

Searching for a room of one's own in cyberspace: Datafication and the global feminisation of privacy

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Introduction

In May 2017, in the context of a Supreme Court case questioning the constitutionality of India's Aadhaar or unique ID program, the country's then Attorney-General, Mukul Rohatgi, made some controversial claims. When opponents attempted to counter the collection of biometric data by linking privacy and bodily integrity, Mr. Rohatgi labelled their arguments 'bogus', and added that Indians' right to their body was in any case not absolute.² Outrage ensued on social media and in newspaper columns about the latter point in particular.³ But while it was disappointing to see the Attorney-General restating this principle in court, women and gender and sexual minorities knew that his words reflected reality. Whether in social life or in law and jurisprudence, their right to their bodies and related privacy sometimes is not recognised at all.

Over the past few years, growing attention has been paid to the ways in which gender and sexuality intersect with privacy concerns in the digital age. Whether through social, corporate, or state surveillance, such work highlights that women and sexual and gender minorities are at particular risk when a loss of privacy occurs as a consequence of

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² Amit Anand Choudhary, 'Citizens Don't Have Absolute Right over Their Bodies: Government' *Times of India* (3 May 2017) <<https://timesofindia.indiatimes.com/india/citizens-dont-have-absolute-right-over-their-bodies-government/articleshow/58486260.cms>>; DownToEarth Staff, 'Who Has Rights over a Citizen's Body? New Twist in Aadhaar Controversy' *DownToEarth* (3 May 2017) <<https://www.downtoearth.org.in/news/governance/who-has-rights-over-citizens-body-new-twist-in-aadhaar-controversy-57754>>.

³ 'Aadhaar Case: Mukul Rohatgi Is Wrong. "Bodily Integrity" Is Sacrosanct' *Hindustan Times* (5 May 2017) <<https://www.hindustantimes.com/editorials/aadhaar-case-mukul-rohatgi-is-wrong-bodily-integrity-is-sacrosanct/story-EghyEtXCUDkaw3RQ9TJ9qO.htm>>.

digitisation and datafication.⁴ But what the above anecdote draws attention to is that, if we are to examine how privacy and gender intersect, instances in which there is a loss of privacy should not be the only focus of our attention. In addition, as I will further explore below, the construction of privacy *itself* has been deeply gendered, as women and gender and sexual minorities are often at the receiving end of forms of privacy that are subordinating, rather than equalising.⁵ Instead of enabling greater freedom, privacy then becomes a duty, a responsibility, the maintenance of which a woman or person belonging to a gender or sexual minority can and is being held accountable for. Privacy becomes something that is intended to keep their world small and restricted, rather than enabling exploration and expansion.

It is my contention in this essay that, as a result of pervasive datafication, we are now witnessing a generalisation of such problematic interpretations of privacy, to include and affect *everybody*. Although datafication is fundamentally reconfiguring our bodies and our lives,⁶ a comprehensive rethink of what it means to substantially protect privacy in this context remains lacking. The result is that the watered-down, inferior version of privacy that women and sexual and gender minorities historically have been faced with is now extended to all. Those who are more privileged will continue to be less (negatively) affected than those who are marginalised, in one or more ways. But nobody can escape completely. We are effectively witnessing a *global feminisation of privacy*.

⁴ Tatiana Dias and others, 'Mother in a Click: Pregnancy as a Jackpot for the Datasucker' (*Chupadados*, 2014) <<https://chupadados.codingrights.org/en/vc-e-oq-vc-clica/>>; Anja Kovacs, "'Chupke, Chupke': Going Behind the Mobile Phone Bans in North India' [2017] Gendering Surveillance <https://genderingsurveillance.internetdemocracy.in/phone_ban/>; Nayantara Ranganathan, 'A Handy Guide to Decide How Safe That Safety App Will Really Keep You' <<https://genderingsurveillance.internetdemocracy.in/safety-app/>>; Nayantara Ranganathan, 'Caution! Women at Work: Surveillance in Garment Factories' <<https://genderingsurveillance.internetdemocracy.in/cctv/>>; Vanessa Rizk and Dahlia Othman, 'Quantifying Fertility and Reproduction Through Mobile Apps: A Critical Overview' (2016) 22 *Arrow for Change* 13; Nicole Shephard, 'Big Data and Sexual Surveillance'.

⁵ Anita L Allen and Erin Mack, 'How Privacy Got Its Gender' (1990) 10 *Northern Illinois University Law Review* 441.

⁶ Anja Kovacs, 'When Our Bodies Become Data, Where Does That Leave Us' (*Deep Dives*, 28 May 2020) <<https://deepdives.in/when-our-bodies-become-data-where-does-that-leave-us-906674f6a969>>.

In what follows, I will first examine, in part one, in what ways dominant understandings of privacy have been gendered and how such gendering has been reflected in Indian jurisprudence. I will outline how privacy has been mobilised and interpreted in ways that have entailed a fundamental curtailment of the decisional autonomy of women and gender and sexual minorities, and of their ability to engage in self-determination. In part two, I will then argue that, in the age of datafication, this predicament now presents itself to all of us, as a result of three trends in particular: the specific ways in which consent and anonymity are mobilised by surveillance capitalism (and government) as key tools to drive the datafication of our lives; the resulting reconfiguration of the public and the private; and the portrayal and treatment of data as by default disembodied and deterritorialised. It is these three trends that lie at the heart of the global feminisation of privacy.

1. The gender of privacy

Privacy as a right has always had a somewhat ambivalent standing in feminism.⁷ Revisiting the dominant understandings of the concept of privacy can explain why this is so. It will also allow me to establish the first part of my thesis: i.e. that privacy is gendered, or to be more precise, that the privacy protections that women, as well as sexual and gender and minorities, have traditionally enjoyed are not only not the same as those that men have, but also that they are not unequivocally a positive good.

1.1. Privacy and the home

Historically, and perhaps even today, dominant understandings of privacy have focused on the home, the domestic, as the locus of a set of both spatial and relational or socio-

⁷ Anita L Allen, 'Privacy' in Alison M Jaggar and Iris M Young (eds), *A Companion to Feminist Philosophy* (Blackwell 1998).

institutional conceptions of privacy. As Samuel Warren and Louis Brandeis put it in their seminal 1890 essay on the right to privacy, a ‘man’s home is his castle’, and this man, not his government, is its ruler.⁸ The home thus emerged as a space of exclusion, where one can exercise the right to be alone – or at least to be left alone by the state.

1.1.1. The home as a black box

Such constructs of privacy have for long been deeply criticised by feminists. By making the home, not the individual, the basic unit for privacy, they have argued, these notions disregard the unequal power relationships that exist within the household, at the expense of those more vulnerable in the equation.⁹ With the protection of the home as a private space also came the designation of a whole range of relations and activities centred around the domestic sphere, such as the family and marriage, as private¹⁰ and thus, to be excluded from state intervention. Moreover, the shape such relations and institutions would take often would primarily benefit the interests of the men of the household. As homes, families, and marriages were designated men’s castles to rule, ‘the private’ thus often functioned as a flag to cover up the oppression of, and violence against, women that takes place in homes.

When the Indian Supreme Court, in the absence of a specific provision guaranteeing this right, for the first time read a right to privacy into the Indian Constitution in 1975,¹¹ the judgment reflected such an intertwining of spatial and socio-institutional conceptions of privacy driven by patriarchal, heteronormative ideals. It said: ‘Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage,

⁸ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 193.

⁹ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Linda J Nicholson, *Gender and History: The Limits of Social Theory in the Age of the Family* (1986); Frances Olsen, ‘Constitutional Law: Feminist Critiques of the Public/Private Distinction’ (1993) 10 319; Elizabeth M Schneider, ‘The Violence of Privacy’ (1991) 23 Connecticut Law Review 973; Ruth Gavinson, ‘Feminism and the Public/Private Distinction’ (1992) 45 Stanford Law Review 45.

¹⁰ Gautam Bhatia, ‘The Constitution and the Public/Private Divide: T. Sareetha vs. Venkatasubbaiah’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010972>.

¹¹ *Gobind v. State of MP* (1975) 2 SCC 148.

motherhood, procreation and child rearing'. Motherhood, but not fatherhood, as Gautam Bhatia has pointed out.¹²

Because indeed, the protection of non-interference foreseen was principally for the benefit of the institutions concerned, not for individual rights or intimacy as such. For example, as Aparna Chandra (2017) has noted, while it is often held that sexual relations are a private matter, in many ways it is not sex but 'marital sex' that is protected by privacy.¹³ It is for this reason that, for example, section 9 of the Hindu Marriage Act, 1955 could for many years coexist with the criminalisation of consensual homosexual intercourse under section 377 of the Indian Penal Code. Section 9 of the Hindu Marriage Act allows for the reconstitution of conjugal rights where a spouse has deserted the other 'without reasonable excuse' and is often seen as a tool for women's oppression.¹⁴ Only in 2018 was the criminalisation of consensual homosexual intercourse finally struck down by the Supreme Court.¹⁵

To its credit, the *Puttaswamy* judgement of 2017, the landmark privacy judgement pronounced by India's Supreme Court,¹⁶ seemed to break with this tradition. As I will discuss in detail below, it acknowledged these feminist critiques and highlighted the importance of privacy for individual autonomy and decision-making. Yet even this judgement was not free from this tension. For example, in his opinion, Justice Bobde referred, among other things, to the 'well-established rule in the Ramayana' that 'a woman ought not to be seen by a male stranger' as evidence that a 'well-developed sense of privacy'

¹² Bhatia (n 10).

¹³ Aparna Chandra, 'Privacy and Women's Rights' (2017) 52 Economic and Political Weekly; Martha C Nussbaum, 'Is Privacy Bad for Women' (*Boston Review*, 21 July 2014) <<https://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women>>.

¹⁴ The constitutionality of section 9 of the Hindu Marriage Act, too, is currently being challenged in the Supreme Court. The arguments revolve to an important extent around the patriarchal nature and impact of the section, its gender neutral language withstanding. See Samanwaya Rautray, 'SC to Examine Whether Forcing Woman to Stay with Husband against Her Will Is Violative of Her Rights' *Economic Times* (5 March 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-examine-whether-forcing-woman-to-stay-with-husband-against-her-will-is-violative-of-her-rights/articleshow/68274137.cms>>.

¹⁵ *Navtej Singh Johar And Ors. v. Union of India* (2018) 10 SCC 1.

¹⁶ *Justice K.S.Puttaswamy (Retd). v. Union of India And Ors.* (2017) 10 SCC 1.

existed ‘even in the ancient and religious texts of India’.¹⁷ Similarly, he noted, ‘Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Civil Procedure Code’s exemption¹⁸ of a pardanashin’s lady’s appearance in Court’.¹⁹ While the latter provision may have its uses, it is noteworthy that Justice Bobde never asked whose privacy is really sought to be protected in these instances: the woman’s, or her husband’s and his family’s?

This reminds us not only that the private sphere is never isolated from government influence; in addition, heteronormative, patriarchal notions of gender often shape government imagination of what is private and what is not as much as society’s. And to the extent that this is true, such notions tend to be reflected in law as well.²⁰

1.1.2. Privacy and space

Spatial notions of privacy that are focused on the home also disregard the fact that for many, including many women, people belonging to gender and sexual minorities, and poor people, the home in fact provides few opportunities for solitude, or to be left alone – sometimes simply because of space constraints. To be fair, not all women consider an absence of solitude problematic;²¹ they may well consider companionship and care more important goals, and things to be cherished.²² But as one of the main loci of socialisation for women in particular, the home can also become a deeply stifling space,²³ especially when they attempt to develop their individual identity in ways counter to established norms.

Many in such situations turn, then, to the public sphere, rather than the private, to find privacy and autonomy. The young people sharing intimacies on public transport and

¹⁷ Ibid 23.

¹⁸ Section 132 of the Code of Civil Procedure, 1908.

¹⁹ *Puttaswamy* (n 16) para 23.

²⁰ Allen, ‘Privacy’ (n 7); Chandra (n 13).

²¹ Chandra (n 13).

²² Allen, ‘Privacy’ (n 7).

²³ Chandra (n 13).

in parks and cinema halls across India attest to this. For couples in same-sex, inter-faith, or inter-caste relations whose families disapprove, such opportunities may be especially important.

The public sphere is deeply gendered as well, of course: it requires women and gender and sexual minorities to always demonstrate a clear purpose for being in public and to thus confirm that their place really is in the private.²⁴ Such activities, therefore, are not without risk. But for those willing to take that risk, the anonymity that public space provides, especially in cities, can be a key tool in aiding the transformation of unequal gendered relations in the household.²⁵

For those at the vulnerable end of unequal power relations, privacy in public can be as important as privacy at home.

1.2. Privacy and autonomy

This brings us to a second key understanding of privacy, one that has gained prominence in recent years: privacy as a core element of autonomy and agency in decision-making, crucial for the development of our capacity for self-determination and, thus, for our subjectivity.²⁶

Central to this aspect of privacy is our ability to engage in the management of our personal boundaries - whether physical or digital - as we see fit. Whenever we take a decision about what to reveal or not to reveal about ourselves to others, be it in social settings or more formal ones, we engage in such boundary management. These decisions are always contextual and dynamic: they change as our relationships change or as new

²⁴ Shilpa Phadke, Sameera Khan and Shilpa Ranade, *Why Loiter? Women and Risk on Mumbai Streets* (Penguin 2011).

²⁵ This point builds on Ambedkar's work which, addressing a slightly different context, urged India's dalits to move to the cities. The anonymity these provide, Ambedkar argued, would give them a much better chance at escaping many of the pressures of casteism, and thus to build better lives for themselves, than India's villages would. See Jesús Francisco Cháirez-Garza, 'Touching Space: Ambedkar on the Spatial Features of Untouchability' (2014) 22 *Contemporary South Asia* 37.

²⁶ Julie E Cohen, 'What Privacy Is For' (2013) 126 *Harvard Law Review*.

situations emerge. In this way, boundary management allows us to create breathing room to validate our own experiences, beliefs, feelings and desires. Especially when these do not align with dominant norms, this is critical to living a life with dignity. Through boundary management, it becomes possible for us to be deeply social, relational beings, pervasively shaped by our social worlds, while at the same time being able to take a step back and develop a critical perspective on those worlds around us, and through this, our capacity for self-determination.²⁷

If solitude may not matter that much to some women and people belonging to gender and sexual minorities, boundary management does. Yet the ability to decide for oneself how much to reveal and to whom, often remains denied to them, as others arrogate to themselves the right to take these decisions for them.

1.2.1. Gender, sexuality and autonomy in Indian jurisprudence

How has the Indian judiciary fared in this regard? Since at least 1983, Indian jurisprudence has considered the contradictions between laws that protect the institutions of family, marriage, motherhood and procreation, on the one hand, and Indian women's autonomy and agency with regard to these areas of life, on the other.²⁸ Yet, the judiciary's track record on this count since then has been uneven at best, and in all too many cases, it failed to recognise individual privacy and decisional autonomy where a challenge concerned the sphere of the family. Thus, allowing ambiguity to surround the status of

²⁷ *ibid*; Kovacs (n 6).

²⁸ See, for example, the detailed analysis of *T. Sareetha v. T. Venkatasubbaiah*, AIR 1983 AP 356, by Bhatia. In this case, Justice PA Choudary of the Andhra Pradesh High Court struck down section 9 of the Hindu Marriage Act as unconstitutional, on the grounds that it violates women's personal privacy, bodily integrity and individual dignity, as well as furthering inequality between men and women. Justice Choudary's verdict was overruled by the Supreme Court a year later, in *Saroj Rani v. Sudarshan Kumar Chadha*, AIR 1984 SC 1562. For further examples, see Surabhi Singh, 'The Puttaswamy Effect: Exploring the Right to Abortion in India' (*Centre for Communication Governance at, National Law University, Delhi*, September 2021) <<https://nluwebsite.s3.ap-south-1.amazonaws.com/uploads/the-puttaswamy-effect-exploring-the-right-to-abortion-in-india-ccg-5.pdf>>.

notions of autonomy and personal decision.²⁹

This finally seemed to change in 2017, when India's Supreme Court reaffirmed in *Puttaswamy vs. Union of India* that the Indian people enjoy a fundamental right to privacy under their Constitution: privacy as autonomy and decision-making was one of the pillars around which the judgement was framed. Thus, this decision had the potential to open up a clear path to challenge any attempt, in law or jurisprudence, to undermine the decision-making agency and autonomy of women and sexual and gender minorities regarding even the most intimate aspects of life.³⁰ This was even more so because the importance of privacy for autonomous decision-making regarding one's body and to preserve bodily integrity and dignity, in particular, was discussed in the judgement at length. With this, the judgement implicitly recognised the centrality of the body, and the control over sexuality, in keeping inequalities intact - as well as in challenging them.

Yet challenges remained. As the judgement also reiterated the language of privacy centred on the home and household, whether in spatial or in relational or socio-institutional terms, it remained unclear how any conflicts between the individual rights of women and gender and sexual minorities, on the one hand, and the protection of institutions related to the home and family, on the other, would be resolved.³¹ Would individual freedom actually prevail?

1.2.2. After Puttaswamy

It seems like something might finally be shifting in the law. In 2018 alone, for example, the Supreme Court delivered several landmark verdicts. It finally decriminalised homosexual relations between consenting adults;³² reaffirmed the right of adult women to

²⁹ Singh, *ibid.*

³⁰ Chandra (n 13); Anja Kovacs, 'How Privacy as a Fundamental Right Brings New Hope to India's Marginalised' *Hindustan Times* (30 August 2017) <<https://www.hindustantimes.com/analysis/how-privacy-as-a-fundamental-right-brings-new-hope-to-india-s-marginalised/story-3hNuzNyUkK9LtYD8CjyNpI.html>>.

³¹ Chandra (n 13).

³² *Navtej Singh Johar* (n. 15)

choose their own life partners and faith;³³ and decriminalised adultery.³⁴ Until then, the crime of adultery was deemed to be committed when a man slept with the wife of another man – as if women are men’s property, and as if women can only be victims, not agents in this scenario (not to mention that the law didn’t even recognise the possibility of same-sex relationships).

There is much to celebrate then. Yet constructions of ‘home and marriage as sacred private spaces’ remain alive in law.³⁵ For example, section 375 of the Indian Penal Code, which criminalises rape, continues to explicitly exempt marital rape. Forcing a woman to have sex without her consent in the context of marriage, although under challenge, remains legal in India for the time being.³⁶ In addition, albeit in varying degrees, across the judiciary courts continue to apply patriarchal norms in formulating their verdicts. For example, in 2021, the High Court of Haryana and Punjab dismissed a petition for protection filed by a couple in a live-in relationship who feared violence from their families, arguing that such relationships are neither ‘morally nor socially accepted’.³⁷ This happened even though, as another bench of the same court pointed out in 2021 as well, nothing in the law forbids such relationships.³⁸ Even bills currently under discussion continue to contain provisions that undermine the decision-making agency of already marginalised people. For example, section 16 of the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021,³⁹ allows for a Magistrate to send actual or perceived victims of trafficking to a rehabilitation home without having to even so much as ask the person for their opinion. Instead, the person in question has to make an application for their release, which the Magistrate can

³³ *Shafin Jahan v. Asokan K.M & Ors.*, AIR 2018 SC 357.

³⁴ *Joseph Shine v. Union Of India*, WP (Crl.) 194/2017.

³⁵ Chandra (n 13).

³⁶ ‘Plea on Criminalisation of Marital Rape: Delhi HC Rejects Centre’s Request for More Time, Reserves Verdict’ *The Indian Express* (22 February 2022) <<https://indianexpress.com/article/cities/delhi/marital-rape-criminalisation-pleas-delhi-hc-reserves-judgment-7783793/>> accessed 22 April 2022.

³⁷ *Gulza Kumari & Another v. State of Punjab & Ors.* CRWP No.4199 of 2021 (O&M).

³⁸ *Pardeep Singh & Another v. State of Haryana & Ors.* CRWP-4521-2021 (O&M).

³⁹ The Trafficking In Persons (Prevention, Care And Rehabilitation) Bill, 2021 <<https://wcd.nic.in/sites/default/files/DRAFT%20TRAFFICKING%20IN%20PERSONS%20%28PREVENTION%2C%20CARE%20AND%20REHABILITATION%29%20BILL%202021%20%281%29.pdf>>.

reject if he believes the application was not made voluntarily.

For this legacy to be completely undone, a lot more judicial and legal work is, thus, needed.

1.3. The privacy predicament

What women in India and, in varying degrees, around the world, continue to suffer from, then, is what Anita Allen has called ‘the privacy predicament’.⁴⁰ They have too much of the ‘*wrong* kinds of privacy’:⁴¹ imposed modesty, chastity, reserve, and confinement, even isolation, in the ‘privacy’ of the home. They do not have enough privacy in the sense of adequate opportunities for ‘replenishing solitude’ or for boundary management, private choice, or autonomous decision-making.⁴²

In these circumstances, privacy then is no longer a right, but a duty, a burden to be carried. And when their privacy is violated, it is women themselves who are held responsible. *She* should not have shared that picture. *She* should not have gone to that place.⁴³ Thus, as discussed before, even in the public sphere women have to demonstrate purpose to perform respectability and make evident that the private really is where they believe they belong.⁴⁴ Irrespective of how they behave, however, when something does go wrong, women themselves are generally held accountable ‘for not being private enough’, in ways that men simply are not.⁴⁵ And initiatives such as the deployment of facial recognition systems by law enforcement to detect ‘women in distress’ in public only

⁴⁰ Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa: Rowman & Littlefield 1988).

⁴¹ Anita L Allen, ‘Gender and Privacy in Cyberspace’ (2000) 52 Stanford Law Review 1175.

⁴² *ibid* 1179.

⁴³ Allen, ‘Gender and Privacy in Cyberspace’ (n 41).

⁴⁴ Phadke, Khan and Ranade (n 24).

⁴⁵ Allen, ‘Gender and Privacy in Cyberspace’ (n 41).

reinforce notions that the public sphere really is a masculine domain.⁴⁶

Unlike other human rights, privacy has been much more contradictory in its applications then. For privacy to do even half of the work we expect of it, the uneven way in which privacy is made accessible and the contradictory uses to which it is put need to be thoroughly interrogated. Without such an examination, we might end up inscribing into law a solution that is half-hearted at best and deeply damaging in the long term at worst. The experiences of many women and gender and sexual minorities in India who have attempted to mobilise the right to privacy to support their autonomous decision-making are instructive in this regard.

2. Privacy and data

If women have always had to contend with the wrong kind of privacy and the associated burdens, this challenge now reasserts itself in the age of datafication — but no longer only for women. Rather, ‘in their quest to make all of us increasingly legible, transparent, predictable, and manipulable, governments and private actors are fundamentally undermining our capacity to engage in the autonomous management of our bodies, selves, and lives as we see fit’.⁴⁷ Women, gender and sexual minorities and other marginalised groups will remain more vulnerable to these efforts and their impacts than more privileged sections of the population; yet nobody is excluded from the fundamental curtailment of our decisional autonomy and ability to engage in self-determination that data governance regimes at present entail.

This is what I mean by the global feminisation of privacy. Because, while some regions of the world may be better off because stronger regulation is in place, such as Europe with

⁴⁶ Danya Hajjaji, ‘Indian City Deploys Facial Recognition to Detect Harassed Women’s Expressions’ *Newsweek* (22 January 2021) <<https://www.newsweek.com/indian-city-deploys-facial-recognition-detect-harassed-womens-expressions-1563761>>.

⁴⁷ Kovacs (n 6).

its General Data Protection Regulation, this remains a worldwide phenomenon - albeit in varying degrees.

2.1. Key tools underpinning the political economy of datafication

Some aspects of the global changes that are underpinning this shift are, by now, well-known: intense datafication of our everyday lives; a securitisation of State-citizen relations that is in part driving this; and a shift to economic visions and policies that see surveillance capitalism as the driver of growth and well-being.⁴⁸

Under the influence of these trends, two key tools have emerged that have contributed significantly to the global feminisation of privacy. The first is the widespread mobilisation of user 'consent' as a tool to legitimise contracts (between users and corporations or users and the state) that effectively undermine users' privacy. If we don't like how our data may be used, we simply shouldn't hand it over, i.e. we shouldn't consent, users are told. But such arguments leave out of consideration that users generally do not have 'the power to influence how this consent is defined, where it begins and ends, or what it looks like'⁴⁹ nor, in many cases, do they have the option not to consent. User consent in the digital age can therefore hardly be called meaningful. On the contrary, 'consent' here functions to effectively invisibilise, depoliticise, and even legitimise the new data infrastructures and deeply unequal power relations that shape them, while at the same time turning the protection of privacy into an individual responsibility.⁵⁰ As Lindsay Weinberg has noted, 'Privacy rights enacted through contracts largely protect the interests of corporations'.⁵¹

⁴⁸ See e.g., Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

⁴⁹ Anja Kovacs and Tripti Jain, 'Informed Consent — Said Who? A Feminist Perspective on Principles of Consent in the Age of Embodied Data — A Policy Brief' (Internet Democracy Project 2021) <<https://internetdemocracy.in/policy/informed-consent-said-who-a-feminist-perspective-on-principles-of-consent-in-the-age-of-embodied-data-a-policy-brief>> accessed 26 October 2022.

⁵⁰ *ibid.*

⁵¹ Lindsay Weinberg, 'Rethinking Privacy: A Feminist Approach to Privacy Rights after Snowden' (2017) 12 *Westminster Papers in Communication and Culture* 5.

Or, the state, as the case may be.

If the protection of their privacy for long has been a burden for women to carry as much as a right, current uses of consent tools ensure, in other words, that now all of us carry such a burden. Moreover, this challenge is increasingly heightened as consent tools are also used to legitimise the myriad practices - such as third party data sharing - that make boundary management by users effectively impossible.⁵² In other words, the same tool that shoulders users with greater responsibility for the protection of their own privacy simultaneously curtails their ability to actually do so. If the capacity to engage in boundary management is crucial to preserve privacy as autonomy and decision-making, the way in which consent tools are deployed to legitimise datafication now undermine the ability of us all to do so effectively in the digital age.⁵³

A second key tool to support the intense datafication of our lives further challenges our ability to effectively engage in boundary management: the practice of anonymising data. By anonymising data, 'institutions can argue they uphold the legal protections afforded to users in regard to individual privacy and concerns over discrimination'.⁵⁴ Yet even anonymous data can easily be mobilised to undermine a user's ability to engage in boundary management. In fact, that is often precisely its goal: in many cases, companies and states simply seek to figure out what 'type' of user you are, so as to slot you into different categories, based on which further action, targeting or excluding you, may or may not be taken. For example, algorithms used to decide who to advertise a particular job to need not know people's names; they rely instead on knowledge about a range of other attributes to take such decisions, including, in the case of one infamous algorithm developed by

⁵² Anja Kovacs and Tripti Jain (n 49); Kovacs (n 6).

⁵³ Although consent will likely never be able to do all we are currently expected from it, a feminist analysis makes clear that existing consent regimes can be strengthened considerably. Among other things, this requires an acknowledgement that autonomy is always relational to be at the heart of any meaningful consent regime. For a detailed analysis of the kind of changes required and why, see Anja Kovacs and Tripti Jain (n 49).

⁵⁴ Weinberg (n 51).

Amazon, people's gender.⁵⁵ While the persons affected may not even be aware that those deploying the algorithm possess this wealth of data about them, such exercises can nevertheless significantly affect the opportunities they get access to in life. If in the past, privacy has often been used as a flag to cover women's lack of autonomy within the household, it now 'conceals the non-sovereignty of online users who are governed through the commercialised capacity to distill patterns in aggregate data'.⁵⁶

Whether offline or online, anonymity, and its contribution to enabling boundary management, has often been pivotal to the transformation of social relations. Yet in the age of datafication, meaningful anonymity is less and less available to us.

2.2. The reconfiguration of the public and the private

There are, however, two additional shifts, underlying all these changes, that are crucial to understand why and how the global feminisation of privacy could have come about - and these have received far less attention so far.

The first crucial shift is the reconfiguration of the public/private divide. As I have outlined above, feminist political theory has for long critiqued the notion that the public and private are two separate, independent spheres of life. In the past, these critiques have primarily focused on bringing to light the gendered social relations that underlie the construction of both spheres and their interrelation. Now has been added to this the 'hybridisation of public and private life where the private is increasingly publicised, commodified, and subject to state and corporate surveillance'⁵⁷ — often by co-opting us

⁵⁵ Miranda Bogen, 'All the Ways Hiring Algorithms Can Introduce Bias' (*Harvard Business Review*, 6 May 2019) <<https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias>>; Jeffrey Dastin, 'Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women' *Reuters* (11 October 2018) <<https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>>.

⁵⁶ Weinberg (no 51) 13.

⁵⁷ Weinberg (n 51) 8.

into the surveillance of our own private lives.⁵⁸ Even the most intimate aspects of our existence are now made easily accessible to corporate and government interests.

Once again, the clean division between public and private life that liberal democratic theorists argued was essential to democracy is, thus, revealed as a mirage, and the private is effectively established as public. As Weinberg has pointed out, this time, however, this has largely happened without an accompanying liberatory politics such as that of the women's movement.⁵⁹ Privacy rights as currently conceptualised (and many who advocate for them) largely continue to maintain a dichotomy between public and private life. They do not recognise sufficiently the ways in which the political economy and cultural practices of datafication undermine the very dichotomy of the public and private, and the liberal idea of the sovereign subject, on which these rights continue to be largely based;⁶⁰ nor do they take into account that the subject is always relationally constituted. As a consequence, they once again fall short in protecting our rights, at the risk of becoming irrelevant. If we are to turn around the global feminisation of privacy, these realities need to be squarely faced and addressed.

2.3. The myth of disembodied data

This brings me to a second important further shift that lies at the heart of the reconfiguration of the relation between the public and the private, and the rise of dataveillance that drives it: a new way in which the individual is believed to be constituted. No longer are we the 'juridical, rights-bearing subject of liberal democracy',⁶¹ instead we are treated as what Deleuze has termed 'dividuals':⁶² disembodied, deterritorialised beings, fragmented into masses of data points which can be aggregated and used for purposes of

⁵⁸ Kirstie Ball, Maria Laura Di Domenico and Daniel Nunan, 'Big Data Surveillance and the Body-Subject' (2016) 22 *Body & Society* 58.

⁵⁹ Weinberg (n 51).

⁶⁰ *ibid.*

⁶¹ *ibid* 7.

⁶² Gilles Deleuze, 'Postscript on the Societies of Control' (1992) 59 October.

control by those who have both access to the data and the means to engage in such processes. Indeed, most of the value of datafication for corporations and governments lies in the analysis that aggregation allows for, even if our individual experiences of datafication may not make this self-evident.

If the notions of selfhood and rights, on which liberal democracy is based, presume an indivisible subject, how could such a shift happen in any rights-respecting society — and seemingly largely uncontested? The answer lies in how we understand what data is. Currently dominant understandings of data - whether furthered by governments, big tech companies, or start-ups - portray data as a layer that somehow penetrates everything, yet exists independently of the medium that has generated it.⁶³ Moreover, once generated, this data, just like a natural resource such as oil, is held to be simply ‘out there’, ready to be mined and used by companies and governments as they see fit.

As individuals, we are treated as disembodied and deterritorialised because the argument is that data is disembodied and deterritorialised.

Yet such understandings of data often do not sit well with our experiences as users. After all, more and more, decisions that affect our physical bodies, their movements and actions are taken on the basis of our data bodies, and the claims our physical bodies may make, including to challenge such decisions, have less and less power in their own right. Rather than an independent layer or a disembodied mirror of our bodies, our experience, thus, tells us that our bodies and our data are closely intertwined - so much so that, as Irma van der Ploeg has pointed out, the line between our physical bodies and our virtual bodies really has become irrelevant.⁶⁴ Seeing that our bodies are always relationally constituted, the intense datafication of our lives necessitates, in other words, a veritable paradigm shift

⁶³ Katherine N Hayles, *How We Became Posthuman: Virtual Bodies in Cybernetics, Literature, and Informatics* (University of Chicago Press 1999).

⁶⁴ Irma van der Ploeg, *The Body as Data in the Age of Information* (Kirstie Ball, Kevin Haggerty and David Lyon eds, Routledge 2012).

in the conceptualisation of our bodies: rather than treating the virtual merely as a reflection of the physical, our understanding of our bodies now needs to comprehensively incorporate both.⁶⁵ This also means that the broader data relations⁶⁶ in which we find ourselves, too, need to be centrally considered in any analysis of our embodied experiences and realities today, and of how these have come into being.

Seeing that these connections are so rarely made, it is no surprise that the protection of our rights is in crisis. While bodily autonomy and integrity and autonomy over fundamental personal choices were also discussed at length in the *Puttaswamy* judgment, the impact of data governance regimes on these aspects, including through their impact on our capacity to effectively engage in boundary management under regimes of datafication, was not considered. They couldn't be, as the data-as-resource narrative has ensured that we, so far, simply lack the common vocabulary necessary to do so.⁶⁷ As long as the fact remains obscured that data and the impact of targeting people through data are always embodied, and thus always also have a material basis, data will continue to be treated as something that merely concerns 'informational privacy'. Would we have been so cavalier with how we understand consent or the value of anonymity online otherwise?

Way Forward

The global feminisation of privacy is then a direct consequence of these trends: in essence, it is the dissociation between bodies and data and the consequent removal of the embodied, relationally constituted realities of people and their lives from the data governance debate that has enabled the global feminisation of privacy in the age of

⁶⁵ *ibid.*

⁶⁶ 'Data relations' refers to the range of relationships through which datafication is operationalised, including those that connect us to the economic and government actors who surveil us, or which datafication manifests in new digital forms, such as group based oppressions such as sexism and racism. Salomé Viljoen, 'Data Relations' (2021) 13 *Logic* <<https://logicmag.io/distribution/data-relations/>>. Also see Ulises A Mejias, *The Costs of Connection: How Data Is Colonising Human Life and Appropriating It for Capitalism* (Stanford University Press).

⁶⁷ Anja Kovacs and Tripti Jain (n 49).

datafication. The reverse is also true: if obscuring the entanglements of our physical bodies and our data is at the heart of the numerous shifts that have led to the global feminisation of privacy, bringing their deep interconnections, and the new context that shapes them, to light is a crucial first step in reversing this trend. In claiming that the link between data, privacy and bodily integrity is 'bogus', Mr. Rohatgi was simply incorrect.

In India, at least, it is an opportune time to do so. In the *Puttaswamy* judgement, we have finally found a firm legal basis to promote and protect the bodily privacy of women and gender and sexual minorities as a crucial element of their autonomy and decision-making, and a number of judicial decisions doing precisely that are already available. Recognising that in the datafied society, our bodies are fundamentally reconstituted to encompass not only flesh, blood, organs, emotions and senses, but also data, would now allow us to bring these long-overdue acknowledgments and their positive impact into the arena of data governance as well.