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Privacy and data protection in India and Germany: A comparative analysis

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PRIVACY AND DATA PROTECTION IN INDIA AND GERMANY: A COMPARATIVE ANALYSIS

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Abstract

Privacy and data protection in India and Germany: A comparative analysis

by Kim Arora*

This research report offers a comparative analysis of privacy and data protection in Germany and India. It compares the two regimes on four counts. First, it examines how the right to privacy and/or its allied rights have developed in the two countries historically. In this, it explores the political factors contributing to the understanding and acceptability of the principles of privacy in the decades after the Second World War. Second, it delves into the instruments and forms of state surveillance employed by both the countries and analyses how the presence of parliamentary and judicial oversight on intelligence agencies impacts individual privacy. In the third section, it compares how biometric identity systems have been deployed in the two countries, the safeguards designed around the same, and the legal challenges they have thrown up. Lastly, it evaluates data subject rights as defined under the General Data Protection Regulation (GDPR) together with the Bundesdatenschutzgesetz-Neu (BDSG-Neu) and how they compare with those as defined under the Draft Personal Data Protection Bill, 2018 in the Indian context.

Keywords: data protection, surveillance, biometrics, Internet regulation, comparative analysis, India, Germany

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This report was produced as part of the German Chancellor Fellowship, and completed in November 2019. The version of India's data protection bill referred to here, therefore, is the Draft Personal Data Protection Bill of 2018, as drafted by the B N Srikrishna Committee. This is not a peer-reviewed text.

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List of abbreviations

AFSC	Afghanistan SIGINT Coalition
BDSG	Bundesdatenschutzgesetz
BND	Bundesnachrichtendienst
BRH	Bundesrechnungshof
BfDI	Bundesbeauftragter für den Datenschutz und die Informationsfreiheit
BfV	Bundesamt für Verfassungsschutz
CBI	Central Bureau of Investigation
CCC	Chaos Computer Club
CCPA	California Consumer Privacy Act
CIDR	Central Identities Repository
CIS	Centre for Internet and Society
CMS	Central Monitoring System
DSPE	Delhi Special Police Establishment
EU	European Union
GDPR	General Data Protection Regulation
GFF	Gesellschaft für Freiheitsrechte
IB	Intelligence Bureau
LDSG	Landesdatenschutzgesetz
LTTE	Liberation Tigers of Tamil Eelam
MAD	Militärischer Abschirmdienst
MLAT	Mutual Legal Assistance Treaty
MeitY	Ministry of Electronics and Information Technology
NIA	National Investigation Agency
NIRA	National Identification and Registration Act
NSA	National Security Agency
NTRO	National Technical Research Organisation
PAN	Permanent Account Number
PIL	Public Interest Litigation
PKGr	Parlamentarisches Kontrollgremium
RAW	Research & Analysis Wing
SAARC	South Asian Association for Regional Cooperation
SB	Ständiger Bevollmächtigter
SIGINT	Signals Intelligence
SNV	Stiftung Neue Verantwortung
SRDH	State Residents Data Hub
SSPAC	Sigint Seniors Pacific
TRAI	Telecom Regulatory Authority of India
UG	Unabhängiges Gremium
UIDAI	Unique Identification Authority of India

Introduction

The year 2018 was significant for privacy and data protection in both India and Germany. While India introduced an exhaustive Draft Personal Data Protection Bill, Germany revised its existing data protection statute, the Bundesdatenschutzgesetz (BDSG) or the Federal Data Protection Law, to be streamlined with the new pan-European Union General Data Protection Regulation (GDPR).¹

The way the two countries have dealt with the subject differs rather fundamentally. Germany was among the first countries in the world to have a data protection law, albeit at a regional level.² This was as early as 1970. India, on the other hand, began taking its first steps towards acknowledging data protection as an issue that might need exclusive regulation only in the 21st century. The Information Technology Act, 2000 contained a punitive provision for a business entity's negligence "in maintaining a reasonable security to protect ... data or information". By 2011, a set of "Rules" governing handling of data by businesses were introduced under the Act by executive action. It was as late as 2017 that the country recognised privacy as a fundamental right. Meanwhile in Germany, the Grundgesetz or Basic Law that came into being in West Germany soon after the War, codified the right to "privacy of correspondence, posts and telecommunications". It extended to all of Germany after reunification. In addition to this, German lawmakers and jurists developed further positions over time on issues such as the right to informational self-determination. With the revised BDSG-Neu today, it has taken yet another step forward in further developing its legal framework on the matter.

The countries' respective experiences of privacy abuses through the years also offer a stark contrast that has incontestably impacted their philosophies and policies on privacy and data protection today. Germany, as a whole, saw two waves of institutionalised privacy violations. One, with the large-scale profiling that took place under the Nazi regime in the pre-Second World War years. Second, with Soviet surveillance in East Germany after the war and before reunification. India, by comparison, had seen scattered, individual cases of privacy violations in the 20th century. The possibility of mass-scale privacy violation only entered the popular consciousness at the turn of the millennium.³ This too, was largely as a function of the proliferation of businesses built on digital technologies. India offered a fertile ground for such businesses, particularly those from the USA. As the second most popu-

¹ The resulting reformed law is referred to as the BDSG-Neu.

² The state of Hessen passed a local data protection law in 1970. Called the Hessisches Datenschutzgesetz (HDSG), or Hessian Data Protection Act, it is credited with being the first data protection regulation in the world.

³ Although the possibility of mass-scale privacy violation became more widely acknowledged in the Indian context with the proliferation of digital technologies, the idea of state-enabled violation of privacy did come up in the Constituent Assembly debates of the 1940s. We explore that further later in the paper.

lous country in the world after China, coupled with its openness to foreign investments, India became an attractive and lucrative proposition for these businesses, by virtue of the sheer volume it promised. However, given the country's colonial past, "data colonisation" was a fear that began to be articulated soon after, often with varying motivations—either when fighting against an exploitative practice like Facebook's anti-net neutrality Free Basics programme or when building support for protectionist policies such as a proposal to introduce strict data localisation measures.

Why, then, with such diametrical differences, must India and Germany be compared? These points of strong contrasts are exactly what make the exercise illuminating on how events, attitudes, and geopolitical realities have impacted the current privacy and data protection policies in the two countries. For the Indian context, studying the German example offers insights into the issues that may emerge as future sites of contestation. One such example is the census. For a large, diverse, and populous country such as India, census data has been central in designing central government's policies and welfare programmes. There has so far been no large-scale public disaffection in India against the exercise or the manner in which it is carried out, unlike in 1980s Germany, which saw citizens boycotting the exercise and the Constitutional Court stepping in. The movement led to Germany recognising the right to informational self-determination. In India, diffused murmurs of disapproval over potential privacy violations through the census exercise are beginning to be heard now. Government officials now claim willingness to incorporate principles of data protection in the census as it prepares to go digital with the mammoth nationwide exercise.⁴

While there is much that sets these two countries apart, their political and economic status in their respective regions gives them common ground. Germany was one of the six founding members of the European Union. India was one of the founding countries of the (relatively smaller) grouping of the South Asian Association for Regional Cooperation, or SAARC. According to the International Monetary Fund's World Economic Outlook for October 2019, Germany had the highest GDP in the European Union.⁵ Within the SAARC countries, India had the same position according to the same IMF data.⁶ Both countries carry significant political capital in their respective regional groupings. Comparing these two, then, also provides a barometer of sorts of how the European Union and the SAARC would compare.

⁴Sreevatsan, Ajai, "We Have to Factor in Data Privacy in Census Design and Methodology", *Mint*, 22 January 2018, <https://www.livemint.com/Politics/04X1G5qikIWynGdtlxyAuO/We-have-to-factor-in-data-privacy-in-census-design-and-meth.html>.

⁵"GDP, current prices, European Union", IMF, accessed 14 November 2019, <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/EU?year=2019>.

⁶"GDP, current prices, manually selected country group: Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka", IMF, accessed 14 November 2019, <https://www.imf.org/external/datamapper/NGDPD@WEO/AFG/BTN/IND/NPL/PAK/MDV/BGD/LKA?year=2019>.

Another point where a comparison appears practical is that of legislation. When India released its Draft Personal Data Protection Bill in July 2018, it had hardly been two months since the enforcement of the GDPR in the EU. This led to various comparisons of the Bill with the EU Regulation, from where it appears to borrow a fair amount of phrasing and structure. A comparison with a particular EU jurisdiction where the GDPR has been applied certainly provides clearer and more practical points of juxtaposition. In this, Germany stands out for its decades of experience in enforcing and updating statutes on data protection, privacy, and related spheres.

The current point in time points to the urgency of undertaking a comparative study of this sort. The last decade has inarguably seen some of the most defining shifts in the debates and policies surrounding data protection and privacy across the world. These shifts were spurred on by events and movements, the ripples of which extended far beyond national borders. The most path-breaking of these was, without question, the Snowden revelations of 2013. The US National Security Agency contractor Edward Snowden blew the whistle on the country's sweeping global spying programmes, exposing how regular individuals and heads of states alike were compromised. Diplomatic standoffs ensued, as did large-scale public awareness of the various ways in which it was possible to trace, profile, and surveil a person. While this happened, a young Austrian activist, Max Schrems, was taking a global social media conglomerate to court in Ireland, putting the wheels in motion for changes in transatlantic commercial data transfers. His legal battle with Facebook, which started in 2011, set pan-EU precedents when it comes to transfers of data outside of Europe and has been significant in setting standards for acceptable forms of data processing for the EU. In yet other developments, in 2014 the European Court of Justice recognised the Right to Be Forgotten. And all this while, deliberations were on for a new pan-EU regulation to govern data protection with the General Data Protection Regulation (GDPR). By the time this regulation came into force, a global data protection scandal had revealed how democracies could be manipulated—consultancy firm Cambridge Analytica had exploited Facebook's terms of service to profile, target, and manipulate US voters in the 2016 presidential elections and UK voters in the EU referendum the same year. The impacts of and the reactions to these events have been a reflection of nothing less than the strength and integrity of democracy, democratic processes, and democratic institutions in the countries involved.

This research report analyses the issues of privacy and data protection as they have arisen in India and Germany, and the way that they interact with the ideas of individual rights and government accountability. It compares the two countries' approaches to privacy and data protection on four counts: the key historical events and factors; state surveillance; functioning and deployment of biometric government IDs; and the legal frameworks (in India's case, the *proposed* legal framework) governing data protection and protecting an individu-

al's right to privacy. In examining these four aspects, this comparative study explores, among other things, the right to privacy granted to and/or wrested by the individual within a state machinery and how that affects the relationship imagined between the citizen and the state. With this, it also explores the ideas of accountability and transparency in the two countries within the rubric of data protection and privacy.

The first section delves into the historical evolution of the approach to privacy as a right in Germany and India, followed by the countries' moves in data protection regulation. The chronological point of departure for both is after the Second World War, when Germany saw the toppling of the Nazi regime in 1945 and India the official departure of the British colonial government in 1947. It goes on to analyse how and why certain constitutional protections were introduced (informational self-determination for Germany) or rejected (privacy as a fundamental right, in the initial years, for India). It uses these threads to connect with current motivations animating data protection policies in the two countries.

The second section focuses on the architecture and functioning of state surveillance and the oversight mechanisms that assign accountability to law enforcement and government institutions. It focuses on India's lack of judicial and parliamentary oversight over intelligence agencies, alongside Germany's recently revised oversight regime. The section also examines the impact of and the reaction to the Snowden revelations of 2013 to illustrate the extents of government accountability that the two democracies had room for.

The third section is centred on the biometric identity tools in Germany and the biometric identity programme in India. It takes into consideration the deployment of biometric passports in Germany after 2005 requirements prescribed by the European Union, as well as the use of biometrics in the national ID instrument called the Personalausweis. In India, the biometric-linked unique identity programme Aadhaar serves as a point of comparison. The two are analysed for the extent of function creep and the resulting impact on individuals' control over their personal data.

The last section analyses the legal regimes in both countries, taking as points of comparison the GDPR and the BDSG-Neu in the German context and the Draft Personal Data Protection Bill, 2018, authored by the B N Srikrishna Committee, in the Indian context. It begins with a comparative analysis of the legal rights conferred upon individuals. This is followed by an analysis of data transfer obligations and how they impact these individual rights. Finally, it explores the kinds of exemptions afforded to governments and government agencies under the two regimes, and how these fare when it comes to accountability and transparency.

1. Data protection and privacy through the years: A look at the historical evolution of regulation in India and Germany

This section describes how India and Germany have approached data protection legally and politically. There have been significant parallel developments in recent years. In India, a draft bill on privacy prepared by a committee led by former Supreme Court judge Justice B N Srikrishna was released to the public in July 2018. Shortly before, in May 2018, Germany with the rest of the European Union had come under the purview of the General Data Protection Regulation (GDPR). A comparison of past events leading up to this point provide a better insight into the motivations, apprehensions, and the concerns of the two countries.

The end of the Second World War in 1945 serves as an important time-marker to start this comparison, as it establishes a significant point in the very nationhood of both the countries. Germany began its journey as two nations under military occupation, while in India, the end of the war precipitated the departure of the British imperial government two years later and the establishment of an independent sovereign nation of India. Political events in the years that followed set very different priorities for both the countries. These set the tone for political and legislative action for the years ahead.

1.1. Evolution of the Indian position

The Indian Constituent Assembly debates from the 1940s show how lawmakers of independent India considered and then discarded the idea of instituting privacy as a fundamental right—something that would come back under legal consideration seven decades later, and finally be granted the status in August 2017.

Legal scholar Chinmayi Arun identifies two kinds of “privacies” that were considered in these debates: one that dealt with secrecy of correspondence and another that offered protection against unreasonable search and seizure.⁷ The debates show that a primary concern while deliberating the fundamental right to privacy and/or secrecy of communication was the impediments it could create for the administrative class to carry out state functions. Those who opposed the introduction of the right saw an architecture of permits, sanctions, and approvals as something that would slow down the work of a bureaucracy dealing with a population as large as India’s.⁸

⁷ Arun, Chinmayi, “Paper-Thin Safeguards and Mass Surveillance in India”, *National Law School of India Review*, no. 26 (2014): 106-108.

⁸ The 1951 Census of India recorded the country’s population at 361,088,090 persons.

The Draft Report of the Indian Sub-Committee on Fundamental Rights presented in April 1947 contained an Article 9(d), which guaranteed the right to secrecy of correspondence and the right against unreasonable search and seizure. Interestingly, here, India was already looking to pre-war Germany. This section was adapted from the Weimar Constitution,⁹ where Article 117 guaranteed secrecy of postal, telegraphic, and telephonic communication, while Article 115 said that the dwelling of every German was inviolable.¹⁰ Opposition to the inclusion of the right came from Constituent Assembly members such as Alladi Krishnaswamy Iyer, who said, “A clause like this may checkmate the prosecution in establishing any case of conspiracy or abetment in a criminal case and might defeat every action for civil conspiracy, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties, which in all these cases would furnish the most material evidence ... On a very careful consideration of the whole subject, I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice.” Fellow member BN Rau too felt it would impede criminal investigations and said, “Often, in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but if he has to apply for a court’s warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal.”¹¹ Here, it is pertinent to mention for the record those in the Constituent Assembly who argued on the other side of this issue. Those like Kazi Syed Karimuddin, Pandit Thakur Das Bhargava, Somnath Lahiri, and indeed, father of the Indian constitution Dr B R Ambedkar himself, had argued in *favour* of different facets of a right to privacy. These included right of the people to be secure in their houses against unreasonable search and seizure and also a right to privacy in correspondence.¹²

When discussing privacy in 2017, case law became an important factor in formulating a position. By then, various cases had covered this ground from the vantage points as diverse as health and medical information, state surveillance, confidentiality of financial details, intrusive media reportage, and even sexual violence.¹³ For example, a 1998 Supreme Court case, titled *Mr X vs Hospital Z*, concerned a hospital that had divulged the petitioner’s HIV

⁹ Matthan, Rahul, *Privacy 3.0*, 2018th ed. (HarperCollins Publishers India): 80.

¹⁰ “The Constitution of the German Reich, Translation of Document 2050-PS, Office of U.S. Chief of Counsel”, Ithaca, New York: Cornell University Law Library. Accessed 26 April 2019. <http://reader.library.cornell.edu/docviewer/digital?id=nur:01840#page/7/mode/1up>

¹¹ Matthan, *Privacy 3.0*, 83-84.

¹² Arun, “Paper-Thin Safeguards and Mass Surveillance in India”: 105-108.

¹³ Centre for Communication Governance, National Law University, Delhi detailed 37 cases connected to the Right to Privacy in India between 1964 and 2015. “The Indian Supreme Court on the Right to Privacy: 63 Years of Progress”, *The CCG Blog*, 13 August 2017, <https://ccgnludelhi.wordpress.com/2017/08/13/h/>.

positive status to his fiancée. This led to the petitioner's wedding being called off and subsequent social ostracisation. The petitioner sued the hospital for not maintaining confidentiality. The court here adjudged that while the right to privacy was "an essential component of (the) right to life", the fiancée in this case had a right to know, as it would have posed a health risk to her. The hospital, the court ruled, violated neither privacy nor the rules of confidentiality in this case.

Among the most cited in Indian case law is *Kharak Singh vs the State of UP and Others* from 1962.¹⁴ The case concerned a person who had been charged with dacoity but then later let off for lack of evidence. However, he continued to be on the receiving end of domiciliary visits by police personnel at nights. A majority of the six-judge bench of the Supreme Court ruled that in this case, although privacy was not a constitutional right, the repeated domiciliary visits by the police at night did constitute a violation of fundamental rights. In a minority judgement, the sole dissenting judge, Justice Subba Rao, read the right to privacy as an essential component of Article 21 of the Indian Constitution, which guarantees the right to life and liberty. In a dramatic departure in 2017, when the Supreme Court adjudged the right to privacy to indeed be a fundamental right, the majority judgment in the *Kharak Singh* case was overruled.

As concerns data protection, there was an attempt to introduce the same in 2011. This was not done by the passage of a separate Act, but with the introduction of a new set of "Rules" under Section 43A of the Information Technology Act, 2000. Section 43 A deals with the "compensation for failure to protect data" when the failure is on the hands of a "body corporate" or a private firm or company engaged in business. Under this Act, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, or IT Rules 2011, were introduced. The Rules prescribed conduct for private organisations and businesses when it came to processing, collection, storage, and other kinds of data handling. These were, however, criticised for falling "short of internationally accepted data protection standards"¹⁵ and were described as "not a model of clarity".¹⁶ For one, the Rules weren't exhaustive—the short title and commencement, definitions, and the rules themselves were contained in just five pages. Second, it did not apply to public bodies or the government. Furthermore, while the definitions under the Rules de-

¹⁴ *Kharak Singh vs the State of UP and Others*, Supreme Court of India, 1962.

¹⁵ Acharya, Bhairav, "Comments on the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011", Centre for Internet and Society, 31 March 2013. <https://cis-india.org/internet-governance/blog/comments-on-the-it-reasonable-security-practices-and-procedures-and-sensitive-personal-data-or-information-rules-2011>.

¹⁶ Saikia, Nandita, "On The Indian Government's Clarification On IT Rules And Personal Data", *MediaNama* (blog), 26 August 2011, <https://www.medianama.com/2011/08/223-on-the-indian-governments-clarification-on-it-rules-and-personal-data/>.

ned both personal information and sensitive personal data, the protections offered and the fines prescribed were solely for sensitive personal data. This class of data included passwords, financial information, health conditions, sexual orientation, medical records and history, biometric information, and any details related to these. This left out communications data, profiling information, identifying information such as names, addresses, and the like, among others. The Rules mandated that “body corporates” disseminate a privacy policy; that they obtain written consent from the data subject who is described throughout as the “provider of sensitive personal data or information”; and that the data subject be told about the collection of information, purpose, and recipients of the same. The Rules allowed data to be transferred to another body corporate within India when necessary for performance of contract or under consent from the “provider of information”.

The terminology in these Rules—such as “provider of information”—left much open to interpretation. As far as the operations of the “body corporates” were concerned, the government had to issue a clarification to the effect that it applied only to those operating within India,¹⁷ thereby leaving the coast clear for foreign business process outsourcing companies. Puzzlingly, this clarification came not in the form of a further amendment or another executive order but a press release from the Ministry of Communications and Information Technology (MeitY).

Legal consultancy Linklaters found no “example of enforcement action taken under the IT Rules, 2011”—a testament to their lack of efficacy. In fact, in its report, the BN Srikrishna Committee itself commented on the Rules’ “unduly narrow” definition of personal data and its “problems of implementation due to delays in appointments to the adjudicatory mechanisms”. The Committee also pointed to its lack of jurisdiction over public bodies, saying, “Ensuring that the state respects the right to privacy of the citizen should be a key aim of any data protection framework building on the fundamental right to privacy.” However, in the very next line, it qualifies this requirement, saying, “it must be recognised that several purposes for state processing of personal data may relate to the public interest”, and that “specific purpose-based exemptions” for “national security, investigating crime, protecting revenue etc.” must be created within the law.¹⁸ This is in line with the Justice B N Srikrishna Committee’s own formulation in the Draft Personal Data Protection Bill, where state, legislature, and security agencies are given a wide range of exceptions when it comes to data processing.

¹⁷ “Clarification on Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 Under Section 43A of the Information Technology ACT, 2000”, Ministry of Communications & Information Technology, 24 August 2011. <https://pib.gov.in/newsite/erelease.aspx>.

¹⁸ Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, “A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians”, 27 July 2018: 6-7.

In addition to these efforts towards data protection in India, there were other formal discussions and consultations at the administrative and political levels earlier, but to no conclusion or state action. In 2012, for example, the central government had constituted a “Group of Experts” headed by the former chief justice of the Delhi High Court, Justice A P Shah. This group released a report defining the principles governing the right to privacy. This was to facilitate the “authoring of the Privacy Bill” for the government¹⁹—something that took another five years to even get started. Before the central government got started on this project, five private member Bills²⁰ on privacy were floated until 2016, though none came up for discussion in Parliament.²¹ The current Bill, however, was drafted by a committee formed directly under the central government’s Ministry of Electronics and Information Technology (MeitY) in July 2017. At the head of the government committee this time was again a jurist: former Supreme Court judge Justice B N Srikrishna. Also, the Committee was more specifically tasked with developing a framework for data protection. The committee submitted its Bill in July 2018 along with a report on its work.

At an institutional level, the debate on privacy had begun to shift when the Supreme Court started hearing a collection of Public Interest Litigations (PILs) in 2012 challenging the constitutional validity of the nationwide biometric-linked identity programme, Aadhaar. This process began in 2012, and a decision in the matter was finally reached in 2018. The events mentioned in the paragraph above took place alongside the hearings in the matter. Along the way, in 2017, an important legal milestone was crossed with privacy being adjudged a fundamental right. Briefly, the events were as follows. With the 2012 Public Interest Litigation, the petitioners in the Aadhaar case argued that the programme, in its collection, handling, and linking of citizens’ biometric data, violated the right to privacy. Responding to this, government counsel, Attorney General Mukul Rohatgi, argued that the right to privacy does not exist.²² He referred to previous cases, like the Kharak Singh case from the 1960s, when majority bench did not recognise such a right, to make this argument.²³ The government’s assertion that privacy was not a fundamental right put another set of legal events into motion. The Supreme Court in August 2015 referred the matter of identifying privacy

¹⁹ “Group of Experts on Privacy Submit Report” (Press Information Bureau, Government of India, October 18, 2012), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=88503>.

²⁰ Private Member Bills are bills formulated and floated by the members of Parliament instead of government committees.

²¹ Dutta, Prabhask K, “Right to Privacy: 5 Bills yet No Law, How Parliament Has Dealt with Personal Data Protection”, *India Today*, 24 August 2017, <https://www.indiatoday.in/india/story/right-to-privacy-fundamental-right-parliament-1031136-2017-08-24>.

²² Choudhary, Amit Anand, “No Fundamental Right to Privacy to Citizens: Centre Tells SC”, *The Times of India*, 22 July 2015, <https://timesofindia.indiatimes.com/india/No-fundamental-right-to-privacy-to-citizens-Centre-tells-SC/articleshow/48171323.cms>.

²³ The part of this judgment which did not recognise privacy as a right was later overruled by the nine-judge bench that delivered the 2017 privacy verdict.

as a fundamental right to another nine-judge bench of the Supreme Court. Two years of arguments later, in 2017, the bench finally decreed it to be a fundamental right.²⁴ The nine judges unanimously recognised it as an intrinsic part of the right to liberty and the right to life under Article 21 of the Indian Constitution. This 2017 decision of the Supreme Court in turn impacted the course of the parallel Aadhaar hearings. With the Aadhaar judgment of 2018 that followed, several provisions of the erstwhile Aadhaar Act²⁵ were deleted, although the programme on the whole was not found to be violative of privacy. The Draft Data Protection Bill of 2018, released by the B N Srikrishna Committee a couple of months before the 2018 Aadhaar judgment, served as the next definitive step on the Indian route to a comprehensive legislation in the field.

We see two concerns at play in the 2017 and the 2018 judgments of the Supreme Court of India. One is that of protecting state interest and state authority, and the other is that of regulating businesses, particularly by foreign players.

The 2017 decision of the Supreme Court focused on the value of privacy as a constitutional right, of which informational privacy and data protection was but a part. “Informational privacy is a facet of the right to privacy”, says the judgment. It then goes on to enumerate “privacy concerns against the state” and the ways in which state-sponsored surveillance and profiling of citizens can harm the exercise of fundamental rights. Justice SK Kaul even recommends looking to the EU GDPR as a guiding point in the judgment, saying, “... formulation of data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed. The European Union Regulation of 2016²⁹ of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data may provide useful guidance in this regard.”

The text of the judgment dwells at length on the matter of “proportionality”—defining the legitimate and proportionate extent of state intrusion into privacy. Among the many examples it took from European case law to illustrate this was the *Uzun vs Germany* case from the European Court of Human Rights, delivered in 2010.²⁶ Here, the state investigative agency—North Rhine-Westphalia Department for the Protection of the Constitution (Verfassungsschutz)—carried out surveillance on a person with links to the Anti-Imperialist Cell, who was convicted for planting bombs outside the houses of members of parliament,

²⁴ Justice K Puttaswamy (Retd) and Another v Union of India (Supreme Court of India 24 August 2017).

²⁵ The Aadhaar (Targeted Delivery of Financial & Other Subsidies, Benefits & Services) Act, 2016.

²⁶ *Uzun vs. Germany* (The European Court of Human Rights (Fifth Section) 2 December 2010).

former members of parliament, and also the Peruvian Honorary Consulate. To establish the case, the agency collected GPS car data on the applicant in the case and his accomplice. The extent of surveillance and the consequent admissibility of the evidence here was what was contested. The European Court of Human Rights held the surveillance to be proportionate here, saying, “There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.”²⁷ The Indian Supreme Court found that in the case, “a fair balance is struck between the general interest of the community and the interests of the individual”.²⁸

As far as regulating commercial activity with personal data is concerned, the text of the Draft Bill appears to keep that concern front and centre.²⁹ This is evident from its accompanying report, which is titled: “A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians”. After it prominently mentions the “transformative potential” of the digital economy to improve lives in India, and also enumerates the harms from both the state and private players in misuse of personal data, the Committee goes on to say in the opening chapter of the report: “It is our view that any regime that is serious about safeguarding personal data of the individual must aspire to the common public good of both a free and fair digital economy.”³⁰

Both these concerns—that of state interest and that of creating a favourable business environment—place the state and commerce as active determinants of an individual's realisation of her right to privacy. Processing of data by public bodies and security agencies is repeatedly formulated as legitimate and necessary. As for businesses, data is repeatedly posited as a value-holding asset waiting to be mined rather than an entity with a personal dimension inherently deserving of protection.

By the time the deliberations of the Supreme Court and the government-appointed committee had ended, various privacy violations through unsecure sharing of Aadhaar details had been recorded, the global Cambridge Analytica scandal had already impacted over 250,000 Indian Facebook users (by the tech giant's own admission), and both homegrown digital wallet Paytm and global player in the sector Google Pay had been accused of sharing user data with third parties without consent. As of the autumn of 2019, this Draft Bill is yet to be

²⁷ Uzun vs. Germany (The European Court of Human Rights (Fifth Section) 2 December 2010).

²⁸ Justice K Puttaswamy (Retd) and Anr v Union of India (Supreme Court of India 24 August 2017).

²⁹ Gupta, Apar, and Uppaluri, Ujwala, “A Fundamental Error”, *The Hindu*, 1 August 2018, sec. Opinion. <https://www.thehindu.com/opinion/lead/a-fundamental-error/article24566374.ece>.

³⁰ B N Srikrishna Committee, 7.

tabled in the Indian Parliament. India is yet to join the 118 countries of the world that have enacted a comprehensive data protection law.³¹ Further delays are sure to impact the rights of Indian data subjects going forward.

1.2. The German journey

Germany is seen as a global pioneer in data protection for various reasons. It was the first country in Europe to have passed a data protection act at the state level in the state of Hesse in 1970 and at the federal level in 1978 as the Bundesdatenschutzgesetz or BDSG.

Once the GDPR was finalised in 2016, Germany was among the first countries in Europe to revise its local data protection law, the BDSG. An updated and reformed BDSG-Neu was introduced as early as July 2017—a year ahead of the 25 May 2018 deadline for the GDPR.

As evidenced by the deliberations of the Constituent Assembly, the Supreme Court and the B N Srikrishna Committee, India has repeatedly looked towards Europe in general and Germany in particular in developing its position on privacy and data protection. In this, understanding the events, concerns, and preoccupations that animated the German position and its evolution is pertinent.

The dominant view on the matter holds that large-scale data collection on and surveillance of citizens in Nazi-era Germany, and later in the Soviet-era East Germany, left the country with heavy caution against large-scale exercises involving personal data collection, regardless of the entity collecting the data. Unlike in India, state activities are not considered legitimate by default. This reading has been extended not just to recent developments like the GDPR but also to older events, like the population census decision in the 1980s.

In his seminal work of 2001, Edwin Black details how (in the absence of modern-day computers), the Third Reich tabulated, processed, and acted on extensive data collected on the German population. This, says Black, was largely aided and expedited by the mechanisation offered by technology company International Business Machines or IBM (then Dehomag in Germany) and its Hollerith machines.³² These machines, initially installed in the census complex in Berlin's Alexanderplatz, sorted through population data on "punch cards". These cards recorded data across rows and columns indicating certain characteristics such as religion, language, profession, and others with holes at corresponding spots in the resulting table. These cards were then sorted through the Hollerith machines to arrive quickly at sections of the population the Nazi government wanted to expel or exterminate.³³

³¹ Banisar, David, "National Comprehensive Data Protection/Privacy Laws and Bills 2019", ARTICLE 19: Global Campaign for Free Expression, 1 August 2019. <http://dx.doi.org/10.2139/ssrn.1951416>.

³² Black, Edwin, *IBM and the Holocaust: The Strategic Alliance Between Nazi Germany and America's Most Powerful Corporation*. Little, Brown & Company, 2001: 23-30.

³³ Ibid.

“There are historical explanations for the distrust and revulsion Germans feel toward state surveillance, which help explain the widespread belief that privacy merits special protection”, says an analysis of data protection in Germany from the Bertelsmann Foundation.³⁴ “The Third Reich also systematically abused private data: It maintained a so-called index of Jews that listed the identity of all Jews dating back to their grandparents’ generation. In addition, it relied on data collected during the Weimar Republic (1918–1933), including records of homosexuals. Nazi Germany’s persecution of Jews and homosexuals proved that no matter the intent of the data-collecting entity, the collection of so much personal information about individuals could be dangerous in and of itself”, it says.³⁵

In a piece for *The New York Times* written in the wake of the Snowden revelations, Green Party member and Gesellschaft für Freiheitsrechte secretary general Malte Spitz also points to German history when speaking of the German attitude towards privacy infringements. “Although these two dictatorships, Nazi and Communist, are gone and we now live in a unified and stable democracy, we have not forgotten what happens when secret police or intelligence agencies disregard privacy. It is an integral part of our history and gives young and old alike a critical perspective on state surveillance systems”, he writes.³⁶

In the light of these excesses, post-war West Germany developed the “right to personality”. It was called a *Quellrecht*, or “source right”, since it was the source from which the development of the right to private life and that of the principle of informational self-determination flowed. The development of these happened through case law, with the legal principles linking the right to dignity, personality, and personal life being established early on. According to the legal scholars Paul M Schwartz and Karl-Nikolaus Peifer, German courts took these steps in the post-war period to develop the right to personality and “to solidify the notion of a right to privacy ground in the dignity of the individual”.³⁷ Notably, in the early 1900s, this very right was rejected by legal commentators in Germany for being too broad and amorphous. That, however, changed after the Second World War, which made the framers of the Basic Law see the protection of personality rights for dignity as significant.³⁸

³⁴ Freude, Alvar and Freude, Trixy, “Echoes of History: Understanding German Data Protection”, Bertelsmann Foundation, 1 October 2016, <https://www.bfna.org/research/echos-of-history-understanding-german-data-protection/>.

³⁵ *Ibid.*

³⁶ Spitz, Malte, “Germans Loved Obama. Now We Don’t Trust Him”, *The New York Times*, 19 October 2013, sec. Opinion, <https://www.nytimes.com/2013/06/30/opinion/sunday/germans-loved-obama-now-we-dont-trust-him.html>.

³⁷ Schwartz, Paul M. and Peifer, Karl-Nikolaus, “Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept”, *California Law Review* 98, 2010: 1950.

³⁸ Schwartz and Peifer, “Prosser’s Privacy”, 1947-8.

The German Basic Law does not recognise a right to privacy or to data protection in as many words. “We still don’t have the parliamentary right to data protection in Germany. We also don’t have a fundamental right to privacy. What we have is Article 1 on Human Dignity and we have Article 2 on the right to act like whoever you want or Allgemeine Handlungsfreiheit. These two are combined in the German courts’ verdicts, and they developed from these two fundamental rights the right to private life”, says Malte Engeler, judge at the Administrative Court of Schleswig-Holstein, former deputy head of the supervisory unit of the data protection authority of Schleswig-Holstein, and representative of the German data protection authorities in the Article 29 Working Party subgroups.³⁹

Turning to case law, we can see the key turning points in this process of drawing out other rights from the “source right” of the right to personality. In this, the 1954 Schacht Letter Decision of the Bundesgerichtshof is significant. It was with this case that the Federal Supreme Court read the right of personality into the Civil Code. This was further solidified in the 1958 Gentleman Rider case, in which the court prescribed damages for the violation of the right of personality as well.⁴⁰ As part of personality rights, case law also established the right to a second chance in society. This was with the Lebach case in 1973. Here, a murder convict approached the court against extensive media coverage of him completing his prison term and nearing release, arguing it would hamper his chances of reintegrating into the mainstream. The German Federal Constitutional Court, or Bundesverfassungsgericht, ruled in his favour, recognising his right to a second chance in society.

More recently, in the Federal Constitutional Court decision on online searches in 2008, the Karlsruhe court ruled that a 2006 amendment of the Act on the Protection of the Constitution in North Rhine-Westphalia, allowing the use of malware such as trojans for online searches, was unconstitutional.⁴¹ In their analysis of the case, legal scholars Gerrit Hornung and Christoph Schnabel say that the court found the rights covering secrecy of telecommunications and sanctity of home to be inadequate when applied to online searches of computers and IT systems. The Federal Constitutional Court then read into what it called the “gap-closing function of the general personality right” to develop a right that covers “IT systems that may—as such, or within a network—store personal data to an extent that the searching of the system could disclose important parts of the conduct or life of a person or even a significant image of his/her personality”.⁴²

³⁹ Engeler, Malte, personal interview, 12 February 2019.

⁴⁰ Schwartz and Peifer, “Prosser’s Privacy”, 1951.

⁴¹ BVerfG, Judgment of the First Senate of 27 February 2008 - 1 BvR 370/07 -, paras. (1-333), http://www.bverfg.de/e/rs20080227_1bvr037007en.html.

⁴² Hornung, Gerrit and Schnabel, Christoph, “Data Protection in Germany II: Recent Decisions on Online-Searching of Computers, Automatic Number Plate Recognition and Data Retention”, *Computer Law & Security Review* 25, no. 2 (January 2009): 116, <https://doi.org/10.1016/j.clsr.2009.02.008>.

The Federal Constitutional Court's decision in the Census Case of 1983, known as the Volkszählungsurteil, marked a watershed moment in the development of a data protection regime in Germany. Hornung and Schnabel hold it to be the "very key to the German view on data protection".⁴³ With this decision, the Federal Constitutional Court created a constitutional right to informational self-determination. This landmark development was the result of an equally significant civil movement against mass data collection of citizens in the 1980s. In these anti-census protests in West Germany, protestors questioned the need for the number and kind of questions posed in the census. Some protesters resorted to not answering the questions at all, while others to "accidentally" damaging the forms or writing illegibly.⁴⁴ In its 1983 decision, the court placed constitutional protection over personal data in Germany and recognised individual control over the amount and extent of use of their personal data. It prohibited the creation of citizen profiles with unique identifiers, and even the sharing of data between government departments after a one-time collection. The decision led to the amendment of the BDSG in 1990, where the court's decisions and observations were taken into account in the form of building in consent requirements, transparency, and prevention of abuse by government agencies. Hornung and Schnabel see the development of this right as distinct from and complementary to the right to privacy. They find it strengthens participation in the democratic process. "If citizens cannot oversee and control which or even what kind of information about them is openly accessible in their social environment, and if they cannot even appraise the knowledge of possible communication partners, they may be inhibited in making use of their freedom. If citizens are unsure whether dissenting behaviour is noticed and information is being permanently stored, used and passed on, they will try to avoid dissenting behaviour so as not to attract attention", in effect making freedom of speech and choice "virtually impossible".⁴⁵

Matthew G Hannah traces the root causes of public discontent against the census exercise in the 1980s to various factors, the catalysing one being the 1970s government crackdown on the Red Army Faction, where the law enforcement depended on extensive data collection to trace and track the members of the body and its meetings and activities.⁴⁶ Hornung and Schnabel say public opinion in the German Census Case was characterised by a "general resentment against growing surveillance and data processing".⁴⁷

⁴³ Hornung, Gerrit and Schnabel, Christoph, "Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination", *Computer Law & Security Review* 25, no. 1 (January 2009): 85, <https://doi.org/10.1016/j.clsr.2008.11.002>.

⁴⁴ Hannah, Matthew G., *Dark Territory in the Information Age: Learning from the West German Census Controversies of the 1980s* (Burlington, Vt: Ashgate, 2010): 56.

⁴⁵ Hornung and Schnabel, "Data Protection in Germany I", 85-86.

⁴⁶ Hannah, *Dark Territory*: 6-23.

⁴⁷ Hornung and Schnabel, "Data Protection in Germany I", 85.

This resentment against extensive data processing could be seen even decades after the anti-census mobilisation. For example, in 2007, when CDU politician and then Secretary of Interior Wolfgang Schäuble proposed laws regarding online data retention and surveillance of computer systems, activists resisting the move referenced Soviet-era surveillance. They termed him “Stasi 2.0”, complete with posters and memes for online circulation. The reference, of course, was to the East German State Security Service called Staatssicherheit, or Stasi for short. The Stasi had indulged in extensive and oppressive means of surveillance and suppression of dissenting voices. Similar terminology was employed for former US President Barack Obama in the wake of the Snowden revelations of 2013. Malte Spitz reacted to the US collection of mass data under the NSA’s PRISM programme drawing on the history of the Stasi in East Germany. “In Germany, whenever the government begins to infringe on individual freedom, society stands up. Given our history, we Germans are not willing to trade in our liberty for potentially better security. Germans have experienced firsthand what happens when the government knows too much about someone. In the past 80 years, Germans have felt the betrayal of neighbors who informed for the Gestapo and the fear that best friends might be potential informants for the Stasi”, he wrote in a June 2013 column for the New York Times.⁴⁸

Apart from apprehensions regarding government collection of data, there was also a preoccupation with cashing in on the economic opportunities that effective participation in the digital society had to offer. The internet policy scholars Julia Pohle et al see the beginning institutionalisation of the “information society” discourse in Germany and describe government action at the time as a catching up of sorts to global circumstances and movements. “Like most other countries, Germany began to develop a political response to the internet and its societal impact in the early 1990s, when the discussion on the information society started to unfold on both the national and international level. The concept of ‘information society’ was commonly used as a metaphor to capture the importance of information for economic and societal progress”, they say.⁴⁹

It was with this historical arc that we finally saw Germany welcoming the General Data Protection Regulation (GDPR) in 2018, being one of the first countries to harmonise its local data protection law or the BDSG with the EU regulation. India, meanwhile, awaits the debate on and the passage of the Draft Personal Data Protection Bill, which features several provisions that are similar to the EU GDPR, including a provision for the right to be forgotten, the establishment of a Data Protection Authority, the principles of privacy by design, and the right to correction of data, among others. Later chapters will study these connections in detail.

⁴⁸ Spitz, “Germans Loved Obama”.

⁴⁹ Pohle, Julia, Hösl, Maximilian, and Kniep, Ronja, “Analysing Internet Policy as a Field of Struggle”, *Internet Policy Review* 5, no. 3 (25 July 2016): 7, <https://policyreview.info/articles/analysis/analysing-internet-policy-field-struggle>.

1.3. Identifying contrasts and drawing comparisons

One of the key differences in the way India and Germany have arrived at their current positions on privacy, and later on data protection, is the pace of evolution. Germany, as we saw above, started with an acknowledgement of the right to personality and the right to confidentiality of correspondence. It slowly built other derivative rights upon it through the decades as socio-political realities changed and technical capabilities developed. This evolution, which took decades in Germany, was condensed into a few years in India. A formal legal conversation exclusively on privacy could only begin when the government's unique biometric identity programme Aadhaar was challenged for violating privacy. The third section of the paper, which focuses on biometric IDs, shows how this legal challenge was the very thing that led to the recognition of the right to privacy. The conversation in this context did refer to other jurisdictions and decisions from different times in history. The response, however, was rooted in the country's 21st-century context, and its specific challenges of recognising and implementing a right to privacy while mass collection and processing of data took place.

More importantly, India did not have a collective, defining experience with large-scale, institutionalised surveillance like Germany did. As a result, one can observe in Germany, through the years after the war, a constant effort to keep individual lives inviolate. India, on the other hand, while transitioning from a colony to a sovereign state, focused on administrative ease when dealing with a large and diverse population when the question of privacy arose. These differences also inform the manner in which both the countries have developed their surveillance architectures and their ID systems. These themes are explored in the following sections.

2. State surveillance: A case for oversight

When comparing the intelligence regimes of India and Germany, the most striking difference to emerge is that of the accountability of the agencies. India currently lacks judicial and parliamentary accountability measures for its intelligence agencies. Attempts to introduce the same have been either too weak or have met with resistance. German intelligence agencies, on the other hand, have had strong parliamentary as well as judicial oversight for decades. These oversight mechanisms even saw a revision in 2016. However, these mechanisms and the recent amendments have received strong criticism locally on counts of superficiality, ineffectiveness, and for post-facto legalisation of problematic activities that were discovered only after harm was already done.⁵⁰ This section delves into the consequences of India's lack of an oversight mechanism and its securitisation⁵¹ of the attempts at opening intelligence agencies to scrutiny. It also delves into how Germany failed to contain activities of the intelligence agencies outside the remit of the law despite having an oversight mechanism in place. A particular focus is on the collaboration with foreign investigative agencies as revealed by the documents leaked by whistleblower and former US National Security Agency contractor Edward Snowden.

To contextualise the above analysis, this section explores the structures and functioning of the key investigative agencies of Germany and India. In India, we see an endurance of colonial structures in a sovereign state. In Germany, we see gradual dismantling and rebuilding of structures that were in operation during and before the Second World War. Their origins and their subsequent evolution through the years illustrate the values toward which both the countries orient themselves when it comes to instituting democratic structures around the security apparatus.

2.1. Intelligence agencies in India

In 2018, nine investigation agencies and the office of the Commissioner of Police, Delhi, were officially authorised to intercept, monitor, and decrypt electronic communication and other digital data.⁵² Among these, the agencies with the most far-reaching mandates are:

⁵⁰ Otwinowski, Martha, "Tailor-Made Laws: The State of Surveillance in Germany", *Index on Censorship*, 7 November 2016, <https://www.indexoncensorship.org/2016/11/tailor-made-laws-the-state-of-surveillance-in-germany/>.

⁵¹ Wæver, Ole, "Securitisation and Desecuritisation", in *On Security*, ed. Ronnie D. Lipchutz, 1995, <https://www.libraryofsocialscience.com/assets/pdf/Waever-Securitization.pdf>.

⁵² "The Gazette of India: Extraordinary, Order of the Ministry of Home Affairs (Cyber and Information Security Division)", 20 December 2018.

Table 1

Agency	Area of responsibility and supervision
Intelligence Bureau (IB)	Domestic intelligence. Falls under the Union Ministry of Home Affairs.
Research and Analysis Wing (RAW or R&AW)	Foreign intelligence. Reports to the Prime Minister's Office.
Central Bureau of Investigation (CBI)	Corruption and special crimes. Under the superintendence of the Central Vigilance Commission or the Union Ministry of Personnel, Pension and Grievances (depending on the nature of the case under investigation).
National Investigation Agency (NIA)	Specially constituted after the 2008 Mumbai terror attack to look into cases of terrorism. It falls under the Union Ministry of Home Affairs.

In a 72-year-old democracy, the Intelligence Bureau is a 132-year-old organisation. The body, about which little is known by the general populace or revealed by the government, falls under the administrative remit of the Union Ministry of Home Affairs. It was formed in 1887 by the erstwhile British Colonial government when the then British Home Secretary, Richard Asheton Cross, wrote to the then Viceroy in India, Frederick Hamilton-Temple-Blackwood, asking him to set up a system for “collection of secret and political intelligence in India”. This was in the aftermath of movements against the British government and the struggle for Independence. Containing political dissent was key.

Blackwood wrote back months later with a plan on how he desired to “utilise in British India the services of the Police force and in Native States the existing means at the disposal of Political Officers, for the collection of intelligence on political, social and religious movements ...”⁵³ Barring this British Colonial government letter exchange from 1887, there exists no other order—legal or otherwise—laying out the creation and mandate of the body. A retired IB official himself submitted a Public Interest Litigation in the Karnataka High Court in 2012, questioning the legal basis of the IB. The government here finally described the IB

⁵³ Rani, Sarita, “Snooping: The IB’s Mandate Has Always Been to Protect India’s Rulers from Indians”, *The Wire*. Accessed 25 December 2018. <https://thewire.in/government/snooping-the-ibs-mandate-has-always-been-to-protect-indias-rulers-from-indians>.

as a “civilian organisation” without police powers.⁵⁴ Apart from this description by the government, there is no formal charter of duties for the IB. However, it appears from leaked reports and other events that it continues to function with an aim to contain dissent. In 2014, for example, an IB report on foreign-funded NGOs in India and their links to furthering “policy interests of western governments” was leaked to the media.⁵⁵ The following year, an Indian activist working for Amsterdam-headquartered NGO Greenpeace discovered that her movement out of India was curtailed thanks to an IB order.⁵⁶

By contrast, more information is publicly available about the CBI. Unlike the IB, it has its own website, complete with FAQs for the layperson. It describes its mandate as that of investigating “serious crimes related to Defence of India, corruption in high places, serious fraud, cheating and embezzlement and social crime, particularly of hoarding, black-marketing and profiteering in essential commodities”. The origins of the body, like the IB, lie in pre-Independence India. It started as a government division in 1941 to investigate cases of bribery and corruption in “war related procurements”. It was then called the Special Police Establishment. Five years later, this body was renamed the Delhi Special Police Establishment (DSPE) and placed under the DSPE Act of 1946. The two-page long text of the Act allows the central government, among other tasks, to constitute a police force, issue orders for its functioning, and appoint its officers. In 1963, the central government, via the union ministry of home affairs, constituted the Central Board of Investigation through an executive decision under the DSPE. The CBI has since investigated various high-profile corruption cases in India and has also been called on by the Supreme Court to take over investigations in certain other cases. But the CBI found itself in an existential dilemma in 2013. That year, hearing a public interest litigation challenging the constitutionality of the CBI, the Gauhati High Court quashed the 1963 resolution of the home ministry that was responsible for the formation of the agency. It found the government order lacking in procedural and legal technicalities (lack of oversight was not a consideration here).⁵⁷ The central government soon sought a stay on this decision from the Supreme Court. Since there hasn’t been consequential further development on this case, the validity of the CBI under the DSPE Act continues to be a matter of dispute.⁵⁸

⁵⁴ “Explain Intelligence Bureau’s Legality, HC Tells Centre”, *The Times of India*, 26 March 2012, <https://timesofindia.indiatimes.com/india/Explain-Intelligence-Bureaus-legality-HC-tells-Centre/articleshow/12408605.cms>.

⁵⁵ “Foreign-Funded NGOs Stalling Development: IB,” *The Times of India*, 12 June 2014, <https://timesofindia.indiatimes.com/india/Foreign-funded-NGOs-stalling-development-IB-report/articleshow/36411169.cms>.

⁵⁶ “Priya Parameshwaran Pillai vs Union Of India And Ors”, Delhi High Court, 12 March 2015.

⁵⁷ Navendra Kumar vs The Union Of India & Others, Gauhati High Court, 6 November 2013.

⁵⁸ Rao, YS, “The Mysterious Case of CBI’s Legality”, *Governance Now*, 3 June 2019, <https://www.governancenow.com/news/regular-story/the-mysterious-case-of-cbis-legality>.

As concerns the RAW, considerable secrecy and opacity surrounds the organisation. Even its formation in September 1968—widely attributed to India suffering losses in the Sino-Indian War of 1962 and the 1965 war with Pakistan—was kept under wraps until an article in the newsmagazine *Illustrated Weekly* wrote about it.⁵⁹ Although it is the chief foreign intelligence agency of one of the fastest growing democracies of the world, this organisation answers directly to the Prime Minister’s Office without any external oversight by the parliament or the judiciary. There exists no public charter of its duties. It was formed by cleaving a foreign intelligence unit out of the IB following the two wars in the 1960s.⁶⁰ But the lack of accountability measures has left it open to the risks of being used to meet political ends of the parties in power. From 1975–77, when the then Indira Gandhi government imposed a nationwide state of emergency in the country, political dissidents were reported to have been put under RAW surveillance.⁶¹ Former RAW officer B. Raman, however, has gone on record saying that the RAW was not involved in domestic political espionage at the time.⁶²

The little that is known about the organisation and its activities today is from scholarly literature, journalistic reports, and memoirs and other writings of retired RAW officers. Ryan Shaffer, a scholar who has studied various aspects of the RAW’s functioning in India’s history, has pointed to the role the organisation has played in key geopolitical events in India’s neighbourhood, like the formation of Bangladesh after separation from Pakistan in 1971 and the Liberation Tigers of Tamil Eelam (LTTE) uprising in Sri Lanka in the 1980s.⁶³ Yet efforts to bring the organisation under oversight have failed. Former officers such as B. Raman⁶⁴ and Retired Major General V. K. Singh⁶⁵ have argued for better accountability and more transparency in India’s intelligence organisations, particularly the RAW. Raman drew attention to the lack of RAW’s formal charter, legal backing, and even an acknowledgement of its existence in a newsmagazine column in 2010: “In the 1980s, when Indira Gandhi was the Prime Minister, a law was enacted by the Parliament banning strikes in the intelligence agencies. To my knowledge, that is the only Act of the Indian Parliament in which there is a reference to the R&AW by name. When that law was passed, nobody in the Parliament

⁵⁹ Shaffer, Ryan, “Unraveling India’s Foreign Intelligence: The Origins and Evolution of the Research and Analysis Wing”, *International Journal of Intelligence and CounterIntelligence* 28, no. 2 (3 April 2015): 260. <https://doi.org/10.1080/08850607.2015.992754>.

⁶⁰ Vaughn, Bruce, “The Use and Abuse of Intelligence Services in India”, *Intelligence and National Security* 8, no. 1 (January 1993): 2–5. <https://doi.org/10.1080/02684529308432188>.

⁶¹ Stanley A. Kochanek and Robert L. Hardgrave, *India: Government and Politics in a Developing Nation* (Boston: Thomson Wadsworth, 2000): 98.

⁶² Raman, B. *The Kaoboy of R&AW: Down Memory Lane*, 2013 US edition (Lancer Publishers, 2007): 49–51.

⁶³ Shaffer, “Unraveling India’s Foreign Intelligence”, 259–268.

⁶⁴ “Making Intelligence Agencies Accountable,” *Outlook Magazine*, 20 January 2010. <https://www.outlookindia.com/website/story/making-intelligence-agencies-accountable/263866>.

⁶⁵ Shaffer, “Unraveling India’s Foreign Intelligence”, 253.

well.¹⁵⁵ To do this, they rely on Recital 68, which says “the right to data portability should apply where the data subject provided the personal data on the basis of his or her consent or the processing is necessary for the performance of a contract”. They also rely on the European Data Protection Supervisor recommendation that the right to data portability have “a wide scope of application, and not only be applied to the processing operations that use data provided by the data subject”. They also point to the Working Party 29 recommendation that the phrase “provided by” be interpreted broadly. One is yet to see how it is applied in case law. The Indian Draft Bill defines far more clearly the kinds of data that are valid for porting.

4.3. Cross-border transfer of data and data localisation

The Indian Draft Bill proposes that data controllers store a serving copy of personal data they have in their possession on servers located within India. This has generated much comment on ease of setting up and maintaining businesses both within the country and without. More importantly, there have been concerns about what this move would mean for domestic surveillance and the individual’s right to privacy. The GDPR, on the other hand, introduces conditions for transfer of data to third countries, but unlike India, has no explicit condition to store data within EU borders. Nonetheless, the terms of transferring data across borders has been at the centre of legal and economic discussions with Schrems challenging data transfers from Facebook Ireland to the social media conglomerate’s parent company in the US. Here too, surveillance concerns were raised, albeit the potential surveillance of European citizens by US agencies.¹⁵⁶

Articles 44-50 of the GDPR on “Transfers of personal data to third countries or international organisations” essentially set down terms of transfer of data—subject to consistency when done to a country within the Union, and subject to data protection standards when transferred to a country outside of the European Union (third country). Recognising a country as fit for free flow of data with a data adequacy agreement (as laid down in Article 45) takes into account several aspects. These include factors as far-ranging as respect for human rights to the presence of a data protection supervisory authority. As of August 2019, the EU had adequacy agreements with 13 countries.

¹⁵⁵ De Hert, Paul, Papakonstantinou, Vagelis, Malgieri, Gianclaudio, Beslay, Laurent, and Sanchez, Ignacio, “The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services”, *Computer Law & Security Review* 34, no. 2 (April 2018): 193–203, <https://doi.org/10.1016/j.clsr.2017.10.003>.

¹⁵⁶ “CJEU Hears Case on EU-US Data Transfers (Standard Contractual Clauses and Privacy Shield)”, *Noyb.Eu*, accessed 19 August 2019. <https://noyb.eu/cjeu-case/>.

Other legal means for cross-border transfer of data to third countries include: binding corporate rules for an international group of enterprises and/or their business partners when engaged in joint economic activity (Article 47), Commission-approved codes of conduct or certification mechanisms (Article 46), or via derogations such as the need for performance of contract or when the data subject herself consents to the transfer of data (Article 49). Data requests resulting from court decisions can be complied with by relevant mutual legal assistance treaties (MLATs) between concerned countries (Article 48).

The Indian Draft Bill proposes a more stringent regime. Apart from adequacy conditions, Section 41 of the Draft Bill mandates that the data protection authority may approve standard contractual clauses. Much like the GDPR, it may also lay down conditions for transfer. However, Section 40 introduces strict restrictions for the same. Section 40(1) asks every data fiduciary to “ensure the storage, on a server or data centre located in India, of at least one serving copy of personal data to which [the] Act applies”. It also requires that certain categories of “critical personal data” shall only be processed in a server or data centre located in India. These categories of “critical personal data” aren’t defined in the Bill but are left to the central government to notify. The government is also given an opening to define exceptions to these clauses based on “necessity or strategic interests of the State”.

Data localisation in India has been presented as a way for the government to work around the slow MLAT processes in case of cross-border crimes or other legal violations that may happen on foreign-owned social media or technology platforms. In its report accompanying the Draft Bill, the Srikrishna Committee cites a need to “reduce reliance on the MLAT request regime”¹⁵⁷ as one of the motivations to introduce these conditions.

Noting that eight out of the top 10 most visited websites by Indians are US-based, the Committee finds that “law enforcement bodies often need to gain access to information that is held and controlled by data fiduciaries. As a result of this, it is important for the law to acknowledge the importance of quick and easy access to information to effectively secure national security and public safety. A requirement to store personal data locally would boost law enforcement efforts to access information required for the detection of crime as well as in gathering evidence for prosecution. This is because it is easier for law enforcement agencies to access information within their jurisdiction as compared to awaiting responses to requests made to foreign entities which store data abroad.” The Committee also realises that the long-term solution to this lies not in data localisation but in modernising current procedures to respond better to a digitally connected world. “However, it is advisable that in the future, nation states should strive towards harmonisation to create an enforcement regime that provides for effective information sharing”, says the Committee re-

¹⁵⁷ B N Srikrishna Committee, “A Free and Fair Digital Economy”, 96.

port.¹⁵⁸ Interestingly, their reasoning for this proposal mirrors that of the Constituent Assembly when rejecting privacy as a fundamental right (see section one of report). Here too the practical and operative ease of law enforcement is a key interest that trumps other concerns.

The GDPR prescribes a set of rules and conditions that must be met for the transfer (to third countries) of personal data either under processing or intended for processing. Contained in Chapter 5 of the Regulation, these include, among others, an adequacy decision from the European Commission deeming third countries or international organisations meeting the EU data protection requirements; contractual and other kinds of safeguards in the absence of such a decision; and competent supervisory authority-approved binding corporate rules. There is no explicit requirement to store a “serving copy” of personal data within EU borders as we see in India. However, the transfer conditions have been seen as restrictive by some quarters. A research report on data localisation from the Leibniz Information Centre for Economics, in cooperation with the European Centre for International Political Economy, warned that “GDPR reform could lead to a stoppage of cross-border data flows from the EU to important data processing countries such as the US and India, which are deemed to have adequate data privacy safeguards in place under the EU’s current regime”.¹⁵⁹

While the EU regime has raised concerns regarding data flows, the Indian data localisation proposal has provoked unease regarding individual rights. In their analysis of India’s data localisation proposal, Rishab Bailey and Smriti Parasheera point out how “[p]hysically locating all data within the territory of a state leads to a significant increase in the capacity of law enforcement agencies to access that information, and consequently surveil domestic residents”. In terms of alternative mechanisms, they point to the Telecom Regulatory Authority of India’s (TRAI) 2017 recommendations on cloud services, where it is suggested that MLATs signed with various countries be made more comprehensive. The TRAI has also suggested the use of the US CLOUD Act to obtain data on Indians from US companies.¹⁶⁰

Currently, both countries have a limited localisation regime. India has a localisation requirement for financial and payments data. Germany enforces the same with telecommunications metadata. However, when it comes to the overarching legislation governing data flows, India has shown a stronger bent towards protectionism with the regime proposed under the Draft Bill.

¹⁵⁸ Ibid., 88.

¹⁵⁹ Bauer, Matthias, Lee-Makiyama, Hosuk, Van der Marel, Erik, and Verschelde, Bert, “The Costs of Data Localisation: Friendly Fire on Economic Recovery”, ECIPE Occasional Paper, No. 3/2014. European Centre for International Political Economy (ECIPE), Brussels, 2014.

¹⁶⁰ Bailey, Rishab and Parsheera, Smriti, “Data Localisation in India: Questioning the Means and Ends”, Working Paper No. 242. NIPFP Working Paper Series. NIPFP, 31 October 2018. <https://www.ssrn.com/abstract=3356617>.

4.4. Exemptions and exceptions for government bodies

National security and public interest are the primary drivers of data processing exemptions afforded to governments and government bodies in both India and Germany.

Article 23 of the GDPR provides an opening clause for Member States to introduce restrictions to the obligations of data controllers and to the rights of data subjects “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society”. The conditions for restrictions include the expected concerns of safeguarding “national security, defence, public security” and other concerns such as investigation and prevention of breaches and protection of the rights of data subjects. As a safeguard for preventing abuse, Article 23(2)(h) further says that Member States must provide for “the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction”. The BDSG-Neu cites this Article twice in Section 32 and Section 33—both dealing with the information that a data controller must provide to a data subject. Section 34 of the BDSG-Neu reiterates the documentation requirement. It says that the “refusal to provide information shall be documented” and that the “data subject shall be informed of the reasons for refusing to provide information, unless providing the reasons in law and in fact on which the decision is based would undermine the intended purpose of refusing to provide the information”. As concerns a federal public body refusing to provide information, the section mandates that in such a case “information shall be provided to the Federal Commissioner at the request of the data subject, unless the responsible supreme federal authority determines in the individual case that doing so would endanger the security of the Federation or a *Land*”.

Article 9(1) of the GDPR expressly prohibits the processing of special categories of personal data, under which it counts “revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation”. These restrictions serve to further protect the interests and privacy of a data subject, be it from the data processing actions of a state body or a private one. However, in the very next paragraph, Article 9(2) lists out exceptions to the rule, a number of which are directly applicable to state governments. These include, among others: social security, social protection and employment; protection of vital interests of the data subject; legal proceedings; providing healthcare; archiving in public interest, historical, or statistical purposes.

With reference to the above derogations under Article 9(1), the BDSG-Neu in its Section 22 introduces exceptions to processing of “special categories of personal data” under two heads: one for both public and private bodies and another exclusively for public bodies. Exceptions under the first are limited to the purposes of healthcare and for protection of data subject rights (under social protection and social security).

Exceptions under the second head, on the other hand, are broadly under the rubric of defence and security. These include processing of said category of data when “urgently necessary for reasons of substantial public interest”, “to prevent a substantial threat to public security”, “necessary to prevent substantial harm to the common good or to safeguard substantial concerns of the common good”, and cases where processing is “necessary for urgent reasons of defence or to fulfil supra- or intergovernmental obligations of a public body of the Federation in the field of crisis management or conflict prevention or for humanitarian measures”. Added to this is the caveat that the need for such processing must outweigh the interest of the data subject.

We see national security concerns and fundamental rights posited as opposite forces rather than be posited in a framework where national security concerns work to protect the very same fundamental rights.

These themes and a similar treatment of them are seen in the Indian Draft Bill as well. What is different, however, is the way the exceptions are designed. While Germany offers a set of exceptions to an established norm when it comes to government functions and national security, the Indian Draft Bill institutes a separate norm altogether for the same. It does this with a blanket allowance for state functions, defining those as one of the many legitimate grounds for processing.

Sections 13, 14, 19, and 20 of the Indian Draft Bill fall under the chapter on legitimate “grounds for processing of personal data”. Section 13 of the Bill offers a strong contrast to the provision under Section 34 of the BDSG-Neu. The German law provides for a stand-in accountability mechanism in case a government department or body refuses information to a data subject. This is in the form of the government controller being answerable to the Federal Commissioner. The Indian Bill gives the state a much broader berth. Section 13 allows for the processing of personal data when “such processing is necessary for any function of Parliament or any State Legislature” and when it is “necessary for the exercise of any function of the State authorised by law”, including for the “provision of any service of benefit to the data principal from the State”. The services and benefits, in the practical sense, give broad permissions to programmes like Aadhaar, where data collection, processing, and even sharing has already happened so far without a data protection statute. Section 14 of the draft Bill allows for the processing of personal data for compliance with any order of

any court or tribunal and also when “explicitly mandated under any law made by Parliament or State Legislature”. Sections 19 and 20 allow the same kind of processing as under Sections 13 and 14 (state functions and legal compliance), but for sensitive personal data.

Furthermore, according to Section 42 of the Draft Bill, any data processing to achieve lawful ends of “security of state” are exempt from processing obligations that observe and protect most rights of the data principal. Sections 43 and 44 allow for exemptions from processing requirements when done for investigations and legal proceedings. They also allow for data retention after an investigation is through. The advocacy organisation Access Now has pointed out that since Indian surveillance laws are in need of reforms and an oversight mechanism—something the BN Srikrishna Committee itself has also acknowledged in its report—exemptions such as these could throw up challenges in implementing data subject rights going forward.¹⁶¹

Between the BDSG and the Indian Draft Bill, the exemptions and exceptions for the government are drafted more broadly in the latter. In the EU framework, the exemptions under Article 23(2) of the GDPR mandate that the restrictions to the rights of the data subject come with specific provisions such as the categories of personal data allowed to be processed, safeguards to prevent abuse or unlawful transfer, right of the data subject to be informed of the restrictions, and the like. In Germany in particular, a look at personal data processing by public bodies must also take into account programmes and legislations outside of the BDSG-Neu.

In what has been dubbed as the Staatstrojaner or State Trojan programme, a 2017 amendment to the German Criminal Code made room for the federal police in the country to obtain access to devices or networks via malware. The recent amendment to the Passausweisgesetz and the Passgesetz (see chapter on government IDs) also allow law enforcement to retrieve biometric photographs of those who have been issued these IDs. This kind of access has raised privacy concerns in Germany. Activists have already filed constitutional complaints against the Staatstrojaner programme. The Indian Draft Bill, however, proposes a regime where all government functions requiring processing—not just those related to security—are legitimate grounds for processing data. In this, the further discussion and input of parliamentarians before the Bill is signed into law will prove instructive.

¹⁶¹ “Assessing India’s Proposed Data Protection Framework: What the Srikrishna Committee Could Learn From Europe’s Experience”, (Access Now, 2018), <https://www.accessnow.org/cms/assets/uploads/2018/09/Assessing-India%E2%80%99s-proposed-data-protection-framework-final.pdf>.

4.5. Identifying contrasts and comparisons

In comparing the data subject rights as applied in Germany under the GDPR and as proposed by the Draft Bill in India, we see how they employ similar terminologies but differ in the application (in the case of the Draft Bill, proposed application).

A peculiar point of difference presents itself with the right to access. The Indian Draft Bill proposes a right to access a “brief summary” of personal data from the data controller. In its comments to the Indian government, the EU Commission raised this point as something that could be reconsidered to grant a data subject her data in full. However, interpretation of the right in the German jurisdiction appears to be more varied. For example, the Hessian Commissioner for Data Protection and Freedom of Information has interpreted the right to be that to a summary. Two regional courts, however, hold a different view. The right to correction in the Indian Draft Bill is framed as a right that may be exercised “where necessary” —a framing not seen in the EU context. In the right to be forgotten and the right to erasure, we see the GDPR clearly makes a reference to delinking or delisting of information that is sought to be “forgotten”. A similar explicit reference is not present in the Indian Draft Bill. With the right to data portability, the two jurisdictions seem to have common ground. However, the Indian Draft Bill is clear and explicit about the categories of data that may be ported. Under the GDPR, one must depend on Recitals and Working Party 29 recommendations to interpret the same. The strongest point of difference remains with the provisions on data transfers and localisation. Both Germany and India have limited localisation requirements. The Indian Draft Bill, however, goes a step further in proposing that a copy of all sensitive personal data be stored on servers within Indian borders. The GDPR on the other hand, prescribes conditions for the transfer of EU citizens’ and residents’ personal data outside of the EU borders.

Exceptions for state bodies and security agencies is another point where we see the two countries converge, but only to the extent that national security can be grounds for not observing data subject rights. Under the BDSG-Neu, such exceptions come with requirements for documentation of restriction of rights. The Indian Draft Bill, on the other hand, does not propose such a documentation.

With over one year of the GDPR regime already past in the EU in general and Germany in particular, many lessons and learnings have already presented themselves. One of the first points to emerge was that the impact of the regulation extends far beyond the obviously visible objects of technology and data companies. Schools, human resource departments, and private clubs with data on their members were all to comply with the regulation. However, as it later emerged, owing to the large fines, there were cases of over-compliance, and interpretation of the law far beyond the context of activities carried out by the data control-

lers or processors. A curious example of this comes from Dormagen, a German town northwest of Cologne. In August 2018, a children’s day care centre in this town distributed its usual remembrance photo album to the children at the end of the year, except it only showed the face of the child receiving the album. The faces of their friends were blackened for privacy.¹⁶² Complexity of compliance with data requests is another issue that data controllers and processors have raised. A European software developer floated a website called shipyourenemiesgdpr.com in May 2019. Using the website, one can send a data access request to one’s “enemies” (the website suggests landlords and ex-employers among other potential receivers) in order to “waste as much of their time as possible”.¹⁶³ India could potentially look into investing in legal awareness to avoid results such as out-of-context compliance and the law being used as a bullying tool.

Looking at the recent and consistent statements from Indian lawmakers and business magnates, a concern most often referred to within data protection has been that of “data colonisation”—a concern that foreign control over data of Indians would replicate the conditions of the British colonial period, when a foreign power held political control over the country. Nandan Nilekani, Infosys co-founder and the chief architect of the Aadhaar programme, in August 2017 asserted the need for a policy against “data colonisation”.¹⁶⁴ India’s richest man, business magnate Mukesh Ambani—who happens to own Reliance Jio, a major telecom and internet service provider in India—also made a statement in December 2018 about “data colonisation”, adding that “India’s data must be controlled and owned by Indian people and not by corporates, especially global corporations”.¹⁶⁵ In February 2019, the union minister for electronics and information technology made a similar statement, affirming the need to prevent “data imperialism”.¹⁶⁶ India brings its own set of historically relevant anxieties to this issue, where one can observe the gradual securitisation of the subject. Under these circumstances, assertion of data subject rights in the face of the Indian government wanting to control data flows is likely to emerge as a key challenge in the coming years.

¹⁶² “Datenschutz: Kita schwärzt Gesichter in Fotoalben”, *Die Welt*, 2 August 2018, <https://www.welt.de/vermischtes/article180429010/Datenschutz-Kita-schwaerzt-Gesichter-in-Fotoalben.html>.

¹⁶³ <https://shipyourenemiesgdpr.com/>

¹⁶⁴ Pramanik, Ayan, “Need Policy against Data Colonisation: Nandan Nilekani”, *Business Standard India*, 9 August 2017, https://www.business-standard.com/article/technology/need-policy-against-data-colonisation-nandan-nilekani-117080900007_1.html.

¹⁶⁵ PTI, “India’s Data Must Be Controlled and Owned by Indians: Mukesh Ambani”, *Mint*, 19 December 2018, <https://www.livemint.com/Politics/nxrCcqAFoDxyGUjZkSrNK/Indias-data-must-be-controlled-and-owned-by-Indians-Mukesh.html>.

¹⁶⁶ ET Bureau, “Data Imperialism by Companies Not Acceptable: Ravi Shankar Prasad”, *The Economic Times*, 25 February 2019, <https://economictimes.indiatimes.com/news/company/corporate-trends/data-imperialism-by-companies-not-acceptable-ravi-shankar-prasad/articleshow/68146136.cms?from=mdr>.

5. Concluding remarks

In analysing Germany's and India's responses to issues surrounding privacy and data protection, one can see a reflection of their legal, political, and economic interests, their contexts and their capabilities. Their responses and decisions not only reveal their position on privacy as a value, but they also betray the strengths and failings of their respective democratic institutions.

The two countries' outlook on these issues can be seen to be coloured by their respective political histories. Germany suffered excesses under the Nazi regime in the pre-war years, with its extensive and mechanised profiling of citizens. Later, in East Germany, the government's surveillance machinery worked to monitor citizens, intruding on their communications and daily lives to contain dissent or the possibility thereof. The country today has outlawed profiling of citizens by the government, as evidenced by the provisions in the Passgesetz and the Personalausweisgesetz. It is not just what is codified in law alone. Awareness of these historical events and times is strong in popular discourse as well. One can see this in the commentary that followed in street protests and other activism when the USA's global spying programme came to light in the summer of 2013. The immediate comparison was with East German surveillance methods, with the US National Security Agency being compared to the Stasi. Before that, in 2007, when German secretary of interior Wolfgang Schäuble proposed a longer and more extensive regime for telecommunications data retention, digital rights activists billed him "Stasi 2.0". When Germany began to trial facial recognition technologies and expand functions in video surveillance, member of the Bundestag Andrea Lindholz accused those suggesting that the state be trusted of "historical amnesia".¹⁶⁷

In India, meanwhile, the anxieties of being wronged stem primarily from two and a half centuries of oppressive British colonial rule. We see this most starkly in the way the term "data colonisation" often comes up when describing the practices of foreign digital technology companies with a large user base in India. Large-scale data collection, profiling, and intrusions of privacy did not form a part of the national experience in India the way it did for Germany. However, with several international companies expanding in India, and their unhealthy data collection and processing practices being exposed in various parts of the world, India today is alive to the issues that stem from such practices. This took some evolution over time. While the government reaction to the Snowden disclosures was weak, the response to the Cambridge Analytica Scandal five years later gave the appearance of seriousness, albeit only in speech and not in action. The scandal, which unearthed the Russian

¹⁶⁷ "Those who suggest in principle that our state would misuse any bit of information that's available to it suffer from historical amnesia and places today's Germany on the same level as the GDR", Lindholz was reported as saying. Delcker, "Big Brother in Berlin".

interference in the US presidential elections of 2016, came to light in 2018—one year before India had its own general elections of 2019. The threat was too close and too real.

As for the state turning against the citizens with all the data it captures on them—a recognition of that can only be seen from the activist quarters, best illustrated by the legal activism against the Aadhaar programme. The state attitude here is in stark contrast with that of Germany. Privacy was not seen as an inherent value to be protected by default, but as an optional privilege easily and legitimately sacrificed at the altar of operational ease. A similar line of thought could be observed first in the arguments of those in the Constituent Assembly who argued against recognising privacy as a right, and then later in the arguments of the proponents of the Aadhaar programme, who dismissed concerns about privacy as elitist ideas unmindful of the ground realities of the underprivileged.

These ideas find an echo in the design and use of biometric ID systems in both the countries. The Personalausweisgesetz says that the number assigned to the ID document (the Ausweis) may not be linked to the identity of the ID holder. This is in complete contrast to India, where the Aadhaar number is treated as an identity number that must be cited to receive welfare benefits from the state. In fact, in the 2019–20 annual budget, the central government even announced that one can cite their Aadhaar number instead of their Permanent Account Number (PAN) while filing taxes.¹⁶⁸ Germany, as mentioned above, specifically outlaws the creation of a national ID database. Aadhaar, on the other hand, functions with a Central Identities Repository, or CIDR. However, the German protection against the creation of an ID repository stands threatened after a 2017 amendment to the Passgesetz and the Passausweisgesetz. Law enforcement agencies now have access to a database of passport photos, and the means to automatically retrieve them, letting them create a potential database of biometric photos of all citizens.

When it comes to authentication functions using identity instruments, both Germany and India offer an option for the same to ID holders. However, the scale and design of such operations differ significantly. India went through a period of mandatory linking of Aadhaar to mobile phone connections, bank accounts, and the like. While linking to private operations today is a possible option, it remains mandatory for receiving welfare benefits and for filing tax returns. In Germany, there is a clear attempt (although an unsuccessful one, judging by the numbers) at nudging people towards using electronic IDs for online transactions and for e-governance functions. While there are no strict rules mandating the same, the pushback against it remains strong. This illustrates a key difference between state-citizen

¹⁶⁸ “Explainer: Can You Now Use Aadhaar in Place of a PAN Card?” *Scroll.in*, 9 July 2019, <https://scroll.in/article/929839/explainer-can-you-now-use-aadhaar-in-place-of-a-pan-card>.

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