

THE DIGITAL DATA PROTECTION BILL, 2022: A CRITICAL STUDY IN CONTEXT OF PRIVACY PERSPECTIVE IN INDIA

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ABSTRACT

The Data Protection Bill was first framed by Justice B.N. Srikrishna Committee in the wake of the Supreme Court's judgment in Justice K.S. Puttaswamy vs. Union of India case of 2017. The draft Bill was introduced in the Parliament but was sent to a Joint Parliamentary Committee for a detailed scrutiny. After wide and exhaustive deliberations, the Committee presented its recommendations on the table of the Parliament in the latter part of 2021. However, the government of India withdrew the Bill of 2018, and started fresh thinking on the Bill. Now, the Bill has been renamed as Digital Data Protection Bill which is now sharing the public domain for public comments. This paper attempts to examine various aspects of the proposed Bill, especially its impact on the right to privacy, a fundamental right in India.

Keywords: The Draft Data Protection Bill, 2022, Justice B.N. Srikrishna Committee's Report, Role of Intermediaries, Oversight, and Data Centres.

INTRODUCTION

This is an age of information. The whole virtual ecosystem is flooded with all kinds of information and data related to human beings and the institutions run by them. Everybody stands exposed before the prying eyes of interested parties in search of information and data about the others. The privacy of humans is at stake. In such a dire situation, there is an urgent need to have a data protection law for safeguarding information and data. In India, the Apex

Court declared the right to privacy as a fundamental right in the historic judgment of Justice K.S. Puttaswamy vs. Union of India in 2017. In the same judgment, at the behest of the Court's directions, the Government of India constituted a committee under the chairmanship of Justice B.N. Srikrishna, a retired Supreme Court judge to put up a draft data protection law for the country. The Committee submitted its report in August 2018 and came up with a draft Data Protection Bill in 2018 which was, after some modifications, tabled before the Parliament as the Personal Data Protection Bill, 2019. In December 2019, this Bill was sent to the Joint Committee of Parliament where it was deliberated in great detail. There a total of '81 amendments were proposed, and 12 recommendations were made towards the comprehensive legal framework on the digital ecosystem', as was told by Mr. Ashwini Vaishnav, the Minister of Electronics, and IT before the Parliament.ⁱ JCP took two years and six extensions to submit its report. The draft Bill had to face 'criticism from civil liberty activists, digital businesses, technology evangelists and, most importantly, was met with a voluminous list of amendments from a joint parliamentary committee (JPC)'.ⁱⁱ 'These contentions were natural because the legislation aims to tackle one of the most profound problems today: How to protect privacy in the age of information', Editorial, Hindustan Times, Aug 5, 2022) Considering the recommendations of the JPC, the Bill of 2019 was withdrawn from the Parliament on 3rd August 2022 with an intention to present a new Bill 'that fits into the comprehensive legal framework'. (Out Bureaus....)

THE GUIDING PRINCIPLES OF THE NEW LEGISLATION

According to Sri Ashwini Vaishnav, the Union Minister for Electronics and IT, Communication and Railways, the following guiding principles should be adhered to in the formulation of the fresh legislation regarding data protection.ⁱⁱⁱ

1. While making laws concerning the digital landscape, the transformational changes in the field of technology and its usages, should be necessarily taken into consideration.
2. Laws must keep pace with the changing times and advancements in technology.
3. In Indian perspective, there is a need to evolve a comprehensive set of laws to address the digital landscape in the holistic manner.
4. The law on the protection of personal data should 'facilitate and nurture' the spirit of innovation behind the digital economy.

5. From the conceptualisation stage, the role of techno-savvy professionals must be given due importance and their inputs should be given due weightage.
6. Special consideration should be taken to the ease of implementation, and in this regard, the implementation structure should be designed to be digitally implemented.
7. There should be a grievance redressal mechanism that can be easily accessed by the individuals for enforcing their rights.
8. The proposed law should be comprehensible to all and its language should be easy to understand, plain and simple.
9. There should be a reflection of the Indian experience with the adoption of IT in the law on personal data.
10. The proposed law should act as an enabler and enhancer to promote the innovative spirit behind the digital economy.
11. In case of non-compliance with the law, the penalties should be commensurate with the harm suffered by individuals and the gravity of non-compliance. The erring parties should be given reasonable opportunity to make necessary amends and comply.
12. The proposed law needs to be aligned with The Digital India Programme carrying the vision of inclusive growth. New law on data protection should be consistent with the framework of Digital India.
13. The proposed law should incorporate the best practices in vogue globally.
14. This law should also take care of the ground realities encompassing our digital economy that is enabling all-round development.

THE DEPARTURE FROM THE PAST VERSION

1. In the proposed Bill, provisions regarding data localisation, social media, hardware and non-personal data have been done away with.
2. A novel concept 'trusted geographies' has been introduced in the Bill which replaces the earlier version which had mandated the storage of critical data and a copy of sensitive personal data within the country.
3. The draft new Bill's title vividly 'signifies the intent to continue pushing the digitization agenda, thereby offering a legal framework to govern collection, usage, processing, and storage of digital personal data.'

On 18th November 2022, the Union Government brought the revised version of the Data Protection Bill into public domain for the comments of the public at large. The Bill, known as the Digital Data Protection Bill, 2022, has appeared after the three months when the earlier draft version of the Bill was withdrawn.

THE SALIENT FEATURES OF THE NEW BILL ARE AS UNDER:

1. It lays down certain conditions as to how personal data of Indian citizens will be handled. Further, it enumerates the obligations of those who collect it, and the powers of the government while accessing this information;
2. It focuses on protecting internet users from online harm of any kind, and creating a safe and trusted digital ecosystem;
3. It incorporates all the privacy principles enunciated by the Supreme Court as well as those applicable in other countries. This has been done to ensure that the ecosystem of start-ups and small businesses is not affected by a huge compliance burden.
4. It contains the old provisions saying that data must be processed after obtaining the clear consent which can be revoked later. The users will have the right to be forgotten. Further, that collecting the data will be liable for any breaches in case of exposure of personal information of people in an unauthorised way.
5. According to Mr. Ashwini Vaishnav, the Minister for Electronics &IT, this Bill is innovative in the sense of women's empowerment as it uses the wordings of 'she' and 'her' in place of 'he' and 'his' in the entire Bill.
6. Data Protection Board will act as oversight to oversee the compliance of the proposed law which is capable of imposing levy up to Rs.500 crore in fines against a data fiduciary, an entity authorised to collect or process data, in case of failure to ensure reasonable safeguards to prevent breach of private information. This is in contrast to Rs.15 crore of 4% of annual turnover enshrined in the earlier Bill.
7. Data fiduciaries will be responsible for appointing data protection officer, carrying out regular audits, if they are classified as a significant data fiduciary. They will also remove the private information as soon as the concerning business purpose gets completed.

8. As far as data localisation is concerned which was resisted by the industry people, the new draft envisages that the government could specify countries to which personal data of users can be transferred by the entities managing data.
9. The new Bill retains the exemptions under Section 18, allowing the government to process personal data without consent for purposes such as maintenance of public order and preventing incitement to any cognizable offence.
10. The new Bill also proposes to exempt the government from the responsibility to remove personal data after the said purpose is fulfilled. It also gives the government the power to exempt any instrumentality of the state in the interests of sovereignty, security, friendly relations with foreign states, and maintenance of public order, from the safeguards of law by issuing notifications in the future. In the 2018 draft Bill, the government needed the approval of the Parliament. Now the exemptions can be issued by order of the central government.

POINTS OF CRITICISM OF THE NEW BILL

1. Justice B.N. Srikrishna (Retd.) has said in an interview about the new draft Bill that "The government has gotten a blank cheque with this bill. They, central or state, can do anything, anytime, under any section of the bill. This is concerning because if you are going to somehow make an inroad into data protection as a fundamental right, it can't be guaranteed anymore. They (the government) are not bound by the bill at all"^{iv} In this context, it may be pointed out here that in the new draft Bill, a term "as may be prescribed" has been used more than a dozen times, referring to the rule-making power of the executive.^v
2. In the draft Bill, an option has been provided to use a consent manager, which could manage what kind of data can be or can't be used by data processors, on behalf of the user. According to the critics, this kind of consent-based approach is not feasible for data processing. Sometimes, additional grounds can be preferred grounds to process data in lieu of consent. In the field of business, consent once given is not un retractable.^{vi}
3. Further, the obliteration of data differentiation categories, namely 'sensitive personal data' and 'critical personal data' could also prove to be harmful for the end user. As per the experts, a breach of sensitive personal data is, supposedly, much higher, and the

harm could be caused to a data principal by surveillance. This categorisation of data into personal and sensitive personal data should have been retained as before.^{vii}

4. The definition of children in the proposed Bill stipulates that all users below the age of 18 will be considered as children which is a departure from the global norm. This will require explicit consent of parents for processing the data of children. This target group should be exposed to any advertisement or process their data in any way that may harm them. In the given situation, it will be very much difficult for the social media intermediaries catering to a large category of users in the sub-18 age group. Companies failing in this obligation will face penalties of up to Rs. 200 crore which is an unusual position.^{viii}
5. The proposed set up of Data Protection Board in the draft Bill envisages that the appointment of the chairperson and the members of the Board will be at the disposal of the government. 'This along with indications that the latest version ends up curtailing the board's powers raise concerns over its independence'.^{ix} This is also alarming since no other oversight such as the Parliament or the judiciary has been roped in the draft Bill to oversee its working.
6. The draft Bill encompasses the expansive exemptions provided to the government and its agencies with limited safeguards. It is worth mentioning here that the Joint Parliamentary Committee, while dealing with the earlier version, had suggested that the exemptions be provided under a "just, fair, reasonable and proportionate procedure". However, this pious intention of the legislature finds no mention in the draft new Bill.

CONCLUSION

The new draft Digital Data Protection Bill is now under public domain for comments. Its provisions clearly reflect the government's resolve to enhance the growth of the digital economy in the country. The further pace of industry and business in the country should not be hampered in the name of data protection law. Keeping in view that objective, some old provisions have been dropped from the new draft in order to avoid any heartburning. But the most concerning aspect is that of giving vast exemptions to the government and its agencies without proper safeguards. This would amount to ushering in the era of surveillance state in the country. Secondly, the lack of proper oversight outside the executive domain is also

dangerous as it could make a dent into the privacy of ordinary citizens. The differentiation between the sensitive personal data and the personal data is also an issue which needs fresh consideration. Though the first Bill was prepared by Justice B.N. Srikrishna Committee in 2018 on the lens of the General Data Protection Regulations of 2016 of the European Union, the new Bill appears to be a slight departure from the old version. However, the real taste of the law will only take place when the new Bill becomes an Act. Till now, one can hope for a robust data protection enactment which will serve the country's needs to the fullest.

ENDNOTES

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- ⁱ Out Bureaus, Govt Withdraws Data Protection Bill, 2021, The Economic Times, Aug 4,2022.
ⁱⁱ Protect Data Without Stifling Enterprise, Editorial, The Economic Times, Aug 5,2022.
ⁱⁱⁱ Ashwini Vaishnav,What the new data law must focus on, Hindustan Times,Aug 8,2022.
^{iv} 'Sweeping Govt Exemptions Biggest Concern in Data Bill', The Economic Times, Nov 22, 2022.
^v Suraksha P and Aashish Aryan, In Data, We Trust, The Economic Times, Nov 11,2022.
^{vi} *Ibid.*
^{vii} *Ibid.*
^{viii} *Ibid.*
^{ix} Editorial, The Indian Express, Nov 22,2022.