The Origin of Right to Privacy and its Migration and Evolution in Nepal

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Abstract: Blockchain technology could bring many advantages to our society, in many different areas. In particular, it could improve individuals' control over their data. Through blockchain, data could be shared easily and in a secure way among different actors, thus preventing its accumulation in single points of failure. As the use of blockchain technology becomes widespread, its compatibility with Regulation (EU) 2016/679 (the General Data Protection Regulation, 'GDPR' or 'Regulation' hereafter) has emerged as a point of tension. Some have argued that blockchain pursues the same objectives as the GDPR, but it does so in ways which are different from those established by the Regulation. This is mainly due to the fact that the Regulation implies a centralized data collection system, where it is possible to single out an accountable central entity, against which users' rights have to be safeguarded. Whereas, in public permissionless blockchain projects, the network is decentralized, no single entity is responsible for it, and the decision-making power is shared among different stakeholders. It has been argued that this incompatibility, and the resulting regulatory uncertainty, will asphyxiate the development of this technology. Being the Ethereum blockchain the one which, at the time of writing, promises to be the most suitable to be adopted in a variety of use cases, this paper assesses whether, having regard to the allocation of GDPR responsibility roles, to the legal bases and principles of data processing, and to the data subject's rights, it is possible to consider the Ethereum blockchain GDPR-compatible.

Keywords: GDPR; blockchain; ethereum; data protection law.

1. *Introduction*

Privacy has always been a topic of concern in human societies. However, the right to privacy, as a constitutional right, results from recent developments. Since antiquity, people in nearly all societies have debated issues of privacy ranging from gossip to eavesdropping on surveillance[1]. Privacy is considered a topic of the utmost importance throughout the world. Nearly all national and international human rights laws guarantee privacy as a fundamental right, as exemplified explicitly for instance by article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"[2]. Similar provisions are also to be found at articles 7 and 8 of the EU Charter of Fundamental Rights[3] and at article 8 of the European Convention on Human Rights[4]. Nearly every country in the world recognizes a right of privacy explicitly in their Constitution (e.g., Article 28 of the Nepalese Constitution). In the least, these provisions include rights

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1. See Daniel J. Solove, *Understanding Privacy*, GWU Legal Studies Research Paper (2022).

2. See Art. 12, Universal Declaration of Human Rights ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation").

3. See Art. 7, tit. 1, *Charter of Fundamental Rights of the European Union* ("Everyone has the right to respect for his or her private and family life, home and communications"). See also Art. 8 tit. 1, cit. ("Everyone has the right to the protection of personal data concerning him or her").

4. See Art. 8, *European Convention on Human Rights* ("Everyone has the right to respect for his private and family life, his home and his correspondence").

of inviolability of the home and secrecy of communications – for instance, such provisions might be found in article 15 of the Constitution of Italy[5], and article 29 of the Constitution of Nepal[6]. Most recently written Constitutions such as South Africa's and Hungary's include specific rights to access and control one's personal information; in a number of other jurisdictions, supreme and constitutional courts have recognized a right to privacy as implicitly incorporated in the constitutional charters. For example, in the US, courts decisions have defined the corporation of privacy within the constitution, even though not mentioned particularly[7]. Thus, every legal system is aware of privacy and agrees to protect it.

This article traces the origin of the Right to Privacy in the world and then discusses the migration of the constitutional idea in the Nepalese legal system. It explains the evolution of the Right to Privacy in Nepal through a systematic and chronological study of Supreme Court cases in the field. It summarizes that the development of privacy laws in Nepal has revolved around constitutional interpretation by the court. However, in 2018 a specific act to regulate privacy matters was enacted in Nepal. Hence, we also aim to critically evaluate the Right to Privacy Act, 2018 of Nepal as specific-scope legislation in addressing contemporary privacy issues.

2. *The Origin and Meaning of Privacy*

Right to privacy, for the most part, seems to be absolute, but finding a mechanism to enforce it in this technologically overwhelmed global village seems to be a difficult task. Currently, privacy is intended as a far-reaching concept, encompassing freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations[8]. However, several questions

5. See Art. 15, *Constitution of the Italian Republic* ("Freedom and confidentiality of correspondence and of every other form of communication is inviolable").

6. See Art. 29, par. 1, *Constitution of Nepal* ("Every person shall have the right against exploitation").

7. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. See Solove, *Understanding privacy* (cited in note 1).

emerged in discussions regarding the right to privacy. Where does this right to privacy in legal statutes arise from? How valuable is it? What was it like during its origin? How was it differentiated from right to life or right to property? This series of queries lead us to a common birthplace: Samuel Warren and Louis Brandeis' paper, "The Right to Privacy"[9].

2.1. *Warren and Brandeis' "Right to privacy" paper*

Warren and Brandeis conceived an entirely new constitutional right by differentiating the right to privacy from other similar rights. The relevance of this paper in legal history is paramount: although not being a constitutional moment, it still gave rise to certain constitutional rights; although not being a broad statutory scheme, it spurred the adoption of numerous statutes nationwide in the United States[10]. Warren and Brandeis appeal to the courts of law to guarantee the right to privacy by combating the threats and breaches to it and thus, in practice, adding a new right: "the right to be let alone". This differs from the protection from assault, or protection of tangible and intangible property. Rather, privacy is constituted as a right to decide to what extent personal "thoughts, sentiments, and emotions shall be communicated to others"[11].

The relevance of the ideas expressed by Warren and Brandeis is widely recognized: the paper has been called an "unquestioned classic"[12], the "most influential law review article of all"[13], "one of the most brilliant excursions in the field of theoretical jurisprudence"[14], "an outstanding example of the influence of legal periodicals upon the American law", "a pearl of common-law reasoning" that

9. See Samuel Warren and Louis Brandeis, *Right to privacy,* 4 Harvard L.R. 193 (Dec. 15, 1890).

10. See Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 Cath. U. L. Rev. 703 (1990).

11. See Warren and Brandeis, *Right to privacy* (cited in note 10).

12. See Shapiro, Fred R., *The most-cited legal scholars*, 29(S1) The Journal of Legal Studies (2000).

13. See Kalven Jr, Harry, *Privacy in tort law-were Warren and Brandeis wrong,* Law & Contemp. Probs. 31 (1966).

14. See Adams, Elbridge L., *The Right of Privacy, and its Relation to the Law of Libel,* Am. L. Rev. 39 (1905).

"single-handedly created a tort", "momentous" and "brilliant" by the Supreme Court of Mississippi and the U.S. Court of Appeals for the Ninth Circuit[15]. Most notably, the paper has been called upon by the Supreme Court of Kentucky, in reaching its holding that a statute criminalizing sodomy violated the privacy and equal protection provisions of the state constitution[16]. The court, in this case, struck down the state's statute criminalizing consensual sodomy between same-sex partners. Had it not been for the paper, the right to privacy might not have been as protected as it is today. Warren and Brandeis, in this regard, have written a brilliant paper, which is relevant even today, as much as it was during the inception of the right to privacy.

2.2. *Development of Right to Privacy after Warren and Brandeis' paper*

Privacy refers to an individual's right to seclusion, or the right to be free from public interference. The "right to be alone" was already recognized, particularly by Judge Cooley[17]. The nature and extent of such a right was an issue to discuss. Mentioning political, social, and economic changes, Warren and Brandeis' illuminate the invasion of the right to privacy brought upon by those changes. The right to privacy is based upon a principle of "inviolate personality"[18]. It is different from protecting corporeal or intellectual property, but rather it focuses on protecting peace of mind, or "the right to one's personality"[19].

The attention of philosophical debate shifted focus on privacy during the second half of the twentieth century. Some authors focused on the control over private information[20], whereas others connects privacy with human dignity[21]. Charles Fried defended privacy as necessary for the development of varied and meaningful interpersonal

15. See Ben Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy,* Tenn. L. Rev. 69 (2001).

16. See *Commonwealth v. Wasson*, 842 S.W.2d 487 (1992).

17. See Warren and Brandeis, *Right to privacy,* (1890) (cited in note 10).

18. See *ibid.*

19. See *ibid.*

20. See William A. Parent, *A new definition of privacy for the law*, 2(3) Law and Philosophy 305, 338 (1983).

21. See Edward J. Bloustein, *Privacy as an aspect of human dignity: An answer to Dean Prosser*, 39 N. Y. Univ. Law Rev. 962 (1964).

relationships[22]. The concept of privacy by Warren and Brandeis focusing on private information was endorsed by Parent and Fried. Professor Ken Gormley divides legal privacy into five species: 1) The Privacy of Warren and Brandeis (Tort Privacy), 2) Fourth Amendment Privacy, 3) First Amendment Privacy, 4) Fundamental-Decision Privacy, and 5) State Constitutional Privacy. According to "The privacy of Warren and Brandeis" species the common law had nurtured a new right, simply known as privacy, which demanded acceptance in American jurisprudence. After the publication of the paper, there have been hundreds of books and articles written about the notion of privacy in the United States[23].

The right to privacy is different from the right against physical harm (i.e., battery and assault), or property rights. Traditionally, physical battery was incorporated under breach of the right to life, which later extended to the threat of battery, i.e., assault as well. Similarly, the right to property constitutes the right to own, acquire, sell, dispose, and possess physical property, which later extended to intangible and intellectual property as well. Laws of copyright were enacted and statutory rights were developed. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society[24]. But the right to privacy was something different. It should not be incorporated under common law right to life, or statutory intellectual and intangible rights such as copyright but rather, according to Warren and Brandeis, be developed as a distinct right to privacy which is the right to decide what shall be published.

The right to privacy accords the same protection to a casual letter, or an entry in a diary, and to the most valuable poem or essay, to a botch, or daub and a masterpiece[25]. It is different from the common law right which secures the right to decide "to what extent his thoughts, sentiments, and emotions shall be communicated to others"[26]. It is

22. See Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice,* Harvard University Press, 1970..

23. See Gormley, Ken, *One hundred years of privacy,* Wis. L. Rev. at 1335 (1992).

24. See Warren and Brandeis, *Right to privacy* (cited in note 10).

25. See *ibid.*

26. See *Millar v. Taylor,* 4 Burr. 201, 242 (1769), available at http://www.commonlii.org/uk/cases/EngR/1769/44.pdf (last visited April 4, 2022).

independent of copyright laws, which merely secures to the author, composer, or artist the entire profits arising from publication: privacy enables him to control absolutely the act of publication, and in the exercise, if his discretion, to decide whether there shall be any publication at all[27].This right to decide about what shall be divulged and made public is wholly independent of the material on which, or how, the thought, sentiments, or emotion is expressed. It is lost only when the author himself communicates his production to the public, publishing it[28]. The right to privacy does not depend upon means chosen by the person to whom the information, or emotions belong. It ceases to exist once the owner himself publicizes such information or emotions. This way, it is different from copyright, as copyright continues to exist even after the publication of the works.

Some critics argue that all the cases that have been thought to be violations of the right to privacy, can be adequately and equally well explained in terms of property rights or the right to life[29]. Such arguments are the result of treating private data and information as private property. This concept is a danger to the protection of privacy, as the right to privacy can be similar to other forms of property. Others contend that selective disclosure or concealment of information is usually done to mislead or manipulate others, and thus protection of individual privacy is less defensible[30]. Malicious intentions to conceal information cannot be protected by the law, hence, they argue the right to privacy should not be as important as it is made out to be. The US Supreme Court decision of Griswold v. Connecticut, which based its reason upon the Warren and Brandeis' paper, is also criticized as an attempt by the Supreme Court to take a side on a social and cultural issue, and as an example of bad constitutional law[31].

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27. See *ibid.*

28. See *ibid.*

29. See Thomson, Judith Jarvis, *The right to privacy,* Philosophy & Public Affairs at 295-314 (1975), available at https://www.jstor.org/stable/pdf/2265075.pdf (last visited April 4, 2022).

30. See Posner, Richard A., *The economics of privacy*, 71 (2) The American economic review at 405-409 (1981), available at https://www.jstor.org/stable/pdf/1815754.pdf (last visited April 4, 2022).

31. See Bork, Robert H., *The Tempting of America: The Political Seduction of the Law,* Law Review 1990, no. 2 BYU, 1990, p. 665-672

Eventually, the contemporary privacy rights create a situation called the "privacy paradox". Justice William O. Douglas has stated, "we are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from the government"[32]. Individualists today are concerned that new technological and social developments may lead to the diminution, if not the destruction of privacy[33]. Privacy is a state in which one is not observed or disturbed by other people. It is toted with the inviolability of private life. Even though some critics still question the existence of the right to privacy by confusing it with other rights, the importance of the right to privacy has been rising every day in the contemporary world and as Justice William O Douglas said: "The right to be let alone is indeed the beginning of all freedom."

3. *Evolution of Right to Privacy in Nepal*

Various can be the implications and effects of the Constitutional migration phenomenon, positive or negative depending on whether it respects the recipient order and propose measures contrasting with conventional ideas or operate in an undemocratic way against national cultures and traditions[34]. Since Nepal is a state filled with cultural pluralism where more than 125 ethnicities thrive in a relatively small land, Constitutional migration is even more challenging. From its inception in the 19th century, the right to privacy took more than two centuries to migrate and establish itself democratically in the Nepalese legal system. Presently, it is a fundamental right in the Constitution of Nepal 2015.

The right to privacy enshrined under Article 28 of the Constitution provides that "Except, in circumstances provided by law, privacy in relation to the person, and their residence, property, documents,

32. See *Osborn v. United States*, 385 U.S. 323 (1966).

33. See Etzioni, Amitai*, A contemporary conception of privacy,* Telecommunications and Space Journal 6 at 81-114 (1999).

34. See generally Walker, Neil, *The migration of constitutional ideas and the migration of the constitutional idea: the case of the EU,* (2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=837106 (last visited April 5, 2022).

records, statistics, and correspondence, and their reputation are inviolable."

If we compare south-Asian constitutional traditions, only Nepal has listed the right to privacy as an inalienable right. Meanwhile, others have not defined it explicitly, as for example the case under Article 21 on the "Protection of life and personal liberty" in the Constitution of India and Article 43 on the "Protection of home and correspondence" in Bangladesh[35]. However, the introduction of the right spurred struggles and debates. Nepal underwent a series of political and social changes in the 90s after the first civil movement to eliminate the party-less Panchayat System or the royal coup. After the revolution, the promulgation of the Constitution of the Kingdom of Nepal restored democracy. While envisioning democratic principles to incorporate in the constitutional draft, members of the constitution commission travelled across the nation and abroad to learn ideas to fill up the canvas. Finally, they recommended human rights as one of the main issues to address as suggested by the Human Rights Organization of Nepal (HURON), the Forum for the Protection of Human Rights (FOPHUR), and Amnesty International[36]. Hence, for the first time the right to privacy was introduced in the Nepalese legal system. Since then, the Interim Constitution of Nepal 2007 and the present Constitution of Nepal have retained it. Nevertheless, the development of privacy laws owes a lot to the precedents established by the supreme court of Nepal as well.

Nepalese legal system has always had the doctrine of stare decisis (let the decision stand) in the apex court due to the influence of common law in its early constitutions[37]. In 1956, after the introduction of democracy in 1951 the Supreme court of Nepal was established by the

35. See Gautam, Dilli Raj, *An Assessment on the Constitution of Nepal 2015*, Journal of Political Science 20 (October), 2020, p. 46-60, available at https://doi.org/10.3126/jps.v20i0.31794 (last visited April 9, 2022).

36. See Hutt, Michael, *Drafting the Nepal constitution,* Asian Survey 31, no. 11, 1991, p. 1020-1039, available at https://www.jstor.org/stable/2645305?seq=1#metadata_info_tab_contents (last visited April 9, 2022).

37. See generally Acharya, Suman, *Historical Compartment of Nepalese Legal System,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835576 (last visited April 9, 2022).

Supreme Court Act[38]. Since, its establishment, the Supreme Court has always had the authority to interpret the law in Nepal, albeit its independence is debatable before the 90s[39]. The court has consistently introduced and defined new legal concepts to initiate innovative legal trends in its jurisdiction. The notion of the Right to privacy is one of them. Although substantial changes have not been made constitutionally, the Supreme Court has always been examining and defining multiple facets of privacy laws through the decisions time and again. Observing chronologically the relationship between these cases, the evolution of privacy laws can be seen in judicial interpretation.

The Supreme Court decided upon the right to privacy for the first time in 1998 in the case of Annapurna Rana v. Gorakh Shamsher JBR and others[40]. The socio-political community of Nepal had to recognize equal rights for women at that time. In this context, the plaintiff, Gorakh Sumsher, demanded a virginity test of Annapurna Rana, the defendant. Married women were not entitled to ancestral property according to the existing law[41]. The defendant argued that the claims were against her right to privacy. In the case, the Supreme Court concluded that even the court cannot order the defendants to undergo the tests against their will because it would amount to a violation of their right to privacy as an inherent part of the right to liberty. Surprisingly, this family feud about inheritance has become a landmark decision in privacy matters. Increasingly more cases relating to privacy matters started to reach the Supreme Court after this case, and gradually a series of precedents developed privacy laws in Nepal.

A couple of years later, Sharmila Parajuli[42] filed a writ of a Mandamus demanding exclusive legislation against workplace sexual

38. See *Supreme Court Act,* repealed by the *Supreme Court Act*, 1990, available at http://rajpatra.dop.gov.np/welcome/book?ref=23 (last visited April 9, 2022).

39. See *Ibid*.

40. See *Annapurna Rana v. Gorakh Shamsher Jabara and others,* 40, Supreme Court of Nepal, 1998, available at https://nkp.gov.np/full_detail/5971 (last visited 9 April, 2022).

41. See Inheritance at *Civil Code, 1963 A.D,* repealed by The National Civil (Code) Act, 2017 A.D, Chapter 16, available at https://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/muluki-ain-general-code-2020.pdf (last visited April 9, 2022).

42. See *Sharmila Parajuli and others v. His Majesty Government,* 46, Supreme Court of Nepal, 2004, available at https://nkp.gov.np/full_detail/3015 (last visited

harassment of women. The two-judge panel noted that the body and life of women are protected under the right to privacy and directed the state to protect the right to privacy of women in the workplace and public places by enacting the required laws. Similarly, while deciding Laxmi Devi Dhikta v. Government of Nepal[43], a case about reproductive rights, the joint bench observed the inviolability of the right to privacy. It extended the applicability of the right to privacy in cases of similar nature based on rights of women. However, no significant strides were made before 2006 by the court to explain the privacy laws of Nepal.

In 2006, Nepal underwent another significant political change after yet another revolution. The republican system of government replaced the constitutional monarchy of 1990, and a surge of changes came along with the interim constitution of 2006, giving sovereignty for the first time to the people. The judiciary also became more independent given that the separation of power was not shadowed anymore by the monarchical rule. On 25 December 2007, the Supreme Court in Sapana Pradhan Malla v. Government of Nepal[44] elaborated on various aspects relating to privacy. After the promulgation of the interim constitution[45], this landmark decision served as a foundational reference to interpret the right to privacy. Referring to Article 28 of the Interim Constitution of Nepal 2007, the court asserted the right to privacy as the main ground to protect the self-dignity of a person. The case was primarily concerned with the collection of private information of children, women, and HIV-infected people during the process of a lawsuit or a trial. In light of the pleas of claimants, the court opined that the protection of privacy of vulnerable and marginalized groups must be secured to ensure the right to justice[46].

April 9, 2022).

43. See *Laxmi Devi Dhikta v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 52, Supreme Court of Nepal, 2009, available at https://nkp.gov.np/full_detail/3444 (last visited April 9, 2022).

44. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

45. See *The Interim Constitution of Nepal,* 2007, available at https://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf (last visited April 9, 2022).

46. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.

Additionally, the bench defined the ambit of the right to information and the right to privacy and their intersection in a judicial process. In response to the question concerning whether privacy affects the right to information, the judges reasoned that information about a person, a citizen, must be kept private except in the cases provided by the law. The exceptions have been outlined in Section 4 of the Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007)[47]. The provision includes necessity clause for the protection of fair judicial hearing and consented disclosure of personal information[48].

The protection of privacy ensures other general rights such as the right to get treated as a human being and access services and facilities as a citizen and the right to live with dignity. The right to privacy of an HIV-infected person is necessary for their right to health, employment, education, labor, property, equality, and against discrimination. Furthermore, the court held that information, character, and data related to a person intersect with other rights such as the right to life, liberty, health, of women, of children, property, justice, and legal remedies. Therefore, the right to privacy of vulnerable groups like children, women, and HIV/AIDS infected people must be guaranteed as they are disadvantaged due to social, cultural, economic, and political reasons[49]. It protects the women from disparity during court proceedings, enables efficient juvenile justice without hindering the future for the children, and provides an effective way to tackle the social stigma for HIV/AIDS infected people.

The panel took a further step and defined the concept of the right to privacy. It held that privacy had a dual role, one as a fundamental human right and another as about the right of access to justice. Judges considered that ensuring privacy rights in judicial processes motivates parties to seek justice. To this reason, it cited Scott v. Scott, in which

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gov.np/full_detail/3887 (last visited April 9, 2022).

47. See *The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases*, 2064 (2007) Available at https://supremecourt.gov.np/web/assets/downloads/Gopaniyata_Nirdesika.pdf

48. See *ibid.*

49. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

the court held that: "the state has an interest in the fair administration of justice. It requires that the victims and witnesses dispose without fear and intimidation and that the judge is given sufficient power to achieve that object"[50].

In explanation, it held that the right to opinion and expression also consists of a right not to express. Hence, only by ensuring privacy, the marginalized people can be given justice[51]. Thus, privacy does not always disturb the flow of information, for example, in the Victim and Witness Protection Scheme[52]. The scheme enables a covert court procedure applying protective measures before, during, and after hearing for "at-risk" witnesses[53]. Such provisions have been incorporated in Sections 24 and 25 of the United Nations Convention Against Transnational Organized Crime[54] to protect the witnesses from threats, intimidation, or other injuries. Consequently, the judicial system also functions efficiently without undermining privacy.

It might be a case where the accused wants information about the case according to the right to a fair trial, and the right to privacy may be prohibited by keeping some information private in camera court[55]. The court answered this contradiction, deciding that not all information about a judicial hearing need be public but a balance between open hearing and privacy concepts is to be found[56]. Right to information covers the public, but private information needs to be protected. It is neither legal nor justifiable to publicize them without consent[57].

What is commendable about this judgment is that the court after ordering the government to legislate went a step further to issue a directive to protect the right to privacy in specific types of cases within

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50. See *ibid.*

51. See *ibid.*

52. See UNODC, *Victim Assistance and Witness Protection* (UNODC), available at https://www.unodc.org/unodc/en/organized-crime/witness-protection.html (last visited April 9, 2022).

53. See *ibid.*

54. See *United Nations Convention Against Transnational Organized Crime And The Protocols Thereto,* UNO (2004).

55. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

56. See *Ibid*. at Section 19.

57. See *Ibid*.

the decision during the interim period in order to keep the name, surname, address, and other details of the parties private in sensitive cases[58]. It also outlined that privacy should be maintained from the first information report (FIR) till the final decision and further. This guideline improved privacy matters in various court proceedings such as rape and human trafficking cases where victims are women and children[59]. Even in the judicial decisions, the concept of privacy kept on evolving. A two-judge panel considered the case of Bikash Lakai Khadka[60] in 2014. The applicant appealed that due to the absence of no voting rights, his right to privacy was infringed and pleaded to amend the election laws in Nepal and introduce no vote right. The court defined the no vote right under the right to privacy and issued an order to make essential legal provisions and ensure this right. Slowly privacy concerns in contemporary issues started to show up in the court.

Nepal was relatively late to develop e-privacy and data protection laws. In 2016, Baburam Aryal[61] filed a petition claiming that Nepal Police was misusing the SMS and other data collected during the investigation of a murder case. Before this case, data protection was unregulated in Nepal. The court clarified that the private phone calls and SMS details also fall under the right to privacy. Therefore, it decided that using these details without a valid law to regulate data protection is illegal, and it endangers the "right to be let alone" of a person. Thus, a mandamus was issued to stop unregulated data usage and legislate regulatory laws. However, the court's role is not to actively make laws but to interpret and implement them. Regardless of the interpretation given by the court, due to political clashes and uncertainty about the promulgation of the new constitution, it took eleven more years for a privacy act to be enacted in Nepal. Before that, precedents guided privacy-related cases.

58. See *id.* at Section 19.

59. See *ibid.*

60. See *Bikash Lakai Khadka v. Chairman of Office of the Prime Minister and Council of Ministers*, 55, Supreme Court of Nepal, 2014, available at https://nkp.gov.np/full_detail/494 (last visited April 8, 2022).

61. See *Baburam Aryal and others v. Government of Nepal, Office of the Prime Minister and Council of Ministers*, 59, Supreme Court of Nepal, 2016, available at https://nkp.gov.np/full_detail/8741 (last visited April 8, 2022).

In 2017, the Supreme Court decided the case of Achyut Prasad Kharel[62]. In this case, the petitioners claimed that the publication of the personal details of a marginalized woman by a renowned national daily could be considered yellow journalism. Warren and Brandeis argued that the right to privacy prevents malpractices in journalism[63]. The petitioners in this case also asked the court to protect the right to privacy from yellow journalism as protecting the right to privacy of a marginalized community is a matter of public interest. The court departed from the plaintiff's arguments and decided that the published news was not necessarily yellow journalism. Nonetheless, the bench held that during publishing and broadcasting, conscious consent is necessary. Therefore, it decided that the publishers breached the right to privacy and the right to live with dignity.

Almost a decade after the second revolution in 2006, Nepal finally got its democratic constitution in 2015. An updated catalogue of fundamental rights was listed under chapter 3. To implement these rights enabling legislation was required, and therefore, for the right to privacy, the Right to Privacy Act, 2018 was passed.

4. *An analysis of the Right to Privacy Act, 2018*

It took three constitutions, a shift from monarchical to a federal structure, two mass movements, and almost three decades for Nepal to have a special-scope privacy act. Eventually the Privacy Act was adopted and came into effect in September 2018. For 28 long years, only the supreme court interpreted and implemented the right. Consequently, it could be argued that the development of privacy laws significantly lacked in Nepal. Ultimately, after the enactment of the Privacy Act, a surge of new cases and discussions arose.

62. See *Achyut Prasad Kharel v. Office of the Prime Minister and Council of Ministers and others*, 60, Supreme Court of Nepal, 2017, available at https://nkp.gov.np/full_detail/9052 (last visited April 8, 2022).

63. See Warren and Brandeis, *Right to privacy* at 193 (cited in note 10).

Apart from the Privacy Act, Nepal's National Civil Code[64] and Penal Code[65] also append privacy laws. However, they had a limited scope which Privacy Act, in this regard, was supposed to fill by complementing the existing laws. Under the constitution of Nepal, seven subjects are inviolable under the law, namely, the privacy of body, residence, property, document, data, correspondence, and character[66]. The Right to Privacy Act provides separate chapters to provide detailed definitions of these legal subcategories. For instance, chapter 2 elucidates the privacy of the body and family of a person, while chapter 3 deals with the residence[67].

The scope of the legislation envelops a wide array of contemporary privacy matters. It not only binds the state to protect the physical and mental privacy of a person but also empowers people to maintain the privacy of matters such as biological or biometric identity, gender identity, sexuality, sexual relation, conception or abortion, virginity, potency, or physical illness related to personal life[68]. By comparing its content with similar provisions adopted in other countries, it could be argued that it measures/pairs/correspond to the level of detail of the Data Protection Act of the UK[69], the US, or the regulation of the EU. However, practicality is an entirely disparate matter. The General Data Protection Regulations (GDPR) of the EU secures the protection of personal data, which is defined as any information relating to an identified or identifiable natural person by reference to an identifier such as a name, an identification number, location data,

64. See generally The National Civil (Code) Act, (2017), available at http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Civil-code.pdf (last visited April 8, 2022).

65. See generally The National Penal (Code) Act, (2017), available at http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf (last visited April 8, 2022).

66. See generally The Constitution of Nepal.

available at https://www.refworld.org/docid/561625364.html (last visited March 10, 2022).

67. See generally *The Right to Privacy Act* (2018), available at https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Privacy-Act-2075-2018.pdf (last visited April 8, 2022).

68. See *ibid.*

69. See generally *Data Protection Act 2018*, available at https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted (last visited April 8, 2022).

an online identifier, or to one or more factors specific to the physical, psychological, genetic, mental, economic, and cultural or social identity of that natural person[70]. The Data Protection Act 2018 of the UK contains identical provisions in Section 3[71]. Concurrently, in the case of the Nepalese Act, Section 2(c) defines personal information in a comparatively narrow way. It limits itself to specifying the types of personal information[72]. It provides for eight broad categories ranging from caste and ethnicity to criminal history and expressed opinion[73]. Nepalese legislation leaves little room for further interpretation and makes it rigid in many senses, unlike GDPR which also has aspirational principles[74].

Unlike the EU and the UK, the US does not seem to have a federal-level data protection act[75]. Instead, several privacy statutes such as the Fair Credit Reporting Act (FCRA)[76], Health Insurance Portability and Accountability Act (HIPAA)[77], Family Educational Rights and Privacy Act (FERPA)[78], Gramm Leach Bliley Act (GLBA)[79], Electronic Communications Privacy Act of 1986 (ECPA)[80], Children's Online Privacy Protection Act of 1998 (COPPA)[81], Video Privacy Protection Act (VPPA)[82], Freedom of Information Act (FOIA)[83], and the Privacy Act of 1974 regulate privacy in the US[84]. Even Nepal did not have a fed-

70. See generally Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, *The European Union general data protection regulation: what it is and what it means*, 28 Information & Communications Technology Law 65 (2019).

71. See *Data Protection Act*, at Section 3 (cited in note 68).

72. *The Right to Privacy Act*, Section 2 (c).

73. *See ibid.*

74. See generally Hoofnagle, Van der Sloot and Borgesius, *The European Union general data protection regulation: what it is and what it means* (cited in note 72).

75. See Jean Slemmons Stratford and Juri Stratford, *Data protection and privacy in the United States and Europe,* 22 Iassist Quarterly 17 (1999), 17, available at https://iassistquarterly.com/public/pdfs/iqvol223stratford.pdf (last visited April 8, 2022).

76. Pub L No 91-508, 84 Stat 1127 (1970).

77. Pub L No 104-191, 110 Stat 1936 (1996).

78. 20 U.S.C. § 1232g (1974).

79. Pub L No 106-102, 113 Stat 1338 (1999).

80. Pub L No 99-508, 100 Stat 1848 (1986).

81. Pub L No 105-277, 112 Stat 2681-728 (1998).

82. Pub L No 100-618, 102 Stat 3195 (1988).

83. Pub L No 89-487, 80 Stat 250 (1967).

84. See Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)* (Wirecutter, September 6, 2021), available at https://www.nytimes.

eral level act up until a couple of years ago. However, the separation of power enables the apex court to interpret the laws and annul them if found contradictory. It helps to keep the balance intact in many ways.

Despite that, normative deviations separate Nepal and foreign jurisdictions in privacy laws. The US privacy laws address citizens' distrust of by focusing on the potential misuse of personal data held by the government [85]. Therefore, US citizens have a right to access any data held by government agencies as per the Right to privacy act[86]of 1974, Section d[87] and the data minimization principles are to be followed by agencies when collecting data according to Section e (1)[88] of the same act. On the contrary, in the EU and the UK, the laws protect individual dignity more than potential liberty interference from government agencies[89]. Instead, the Nepalese privacy act provides unlimited power to the government agencies mentioning the rights of "authorized official" in different sections. Section 19(4) allows "any notice, information or correspondence may be listened to, marked or recorded, or cause to be listened to, marked or recorded with the consent of the concerned person or order of the authorized official."[90] Therefore, it significantly infringes the rights of an individual. Likewise, the statute falls short in clearly explaining the grounds for such interception. There is a hiatus in privacy and surveillance laws. Thus, it jeopardizes personal freedom and may risk turning the state into a police state, with the government with unlimited access to citizens' data.

A critical limitation in the Nepalese Right to Privacy Act is data protection. The issue of data protection has been increasingly paramount over the years. However, the Privacy Act does not address singularly data protection issues. Even though chapter 6 of the act is close as it is shown, it presses on statistics rather than data protection. To

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com/wirecutter/blog/state-of-privacy-laws-in-us/ (last visited April 8, 2022).

85. See *ibid.*

86. The Right to Privacy Act, Pub L No 93-579, 88 Stat 1896 (1974).

87. See i*d.*, Sec. d 88 Stat at 1898.

88. See *id.*, Sec. e (1) 88 Stat at 1899.

89. See Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy-Is There a Match.* 22 Temp. Int'l & Comp. LJ 307 (2008).

90. The Right to Privacy Act Sec. 19(2) (cited in note 87).

name a few of the problems, it falls short of including a transnational data regulation mechanism. It has no provisions on data destruction. It has no provisions to regulate privacy matters for big data. There is no concept of open data in the legislation. It also fails to provide sufficient protection to the concept of consent.

Moreover, Section 12(6) of the act confers officials unlimited power to access data without consent[91]. In sections 25[92], and 26[93], there is a restriction posed to the usage of collected personal information and data which also extends to research or journalistic investigation. While protecting the right to privacy, there should be provisions regulating open access to data remaining in the public body, yet the statute completely misses it. Another limitation of the statute is its contradiction to press freedom in Section 18[94]. The restriction creates tension among journalists to publish information they collect through investigation or undercover operations. Even though unlimited power limits privacy while publishing sensitive data, disclosure of certain information of public interest must be regulated. The exception to this restriction is provided in Section 34(e)[95] but it leaves a wide gap for interpretation by just mentioning a clause that says without making it contrary to the basic norms of privacy of the person. Here, the rules again seem inadequate to specify the preconditions for privacy protection. Other limitations of the law include the regulation of privacy in public places. Even in Section 16[96] prohibiting taking or selling unconsented photographs, privacy in public is left out.

Conclusively, it may be argued that the right to privacy is a personal right of an individual. Contrarily, the statute shows it as armour for the impartiality of government agencies. Hence, there is a need to create a fine line between privacy and information rights and demarcate their boundaries in the Nepalese jurisdiction. A case concerning the statute reached the court amidst the COVID-19 crisis. The case raised many questions on its practicability to address contemporary issues. Although recently promulgated, it failed to define the scope of

91. See *id.* at Sec. 12 (6).
92. See i*d.* at Sec. 25.
93. See *id.* at Sec. 26.
94. See *id.* at Sec. 18.
95. See *id.* at Sec. 34(e).
96. See *id.* at Sec. 16.

privacy in-depth, let alone sensitive issues about personal data and its relation with the right to information. In this writ petition[97], petitioner Roshani Poudyal condemned that the National Information Commission was infringing the privacy of the infected people, dead, and their families by publishing their personal information in different media. The court bridged the gap between the right to information and privacy via this judgment and held that the goal of the Right to Privacy Act of 2018 is to protect personal privacy even in public bodies in order to promote a dignified standard of living. Notwithstanding that the court can provide interpretation on the act, the actual goal of the legislation is to assist the court, not the other way around.

Although Nepal has made significant strides in developing privacy-related laws, the Act still fails to address many contemporary issues. As specific scope legislation, the Act aims to provide an expository explanation in the field. However, it falls short of addressing issues like data protection and information privacy subjects, making the statute vulnerable to contraventions. Be that as it may, the Supreme court has played a remarkable role in developing privacy-related doctrines and it continues to contribute effectively in holding and interpreting them in light of the constitutional spirit of equality, freedom, and proportionality. Accordingly, a revaluation of the legislation is indispensable to introduce regulation of critical privacy matters in the legal system.

5. *Conclusion*

The government, the press, and large corporations are intruding more into personal privacy[98]. This rate is even higher than it was during the 1890s[99]. The relevance of Warren and Brandeis' paper has become significantly greater than ever. The concept of limited

97. See *Roshani Paudyal and others v. Government of Nepal, Secretariat of the Prime Minister and Council of Ministers*, 62, NKP (online), Supreme Court of Nepal, 2020, available at https://nkp.gov.np/full_detail/9592 (last visited April 8, 2022).

98. See generally Jon L. Mills, *Privacy: the lost right*, (Oxford University Press 1st ed. 2008).

99. See generally Konrad Lachmayer and Normann Witzleb, *The challenge to privacy from ever increasing state surveillance: A comparative perspective*, 37 UNSW Law Journal 748 (2014).

government and regulated giant tech corporations is vital to govern privacy. As Prosser writes, privacy right originated from Warren and Brandeis' paper have now extended into a bundle of rights against intrusion upon a person's seclusion or private affairs and public disclosure of embarrassing facts about an individual[100]. The relevancy of privacy laws encompasses every jurisdiction. In this light, the migration of privacy right as a fundamental right in the Nepalese constitution seems pertinent. However, there are many pressing concerns in privacy matters, given that the Nepalese jurisprudence still has to develop its legal basis. The Privacy Act was enacted after three decades following the introduction of the right to privacy into the Nepalese legal system. However, it still does not incorporate several present-day issues. Thus, a comprehensive revision and social auditing of the act is essential to include the provisions that could answer contemporary contentions in privacy.

100. See generally Edward J. Bloustein, *Privacy as an aspect of human dignity: An answer to Dean Prosser*, 39 NYUL rev. 962 (1964).