

Research-based Advocacy on Unintended Lacunae of including aspects of NPD in PDPB

Background

The sheer economic value, quantum of data flow, and nature of data (since it encompasses all spheres of human life due to an increasingly 'connected living') make regulation imperative. Despite being the fastest-growing digital economy,¹ India has a flourishing IT industry that lags far behind in its data protection regime.²

Currently, the country does not have any specific and comprehensive legislation regulating personal or Non-Personal Data (NPD). However, the most recent development in this regard has been the Joint Parliamentary Committee's (JPC) Report on the Personal Data Protection Bill 2019 (PDPB), which was tabled in the Parliament on December 16, 2021.

The JPC report on the PDPB has recommended a slew of amendments in the PDPB. One of the most notable ones pertains to widening the scope of the PDPB to include aspects of NPD, including anonymised personal data.³ The inclusion of NPD under the scope of PDPB is a significant departure from previous recommendations and drafts of the Bill. This may lead to various unintended challenges and adverse consequences for data principals (users), data fiduciaries (service providers), proposed Data Protection Authority (DPA), as well as the government.

Problematique

Including NPD in the PDPB has been recommended to ensure that NPD is regulated by the same DPA, based on the premise that it may not be possible to differentiate between NPD and personal data. However, this poses several concerns, which include the following.

- Dilution of the objective of the PDPB to provide for the protection of fundamental rights to privacy of individuals relating to their data by chasing the objective of NPD governance, i.e., creating a modern framework for the creation of economic value from the use of data for citizens and communities in India⁴
- Aggravating the already existing shortcomings of the DPA,⁵ by expanding its scope to govern NPD.
- Fuelling the already raging debate on government's access to personal data⁶ by expanding the scope of access to data to NPD.
- The PDPB already has many deviations/contradictions to the draft bill and report prepared by the BN Srikrishna Committee. Further, the

inclusion of NPD in the PDPB will also go against the recommendations of the Kris Gopalakrishnan Committee, which had recommended the removal of references to NPD from the PDPB.

- Fore fronting the existing ambiguities in key definitions – personal data, non-personal data,⁷ sensitive personal data, sensitive non-personal data, community data, anonymised data; explicitly concerning the explicit interpretation of Personally Identifiable Information (PII).

CUTS Project

With this background, it becomes important to bring forth a multi-stakeholder perspective on the concerns arising due to the inclusion of NPD to ensure a whole-of-government approach to data governance. Accordingly, CUTS is undertaking a **two-month** (between January and February 2022), **research-based advocacy and outreach initiative** for key policymakers/ influencers (among other relevant stakeholders), on the challenges prevalent in including

aspects of NDP governance in the PDPB. This will help **sensitise stakeholders on the various challenges prevalent in including aspects of NDP governance in the PDPB**. The initiative will be undertaken on similar lines to CUTS extensive parliamentary outreach initiative undertaken in 2020.⁸ The following methodology will be adopted to achieve these objectives:

- **Desk Research:** Comprehensive literature review will be conducted on the subject, which shall include relevant reports of committees formed on data governance, opinions of thought leaders, studies conducted on NPD governance, and select aspects of the PDPB, good international practices adopted on the subject etc.
- **Meetings with relevant stakeholders:** Findings from CUTS research-based studies would be presented to relevant stakeholders (such as policymakers/ influencers, industry representatives, subject experts, consumer groups etc.), and hard copies of the same would be posted to those who would not be met in-person. Apart from the CUTS report 'Navigating the Puzzle of Non-Personal Data Sharing',⁹ and CUTS submission of 'Comments on the Revised Report of the Committee of Experts on NPD governance framework',¹⁰ other outputs mentioned in the

subsequent section will be appropriately disseminated a part of this initiative.

- **Stakeholder Consultation:** A virtual roundtable would be conducted, wherein findings from our research would be presented for sensitising stakeholders *wrt* multi-stakeholder perspectives on the inclusion of NPD in PDPB. The roundtable shall also facilitate cross-learning, based on which the recommendations from our study would be finalised.

Project Outputs

The following outputs are expected to be prepared as a part of the project.

1. A research paper based on desk research, on the possible pitfalls of including aspects of NPD governance in the PDPB (such as the ones listed above). The paper shall conclude with key recommendations for the way forward.
2. A brief report encapsulates CUTS discussion with relevant stakeholders, focusing on key issues flagged, suggestions received, and the proposed way forward.
3. An op-ed based on the research paper, brief report and the roundtable discussions would also be published in a leading national daily.

Endnotes

- 1 Digital India: Technology to transform the connected nation, McKinsey Report <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-india-technology-to-transform-a-connected-nation>
- 2 India far behind in data protection: Acronis International, available at: <https://economictimes.indiatimes.com/tech/internet/india-far-behind-in-data-protection-acronis-international/articleshow/45247572.cms>
- 3 Looking at 'bigger umbrella', Personal Data Protection Bill likely to include non-personal data, available at: <https://indianexpress.com/article/business/looking-at-bigger-umbrella-pdp-bill-likely-to-include-non-personal-data-7552240/>
- 4 Ikigai' Summary of the JPC Report on Data Protection, available at: <https://www.ikigailaw.com/summary-of-the-jpc-report-on-data-protection/>
- 5 Lack of independence of the DPA, Power to make regulations shared with the central government, Lack of requirement of transparency in discretion, among others. For details, refer https://cuts-ccier.org/pdf/policy-brief_-data-protection-authority.pdf
- 6 No time limitation for data retention, No legal test for gaining access to data, Broad exemptions from the provisions of the Bill. For details, refer: <https://cuts-ccier.org/pdf/policy-brief-exemptions-for-the-state.pdf>
- 7 Non personal data has been defined as data other than personal data by JPC under Clause 3(28). However, this definition is open-ended and subject to a myriad of interpretations, Refer to Note of Dissent to JPC by Gaurav Gogoi, Member of Parliament.
- 8 Engaging Members of both the Houses of Parliament on issues about Data Protection and Privacy, available at: <https://cuts-ccier.org/pdf/engaging-members-of-both-the-houses-of-parliament-on-issues-pertaining-to-data-protection-and-privacy.pdf>
- 9 Available at: <https://cuts-ccier.org/pdf/report-navigating-the-puzzle-of-ndp-sharing.pdf>
- 10 Available at: <https://cuts-ccier.org/pdf/comments-on-revised-ndp-governance-framework.pdf>



