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# **COMPARATIVE STUDY ON DATA PROTECTION AND LEGAL PRIVACY**

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## **ABSTRACT**

Developing effective data protection and privacy the framework is vital for the progress of the country. This is because of the trend among organizations collect personal and sensitive information. India was recognized as an outsourcing hub by countries such as Great Britain and the USA. These countries take data privacy into account and protection as a fundamental right of its citizens. So, right it is important that India has strong data protection and the legal-political framework of privacy protection to preserve its competitive position. In this paper it was found that India is doing better than China when it comes to data protection and privacy, but lags behind Australia. India must develop data protection and privacy law and also develop appropriate enforcement mechanisms.

Keywords: Cyber offenses, cyber crimes, data Protection, Privacy, Information Technology Act 2000.

## **INTRODUCTION**

Enthusiasm in many countries around the world towards data protection principles and laws is growing.

This is because they are increasingly sensitive and personal data collected by organizations. That's why it's important for organizations to protect and manage personal information. Some countries already do

have strong data protection laws in place, while some are moving in that direction. Recently, there has been a concern India emerged on the impact of data protective laws adopted in other countries.

According to Forrester Research (2013), China actually does not India has privacy and data protection restrictions minimum restrictions and Australia has some restrictions.

It would therefore give a comparative study of these three countries some ideas to move India forward.

## **OBJECTIVE OF STUDY**

The objectives of this research paper are listed below:

- Understand the legal and political aspects data protection and privacy in India.
- Compare data protection and privacy policies as well as laws of India with China and Australia.
- Explore the importance of data protection and privacy for India.

## **OVERVIEW OF DATA LAWS & POLICIES PROTECTION AND PRIVACY**

Overview of data protection laws and principles a privacy laws and policies in India, China and Australia given below:

### **A. Data Protection and Privacy Laws in India**

India has not passed a data protection law, unlike European Union or USA. Due to the absence of a specific law data protection in India is implemented through implementation privacy and property rights. Privacy rights are enshrined in the Constitution of India and also included in the Information Technology Act, 2000. Proprietary Rights are covered by the Indian Contract Act, 1872; Copyright Act, 1957; and Indian Penal Code, 1860. India's Ministry of Communications and Information Technologies has adopted rules for the protection of personal data, called information technology (Reasonable security practices and procedures a Sensitive Personal Data or Information (Lok Sabha Secretariat, 2013). These rules require business entities to collect, process and collect personal data. Personal data includes sensitive personal data comply with established procedures.<sup>1</sup>

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<sup>1</sup> <http://www.dlapiperdataprotection.com/system/modul es/za.co.heliosdesign.dla.lotw/functions/export.pdf?country=all>

## B. Data Protection and Privacy Laws in China

China has not passed extensive data protection legislation. So the data protection provisions and privacy comes from many laws and regulations. China has effective declarations that form the basis data protection.

Examples:

- Decision to strengthen online information Protection passed in December 2012
- National information security standard the technology passed in February 2013

The purpose of these statements is to protect information safety; defend the interests and legal rights of citizens, legal entities and other organizations; and guards the public interest and national security. It is noteworthy that in China, a decision has the same effect as a law. in addition there are certain provisions in various legal instruments which includes certain aspects of privacy and data protection, such as, Article 253 of the Criminal Code, provisions on Personal telecommunications and Internet users Information Protection, Consumer Rights Protection Act etc.<sup>2</sup>

## C. Data Protection and Privacy Laws and Policies in Australia

Data protection and privacy policies apply in Australia a mix of federal and state government legislation. The Australian Government Federal Privacy Act 1988 The Privacy Policy applies to the entire Commonwealth Government agencies, Australian Capital Territory Government agencies and private sector companies with a minimum annual turnover of AUD 3 million. Australian States have data protection laws. Examples include:

- Privacy Act, 2014 by Australian Capital Area
- Information Act, 2002, Northern Territory
- Privacy Act 2004 Tasmania
- Privacy and Personal Data Protection Act, 1998, New South Wales (NSW)
- Privacy and Data Protection Act 2014, Victoria
- Privacy Act 2009, Queensland

There are some other laws that affect data protection and privacy for specific data or activities.

They are:

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<sup>2</sup> Worldwide data protection laws.

- Commonwealth Telecommunications Act 1997
- National Health Act, 1953, Commonwealth
- Health Records and Privacy Act 2002 NSW
- Health Records Act, 2001, Victoria
- Workplace Supervision Act, 2005, NSW

According to the Personal Data Protection Act, an organization can be an individual, partnership, body of a legal entity, association not registered in the commercial register or even trust.<sup>3</sup>

## **STATUS OF DATA PROTECTION AND PRIVACY RIGHTS IN INDIA**

Article 21 of the Constitution of India and related they provide constitutional provisions on fundamental rights the right to privacy. Article 21 of the Constitution of India states that no person can be deprived of life or personal liberty except due process law. The Supreme Court has clarified this in many cases the right to privacy is included in the right to life and personal freedom.

However, constitutional rights cannot be invoked private individuals or organizations. They can be claimed only towards the state or state-owned enterprises. The The Information Technology Act 2000 contains provisions against cyber breaches according to section 43(a) to (h) and cyber crimes under sections 65 to 74. Cyber Violations include obtaining illegal access and Obtaining data from computer systems or networks. Such violation may result in civil prosecution in India. The Cyber crimes include tampering with a computer resource code, hacking with intent to damage the system and breach of privacy and confidentiality. These cyber attacks lead for prosecution under the IT Act. IT Act too establishes sanctions for these offenses (Information Technology Act, 2000).

According to the provisions of the IT Network Service Act the provider or intermediary is responsible for any misuse from 3<sup>rd</sup> party info. It is also responsible for no with due diligence to avert crime. IT Act mentions in the term diary as the entity acting on behalf of another entity and receives, stores, transmits or provides electronic message services. So, an the outsourcing

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<sup>3</sup> <http://heatmap.forrestertools.com/>

company may be responsible for the service provider. The IT Act also has extraterritorial scope. It includes crimes and misdemeanors committed outside India. It does not matter that the person committing the offense is Indian or Foreigner. The only requirement is that the relevant computer system or network should be located in India.<sup>4</sup>

The confidentiality requirements under the IT Act are limited to officers authorized by law. These requirements do not apply to private individuals. Also the official is not responsible for the compensation of the person(s), who has suffered some damage by exposure. At the same time penalties imposed under the provisions of IT Act range from INR 2 hundred thousand to INR 5 hundred thousand (Information Technology Act, 2000). Such financial penalties are compared to profits that may accrue to a person committing cybercrime.

## **STATUS OF DATA PROTECTION AND PROPERTY RIGHTS IN INDIA**

Article 300A of the Constitution of India states that no a person may be deprived of his property except authority of law. However, this right cannot be claimed against private entities. It can only be claimed against the state. At the same time, the affected data must be considered the property of the person to be recovered this right.

The Copyright Act 1957 in India protects intellectuals proprietary (IP) Rights. IP rights are reserved for artistic, dramatic, musical, literary and cinematic it works. It is interesting to note that computer databases are included under literary works. So the act of copying and / or distribution of a computer database may result in infringement Copyright. Civil and criminal remedies for this violation under the Copyright Act can be started in 1957 (ind Copyright Act, 1957). However, copyright law does not distinguish between data protection and database protection protection. Data protection aims to protect privacy information of individuals. Database protection intends defend originality and investment in it compilation, verification and presentation of databases.<sup>5</sup>

Indian Penal Code (IPC), 1860 can also be used as an effective tool to prevent data theft. under the IPC; theft, embezzlement and criminal trespass trust are crimes. Punishments include

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<sup>4</sup> <http://blj.ucdavis.edu/archives/vol-6-no2/offshore-outsourcing-to-india.html>

<sup>5</sup> <http://copyright.gov.in/documents/copyrightrules1957>

imprisonment and fine. The crime of embezzlement of property applies only to movable property under the IPC. It includes corporeal property of every description. Oh yes they do not include things that are permanently attached to land. Since computer databases are mobile in nature.

So they can be protected under IPC to some extent degrees (Law Commission of India, 1997).

A Comparative Study of India, China and Australia

A comparative study of legal and political provisions on privacy and data protection in India, China and Australia are listed below:-

#### A. Definition of Personal Data

- India - Any information that is related to natural person and can identify such a person. This the information may also be available to the company entity.
- China – all data related to a specific person, which can be used to identify it.
- Australia - Any information or opinions on an individual who is identified or is reasonably identifiable.

#### B. Definition of Sensitive Personal Data

- India - Sensitive personal data includes financial data information; physical, physiological and mental health condition; Password; medical history records; sexual orientation; biometric data etc.
- China - Sensitive personal information includes personal information information, the disclosure of which could have an adverse effect to the persons concerned. Such information includes personal identification number, mobile phone number, race, religion, political views, genetics or fingerprints.
- Australia - Sensitive personal data includes genetic data information, racial or ethnic origin, political opinions, philosophical beliefs, sexual orientation, religion convictions, health information, criminal record, union membership etc.<sup>6</sup>

#### C. National Data Protection Authority

- India and China - in both there is no such authority countries.
- Australia – The Data Protection Officer acts as National Data Protection Authority.

#### D. Registration

No registration required in India, China and India,Australia.

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<sup>6</sup> <http://lawcommissionofindia.nic.in/101-169/Report156Vol2.pdf>

#### E. Data Protection Officers

- India – Grievance Officer to be appointed by each legal entity.
- China – No requirement. However, the data controller does recommended.
- Australia – No requirement. However, data protection we strongly recommend the officer.<sup>7</sup>

#### F. Collection and Processing

- India – a legal entity will be held liable for damages if it fails to perform a comply with the rules of personal data protection.
- China - Before collecting personal data; there he should be available for a precise, clear and deliberate purpose with the data controller.
- Australia – Organizations may not assemble in person information unless it is vital to the business. It should be also confirm that the personal data is judicious, accurate and up-to-date.

#### G. Transfer

- India - Data collector must obtain consent provider for any transfer of sensitive persons information.
- China - Data controller may transfer personal data information by 3rd parties under certain conditions.
- Australia - Personal information can only be disclosed organization outside Australia if it takes steps to do so to confirm that legal provisions are complied with.

#### H. Security

- India – Corporate unit needs to maintain reasonable security practices and procedures to protect sensitive personal data.
- China - The data controller must accept the corresponding measures against unauthorized processing a accidental loss or destruction of personal data.
- Australia – Organizations must state as appropriate security measures in place.<sup>8</sup>

#### I. Notice of Breach

- India - Computer Emergency Response Team (CERT) is authorized to collect, examine and disseminate information about cyber incidents.
- China - There is no requirement. However, the instructions recommend immediate notification of data breaches data subjects concerned.

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<sup>7</sup> <http://ijtr.nic.in/articles/art41.pdf>

<sup>8</sup> <http://ijtr.nic.in/articles/art41.pdf>

- Australia - There is no obligation. However, the guidelines are recommended by the concerned persons and the Office the Australian Information Commissioner should be announced.

#### J. Enforcement

- India - Privacy failure attracts citizens and criminal sanctions. Civil penalties are prescribed up to EUR 694,450. Criminal penalties are imposed a prison sentence of up to 3 years or a fine up to the amount 6950 or both.
- China - No special consequences there China.
- Australia – there are fines for individuals and corporations in Australia for failing to protect personal data. For individuals, the fines are up to 340,000 AUD. For corporations, the fines are up to 7 million AUD.

#### K. Electronic Marketing

- India – E-marketing is not directly addressed in India. But sending false information for the cause harassment is punishable by law.
- China - organizations and individuals are not allowed to collect personal electronic marketing information by illegal methods.
- Australia – Electronic marketing is regulated by SPAM Act, 2003 by the Commonwealth Government. This act is enforced by Australian Communications and the Media Office.

#### L. Online Privacy

- India – There are no regulations in India regarding cookies, location data or behavioral advertising. However, the IT Act contains some provisions against civil and criminal for different computers crimes.
- China - According to the decision, the companies are banned from disclosure, falsification, damage, sale or illegal provision of personal electronic data to anyone else.
- Australia - Collection of location data, use of cookies etc. are governed by the Personal Data Protection Act and the State and Territorial privacy laws of Australia.<sup>9</sup>

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<sup>9</sup> <http://lawcommissionofindia.nic.in/101-169/Report156Vol2.pdf>

# IMPORTANCE OF DATA PROTECTION AND PRIVACY IN INDIA

Many developed countries have taken the lead in data protection and privacy. India turned out to be the best choice for global outsourcing . India has clearly benefited from outsourcing. In a survey conducted by the company Statistic Brain Research Institute (2015), 26% Chief Chief Financial Officers (CFOs) prefer India for their company outsourcing needs. The companies surveyed cited economic, political and cultural incentives to choose India. Companies were also impressed by India pro-business and entrepreneurial climate. India historical trade links to the United Kingdom and the United Kingdom States also play an important role (George and Gaut,

2006). India also has cheap and highly skilled workforce with English speaking skills and progress educational standards. India is a stable democracy government, independent institutions, advances in Information technology and also convenient geography which is suitable for continuous work does it companies can look for outsourcing to India as a preferred destination (Chandra and Narsimhan, 2005). However, it is important to note that global competition in outsourcing is growing. Country like Indonesia, Estonia, Singapore, Indonesia, Bulgaria, Philippines etc give tough competition to India. In addition, they are considering countries in Europe and the United States privacy is a fundamental right. So it takes hours that India should tighten data protection and privacy laws. It is also important that India supports companies to self-regulate. India has to address loopholes in its data protection and privacy laws to address the concerns of Americans and Europeans companies about protecting their data and privacy. India it needs to assure its outsourcing clients that the cost-effectiveness of outsourcing will not be undermined additional costs for processing personal data of customers in case of breach.<sup>10</sup>

## CONCLUSION

India has made progress in data protection and privacy by introducing various legal and political measures. The the main conclusions of this data protection research and privacy in India are:

- Privacy and proprietary rights granted under The Indian legal and policy framework provides certain amount of data protection and privacy.

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<sup>10</sup> [http://www.dot.gov.in/sites/default/files/itbill2000\\_0.pdf](http://www.dot.gov.in/sites/default/files/itbill2000_0.pdf)

- There are many laws in India which protect certain aspects of data protection and privacy. These laws include the Constitution of India; Information Technology Act, 2000; Indian Contract Act, 1872; Copyright Act, 1957; and the Indian Penal Code, 1860.
- India has also developed privacy rules for business entities to manage personal data.
- There is no single comprehensive legal policy framework in India for data protection solutions and Privacy.
- Penalties prescribed under existing Indian laws are not enough to deter cybercriminals.
- Existing Indian laws mostly apply to state a state-owned enterprises.
- Existing Indian laws do not address finer points details on data protection and privacy. For example, lack of distinction between data protection and database protection under the Copyright Act 1957.

Clearly, India has some limitations in its data the legal-political framework of protection and privacy. India It seems to be doing better than countries like China, but not as good as a country like Australia. The India's data protection and privacy gaps vis-à-vis Australia are:

- India has no national data protection An authority such as the Australian Privacy Commissioner.
- Unlike the Australian SPAN Act 2003; there is none here legal-policy framework in India for data handling security and privacy issues related to electronics marketing.
- Unlike Australia, there are no laws and regulations India to manage cookies, location or behavioral data advertising.

A comprehensive legal framework for data processing security and privacy issues are the order of the day in India. Such a legal and policy framework can be vital to sustain investor confidence. This applies especially to foreigners investors sending large volumes of data to India managing their back-office operations. Data protection can play an important role in outsourcing.

These arrangements delegate the Indian company with a confidential customer data of foreign companies, business secrets etc. Since outsourcing by foreign companies plays a significant role in contributing ind economy. So it acts as another incentive for India strengthen its legal and policy framework to deal with its data protection and privacy.