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INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

PERSONAL DATA PROTECTION BILL 2018 & 2019

Authored By- Rishav Kumar

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PERSONAL DATA PROTECTION BILL 2018 & 2019

Introduction

The Personal Data protection bill was introduced in Lok Sabha in 2019 by Minister of Law and Justice Dr Ravi Shankar Prasad to protect the privacy of personal data which is a major concern in this ever changing “technological world”. There are various reasons for the introduction of the bill by the government. They are:

1. The 2018 supreme court judgement declaring ‘privacy’ as fundamental right under article 21 of the constitution.¹
2. A subsequent push from the supreme court to frame such law.
3. The Sri Krishnan Committee recommendation and draft on privacy protection.

Justice Js Puttaswamy V.S. Union Of India Case:

The major essential facts:

The case was against AADHAR PROJECT as it violates article 21 related to data privacy of the constitution which provides a database of every citizen of India by establishing personal identity and biometric information of every Indian which requires fingerprints, eyes-scans and mobile number of every citizen of India. Registration has become compulsory for majority of purposes such filing tax returns, opening bank account, securing loans, buying and selling property or even making purchases of 50000 and above.

In 2012 retired Justice K.S. PUTTASWAMY filed a petition in supreme court challenging constitutional validity of AADHAR as it violates the right to privacy. Justice puttaswamy argued that making AADHAR mandatory violates fundamental right. The government argued that there is no violation of right to privacy as the drafters of the constitution did not intend to subject the power of search and seizure to a fundamental right of privacy² is the unanimous view of eight judges bench and privacy is not a fundamental right³ is a major view of four judges bench.

The case came before three judge bench which ordered to refer the case to a Five judge bench on 11 august 2015. The Five judge bench ordered to refer the case to a Nine judge bench on 18 July 2017. Lastly the case was addressed to a Nine judge bench.⁴

The case judgement:

The nine judges give six different opinions on the case producing the longest reasoned judgement in the history. The leading judgement is given by Dr D.Y. CHANDRACHUD J it was said that the Indian general ordinance on privacy and nature of constitutional rights. It also considers comparative law on privacy from various countries outside India and a variety of criticisms from famous feminists, journalists & reporters.

¹ Article 21(3) includes right to privacy as integral part of the constitution; JUSTICE K.S. PUTTASWAMY V.S. UOI, AIR 2017 SC 4161

Article 21(6) includes right to privacy as integral part of life as is cherished constitutional value; RAM JETHMALANI V.S. UNION OF INDIA (2011) 8 SCC 1: JT 2011 (7) SC 104: (2011) 6 SCALE 691

²MP SHARMA VS SATISH CHANDRA ([1954] SCR 1077

³KARAK SINGH VS STATE OF UP ([1964] 1 SCR 332

Obligations were unquestionable as it didn't include any right of privacy, this was the issue of the petitioners, it causes a problem to the justice as it violates some major aspect of the ordinance.

The article 21 states that

“No person shall be deprived of his life or personal liberty except according to procedure published by law.”

CHANDRACHUD J point out that the provisions contain legal aid, shelter, freedom from torture etc. privacy is incident of fundamental liberty. Justice CHANDRACHUD analyse and found out the most important points of dignity.

Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

The conclusion was given that the data privacy should be included under article 21 of the constitution. Although it is not a fundamental right it is given this priority because it meets legality, a need for legitimate aim and proportionality and thus given such a consultation under the constitution. This judgement is known in the history of constitution because it a longest judgement and it provides a basis of living. Also it is refused and transferred many times to different judges of the court.

Justice Sri Krishna Committee

Sri-Krishna Committee of Telangana or the **Committee for Consultations on the Situation in Andhra Pradesh** (CCSAP) is a headed by former chief justice B.N. Sri Krishna. The committee deals with solicited suggestions and views from political parties, social organisations, and other stakeholders. The committee submitted a report on data protection law to the government. Justice Sri Krishna handed over the report to Ravi Shankar Prasad. This report deals with data handling and processing practices and was eagerly awaited by both Indian and foreign companies for data protection.

The thoughts of justice sri Krishna are such that he says that, “data privacy is a burning and highlighted issue and the three major concerns on this issue:

- The citizen rights have to be protected
- The responsibility of states had to be defined
- And last that data protection cannot be at the cost of trade and industry.”

MAJOR HIGHLIGHTS OF THE REPORT

- The law will have official power to make legal decisions and judgements on issues related to sharing of personal data if such data is being shared, transferred, disclosed or processed in India.
- Functionally, the data collected and processed should be entitled under Indian law whether it is published actually in India or in some other country it should be manifested under Indian law. It also empowers or give the government priority to exempt the companies which processes foreign or international data outside India or which is not present in India.
- The laws of the bill will come into force in appreciable and synchronised manner.

- The data protection law will set up a DPA which will be an independent regulatory body responsible for the enforcement and effective implementation of the law. The Central Government shall establish an appellate tribunal or grant powers to an existing appellate tribunal to hear and dispose of any appeal against an order of the DPA.
- The law will cover protection of personal data from both public and private entities.
- Penalties are imposed for the violation of data protection laws. The law, imposed penalties and restrictions on violation which may amount to fines of very high value such as percentage of total worldwide financial income of the year of past.
- Sensitive personal data will include various types of information such as data's of finances and health, office identification, sex life & sexual orientation, biometric & genetic data, transgender status and political beliefs of the person. Additionally, the DPA will also be provided with residuary powers to notify further categories of data according to the criteria set by the law.
- The law provides that cross border data or transfer of personal data except critical personal data will be responsible for all the misconduct of the transferee for the damages cause to the principal i.e., key obligations held to the principal. Critical personal data will be processed only in India and will be a prohibition to cross border data transfer.
- There will be a lawful basis for processing of personal data. The law adopted a modern framework which makes the data fiduciary liable for the loss of data principal by the application of product liability regime.

Data Fiduciary Activities In India

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A data fiduciary is commodity which is associated with processing of personal data, collection of personal data, limitation and storage of personal data etc. A data can be used for a variety of lawful and unlawful activities and to deal with such activities a commodity of data fiduciary is set up by the government. It deals with such activities and provide a safeguard for insuring and providing security over internet. It is set up so that is prevent data security is a responsible and synchronised manner and help to provide a reasonable feedback for such authority given.

The government claimed that WHATSAPP has not informed the government agencies about data privacy breach which targeted many Indian activists, lawyers & journalists, response from WHATSAPP came that they have alerted the government twice," first in May and then in September".The government took up the issue of traceability seriously, during formal structured meeting at the highest level of ministry with both international vice-president (Nick Clegg) and CEO, (Chris Daniels) of WHATSAPP where they objected that their platform was safe. They added that not for the once the government informed them about data privacy breach in the highest formal structured meetings.

Spying Snowballs Into Political Controversy

- The response from WHATSAPP came (as a defence) that they were among the 1400 people globally who were spied upon by unnamed entities using Pegasus (Israeli spyware). This information was given to a few Indian journalist and human right activists.
- WHATSAPP also stated that Pegasus exploited its video calling system by installing the software by missed calls to snoop on 1400 selected global users, including nearly 30-40 in India.
- The owner of Pegasus an Israel NSO Group had limited the sale of the spyware to state intelligence agencies only as it has the ability to collect and mimic or duplicate data from target devices. Pegasus software can be installed on devices as "exploit links".
- The government of India initiated instant plans on the denial of purchasing Pegasus spyware from NGO group.
- The government also get angry from journalists as they demanded clarification and questioned WHATSAPP why it had kept the information hidden from government authorities about spying the Indian citizens despite recent meetings with the CEO.

Features And Loopholes Of The Bill

FEATURES OF THE BILL

1. There are various kinds of personal data such as sensitive personal data, personal data and critical personal data.
 - Sensitive personal data includes financial data, sexual orientation, transgender status, caste/tribe, and religious and political beliefs. It may be transferred for processing outside India with users consent or Data protection Authority or Central's government permission. "passwords" are not included in the sensitive personal data list in the bill.
 - Critical personal data is not notified by the central government and can be transferred only in India.
 - Laws have been made in respect of grounds for processing of personal data sensitive personal data and critical data according to personal data protection bill, 2018.
 - There are laws made for children in respect of personal and sensitive personal data.⁵
2. There are various "Data protection rights" which includes right to confirmation and access, right to correction, right to data portability, right to be Forgotten.⁶
3. This bill provides rights and powers of Data protection Authorities of India in which includes terms and condition of appointment of members, codes of practices, powers and functions of the authority etc.
4. Penalties are imposed if laws are broken which may extend up to five crore rupees or two per cent of its total worldwide turnover of the preceding financial year, whichever is higher is applicable.⁷

⁵CHAPTER 3,4&5 OF DATA PROTECTION BILL, 2018

⁶CHAPTER 6 OF DATA PROTECTION BILL,2018

5. There are transparency and accountability measures taken for transfer of personal data outside India. Some miscellaneous powers are also given under chapter 10 of the bill which includes power to remove difficulties, power to make new rules and regulation etc.

Loopholes Of The Bill

1. There is no judicial oversight. The law empower the enforcement agencies to intercept messages and communication on the grounds of sovereignty and integrity of India, security of the state and public order. **Due to such State capacity concerns, in many countries such as canada, USA (through the FISA court), or Australia judicial control is built into the domestic/foreign surveillance framework, through the process of overseeing and approving warrants and surveillance requests. However, the current Bill entirely sidesteps this issue.**
2. There is no rule on non-state actors. The bill does not expressly deals with surveillance by non-state actors.
3. There is no reform on illegely obtained evidence. **Third**, one of the biggest problems in terms of surveillance reform has been the judicial sanction to admit illegally obtained evidence, including tape recorded conversation. This skews the incentive of law enforcement agencies to comply with the (already weak) safeguards that are recognised in the law. Instead all it does, is reiterate in section 42 that processing has to be done “in accordance with the procedure established by law” – a requirement which, incidentally, has been dropped in section 43 – **without specifying any consequences for non-compliance.**

Additionally, the Bill uses the term “surveillance” only once, while defining the term “harm” in section 3(21)(x) as “*any observation or surveillance that is not reasonably expected by the data principal*”, which in itself seems to indicate that certain kinds of surveillance are to be “reasonably expected” from the State and private actors.

4. There is no accountability for intelligence agencies.
5. There is discretion in government for security and AADHAR.⁸

Personal Analysis On Data Protection Bill 2018 & 2019

As per my personal analysis certain saidimportant phrases such as "personal data", "sensitive personal data", "critical personal data" and "harm" are not properly defined in the Data Protection Bill which can lead to vagueness among public, providers of service and other data fiduciaries.

The bill was with the Joint Parliamentary Committee (JPC) till the date of 17 December 2019, where it was being analysed by the JPC in discussion among various sections of society. Data protection authority (DPA) of India is being proposed by covering all the mechanisms, interpretation and consultation over processing of personal data privacy in the bill.

⁷CHAPTER 10 AND 11 OF DATA PROTECTION BILL, 2018

The JPC panel had taken a good decision and issued an advertisement which invites the general public and stakeholders to send their suggestions and give a proper feedback on the steps taken on social media within a time frame of four weeks.

"Considering the elaborate changes made from the draft bill of 2018, coupled with the suggestions given, we urge the JPC to hold extensive and inclusive open house discussions on the Bill before finalising its report. Also, recommendations received by it from various stakeholders must be made public".

The hurdles or difficulties in the personal data protection bill:

- The bill doesn't provide a time limit to set up the DPA.
- There is absence of transitional provisions which leads to ambiguity on providers of service.
- It may be difficult to explain all provisions of the bill in an adequate and phased manner when it will come into force or enacted by the government.
- obligations of the bill are unquestionable which invite the risk of overlaps in the system. It provides the powers to central government to access non-personal data of the citizens or customers of India.
- The bill requires internet mediators to provide consumers or customers with voluntary account verification option. This is done to solve the hurdles of posts which are inappropriate in nature as provided under drafts of the guidelines of the amendment.
- My personal Recommendation are such that they shall be remove the amendments from the law because it lacks the independence of DPA. Furthermore, a committee of selection of members is asserted in the law for the appointment of members consists only of government executive.
- Moreover, certain powers are transferred from DPA to central government such as notifying categories of sensitive personal data. This weakens the powers of the DPA.

My personal Recommendation suggests a committee for selection which consists of members of judiciary, civil organisation and experts of various subject. It should re-provide the capacity given to the government from DPA, along with making it compulsory to handle cost benefit analysis while exercising the powers.

Conclusion

The general purpose of the **law** is to **protect** the individual against violations of his personal right by handling person-related **data**. Even with the adoption of legal and other protections violations of **privacy** remain a concern for users. Personal data protection bill is a beneficiary uplifted law in the country and have been a great help for protection of data but it have some loopholes furthermore after he changes which need to be fix by the government. The central government access a lot of power in relation to data privacy. The data protection authority on the other hand have to be in command of the central government because some of the major power have been given to the central government. Appointment of members and certain powers of DPA are under control of central government which makes the DPA a dependent authority to the central government.

Either there should be an neutral selection committee for DPA'S selection of members or the DPA should have full authority and be an independent community which exercises all its powers and functions within the government. Time limit should be made for the DPA and its members and proper community should have been set up by the government for this purpose. The rights of the guardian data fiduciary should limit and some rights should also be given to the parents and guardian of the children in relation to data privacy of the child (as the GDF have full access to child data and does not require any consent of his parents or the guardian). Penalties and compensation should be more strict in nature as there are a huge number of hackers breaking the laws of data privacy. Whole so ever the data protection bill is a good initiative taken by the government and can be more prominent in nature if the government work on loopholes. Although the bill is an historical boon in this "technological" society but there are certain loopholes which can and may be fixed by the government to make the bill more prominent in nature.

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