



## A PRIMER OF PRIVACY ON THE WALL OF INDIAN CONSTITUTIONAL LIBERTY

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### Overview

*"Nations and individuals constantly make choices that places the values of privacy over other state objectives such as physical safety. If the police is allowed to barge into any house without a warrant, criminals might be more easily apprehended. If the state is permitted to put monitors in our house and tap our phones, crime rates would fall significantly. But the Constitution was written to prevent such suspicion less invasions by the state. By drawing the line at such actions, we knowingly allow for the probability of greater criminality. Yet we draw that line anyway, exposing ourselves to a higher degree of danger, because pursuing absolute physical safety has never been our single overarching societal priority.*

On 24<sup>th</sup> August 2017, the Indian Supreme Court drew the line that Glenn Greenwald talks about in the context of Edward Snowden's revelations. This line that puts our private realm intertwined with the quality of life at a higher pedestal, than the utopian idea of absolute security at any cost, is **Justice K S Puttaswamy v. Union of India** in the legal

sense. The verdict categorically laid down right to privacy as a fundamental right under Article 21 of the constitution.

The most apt and broadly used metaphor for the privacy issue has always been 'Big Brother' - a totalitarian government as portrayed by *George Orwell* in his book, *Nineteen Eighty Four*.<sup>1</sup> Last few decades have witnessed a plethora of technological advancements, which has corresponded to the increase in the risks to privacy. Technology has taken us to such an extent that our everyday life revolves around informational privacy.<sup>2</sup>

### Privacy ingrained in human consciousness

It is understood that privacy is an essential human need. Humans have always expressed the need to have a certain degree of individual privacy in various forms. Although everyone needs privacy in their innate capacity but our institutions may vary depending on our cultural values. Primitively, it has been a battle between group survival and individual privacy where the former was always given more emphasis. It was only when people engaged themselves in their first act of sexual intimacy; they realized the value of privacy.<sup>3</sup> Primitiveness of a society is inversely proportional to the emphasis on privacy in that society. Therefore, privacy at its core ought to be evolutionary, revolving around the concept of territoriality, which is a natural progression of our animal instinct.

<sup>1</sup> Carls S. Kaplan, Kadkkaesque? Big Brother? Finding Right Literary Metaphor for Net Privacy, The New York Times, Feb 2, 2001. <https://www.nytimes.com/2001/02/02/technology/kadkkaesque-big-brother-finding-the-right-literary-metaphor-for.html>

<sup>2</sup> Daniel J. Solove, Privacy and Power: Computer Database and metaphors for Informational Privacy, 53 Stan. L. Rev. 1393 (2001)

[https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2077&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2077&context=faculty_publications).

<sup>3</sup> Margret Mead, Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation 219. ( The author studied the Samoan culture and learnt that the children in the village were exposed to different aspects of life in the public area, except when they engaged in their first sexual act.)



Neuroscience is generally applied in the context of criminal behavior but it is still not a sure way to conclude that our need for privacy is a direct result of our physiology.<sup>4</sup> However, if one observes the animal behavior it becomes clear that an animal treats territoriality as a means of survival hence, privacy is intertwined with territoriality.

Philosophers such as Aristotle and Locke have also addressed the concept of private realm. Aristotle talks about *oikos* and *polis* as a difference between public and private spheres of life.<sup>5</sup> Locke talks about the ‘zone of exclusivity’ that demanded a societal respect for privacy.<sup>6</sup>

With the inception of civilizations, numerous philosophers also came up with the concept of privacy. It has certain abstract characteristics that makes it difficult to define but it is imbedded in human nature so instinctively that it would be very difficult to imagine satisfying human interactions without the ability to keep things secret, to lead lives unmonitored by others.

This private realm was upheld in the judgement of ***Justice K S Puttaswamy v. Union of India*** that will remain law for years to come.

***Justice K S Puttaswamy v. Union of India***  
**Various Opinions in Puttaswamy**

The judgement consists of six different opinions as far as defining privacy as a

concept is concerned. However, the overtone of these opinions seem to be in harmony with each other and to the modern-world thinking of privacy.

Judges	Opinions
Justice Bobde	Dissected the right to privacy into various interest and values. <ul style="list-style-type: none"> <li>• Right to privacy against the state and its entities.</li> <li>• Right to privacy against the non-state entities.</li> </ul> (Para 31-32)
Justice Chelameswar	Opined the privacy has three facets. <ul style="list-style-type: none"> <li>• Repose - freedom from unwarranted stimuli. (<b>Corporeal punishment</b>)</li> <li>• Sanctuary - Protection against intrusive observation. (<b>Data Protection</b>)</li> <li>• Intimate Decision - autonomy with respect to life choices. (<b>Abortion, Euthanasia</b>)</li> </ul> (Para 36, 38-40)

<sup>4</sup> <http://www.lawneuro.org/> A field of legal scholarship that mixes law and neuroscience to enable legal research with the help of brain mapping.

<sup>5</sup> Kronman, Anthony Townsend, "Aristotle's Idea of Political Fraternity" (1979). Faculty Scholarship Series. Paper 1071. <https://pdfs.semanticscholar.org/3d03/8221cc247a14569e642c6d8a7c7d2796b15e.pdf>

<sup>6</sup> Eric Geller, "The philosophy of privacy: What do Thomas Jefferson and John Locke have to do with encryption?" <https://www.dailydot.com/layer8/privacy-security-philosophy-encryption-john-locke-kenyon-conference/>



Justice Kaul	Emphasized on the right to control dissemination of information as an important aspect of privacy. (Para 53)	<ul style="list-style-type: none"> <li>• Spatial Control (<b>Private spaces</b>)</li> <li>• Decisional Autonomy (<b>Choice of faith, clothes etc.</b>)</li> <li>• Informational Control(<b>Data Protection</b>)</li> </ul>
Justice Nariman	<p>Aligns with the opinion of Justice Chelameswar</p> <ul style="list-style-type: none"> <li>• Privacy that involves the person’s physical body such as right to move freely.</li> <li>• Informational privacy which deals with the person’s mind.</li> <li>• The privacy of choice, which protects the individual’s autonomy.</li> </ul> <p>(Para 81)</p>	<p><b>Data Protection</b></p> <p>The rate at which we are witnessing informational technology advancements is unprecedented. Data privacy goes hand in hand with technological advancements. In terms of internet and digitization, three major developments have altered privacy greatly.</p> <ol style="list-style-type: none"> <li>1. The increase in data creation resulting in the vast collection of personal data.</li> <li>2. The globalization of data and the ability of anyone to collate and examine that data.</li> <li>3. Lack of control mechanisms over the digital data.<sup>7</sup></li> </ol>
Justice Sapre	Emphasized on the Preamble on the constitution and the word ‘dignity’. Opined that right to privacy of an individual is a natural right and originates from birth. (Para 8)	<p>On the aspect of Data Protection, <b>Dr. D. Y. Chandrachud J</b> said that:</p> <p><i>Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would</i></p>
Justice Chandrachud	Opined that privacy has distinct connotations attached to it.	

<sup>7</sup> Jerry Berman, Privacy in the Digital Age: Work in Progress, 23 Nova L. Rev. 551 (1998)

<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3132&context=facpubs>



*include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits.*

This judgement however, did not answer the question of whether the Aadhar Scheme is constitutional or to what extent the State can surveil its citizens. This was not the onus on the court. The prerogative of this judgement was to establish the constitutional framework around the concept of privacy so that certain navigational routes are established for lawyers, judges and academicians do deal with such cases in future. The opinion of **Dr. D. Y. Chandrachud J** on data protection aligns with the international jurisprudence on the subject, provides for the right of every person for the right to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour or reputation.<sup>8</sup>

Moreover, personal data is addressed within General Comment no. 16 from the Human Rights Committee, which expounds upon the applicability of Article 17 of the International Covenant on Civil and Political Rights (ICCPR) to data protection:

*“The gathering or holding of personal information on computers, databanks, and other devices, whether by public authorities or private individual or bodies must be regulated by law. Effective measure have to be taken by States to ensure that information concerning a person’s private life does not*

*reach the hands of persons who are not authorized by law to receive process and use it, and is never used for purpose incompatible with the Covenant.”<sup>9</sup>*

The significance of the General Comment can be understood from the fact that it was drafted in 1988 at a time when internet was at its nascent stage and data collection had only started.<sup>10</sup>

### **Apex Data Protection Systems of the World** **European Union Data Protection Directives**

A couple of decades back the European Union expressed an urgent need to protect privacy rights over personal data. The then Vice President of the European Commission stated that people’s data protection rights must be built on four pillars in one of her speech<sup>11</sup> as the EU Justice Commissioner:

1. The first is the “right to be forgotten”: a comprehensive set of existing and new rules to cope better with privacy risks online. When modernizing the legislation, and that people shall have the right – and not only the “possibility” – to withdraw their consent to data processing. The burden of proof should be on data controllers – those who process your personal data.
2. The second pillar is “transparency”. It is a fundamental condition for exercising control over personal data and for building trust in the Internet.
3. The third pillar is “privacy by default”. Privacy settings often require considerable operational effort in order to

<sup>8</sup> Article 17, International Covenant on Civil and Political Rights.

<sup>9</sup> Human Rights Committee, General Comment 16, <http://www.refworld.org/docid/453883f922.html>

<sup>10</sup> Id

<sup>11</sup> Speech by Viviane Reding, Vice President of the European Commission, EU Justice Commissioner, [http://europa.eu/rapid/press-release\\_SPEECH-11-183\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-11-183_en.htm)



be put in place. Such settings are not a reliable indication of consumers' consent.

4. The fourth principle is "protection regardless of data location". It means that homogeneous privacy standards for European citizens should apply independently of the area of the world in which their data is being processed.<sup>12</sup>

Such level of commitment resulted in creation of a legislation. These were adopted as the European Union Directives and the member states were obligated to harmonize their data protection laws with it.

Informational Privacy, as the need of the hour, is the consensual undertone among all the judges. **Justice Kaul** and **Justice Nariman** both emphasized on the fact that a person should know what his/her data is being used for and control its unauthorized use. The judgement also talks about the state's prerogative to gain informed consent and supervise the use of the data to the extent it has been disclosed.<sup>13</sup>

### **Habeas Data**

When there is a question of protecting the privacy of an individual's personal information in Latin America, *Habeas Data* is the most fundamental concept to data privacy.<sup>14</sup> Habeas data is typically a fundamental right granted to individuals in many Latin American countries is a predominant force in the region's data

privacy. Habeas data actions are available to the parties whose data has been affected.

*Habeas Data* and *European Directives* are among the most cherished legal provision for data protection. India is yet to step in this realm and have a specific legislation focused on data protection. In the Puttaswamy judgment, there a ray hope where Dr. Chnadrachud talks about a committee chaired by Justice B N Srikrishna to review inter alia data protection norms of the country and make its recommendations.<sup>15</sup>

### ***Intimate Conduct and Privacy***

The topography of laws related sexual orientation and private sexual acts across the world has been changing rapidly. India is also catching up in the race<sup>16</sup> liberating itself from the shambles of bigotry. The international community has been consistently responding to the issue of criminalization of private sexual acts by the nations worldwide. Anand Grover's Special Rapporteur on the right to enjoy highest attainable standard of physical and mental health states that all human rights are universal, indivisible, interdependent and interrelated. The criminalization of private, consensual sexual conduct between adults infringes not only the right to health, but also various other human rights, including the rights of privacy and equality. In turn, infringements of these rights impacts indirectly on the right to health.<sup>17</sup>

<sup>12</sup> Id

<sup>13</sup> Para 70, Justice Kaul

<sup>14</sup> Andres Gaudamuz, *Habeas Data: The Latin American Response to Data Protection*. [https://www.researchgate.net/publication/220667878\\_Habeas\\_Data\\_The\\_Latin-American\\_response\\_to\\_Data\\_Protection](https://www.researchgate.net/publication/220667878_Habeas_Data_The_Latin-American_response_to_Data_Protection)

<sup>15</sup> Para 185, Justice Chandrachud

<sup>16</sup> K. Sujatha Rao, *Section 377: A Call to Conscience* <https://thewire.in/lgbtqia/editorial-section-377-supreme-court>

<sup>17</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover*, 31 March 2009, A/HRC/11/12, <http://www.refworld.org/docid/49faf7652.html> [accessed 27 July 2018]



Advocates of criminalization of homosexual activity give the reasoning that it is 'necessary' to protect the moral fibre of the society.<sup>18</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms defined the concept of necessity very strictly. In this context, 'necessary' does not resonates with the expressions of "reasonable," "desirable" and "useful" but implies a pressing social need.<sup>19</sup> In *Dudgeon v United Kingdom*<sup>20</sup> and *Norris v Ireland*<sup>21</sup> it was emphasized that restriction of a Convention right (Article 8 of ECtHR) cannot be regarded as necessary in a democratic society which thrive upon the hallmarks of tolerance and broadmindedness. The crux of Norris case was that *the State has nothing to with the private morality and has no right to legislate in matters of private sexual conduct of consenting adults. To attempt to do so is to exceed the limits of permissible interference and to shatter that area of privacy which the dignity and liberty of humans require to be kept apart as a haven for each citizen.*<sup>22</sup>

The question arises that where the State draws a line in limiting the secrecy of consensual sexual behavior. The answer to this question lies in the obligation of the state to protect and nourish the societal interests. LGBT community like any other minority community is not a threat to the State. Among all, they need protection from the State - not prosecution, persecution and ostracisation. As Harvey Milk puts it, *"It takes no compromise to give people their rights... it takes no money to respect the individual. It takes no political deal to give people*

*freedom. It takes no survey to remove repression."*

Puttaswamy judgement with regard to intimate conduct state that the de minimis rationale used in the **Naz Foundation Judgement** is bad law. Minuscule population of the LGBTQ community is no reason for them not being able to exercise their rights in sync with the majoritarian opinion. **Dr. D. Y. Chandrachud J** said that:

*Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.*<sup>23</sup>

He further criticizes the judgment stating that:

*The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.*<sup>24</sup>

The keywords here being *legislative* and *popular*. He clearly intends the idea that safeguarding fundamental rights should not be subjected to majoritarianism.

**Justice Kaul** was also of the same opinion that sexual orientation come under the ambit

<sup>18</sup> *Dudgeon v, United Kingdom*. <http://ceere.eu/wp-content/uploads/2016/03/CASE-OF-DUDGEON-v.-THE-UNITED-KINGDOM.pdf>

<sup>19</sup> *Olson v Sweden*, 11 EHHR 259(1989)

<sup>20</sup> *European Court of Human Right*, Rep at 162-163

<sup>21</sup> *European Court of Human Right* (1988)

<sup>22</sup> Chief Justice O'Higgins' opinion in *Norris v. Ireland*.

<sup>23</sup> Para 126, *Dr. D. Y. Chandrachud*.

<sup>24</sup> *Id*



of identity and dignity and subsequently under right to privacy.

### ***Feminist Concern***

Dr. D. Y. Chandrachud J, in his verdict talks about the critiques of the concept of privacy. Among them, one is a ‘feminist critique’:

***Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. Privacy must not be utilized as a cover to conceal and assert patriarchal mindsets.***<sup>25</sup>

To understand this lets take up two rights, (i) right to use contraceptives and (ii) right to terminate the pregnancy. Now, both these rights circumvent through the right to privacy. In the American context, it was Griswold v. Connecticut and Roe v. Wade. Without these two judgements the aforementioned rights wouldn't exist and subsequently one can imagine the plight of women in such a paradigm.<sup>26</sup>

The Puttaswamy verdict emphasizes on a woman's inalienable interest in privacy and also on the harm that she can be vulnerable to, under the pretext of privacy.

So, what should be the alternative feminist approach regarding their concerns with privacy? First of all, we need to understand that progress cannot be made by simply rejecting the idea of privacy. Instead, one

should adopts Mill's distinction of *self regarding act* and *other regarding acts*.

According to Jaun Stuart Mill, acts that possess no harm to others are called *Self-Regarding Acts*.<sup>27</sup> Examples of self regarding acts can be abortion, obtaining contraception and making other decisions about the woman's body. Feminists arrive at a two ways street while climbing the bandwagon of privacy. At one instant, the concept of privacy is used to enforce bodily rights of abortion and obtaining contraception while on the other instance privacy is seen as a blockade for government intervention into the private sphere of domestic life where sexism and misogyny is pervasive.<sup>28</sup> *Other-Regarding Acts* include acts that have a third party effect, for instance beef ban.

On scrutiny, we come to a conclusion that both these Acts can be and cannot be viewed through the concept of privacy depending upon the person's mental integrity<sup>29</sup> or simply the person's knowledge of other rights. Even the most serious proponents of privacy would confess that it is difficult to define the essence and scope of the privacy. For instance, abortion is advocated through privacy but it is not a private act. It happens in a hospital or a clinic under a third party(doctor) supervision. It is only when you associate the concepts of modesty and bodily integrity then that would attract the concept of privacy. The point here to note is that same

<sup>25</sup> Para 140 (d), Justice Chandrachud

<sup>26</sup> Martha C. Nussbaum, *Is Privacy Bad for Women?*, Boston Review -a political and iteryary forum. <http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women>

<sup>27</sup> JOVAN BABIC, *Self-Regarding / Other-Regarding Acts: Some Remarks*, <https://hrcak.srce.hr/file/1083>

<sup>28</sup> Annabelle Lever, *Must Privacy and Sexual Equality Conflict? A Philosophical Examination of Some Legal Evidence*,

<https://poseidon01.ssrn.com/delivery.php?ID=085025117117095003097097022004091025052087072045017035073086024100021124067110106099054034100045112022004072108030094089067114112013012044019070118106099119088089006095033062001077084119103066086090119081064100126117122096111122027029107078125030069099&EXT=pdf>

<sup>29</sup> Para 169, Justice Chandrachud.



reasoning can be applied to all the medical treatments.

To avoid this slippery slope and reject the lose argument of privacy being an intersection of rights; Justice Chandrachud relied on **Alan Westin's four basic states of privacy.**

*At the core is solitude – the most complete state of privacy involving the individual in an “inner dialogue with the mind and conscience”. The second state is the state of intimacy, which refers not merely to intimate relations between spouses or partners but also between family, friends and colleagues. The third state is of anonymity where an individual seeks freedom from identification despite being in a public space. The fourth state is described as a state of reservation which is expressed as “the need to hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express.*

#### *The Future of Privacy*

Although the privacy judgement of **Justice K S Puttaswamy v. Union of India**, lays down constitutional directions for privacy to be understood as an indispensable fundamental right, this judgement will still not be a straightforward guiding principle.

Privacy will always be a slippery slope between the State and the individual. As the society and technology progress, which is happening quite fast, we will have to look for more answers and they will not be available to us in black letter law. No doubt this judgment creates a perfect foundation but the future of privacy in India is nothing but uncertain. This case is the result of acknowledgement and recognition of the

discrepancies in the Aadhar Scheme. As long as the stakeholders keep questioning the government, this landmark judgement will act as a strong footnote in answering the grey areas of privacy.

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