as something owing to husband and committing a sexual act against her will is nothing but marital rape. Right to respect for his or her physical privacy and mental integrity*

encompasses bodily integrity, and any disrespect or violation of bodily integrity is a violation of individual autonomy."^[22] Put this in comparison with the view taken by other courts like the Chhattisgarh High Court which held that sexual intercourse between legally wedded man and woman is not rape even if it is by force or against the wishes of the wife and the Gujarat High Court and we begin to see a problem. The Supreme Court has offered little assistance on this matter as they refused to go into the question of marital rape between adults even when presented with the opportunity to bring about change. This is a mistake on part of the Apex Court that must not be ignored any longer. The executive and legislative branches of government have behaved similarly to the judiciary. More than a hundred countries have made marital rape illegal. However, India stands apart among the elite group of around 32 countries where marital rape is not illegal. Our legal rules, passed down from the British, are set in stone and decaying at the foundation, despite the fact that the English themselves criminalized marital rape in 1991.^[23] An irony long obscured by India's patriarchal culture.

In 2018, Congress MP Shashi Tharoor introduced the Women's Sexual, Reproductive, and Menstrual Rights Bill, 2018 in the Lok Sabha, with the goal of criminalizing marital rape. Due to a lack of support from the government, the bill lapsed^[24].

Privacy and the courts cultural consideration

India's cultural distinctiveness and cultural values are recognized to influence its population's views toward privacy, and these features are linked to its regulatory approach. Despite the fact that courts have recognized privacy as a serious concern like in *T. Sareetha v T. Venkata Subbaiah*^[25], it was held that the connection to the "human body" and control over personal identification is indisputable in any idea of privacy, and that it has remained linked to India's culture and social structure. The Court decided in *Garesilal v Rasul Fathima* that Indian women have always been shielded from intrusion into their personal lives at home. The home is seen as the paradigmatic private area as well as a physical expression of intangible culture^[26]. In *Basai v Hasan Raza Khan*, The Court acknowledged "purdah" as the foundation of this right, holding that it allowed the owner of one property to compel the owner of another to change the design or architecture of his property in order to keep the women living in the dominant tenements in "purdah." The right is founded on "natural modesty or human morality," according to the Court, and conforms to the purdah system, which was limited to the protection of "purdahnasin" women and those areas of a house that are normally occupied by females^[27]. This produces an opposing effect that linking privacy to customs perpetuates oppressive acts however this may not always be the case. In *Shri Bhagwan Ramchoudwji v Babu Purshottamdas*^[28], the Court ruled that *'it would have to be decided in each case whether the right of privacy violated is substantial or material or whether the right of privacy claimed by a plaintiff is to an oppressive extent'* The court in the Naz Foundation Case linked a man's privacy in his home to the concept of dignity under the Indian Constitution. The court succinctly opined that *"at the root of dignity are the autonomy of the private will and a person's freedom of choice and action."* Evidently for the cases discussed above, it is clear that Indian culture of

privacy is born out of such intrinsic rights associated with family, observation of the tradition of “purdah” and the belief that a person’s modesty and dignity is negatively affected by intrusion. Privacy became a Fundamental Right under the Constitution only in 2017^[29]. Previously, in *Kharak Singh v State of Uttar Pradesh* accepted in 1964 that a right of privacy is implicit in the Constitution under Article 21 The Court equated “personal liberty” with “privacy”, and observed that: ‘the concept of liberty in Article 21 was comprehensive enough to include privacy and that nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy’.^[30] In *People's Union for Civil Liberties v. Union of India*, the Supreme Court held that right to life and personal liberty inculcates the right to privacy and hence rules that tapping of a telephone conversation in the privacy of one’s home or office violates Article 21 of the Constitution of India^[31]. A similar view was taken against excessive governmental invasion in the case of *R. Rajagopal v. State of Tamil Nadu*^[32]. These points towards the fact that protection of privacy in India judicially has grown on a constitutional basis rather than one born out of a remedy against a tort. It is then expected that this 2017 historic judgement will result in a sea change in India's social culture surrounding privacy. This is significant since the digital age has resulted in a vast influx of data, and privacy can no longer be ignored. Its elevation to a Fundamental Right is a step toward safeguarding its exercise against those who might want to exploit it.

However, many unsolved questions have arisen since it has been elevated to a Fundamental Right. What impact will the decision have on citizens' access to information, rights and subsidies from the government, sensitive and biometric data previously gathered by the government, and so on? Although it has been proven that the right to privacy is not absolute, the government's power over citizens' data suggests that it also has control over their lives. Imagine a situation where access to your biometric sensitive personal data determines whether you get subsidized rations. With the introduction of the Bill, a lot of the unsolved questions about privacy were to be answered. The Bill has sat languishing until 2020 only to be revived and put in the Centre of the Joint Committee debate and discussion that continues to expand. Despite pressure from both within and outside the country, India has a history of refusing to enact explicit privacy legislation^[33]. The Bill has gone through multiple changes such as including non-personal data within its ambit and marking exceptions to the Government access to citizen’s data. A lot of the changes depict a rotten culture of security and privacy in India^[34].

Privacy, technology and the human dimension

The dispute about privacy in modern society is a debate over modern freedoms. We are implicitly deciding the ethics of modern life and the restrictions we set on the abilities of others, whether the State or a private entity, to meddle with our lives as we strive to determine the level of privacy and boundaries of an individual. This right has always been intertwined with technological advancements. While our ability to protect privacy has never been better, the monitoring and surveillance capabilities that exist now are unprecedented. We can now uniquely identify persons in enormous data sets and streams, and draw judgments about them based on large sets of data.

Companies and governments now have access to every communication we have, every business transaction we conduct, and every location we visit. Because these attributes restrict action, exclude others, and discriminate, they may have severe implications for individuals, groups, and even society. They also have an impact on how we think about people, markets, society, and the government.

A perfect example of this is the recent ruckus surrounding Pegasus spyware. Pegasus is a spyware created to and capable of hacking a target’s smartphone to extract data and turn on the microphone and camera. It was developed by the NSO Group. A recent expose dubbed the Pegasus Project points to the fact that the Spyware was used on a list of more than 50,000 phone numbers including 300 Indians the likes of journalists, ministers etc. were hacked and that the Indian Government has had access to the spyware^[35]. The Government has done little to clear the air surrounding the matter and has merely offered a vague denial of allegations^[36]. Like every Fundamental Right, the Right to Privacy is subject to reasonable restrictions such as national security and public interest and Order. These reasonable restrictions were inculcated to offer an equitable balance. However, over the years, the Government has traditionally cited national security as a reason to infringe on the Right and escape liability. However, in the present scenario this requires a clear inquiry and better understanding because India’s surveillance laws allow eavesdropping and surveillance but ban “hacking”, even by the State. And so, it is a welcome step taken by the Supreme Court by initiating a committee of cyber security experts to look into the matter and submit a report. The Court that has previously had a hands off approach when the argument of national security was cited has rejected this argument on this rare occasion in a determined effort to get to the truth^[37].

Privacy has never been more in dispute, and yet many people believe that giving up privacy means obtaining higher returns from things like personalized advertising.^[38] Despite the fact that privacy has been recognized as a Fundamental Human Right, our right to privacy can now be undermined without our knowledge, posing a significant problem around the world^[39].

United Nations Declaration of Human Rights (UDHR) 1948, Article 12 states “*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*” Article 17 of the International Covenant on Civil and Political Rights states the same thing (ICCPR). Over 100 countries now have some type of data protection and privacy legislation. Unauthorized surveillance and invasions of privacy are, however, all too frequently carried out without consideration for these safeguards. India faces a steep slope in this battle.

India’s Privacy Problem

India's privacy has been harmed in two ways. The first is, as previously stated, the Indian culture's lack of acceptance of privacy. Indians often equate privacy with secrecy, claiming that they have nothing to hide or that privacy is a luxury they cannot afford. This is due to a lack of understanding of the concept of privacy and the need of safeguarding it. In the EU and the US, the value of privacy and its protection is emphasized from a young age through data literacy. Why is

data literacy important? With every step we take, data is generated, recorded, exploited, and abused, and this level of digitalization is becoming the norm. To be informed citizens capable of making informed decisions about the use of our personal data, we must be data literate. The purpose of data literacy instruction is to lay the groundwork for independent, critical data handling. Furthermore, data literacy can serve as a foundation for informed debates and judgments about other critical digital concerns such as privacy and security^[40].

India is in dire need of a change in the thought process surrounding privacy and this can only be brought by improving data literacy which India sorely lacks and this has not helped change the perception of privacy in the Indian culture. With its large population, most of whom are ill-equipped and unaware of data protection and data literacy, India finds itself as a hotspot for data theft, ransomware, phishing attacks and other cyber-crimes^[41]. In countries like the EU and US privacy has been instilled a “good thing” and data privacy is enforced by concepts of reasonable security procedures and privacy by design principles, which are enacted through legislation such as the GDPR and other state laws in the US. India, on the other hand, continues to be anti-privacy, which is problematic in the digital age. India would do well to pay heed to the principles adopted by countries that have established a privacy structure. Data theft, ransomware hacking, and other cyber-attacks continue to be common in India. This is due to insufficient infrastructure and institutional constraints in departments that handle sensitive personal data. The lack of expertise within the IT wings of various government departments is appalling due to a lack of awareness of national legislation regulating data sharing and cyber security^[42]. Institutional barriers exist primarily as a result of officials who utilize, construct, manage, and safeguard systems failing to enforce ethical technology practices^[43]. Large corporations face the same issue, but their failure to implement reasonable security measures to protect it is due to a lack of concern for privacy. Security breaches are underreported due to a complicated disclosure process and a lack of enforcement of disclosure. Officials are rarely held responsible for enforcing the law. When it comes to information technology and cybersecurity, the situation is considerably worse. This all stems from India’s culture surrounding privacy and while it is debatable whether the social structure built around privacy is bad or not, it does pose several challenges in the digital age to its enforcement.

Conclusion

A privacy regulation can only go so far when there is a lack of awareness about privacy in a society that doesn't recognize privacy in the first place. Before establishing privacy legislation that protect citizens, India must improve the rule of law in the area. It is necessary to increase and reinforce commitment to appropriate data practices and standards. The number of complaints about cybersecurity has been rising as a result of rapid digitization and the march of the online based. There is a scarcity of cybersecurity personnel. Most police departments in the country simply do not have the resources to deal with cybercrime^[44].

Further we can no longer afford to look at privacy through a birds eye view, the concept of privacy is intrinsically related to other aspects of our life and traditions and not upholding

the same is leading to heinous crimes such as marital rape that vitiates all aspects of dignity, privacy and consent. Change is the need of the hour and in light of the same, I propose few innovative changes I believe must be adopted in Indian Jurisprudence in order to bring about better compliance, awareness and rule of law. The first being a section of law detailing how states should compulsorily invest in training and budgetary allocation towards a year wise target of improving literacy of the law and how it affects the populations daily life with reports to the Centre outlining the scope and extent of this training and investment. Since we are talking extensively of privacy as the subject in this paper, it is pertinent that while violating individual privacy can have dangerous effects, the requirement for transparency and exposure to the fact that privacy is a right that must be protected is more critical. After all, when everyone is ignorant of its importance, no one is aware that their privacy has been compromised until it is too late. Improving our understanding of privacy must begin from a young age and hence as a suggestion, privacy as a chapter should be introduced in moral science classes across the country and should be taught in all languages. This would help improve the culture of privacy from the roots.

Finally, as we’ve seen our laws are a very poor representation of the changing world as they still act as a shield towards defending heinous acts such as marital rape in the guise of protecting tradition custom and culture. Without a change in law, we cannot enforce change in society. Yet we are naturally against changing the status quo unless forced to hence, a solution would be to mandate the date or year by which the next amendment or updation of the law must be done keeping in mind the changing dynamics, because a rotten law is no law.

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