

Overreach of the Bill

Background

In the judgement of *K.S. Puttaswamy vs. Union of India, 2017*,¹ the Supreme Court of India (SC) recognised 'right to privacy' as a fundamental right. ***'Recognizing the importance of data protection and keeping personal data of citizens secure and protected'***², Ministry of Electronics and Information Technology (MeitY), The Government of India (GoI) had formed a committee (led by retired justice BN Srikrishna) to ***'study and identify key data protection issues and recommend methods for addressing them'***³, which proposed the draft Personal Data Protection Bill 2018 (draft bill)⁴. The committee also came out with a detailed report which recognised the objective of the draft bill to be ***'to unlock the data economy, while keeping data of citizens secure and protected'***. After a round of public consultation, The Personal Data Protection Bill, 2019 (bill)⁵ was introduced in Lok Sabha, with certain changes to the previous draft.

The Statement of Objects and Reasons of the bill explicitly states the object of the bill to ***'bring a strong and robust data protection framework for India and to set up an Authority for protecting personal data and***

empowering the citizens' with rights relating to their personal data ensuring their fundamental right to "privacy and protection of personal data".

Overreach of the Provisions

While the preamble of the bill enlists various necessary facets of a personal data protection regime, a few issues have been included in it, which are beyond the objects and reasons given for the bill. These pertain to 'laying down norms for social media intermediary'; and 'ensuring empowerment, progress and innovation through digital governance'. Notably, these are new additions made from the previous draft bill, which have now been proposed in relevant provisions under the revised bill, and have been discussed below.

GoI's access to non-personal data and anonymised personal data:

The bill empowers the GoI to get access to non-personal data, or anonymised personal data processed by service providers (data fiduciaries), for select regulatory objectives.⁶ However, such a provision appears to be beyond the scope of the bill, since the same has been restricted to ***'personal data'*** as mentioned above. The provision also runs the risk of overlap with a separate committee

chaired by Kris Gopalakrishnan, which is deliberating on framing governance norms for non-personal data.⁷

Also, forced access to non-personal data may infringe intellectual property rights of service providers pertaining to such data. Retired justice BN Srikrishna has also raised concerns to this effect. He recently mentioned - *'through this clause, the government can access all business data, including data on intellectual property, business strategy and mergers & acquisitions'*, which he felt was dangerous.⁸

Voluntary verification of users of social media intermediaries: The bill empowers the GoI (in consultation with the Data Protection Authority) to notify certain social media intermediaries⁹ as significant data fiduciaries,¹⁰ who would need to provide its users with voluntary account verification options,¹¹ and provide a visible mark of verification to those availing such an option¹². As was the case with the above provision, this also appears to be beyond the contours of *'personal data protection'*, and hence this bill.

User verification intuitively seeks to solve the problem of inappropriate posts/information through this legislation, which may be considered an overreach, since the issue is already being deliberated upon in The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018.¹³ CUTS

in its submission of comments on the same, flagged how the provisions of the amendment rules are antithetical to privacy and anonymity, and also highlighted the various compliance costs it may impose on service providers.¹⁴

Recommendations

Remove such provisions from the bill:

Considering such overreach of the provisions, it is recommended that these be removed from the bill. Risks of regulatory overlaps must also be avoided, given the overriding effect of the bill.¹⁵ Notably, the GoI shall still retain power to chase its regulatory objectives through other appropriate legislations, since it has explicitly been empowered to frame policies pertaining to digital economy, including measures for its growth, security, integrity, prevention of misuse, which are beyond the ambit of personal data.¹⁶

Adopt scientific regulatory making

processes: Even while being pursued in other legislation (after being removed from the bill), it is imperative to adopt a scientific regulation making process by conducting Cost-Benefit Analysis of proposed regulations, in order to ensure that the costs of the regulation, do not outweigh its intended benefits. Evidence-based policy making tools, such as Regulatory Impact Assessment (RIA)¹⁷ may be useful in this regard, which help in balancing interests of all stakeholders during policy making.

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- 1 Justice K S Puttaswamy (Retd.) and Another Vs. Union of India and Others; SC WP(C) No. 494 of 2012 – judgement delivered on August 24, 2017
- 2 <https://pib.gov.in/newsite/PrintRelease.aspx?relid=181928>
- 3 <https://pib.gov.in/newsite/PrintRelease.aspx?relid=169420>
- 4 https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf
- 5 http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf
- 6 S. 91(2) of the bill.
- 7 <https://www.medianama.com/2019/09/223-meity-non-personal-data-committee/>
- 8 <https://economictimes.indiatimes.com/tech/internet/govt-exemptions-in-personal-data-protection-law-can-be-challenged-in-court-says-justice-srikrishna/articleshow/73762019.cms?from=mdr>
- 9 "social media intermediary" is an intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services, but shall not include intermediaries which primarily,— (a) enable commercial or business oriented transactions; (b) provide access to the Internet; (c) in the nature of search-engines, on-line encyclopedias, e-mail services or online storage services. S. 26(4) of the bill.
- 10 S. 26(4) of the bill.
- 11 S. 28(3) of the bill.
- 12 S. 28(4) of the bill.
- 13 https://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf
- 14 https://cuts-ccier.org/pdf/CUTS_comments_on_the_Information_Technology_Intermediary_Guidelines.pdf
- 15 S. 96 of the bill.
- 16 S. 91(1) of the bill.
- 17 <https://cuts-ccier.org/regulatory-impact-assessment/>