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## India's Constitutionalism's Stress Test in the Digital Age



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The need to insulate from others, nonchalant as it may be, is as time-honoured as hunting. We have yearned for the sense of clandestine enjoyment in harbouring secrets and rejoicing in solitude from the prying eyes of others. Eight decades ago, the “other” was the constabulary that could search and seize at will.

In the constituent assembly in 1948, Ambedkar called privacy a “useful proposition which must be beyond the reach of the legislature”. The digital age is different. When law enforcement goes beyond the threshold of Bentham’s panopticon, retribution for expressing ideas becomes common.

Privacy, until recently, remained neglected by law and abandoned by governments. But, the indispensability of privacy to liberty and dignity, two unmistakable components of our Preamble, always shadowed omissions. Without legislative safeguards, autonomy in speech and expression will be accompanied by censorship and conformity.

It took our courts three decades after public use of the internet began in India to recognise privacy as a fundamental right.

Until the landmark *NALSA* judgment that recognised a “third gender”, the Supreme Court (in *MP Sharma vs Satish Chandra*, 1954 and *Kharak Singh vs State of UP*, 1963) constantly maintained that the Constitution does not recognise privacy as a fundamental right. The creation of the Unique Identification Authority of India (which gave us the Aadhaar Card) became the *aadhaar* (foundation) for discussions on one question: Is the State taking much more away from people for delivering goods and services under Aadhaar-linked welfare schemes? The constitutionality of the Aadhaar project then came under legal challenge.

Seventy years after Independence, *KS Puttaswamy vs Union of India*, 2017 finally recognised privacy as a fundamental right and set the stage for the Digital Personal Data Protection (DPDP) Act, 2023. The jurisprudential journey was long, the outcome up to scratch, but implementation is still in flux.

Recently, the Supreme Court came down heavily on Meta for WhatsApp’s “take-it-or-leave-it” privacy policy and the misuse of data of Indian users (a fourth of its global base). It quickly caught the eye of the Competition Commission of India. Meta services users felt robbed of the opportunity to allow their personal data to be monetised. Big Tech leaned on the legal fig

leaf that clicking “I Agree” equals consent. WhatsApp is free for users, but the brazen monetisation of personal and behavioural data for advertising was chastised. Chief Justice of India Surya Kant warned that forcing such policies makes “a mockery of the constitutionalism of this country” and will not be tolerated.

The difficulty in making sense of convoluted privacy policies applies as much to social media as to the digital avatars of the government. Do individuals have the ability to seclude themselves (or their information)? Do they have the agency to express selectively in the digital space? While these questions remain unaddressed, the long, and sometimes gratuitous, arm of the law continued to poke individual privacy.

The DPDP Act has its own share of problems — broad exemptions for government agencies on grounds of national security and public order, lack of independence and autonomy for the Data Protection Board, and sweeping discretionary powers, to name a few. But, the seeds of mistrust were sown before the Act came to life.

When a crucial Bill is tabled for less than an hour in each House of the Parliament, there will be allegations of coercion.

When it is discussed with only a handful of Lok Sabha members, it raises a red flag.

When journalists investigating corruption and misuse of public funds are asked to seek consent from the subjects of investigation, it sounds a death knell for participatory democracy.

When RTI’s “public interest” safeguard is arbitrarily replaced with a blanket exemption, it curbs press freedom.

Rampant control of new media has come to symbolise the modern power dynamics. Foucault was right. The ongoing WhatsApp and DPDP cases together form a stress test for Indian constitutionalism in the digital age. The Court’s ruling will decide not just who governs our data, but who governs our democracy in the digital era.

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