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# Nature of Privacy in India

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## ABSTRACT

*The nature of privacy in India is a complex and evolving concept deeply rooted in the country's cultural, legal, and historical context. This abstract explores the multifaceted dimensions of privacy, its evolution, and its current status in India.*

*Privacy in India has historically existed within a collectivist society, where individuals' lives are interconnected. This collectivist ethos coexists with the growing influence of Western individualism, particularly post-1991 economic reforms. This juxtaposition necessitates a careful balance between individual and social needs in Indian privacy laws.*

*Defining privacy proves challenging, as it lacks a universally accepted definition. It encompasses concepts of autonomy, information protection, confidentiality, and control over personal domains. Privacy has expanded from mere secrecy to a fundamental human need integral to free speech, research openness, and ethical treatment.*

*The historical evolution of privacy dates back to ancient societies, with early legal codes emphasizing the importance of personal space and boundaries. In the 20th century, international legal documents recognized privacy as a fundamental human right, influencing national legislations.*

*In India, privacy has deep cultural roots, with distinctions between public ("baahar") and private ("ghar") realms existing for centuries. Early constitutional efforts recognized the sanctity of one's home. The Indian Constitution's framers debated privacy's significance, with Dr. B. R. Ambedkar highlighting the need for protection against unreasonable searches and seizures.*

*Several case laws in India have played crucial roles in establishing and shaping privacy laws. The M. P. Sharma case (1954) challenged the introduction of privacy as a constitutional right, while Kharak Singh case (1962) presented conflicting interpretations. The Selvi case (2010) affirmed mental privacy rights, and the R. Rajagopal case (1994) established the right to control personal information.*

*A landmark moment in India's privacy journey was the Justice K. S. Puttaswamy case in 2017, where the Supreme Court recognized privacy as a fundamental right under Article 21 of the Constitution. It introduced the tests of legality, legitimate aim, and proportionality, providing a foundation for privacy protection.*

*The Digital Personal Data Protection Act (DPDP) in India, enacted in 2023, builds on this recognition and incorporates principles akin to the European GDPR. It applies broadly,*

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*emphasizing purpose limitation, individual rights, and oversight by the Data Protection Board.*

*India's approach to privacy blends legislative measures with contractual obligations, particularly in the corporate sphere. With rapid digitization and increasing cybersecurity concerns, data protection is becoming paramount.*

*In conclusion, the nature of privacy in India is a dynamic interplay of culture, history, and legal evolution. Recent legislative developments, such as the DPDP Act, signal a growing commitment to safeguarding personal data, aligning India with global privacy standards while preserving its unique cultural context. Privacy in India is evolving, and the future holds promise for enhanced protection and awareness among its citizens.*

**Keywords:** *Privacy laws, Information Privacy, Legal Evolution, Data Protection Legislation.*

## **I. INTRODUCTION**

Indian society has been a historically collectivist society. The nation hosts a complex, integrated society which is highly dependant on each other for numerous social needs. It is paramount to distinguish this interconnectedness specific to the nation from Western and Scandinavian societies which are more individual focused.

It is thus essential to understand the background in which numerous privacy laws are introduced in the country. Law and culture are in a cyclic relationship- one impacts another and vice versa.

Human society is a dynamic, ever-changing organism, the concept of privacy is also evolving as an important part of Indian laws. Post-1991 economic reforms, the gates of Indian Society were thrown open to Western influences. The idea of an individualistic society that values personal choice and privacy thus prospered in the minds of the residents.

The collectivist ideals were not completely eradicated from the minds of the citizen. This has resulted in a juxtaposition of individual and social needs which need to be chartered to by privacy laws of the country.

### **(A) What is privacy**

Miriam Webster Dictionary defines privacy as “freedom from unauthorized intrusion : state of being let alone and able to keep certain especially personal matters to oneself”<sup>2</sup>

American professor Tom Gerety understands privacy as “the control over or the autonomy of

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<sup>2</sup> “Meaning of privacy” Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/privacy> accessed on 2 Sep, 2023

the intimacies of personal identity”<sup>3</sup>

The University of California Privacy and Information Security Steering Committee Report of January 2013 described privacy as two intertwined concepts of autonomy and information privacy.- Autonomy is an individual’s ability to conduct activities without concern of or actual observation and Information privacy is the appropriate protection, use, and dissemination of information about individuals.<sup>4</sup>

The concept of privacy has been expanded from mere secrecy to a human need. “Privacy is not just about confidentiality, but also about having control over our own domains and knowledge about what is done with those domains. Privacy is integral to free speech, openness in research, and the ethical treatment of individuals and institutional assets. Beyond compliance with laws, *privacy is trust!*”<sup>5</sup>

The term "privacy" is a widely used word in everyday language, as well as in philosophical, political, and legal contexts. However, it lacks a single, universally accepted definition or interpretation. The idea of privacy has deep historical roots in discussions within sociology and anthropology, exploring how different cultures have valued and preserved it. Additionally, it has origins in prominent philosophical dialogues, such as Aristotle's differentiation between the public realm of political engagement and the private domain linked to family and domestic life. Nevertheless, the historical usage of the term varies, leading to ongoing uncertainty regarding the concept's meaning, significance, and scope.

Although privacy has existed for as long as there have been people, it has not always been a legal right. There may be a difference between what is regarded as private and what is legally protected as private. One of the most significant problems with legal privacy protection is that the concept of privacy protection cannot be fully defined legally. The significance of privacy can be explained by the fact that it is increasingly threatened in the age of the information society's rapid technological growth and has a very tight relationship to human dignity, freedom, and independence.

## II. EVOLUTION OF PRIVACY

The concept of privacy has a rich history that predates its formal recognition in the 19th-20th century. It traces back to ancient societies, including references in the Bible such as Adam and

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<sup>3</sup> Gerety, T.: Redefining Privacy. Harvard Civil Rights-Civil Liberties Law Review Vol. 12, No. 2. (1977) p. 281

<sup>4</sup> University of California, 2013, Privacy and Information Security Steering Committee Report of January, <https://ucop.edu/privacy-initiative/uc-privacy-and-information-security-steering-committee-final-report.pdf> accessed on 3 Sep, 2023

<sup>5</sup> “What is privacy” UCSanDiego, <https://privacy.ucsd.edu/privacyy/index.html> accessed on 3 Sep, 2023

Eve's covering of their bodies for privacy. From a legal perspective, early legal codes like the Code of Hammurabi and Roman laws addressed intrusions into people's homes, reflecting the importance of privacy. The notion of privacy arises from the fundamental distinction between 'private' and 'public,' stemming from humanity's innate need to separate oneself from the external world. It's worth noting that the boundaries between private and public have evolved over time and across different societies, contributing to the evolving understanding of what constitutes private matters throughout history.<sup>6</sup>

In the latter half of the 20th century, numerous international legal documents officially recognized the right to privacy as a fundamental human right of the first generation. This recognition led to the incorporation of privacy protection into the national legislations of countries that ratified these documents. However, these international agreements do not provide detailed definitions of what privacy entails. Instead, it is the judicial decisions in courts that enforce these regulations which determine the precise scope of privacy and identify which aspects of life can be classified as private.<sup>7</sup>

The European Convention of Human Rights was one of the first international documents which underlined the importance<sup>8</sup> of Privacy in an Individual's life. states in Article 8 that:

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### **III. PRIVACY IN INDIAN CULTURAL CONTEXT**

The notion of privacy isn't unfamiliar to Indian society. The distinction between public and private realms, known as "baahar" and "ghar," has existed since the inception of Indian civilization.

The concept of privacy can be traced back to ancient Indian texts like the "Dharmashastras" and

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<sup>6</sup> Lucas, A., What is Privacy? History and evolution of Privacy. January, 2016, Doktoranduszok Országos Szövetsége

<sup>7</sup> Ibid

<sup>8</sup> European Convention of Human rights, 1953, September.

"Hitopadesha," where it is specified that certain matters related to worship, family, and intimate aspects should be shielded from disclosure.

During that era, lawmakers often articulated the famous saying: "sarvas swe grihe raja" (every man is a king in his own house), reinforcing the distinction between the public and private spheres. This saying emphasized an individual's personal autonomy within their household and the importance of being left alone.<sup>9</sup>

The concept of privacy in India has historical roots that extend back to the Constitution of India Bill (1895)<sup>10</sup> representing one of the initial endeavors by Indians in constitution-making. This bill underscored that every citizen possesses an inviolable sanctuary within their home. Subsequently, the Commonwealth of India Bill (1925)<sup>11</sup> reinforced this idea by advocating for non-interference in an individual's dwelling, emphasizing the importance of adhering to due legal processes before any intrusion. These developments reflect the evolving recognition of privacy as a fundamental right in India's legal and constitutional history.

During the formulation of the Indian Constitution, Numerous thinkers Debated regarding Privacy. DR. B R Ambedkar's words stand out-

*"The right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized in the state and Minority Report."*<sup>12</sup>

Privacy has been established as a fundamental right by a wide legal interpretation by the courts of the nation. However, the right to privacy is not absolute. All fundamental rights are reasonably restricted for the greater good of the public.

#### **IV. CASE LAWS FOR ESTABLISHING PRIVACY LAWS IN THE COUNTRY PRIVACY LAWS IN INDIA**

- 1. M. P. Sharma And Others vs Satish Chandra, District 15 March, 1954 AIR 300, 1954 SCR 1077-** In this case, a search warrant was issued under section 96(1) of the

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<sup>9</sup> Ashna Ashesh, Bhairav Achary, "Locating Constructs of Privacy within Classical Hindu Law", December, 2014, The Center for Internet and Society, <https://cis-india.org/internet-governance/blog/loading-constructs-of-privacy-within-classical-hindu-law>

<sup>10</sup> The Constitution of iNDIA Bill, 1895, <https://www.constitutionofindia.net/historical-constitution/the-constitution-of-india-bill-unknown-1895/>

<sup>11</sup> Commonwealth of India Bill (1925), <https://www.constitutionofindia.net/historical-constitution/the-commonwealth-of-india-bill-national-convention-india-1925/>.

<sup>12</sup> Matthan R, "Even if Privacy is not a fundamental right, we still need a law to protect it." August, 2014. The Wire, <https://thewire.in/law/privacy-is-not-a-fundamental-right-but-it-is-still-extremely-important>

Code of Criminal Procedure to search the premises of the Dalmia group, who were facing allegations of fraud and related offenses. The Dalmia group challenged the search warrant, claiming it violated Article 20(2) of the constitution, which protects against self-incrimination. However, the court ruled that a search cannot be considered an act of self-incrimination. The court emphasized that the power of search and seizure is a fundamental tool for the state to safeguard social security and is subject to legal regulation. The court pointed out that the Indian Constitution does not include a fundamental right to privacy comparable to the American Fourth Amendment. Therefore, there was no justification to introduce such a right through strained interpretation into a different fundamental right. As a result, the court upheld the authority of search and seizure and concluded that privacy could not be invoked as a defense against search and seizure in this context.<sup>13</sup>

2. **Kharak Singh vs The State Of U. P. & Others on 18 December, 1962 1963 AIR 1295, 1964 SCR (1) 332-** In the case involving Kharak Singh, who had been charge-sheeted for dacoity but was later released due to lack of evidence, the police subjected him to surveillance under Chapter XX of the UP police regulations. This surveillance included secret monitoring of his house and approaches, nighttime visits, and inquiries into various aspects of his life. The petitioner challenged these provisions, arguing that they violated his fundamental rights under Article 19(1)(f) and Article 21 of the Indian Constitution. The court ruled against domiciliary visits permitted by the police regulations but controversially held that there is no explicit right to privacy enshrined in the constitution. However, Justice Subba Rao dissented from this opinion and contended that privacy is an integral part of personal liberty, protected under Article 21 of the constitution. This dissenting view argued that privacy is indeed a constitutional right. Therefore, the Supreme Court's decision conveyed mixed interpretations regarding privacy, with the majority suggesting it was not a constitutional right while Justice Subba Rao's dissent asserted that it was. This case left room for future legal developments on the concept of privacy in India.<sup>14</sup>
3. **Selvi & Ors vs State Of Karnataka & Anr on 5 May, 2010-** In this case, techniques like narco-analysis, polygraph examinations, and the Brain Electrical Activation Profile (BEAP), which compel individuals to incriminate themselves, were legally challenged. It marked the first instance where the court established a link between Article 20(3) of

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<sup>13</sup> M. P. Sharma And Others vs Satish Chandra, District 15 March, 1954 AIR 300, 1954 SCR 1077

<sup>14</sup> Kharak Singh vs The State Of U. P. & Others on 18 December, 1962 1963 AIR 1295, 1964 SCR (1) 332

the Indian Constitution and the concept of privacy. The court ruled that while criminal law permits authorities to intrude into the physical privacy of individuals through interrogations, individuals have the choice to respond to questions posed by investigators voluntarily. However, the same cannot be permitted when an individual cannot give their consent during tests like narco-analysis, polygraph examinations, and brain mapping techniques. The court held that the state should not be allowed to access the thoughts and mental processes of individuals. Therefore, it upheld the right to mental privacy and prohibited the state from utilizing these techniques, emphasizing the importance of protecting an individual's mental privacy from unwarranted intrusion.<sup>15</sup>

4. **R. Rajagopal vs State Of T.N on 7 October, 1994, AIR 264, 1994 SCC (6) 632-** In this case, the petitioners sought to publish the autobiography of Auto Shankar, a serial killer incarcerated in prison, which revealed his connections with several state authorities. The Inspector General of Police warned that the convict had not written his autobiography, and legal action would be taken if it were published. The central issue revolved around whether writing a biography of a person without their consent would violate their right to privacy. The court held that publishing something related to an individual's private affairs without their consent would indeed infringe upon their right to privacy. However, the court established an exception: if the information published is derived from the public record concerning an individual, it would not be considered an infringement of their privacy. This ruling aimed to balance the right to privacy with the public's right to access information in the public domain.<sup>16</sup>
5. **Mr. 'X' vs Hospital 'Z' on 21 September, 1998-** In this case, the hospital disclosed confidential information that the petitioner was suffering from AIDS, which subsequently resulted in the cancellation of his marriage. The court acknowledged that the petitioner had the right to confidentiality regarding his health records. However, the court determined that in this particular instance, the right to confidentiality was not violated because the information was disclosed in the public interest. The disclosure was made to ensure that the petitioner's fiancée was informed about the communicable disease her prospective partner was suffering from. Therefore, the court found that the disclosure served a legitimate public health purpose, justifying the breach of confidentiality in this specific case.<sup>17</sup>

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<sup>15</sup> Selvi & Ors vs State Of Karnataka & Anr on 5 May, 2010

<sup>16</sup> R. Rajagopal vs State Of T.N on 7 October, 1994, AIR 264, 1994 SCC (6) 632

<sup>17</sup> Mr. 'X' vs Hospital 'Z' on 21 September, 1998



6. **Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018-** In a significant and landmark judgment delivered in 2017, the Indian Supreme Court resolved the ambiguity surrounding the right to privacy by establishing it as a fundamental right stemming from Article 21 of the constitution. The court's ruling broadened the scope of privacy to encompass the privacy of one's body, mind, decisions, and information. However, it also emphasized that this right is not absolute and can be subject to intrusion by the state, provided it passes certain tests outlined by the court. These tests include the test of legality, a test of a legitimate aim, and a test of proportionality, as articulated in this judgment. This development marked a crucial milestone in the evolution of privacy as a fundamental right in India, opening up new avenues and facets in the legal landscape as privacy gained constitutional recognition and protection. It laid the foundation for discussions and legal interpretations related to various aspects of privacy in the country.<sup>18</sup>

## **V. DATA PROTECTION LEGISLATION IN INDIA**

The Digital Personal Data Protection Act (DPDP)<sup>19</sup> in India has finally become law after a lengthy period of discussions, postponements, and negotiations. The law was officially published on August 11, 2023, following a remarkably swift journey through both houses of Parliament and receiving approval from the President. This development marks India as the 19th member of the G20 to establish comprehensive personal data protection legislation.<sup>20</sup>

This significant milestone arrives six years after the groundbreaking Justice K.S. Puttaswamy v Union of India case.<sup>21</sup> In that landmark decision, India's Supreme Court recognized the fundamental right to privacy, including informational privacy, within the context of the "right to life" provision in India's Constitution. This ruling prompted the Indian government to embark on a mission to create a robust framework for personal data protection, ultimately resulting in the DPDP Bill.

The DPDP is expansive in scope, drawing inspiration from the European Union's General Data Protection Regulation (GDPR). It applies broadly to all entities, regardless of their size or private/public status, that are involved in processing personal data. Notably, the law also

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<sup>18</sup> Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018

<sup>19</sup> Digital Personal Data Protection Act (DPDP), <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>

<sup>20</sup> "News of the day: PM hits out at Opp at G20 meet, Digital Personal Data Protection bill now an act and more", The Telegraph, September 2023, <https://www.telegraphindia.com/gallery/news-of-the-day-prime-minister-narendra-modi-hits-out-at-opposition-at-g20-meet-digital-personal-data-protection-bill-now-an-act-and-more-photogallery/cid/1958598?slide=1>

<sup>21</sup> Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018

possesses a significant extraterritorial reach.

This legislation introduces stringent requirements for lawful data processing. It places a strong emphasis on purpose limitation, meaning that personal data can only be used for specific, predefined purposes. Additionally, it grants individuals various rights, including the right to be informed, access their data, and have their data erased. To oversee compliance with these rules, the law establishes the Data Protection Board of India (Board), which holds the authority to investigate complaints and impose fines. However, it's important to note that the Board does not have the power to issue guidance or regulations.<sup>22</sup>

While the DPDP sets rigorous standards for data protection, there are notable exceptions. Government bodies, depending on their functions (such as law enforcement), enjoy certain exemptions. There are also exceptions for publicly available personal data, data processing for research and statistical purposes, and the processing of foreigners' personal data by Indian companies under contracts with foreign entities, such as outsourcing companies. Some startups may also benefit from exemptions if notified by the government. The DPDP Act grants extensive powers to the central government, including the ability to request information from entities processing personal data and to issue a wide range of "rules" that specify how the law should be applied, somewhat similar to regulations under US state privacy laws.

It's important to underscore that the law won't come into effect until the government announces an effective date. Unlike the GDPR, which had a two-year transitional period between enactment and enforcement, the DPDP Act empowers the government to determine the dates on which different sections of the law become effective, including those governing the formation of the new Data Protection Board.<sup>23</sup>

## **VI. CONCLUSION**

The concept of privacy has been ever evolving in the country- the lawmakers recognising the importance of individual autonomy. The Western world, particularly Europe, has been proactive in managing personal data, drawing from their insights and the growing volume of data. They've implemented data privacy regulations for many years to protect their citizens' personal information. The European Union's General Data Protection Regulation (GDPR) has emerged as the benchmark for privacy legislation in many countries due to its comprehensive framework.

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<sup>22</sup> Digital Personal Data Protection Act (DPDP), <https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>

<sup>23</sup> Roy R., Zafir-Fortuna G., The Digital Personal Data Protection Act of India, Explained, August 2023, Future of Privacy Forum. <https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/>

In contrast, India's approach to privacy has been somewhat distinct. Privacy protections in the corporate sphere have primarily relied on contractual obligations or requirements imposed by processing data from countries with established privacy and data protection laws. Additionally, the rapid digitization has heightened the importance of organizations focusing on information and cyber security.

While Europe has taken a legislative route to safeguard personal data, India's approach has involved a blend of contractual and legislative measures, with an increasing emphasis on cybersecurity in response to the digital transformation. The Digital Personal Data Protection Act (DPDP) shares a fundamental structure with many global counterparts like GDPR, it also features unique aspects. These include more limited reasons for processing data, broad exemptions for government entities, government regulatory powers to refine the law and grant exemptions to certain parties, the absence of a predefined or heightened safeguard for special data categories, and an unusual provision allowing the government to request information from fiduciaries, the Data Protection Board, and intermediaries, as well as the ability to block public access to specific data on computer resources.<sup>24</sup> It's worth noting that numerous specifics of the Act will become clearer once India establishes its Data Protection Board and formulates additional rules to specify the law, which will then be officially communicated.

Government initiatives through laws and the efforts by businesses to protect data are driven by the rapid digitization, the embrace of new technologies like data analytics and artificial intelligence, and the automation of processes for profiling consumers.

India's Data Protection Act has been under development for a considerable period, and its recent passage represents a positive stride, especially following the recognition of privacy as a fundamental right by India's Supreme Court in the landmark Puttaswamy case<sup>25</sup>

Although we might encounter some initial challenges, the pace of adoption will accelerate when the citizens of India recognize the benefits of protecting their personal data. From our perspective, the future looks promising.

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<sup>24</sup> Roy R., Zanfiri-Fortuna G., The Digital Personal Data Protection Act of India, Explained, August 2023, Future of Privacy Forum. <https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/>

<sup>25</sup> Justice K.S.Puttaswamy(Retd) vs Union Of India on 26 September, 2018