

The Privacy Paradox Of DPDP Act 2023: The Dual Architecture Of India's Digital Social Contract

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Abstract

India's Digital Personal Data Protection (DPDP) Act, 2023, represents a paradigm shift in the nation's digital governance, ostensibly enacted to secure the privacy rights of the "Data Principal." However, the legislation presents a critical paradox: while it robustly empowers individuals as consumers against corporate surveillance, it simultaneously dilutes the transparency mechanisms required to hold the state accountable.

This paper critiques this dichotomy by synthesizing three distinct theoretical frameworks. First, it employs Alan Westin's concept of Informational Self-Determination to analyze the Act's consent architecture, which successfully shifts power from corporate "Data Fiduciaries" to individual "Data Principals". Second, it contrasts this with Jürgen Habermas's theory of the Public Sphere, arguing that the Act's amendment to the Right to Information (RTI) Act dismantles the "public interest" test, blinding the citizenry to state action. Finally, these conflicting modalities are reconciled through Michel Foucault's theory of Panopticism. The paper concludes that the DPDP Act functions as a "Legislative Panopticon," creating an asymmetry of visibility where the state retains total observation powers through broad exemptions (Section 17) while legally shielding itself from public scrutiny (Section 44(3)), effectively cementing a regime of state-centric control under the guise of privacy protection. This paper could form the basis for further research in the area.

Keywords: DPDP Act 2023, Right to Information (RTI), Panopticism, Jürgen Habermas, Alan Westin, Informational Privacy, State Surveillance.

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I. Introduction

In the architecture of modern democracies, two distinct rights often find themselves in a precarious waltz: the right to privacy being the individual's shield against intrusion, and the right to information being the citizen's sword against opacity. For the better part of the 21st century, India's legal framework struggled to articulate a coherent vision for the former, even as the latter flourished under the robust regime of the Right to Information (RTI) Act, 2005. The enactment of the Digital Personal Data Protection (DPDP) Act, 2023, was poised to resolve this asymmetry. Born from the Supreme Court's landmark *K.S. Puttaswamy* judgment, which recognized privacy as a fundamental right, the Act was celebrated as the final piece of India's digital rights infrastructure. However, a close reading of the statute reveals a legislative paradox that complicates, rather than clarifies, the relationship between the individual and the state.

The DPDP Act is not merely a data protection law; it is a bifurcated instrument of governance that splits the Indian subject into two distinct identities: the "Consumer" and the "Citizen." On one hand, the Act constructs a sophisticated fortress around the individual *qua* consumer. It imposes strict obligations on private entities, termed "Data Fiduciaries", requiring affirmative consent, data minimization, and harsh penalties for breaches. In this domain, the law fulfills the liberal promise of empowering the weak against the strong, granting individuals the agency to curb the extractive tendencies of surveillance capitalism.

However, this protective embrace abruptly ends where the state begins. The controversy of the DPDP Act lies not in what it gives, but in what it surreptitiously takes away. Through Section 44(3), the Act amends the Right to Information Act, removing the pivotal "public interest" override that previously allowed personal information of public officials to be disclosed if it served a larger democratic good. By replacing this nuanced balancing test with a blanket exemption for all "personal information," the Act effectively weaponizes the language of privacy to shield the state from public scrutiny.

This restructuring of rights raises a profound theoretical concern: the Act seemingly grants the state a

monopoly on visibility. Through the broad exemptions carved out in Section 17, the state retains the power to bypass consent requirements and survey the population in the interest of "national security" or "public order," all while rendering its own internal machinations opaque to the citizenry via the RTI amendment. This paper argues that this contradiction is not an accident of drafting, but a coherent feature of modern Governmentality.

By synthesizing Alan Westin's theory of informational self-determination, Jürgen Habermas's conception of the public sphere, and Michel Foucault's framework of the Panopticon, this analysis suggests that the DPDP Act functions as a "Legislative Panopticon". It utilizes the rhetoric of consumer empowerment to legitimize a system where the citizen is made transparent to the state, while the state renders itself invisible to the citizen. This paper adopts a strictly theoretical interpretive method. It does not examine jurisprudence, administrative practice, or empirical enforcement. Instead, it employs three philosophical frameworks: Westin, Habermas, and Foucault, to illuminate the conceptual architecture of power embedded in the DPDP Act.

II. The Asymmetry Of The Digital Social Contract: Operationalizing Informational Self-Determination

The "revolutionary" promise of the DPDP Act is best understood not merely as a regulatory upgrade, but as the legislative operationalization of Alan Westin's core privacy thesis. In his seminal work *Privacy and Freedom* (1967), Westin moved the theoretical needle beyond the passive "right to be left alone" toward a dynamic agency he termed "informational self-determination." He defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." This definition rests on the function of Personal Autonomy, one of Westin's four functions of privacy, where the individual's ability to control their digital footprint is intrinsic to their moral independence. The DPDP Act creates a direct parallel to this framework by shifting the legal standard from *security* (protection by others) to *sovereignty* (protection by self).

This theoretical alignment is most visible in the Act's construction of Consent (Section 6). Westin argued that privacy is not a permanent state of withdrawal (Solitude) but a temporary and voluntary adjustment of boundaries (Reserve). The DPDP Act mirrors this by mandating that consent be "free, specific, informed, unconditional, and unambiguous" with a clear affirmative action. This effectively legislates Westin's requirement for active "determination." The "opt-out" models of the past, which assumed consent unless stated otherwise, violated Westin's principle of conscious control. By requiring a "clear affirmative action," the Act ensures that the "Data Principal" is actively navigating their state of privacy, deciding the exact "extent" of communication as Westin prescribed.

Furthermore, the Act incorporates Westin's prerequisite for control: Knowledge. Westin posited that one cannot determine the fate of their information without understanding the context of its use. The DPDP Act's rigorous Notice requirements (Section 5), which dictate that Data Fiduciaries must inform users of the *purpose* of processing and the *rights* available to them, serve as the foundational layer for Westin's self-determination. Without this statutory guarantee of transparency, the "claim to determine" remains a theoretical abstraction. The Act transforms this abstraction into a tangible right, ensuring the individual is an informed agent rather than a passive subject.

Finally, the Act provides the mechanisms for what Westin described as "Limited and Protected Communication". Privacy, for Westin, was fluid; boundaries needed to be adjustable. The DPDP Act's Right to Withdraw Consent (Section 6(4)) and Right to Erasure (Section 12) are the practical tools that allow for this fluidity. The specific mandate that withdrawing consent must be "as easy to do" as giving it acknowledges Westin's view that privacy is a continuous negotiation, not a one-time contractual surrender. In this market-facing dimension, the DPDP Act is a faithful disciple of Westin, constructing a "sovereign consumer" fully equipped to exercise the autonomy that Westin identified as the heart of a free society.

III. The Blinded Citizen: The Erosion Of The Habermasian Public Sphere

Where Westin helps us understand how the Act constructs autonomy in the private sphere, Habermas enables us to see what is lost when this autonomy does not extend to the political sphere. The very agency that governs one's data in the market collapses when the question shifts to holding the state accountable.

While the DPDP Act empowers the individual in the marketplace, it simultaneously undermines their influence in the political arena. To understand the gravity of this dispossession, one must examine the Act through the lens of Jürgen Habermas's *The Structural Transformation of the Public Sphere* (1989). Habermas conceptualized the bourgeois public sphere not merely as a gathering of individuals, but as a specific domain where private people come together to use their reason to hold state power to account. Central to this theory is the "Principle of Publicity" (also known as *Publizitätsprinzip*). For Habermas, publicity is the only mechanism capable of transforming arbitrary domination (*dominium*) into legitimate authority. A democracy, in this view, survives only as long as the "arcana of state"; the secrets of power are exposed to the "light of publicity."

In the Indian context, the Right to Information (RTI) Act, 2005, functioned as the statutory guarantor of

this *Publizitätsprinzip*. It allowed the citizen to source the raw material necessary for what Habermas termed "rational-critical debate." Without access to official records, public discourse degrades into what Habermas called "acclamation": a passive approval of state actions based on public relations rather than reasoned scrutiny. The original Section 8(1)(j) of the RTI Act codified this distinction. It recognized a tension between privacy and transparency but provided a decisive release valve: information could be disclosed if a "larger public interest" justified it. This proviso acknowledged that a public official's "personal" sphere shrinks when it intersects with public duty.

The DPDP Act, through Section 44(3), dismantles this Habermasian infrastructure. by amending Section 8(1)(j) to exempt *all* personal information from disclosure without exception, the Act effectively legislates a return to "Representative Publicness"; a pre-democratic state where power is displayed before the people (like a monarch before subjects) rather than justified to them. By removing the "public interest" test, the Act declares that the privacy of the *functionary* supersedes the right of the *public* to judge the function. This shift marks a severe acceleration of what Habermas termed "Re-feudalization." In this state, the public sphere is colonized by administrative power; the state manages public opinion rather than responding to it. When the DPDP Act shields assets, educational qualifications, and decision-making records of public servants under the guise of "personal data," it prevents the formation of an authentic public opinion. The citizen is reduced from a participant in a rational dialogue to a consumer of state narratives. In this blinded state, the "rational-critical" element of the public sphere evaporates, leaving behind a hollow shell of democracy where the citizen is protected from the market but defenseless against the state.

IV. The Legislative Panopticon: A Unifying Theory Of Governmentality

The dual nature of the DPDP Act, empowering the Westin-style consumer while blinding the Habermasian citizen, presents a legislative paradox. This paradox signals a shift from the normative concerns of democratic legitimacy that define Habermas's framework to the structural logic of power that Foucault theorizes. Where Habermas asks whether power is justified, Foucault asks how power is engineered through visibility and concealment. How can a single statute simultaneously expand and contract the rights of the subject? This contradiction is best resolved through the framework of Michel Foucault's *Discipline and Punish* (1977). Foucault argued that modern power is not exercised through public spectacle or brute force, but through "Panopticism", a mechanism of disciplinary power derived from Jeremy Bentham's architectural design of the Panopticon prison. In this structure, a central tower allows a single guard to observe all inmates, but the inmates cannot see into the tower. The result is an asymmetry of visibility: the subject is "seen, but he does not see; he is the object of information, never a subject in communication." The DPDP Act functions as a Legislative Panopticon, utilizing this exact asymmetry to entrench state power.

The State as the Observer: The Visibility of the Subject

Foucault posited that "visibility is a trap." To control a population, the state must render it completely visible. The DPDP Act achieves this through Section 17, which contains broad exemptions for the state. While private corporations are bound by the strict consent architecture discussed in Section 3, the state allows itself to bypass these protections in the interest of "sovereignty," "security of the state," or "public order." Under Section 17(2)(a), the central government can exempt *any* instrumentality of the state from the Act's privacy obligations. This effectively legalizes mass surveillance. The citizen, whose data is shielded from the private market, remains perfectly transparent to the state. Just as the inmate in the Panopticon is constantly potentially watched, the Indian citizen under Section 17 exists in a state of permanent digital visibility to the government, without the protections of "informational self-determination" that apply in the commercial sphere.

The State as the Unseen Tower: The Invisibility of Power

Simultaneously, the Panopticon requires the central tower to remain opaque; the inmate must never know if the guard is watching. The DPDP Act fosters this opacity through the amendment to the RTI Act (discussed in Section 4). By removing the "public interest" override, the Act creates a chilling effect on transparency. The internal workings of the state: its assets, decisions, and qualifications are shrouded in secrecy. This completes the Panoptic circuit. The Consumer is protected from the market, pacified by Westin's rights. However, the Citizen is caught in Foucault's trap: they are fully visible to the state (via Section 17), but the state is invisible to them (via Section 44(3)).

Governmentality

The term "Legislative Panopticon" here is not a metaphor but an architectural analogy in Foucauldian terms. It refers to a legal design that reproduces the two essential features of Bentham's structure: the perfect visibility of the subject and the perfect opacity of authority. Ultimately, the DPDP Act is a masterstroke of what Foucault termed "Governmentality": the art of managing a population. It does not fracture rights; it reorganizes

them to serve state utility. By adopting the language of privacy, the state legitimizes its own power. It grants the subject "sovereignty" over their data only when it concerns private actors, but reserves for itself the Panoptic privilege of total oversight. The Act, therefore, is not a failure of privacy, but a success of power, a sophisticated instrument that cements the state's position as the all-seeing, unseen guardian of the digital realm.

V. Conclusion

The Digital Personal Data Protection Act, 2023, stands as a defining artifact of India's evolving digital constitutionalism. Through the theoretical triad of Westin, Habermas, and Foucault, this paper has demonstrated that the Act is not a monolithic protector of privacy, but a dual-use instrument that fundamentally alters the visibility of the subject. By operationalizing Alan Westin's "informational self-determination," the Act successfully emancipates the individual from the extractive logic of surveillance capitalism. It restores agency to the consumer, equipping them with the legal tools such as affirmative consent, erasure, and withdrawal to negotiate their boundaries in the private market. However, this empowerment is starkly juxtaposed against the erosion of the Habermasian public sphere. By dismantling the "public interest" override in the RTI Act, the legislation effectively blinds the citizen, replacing "rational-critical debate" with administrative opacity and accelerating the "re-feudalization" of the state.

Ultimately, Michel Foucault's framework of the Panopticon reconciles these contradictions. The Act constructs a regime of asymmetric visibility: the state secures for itself a "God's-eye view" of the population through broad exemptions (Section 17), while simultaneously retreating behind a legislative veil that renders its own actions legally invisible (Section 44(3)). In doing so, the DPDP Act redefines the social contract for the digital age: the Indian subject is granted the sovereignty of a consumer, but denied the scrutiny of a citizen. The result is a "Legislative Panopticon" where data protection serves not as a check on power, but as the sophisticated architecture of modern Governmentality.

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