

Society and Privacy Law Under Indian context

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Abstract:

The globalisation and introduction of innovations in technology in all fields have made society not only worry about cybercrimes but also focus on the protection of personal data of users of technological services. Ever since the protection of the personal data of consumers became imminent to mitigate financial risks, the doctrine of privacy law has been gaining momentum. So, it has become necessary to understand the meaning of privacy and to study the laws on privacy and its role in the welfare of society. And also, to analyse the global laws on privacy and how the society in developed countries and India understand and implement the doctrine of privacy.

Introduction:

Adaptation to technological ways of doing transactions and living along with electronic gadgets are the forerunners of the digital economy. Newer innovations take birth with every day's sunrise making us forget to use our intellect and depend on artificial intelligence. Today's artificial intelligence started its journey via computers and the internet.

The smartphones pass through the cloud servers to reach the beneficiaries, the consumers. Until the 19th century, every communication restricted its journey between limited and concerned persons to get work done, to finish a business deal or to execute a transaction. But today's communication passes through various persons at various stages through an open network and cloud server which makes every private and confidential communication into a public notice accessible to everyone. This has encouraged criminals and hackers to use the information for their benefit resulting in increasing cyber-crimes.

It is not at all possible to go back to the past as society is enjoying the comfort and convenience of the technological services offered at our doorstep. But if the process of open networking is not brought under scrutiny and control, all the countries' financial machinery will break down. Hence protection of each information or communication is important to mitigate the crimes and that has mandated all the countries to enact data protection laws. These laws protect digital information. Here the question arises "What is the link between data protection and privacy law?"

The data, which is to be protected, which is not to be used for unlawful purposes is the personal information and details and the ownership of the same remains with the consumer always. The consumer has the right to keep it secret and confidential and demand privacy. Hence privacy law and data protection law go hand in hand in the digital era. Here the necessity arises to understand the meaning of privacy which is claimed to be a right by the data owners.

Legal recognition of privacy:

The term privacy has been in usage even from ancient times which was demanded as a right by society. When people started to live in groups, realised the importance of saving and investments for the future and formed a society, the necessity of earmarking or labelling the ownership and possession of their assets to protect them from encroachment or theft by others became necessary. Over time, due to social transformation, privacy has become a right of every individual.

Many countries have mandated the right to privacy as a fundamental right and the same is embedded within the constitution of every country. Thus, it has become the legal right to have recognition by the States and can be claimed for restoration if deprived by the acts of others.

With the modernisation and upliftment in the status of people in society, the term privacy extended its area to cover not only physical assets but also a person's respect, dignity reputation and so on.... which cannot be measured in monetary value. "To equate privacy with dignity is to ground privacy in social forms of respect that we owe each other as members of a common community. So understood, privacy presupposes persons who are socially embedded, whose identity and self-worth depend upon the performance of social norms, the violation of which constitutes "intrinsic" injury"¹.

Thus, privacy is a broader term which creates a right depending on the depth of viewing the impact of physical, financial, and mental hardship.

The impact of digitalisation and the advanced style of transacting business and exchange of communication has further forced the extension of coverage of the term privacy to include digital privacy. The increasing cyber-crimes due to technological innovations and the resultant data theft or data compromise of users' confidential information are compelling every country not only to enact protection laws but also to amend the same as when required to maintain the privacy of the users. Thus, recognition of privacy as a legal right has an eternal life for the mankind.

The importance of privacy depends on the understanding of the term privacy by people having different ways of living, different cultures and statuses. Hence it is very difficult to ascertain or expect when and where privacy will become an issue demanding a right. Mr.Gross, in his article on the concept of privacy, contends "that there is a conceptual muddle surrounding the legal right of privacy and that development of legally protected interest in privacy requires recognition of the particular condition of human life that is sought to be protected"². Knowledge of privacy plays an important role in understanding the right to claim privacy. For instance, people living in Western countries are comprised of well-developed societies adhering to rules and regulations to maintain privacy as a daily way of living. These rules are merged with their behaviour as there is no need to specify the law exclusively every time. These people have designed their way of living within the boundaries of their rights safeguarding their rights and not encroaching on others' rights as well.

But in developing countries, rules and regulations always stand as bodyguards to avoid litigation. Hence, unless and otherwise the deprived person knows the compromise of his/ her privacy, the right does not spring up. Thus, the right to privacy still has a place in the Constitution only and is not understood and claimed by

¹ Robert C. Post, Three concepts of privacy, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/1114/Three_Concepts_of_Privacy.pdf?sequence=2 , visited 27.09.2023

² Hyman Gross, The concept of privacy, New York, 1967

everyone. Again, the existence of the right to privacy is understood in different ways by different people. For instance, the privacy of the platform dwellers cannot be measured. Privacy dwells along with the power, and role authority of an individual. Hence, the more powerful individual claims privacy in more things or activities and the poor claim the least.

While thriving to earn for basic needs, longer hours of labour, climatic conditions, and lack of basic health and education facilities in villages of developing countries discourage people from learning about their rights or seeking knowledge about the same. Particularly in overpopulated countries, it is doubtful whether people have time to think about privacy and their rights or whether they know what privacy is.

Laws on privacy before and after digitalisation:

Every country treats the right to privacy as a constitutional right either in the main Articles or in the Amendments. For instance, the United States has included the right to privacy in different areas in its Fourth and Fifth Amendments. In the United Kingdom or Europe right to privacy is treated as a fundamental right and in India too right to privacy is a fundamental right. The only significant difference is that some countries stress the right to privacy in various acts mentioned in different Articles of the constitution and some countries treat the right to privacy as a birthright and highlight its presence in all acts. Again, the term privacy has a wider meaning in the digital era due to open Network platforms publishing private and personal information as public information which is accessible to everyone including criminals. “In social psychology, privacy is defined as the selective control of access to the self. From an economic perspective, privacy relates to the disutility from losing control of and the risk associated with releasing personal information”³. Privacy is a term popularly known to Europe and the United States only before digitalisation. The errors of technology and the resultant financial frauds and other sorts of internet crimes forced society in all countries to worry about safeguarding their information.

So, privacy laws needed inclusion of data protection under the digital era.” Legislation that safeguards sensitive data is important, and many countries are struggling to keep pace with innovations in information technology that have expanded the realm of digital rights. Governments must both protect privacy and promote transparency”⁴. Hence an overview of privacy policies under both situations before digitalisation and after digitalisation will be helpful to understand the significance of the privacy term in the modern digital world.

United States:

The Right to Privacy in the Digital Age U.S Privacy Act, 1974 – rights and restriction of data held by the Government,

Health Insurance Portability and Accountability Act (HIPAA - 1996) – personal data protection in healthcare and insurance,

Gramm Leach Bliley Act (GLBA)-1999) – protects financial and non-public personal information,

Children’s Online Protection Act (COPPA-2000)- personal information of children under 12 years protected.

³ Chong Wang, Nan Zhang, Cong Wang, Managing privacy in the digital economy, Fundamental Research, Volume 1, Issue 5, 2021, ISSN 2667-3258

⁴ Dr. Keith Goldstein, Dr. Ohad Shem Tov, and Mr. Dan Prazeres, The Right to Privacy in the Digital Age, April 9, 2018

USA being a federal State, there are privacy laws enacted by the Individual States.

California Consumer Privacy Act, 2019 (CCPA) - consumers get control over the information collected by businesses and the Amendment Act (CPRA) California Privacy right Act, 2020 – gives the right to know about the information collected by private entities and to know whether they are selling the same and where the information is passing.

The Massachusetts Data Privacy Law, 2009 – handling of personal information of residents of the State and comprises various rules on the collection of data and consent of the with the opt-out provision of the consumers.

New York enacted a personal privacy protection law in 1984 - to recognise the concern of the public regarding their privacy between the Government and people and

New York Privacy Act, 2022 – rights of consumers like right to access, correction, consumers' consent and challenge automated decision making of the businesses collecting the information and responsibility of businesses to maintain security and notification in case harm done to consumers' information etc.

Europe Convention:

CONVENTION FOR THE PROTECTION OF INDIVIDUALS about AUTOMATIC PROCESSING OF PERSONAL DATA -Strasbourg, 108+ -28/01/1981

This Convention is the first binding international instrument which is still the only international legal agreement for the privacy and data protection of individuals for more than 40 years. It protects the individual against abuses which may accompany the collection and processing of personal data, and which seeks to regulate at the same time the flow of personal data. In addition to providing guarantees about the collection and processing of personal data, it outlaws the processing of "sensitive" data on a person's race, politics, health, religion, sexual life, criminal record, etc., in the absence of proper legal safeguards. The Convention also enshrines the individual's right to know that information is stored on him or her and, if necessary, to have it corrected⁵

United Kingdom:

The UK had no specific privacy law like other countries. This may be due to the reason the English constitution is not a written one. The customs, usages and case laws determined the Constitution, and it is evolutionary. The breach of confidence was dealt with as a privacy act.

Human Rights Act, 1998 - effective from the European Human Rights Commission to respect life and liberty. Data Protection Act, 2018 - delivers the privacy of personal information derived from the European Union's GDPR.

GDPR:

European Union's GDPR of 2018 is the Magna Carta for all the countries to derive regulations on privacy and data protection. The major principles of GDPR are inscribed in the privacy and data protection laws of every country which seek fairness, transparency, limitations confidentiality etc.

⁵ <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=108>

India:

In India right to privacy is a constitutional/ fundamental right like the USA. It includes the right to life and liberty. The right has been determined by various case laws and interpreted from different angles giving a broader view of privacy. Like USA's judicial Review which started its journey from Madison's case and delivered various decisions, Judicial review has played a major role in determining the rights of the people of India. Indian constitution is an important constitution to speak about privacy after the USA's Bill of Rights. Hence, this constitutional right determines general privacy law in India.

The Digital Personal Data Protection Act of India- 2023 is a breakthrough to provide protection of privacy for individuals under a digitalised economy covering transactions and communications. The major challenge in the Act will be that there is no specific timeline within which the data fiduciary is required to inform the user or data principal and the data protection board. Time is the essence of any contract. If it is missing, then action cannot be taken in time to solve the problem or to mitigate the risks. Technology being of dynamic nature with its innovations updated every second, it is crucial to tap the errors or crimes without loss of time. Though the drafting has been done in a mature way to protect the citizens of India, understanding in the right way and the implementation needs quite some time.

Society and Privacy law under Indian Context:

The social behaviour of every individual in India is unique which is a major concern to decide the applicability of law. The uniqueness is due to various factors like different types of culture, languages, environment, financial status, health conditions and education. Though India participates in all digital and development activities including financial inclusion at par with other countries, the society in the Indian context does not enjoy or claim the benefits or their rights.

Despite substantial investment in the educational, financial and educational sectors and focus on ways to deliver benefits to deserving communities, a major portion of the population still lacks knowledge of available resources and awareness of legal mechanisms to claim their rights. It is the inborn culture of the people to tolerate the difficulties and challenges with acceptance. This becomes the main reason preventing the people from seeking knowledge of law, rights and duties.

Though the Indian constitution is framed with enabling fundamental rights and duties along with policies for development, only a limited population know these rights and duties. It is disheartening to note that except for those who have access to legal education, people don't know what fundamental rights are, the Preamble of our constitution or the redressal mechanism to address their grievances. This being the situation, how can it be expected from the people to understand privacy, data protection or regulations?

Again, people in developed countries started using electronic gadgets and had become more comfortable with technological ways of doing things even before globalisation. India, being a developing country, even after 75 years of independence could not successfully implement its directive principles of state policies to the fullest extent due to so many hurdles and economic recessions. Then how can we expect the people to know the law before doing things manually or digitally? India comprises mostly rural areas with an illiterate and financially and digitally illiterate population.

And when we verify the age-wise population to estimate and analyse the digital literacy of people, nearly 67% of the total population belonged to 14-65 years age group, out of which 74% of the total population is under

40years age group, and nearly 7% contribute to more than 65 years⁶. So, the real concern lies in 19% of the population living in the age group of 41-64 years as people under this group might have been deprived of gaining knowledge of digital literacy or knowledge about privacy and data protection. Fortunately, as India comprises more of the younger generation and in active employment up to the age of 40 the active participation of the government in providing digital knowledge from schooling itself will help the people acquire digital literacy. The innovation of mobile technology and the widespread use of mobiles and smartphones having wide coverage in rural areas have changed the lifestyle of all individuals (even scavengers) to adapt to technological gadgets.

This has been the backbone of the World Bank's project of financial inclusion targeting the unbanked areas for the provision of financial services is getting an appreciable implementation in India. The setting up of financial literacy centres and activation of various financial and insurance products through mobile banking have been increasingly spreading the awareness of saving and investment to boost the economic status of the neglected societies in rural areas. Despite various measures for spreading the awareness of digital and financial knowledge among the people of deprived societies, it is still questionable fact whether society shows interest in acquiring real knowledge from the view of legal perspective. Hence, the knowledge of individual rights including privacy rights and to claim the right is still lacking among all societies.

Conclusion:

As mentioned by Robert C. Post, among the three concepts of privacy, the creation of knowledge is the first concept⁷. It is quite impossible to measure the knowledge of the term privacy and its legal implications or the term data protection among a 1.4 billion population of multicultural environments speaking different languages, following different religions, and living in different conditions of living. It will be a herculean task to enlighten all the people with knowledge of their legal rights and redressal mechanisms. But it is the need of the hour for the government to take measures to spread the awareness of legal knowledge at least to the extent that people start to know of their constitution along with the word freedom and their claimable rights. Unless and otherwise people of India become aware of their right to privacy and their duties towards society, no law can be effective in protecting the interests of the people. Along with the spreading of digital and financial literacy, the government should take necessary steps to educate and upgrade the legal knowledge of people.

⁶ <https://www.statista.com/statistics/271315/age-distribution-in-india/>

⁷ Robert C. Post, Three concepts of privacy