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Comments / Inputs of Cyber Saathi Foundation On The Digital Personal Data Protection Bill, 2022©*

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"Privacy is an inherent right in every human.
However, even intrinsic rights have to be recognised
by law of the land, for due enforcement." (Nappinai N S (2017)[1])

Privacy – the right that remains elusive in India. Privacy, our fundamental right that needed laws and regulations to give it teeth. Privacy, the right without a rudder continues to drift aimlessly awaiting the laws that would elaborate the mode and manner of its protection, as envisaged over 5 years back in *Justice K.S. Puttaswamy & ors v. Union of India & ors*[2] *(Privacy Judgment).*

The third attempt for a Personal Data Protection law for India is the Digital Personal Data Protection Bill, 2022 ("**DPDP Bill, 2022**"). This draft defies expectations that each draft would result in improved formulations and has given us a very worrisome draft to ponder over.

The first and foremost concern that DPDP Bill, 2022 throws up is the blatant defiance of constitutional constructs oft repeated by the

[1] Nappinai N. S. (2017). Technology Laws Decoded. LexisNexis.
[2] (2017) 10 SCC 1;

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Supreme Court from *Maneka Gandhi v. Union of India*[3] to the 5 – Judge Aadhaar judgment[4] i.e., that legislations ought to be "*fair, just and reasonable, not fanciful, oppressive or arbitrary".* The Supreme Court has held repeatedly that *"equality and arbitrariness are sworn enemies and whilst one belongs to the rule of law in a republic, the other to the whim and caprice of an absolute monarch*."[5] The three postulates that any enactment would have to meet to be sustainable was affirmed by the Supreme Court i.e., of *"(i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them;".*

The DPDP Bill, 2022 unfortunately defies each of these postulates and assumes unto the executive rights that under the Constitution, can and ought to be exercised only by the Parliament. It also defies first principles by resorting to fanciful, arbitrary and oppressive provisions, be it in excessive delegation of authority for subordinate legislations where the parent Act does not set out the law; arbitrary imposition of penalties; fanciful and open – ended provisions that form the basis for such penalties and purported vesting of powers in the authority created under the DPDP Bill, 2022 with no autonomy to the said authority.

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[3] *Maneka Gandhi v. Union of India*: (1978) 1 SCC 248: 1978 AIR 597;
[4] Justice K.S. Puttaswamy (Retd.) & Anr v. Union of India & Ors. (2019) 10 SCC 1.
[5] Unsustainability Of Non – Personal Data In The Personal Data Protection Bill, 2019 - N. S. Nappinai©. Cybersaathi.org.

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There is no countenancing the fact that India needs its personal data protection laws and needs it fast. There is also no splitting hairs over the need for such law to be simple and easy to implement more so when India is taking fledgling steps towards implementation of such laws. Neither the need for a personal data protection law nor for the same to be simple justifies the ambiguous, untenable and misconceived draft that has emerged to disappoint after a wait by Indians of over 5 years.

Now India has three drafts to draw from apart from a multitude of drafts from across jurisdictions. There are bound to be delays and time lags for implementation assuming a draft is tabled and passed by Parliament. To even delay such submission to Parliament therefore merely delays the much needed protections to Indians that a Personal data protection framework is expected to provide. On the contrary, to accept an ill-conceived draft may be more disastrous for Indians, as the same would result in loss of their rights rather than their protection.

This review and analysis of the latest draft DPDP Bill, 2022 commences with voicing the dilemma that such an exercise throws up, particularly for privacy proponents. Topic-wise inputs are submitted to guide rather than to criticize. The intent of this submission is more to bring back the focus on the individual and their rights and means to protect the same and is not intended to merely critique and, we at Cyber Saathi truly hope that this submission along with others helps in formulating a "*fair, just and reasonable*" Privacy enactment and fast!

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DPDP Bill, 2022:

The extant laws in India to protect personal data is limited to Sections 43A and 72A Information Technology Act, 2000 (as amended) (**"IT Act"**) and the Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011 (**"SPD Rules"**). Whilst Section 43A IT Act provides civil penalties for negligence of a body corporate through a negative covenant, in the handling of sensitive personal data, dishonest or fraudulent breaches of personal data may be criminally prosecuted under Section 72A IT Act.

The minimalist provision under Section 43A IT Act were buttressed through the SPD Rules that set out the Data Principles of consent, purpose limitation, transparency, accountability including for third party sharing and transfer of personal data to other jurisdictions.

A new law would therefore be expected to take these protections further with a more robust framework that would include any person, including the Government, that collects personal data (in the present instance in digital or digitised form). The expectation would be for clarity in terms of what the law postulates and the mode and manner in which it will be implemented. Rules to be framed would be expected to only cover the implementation aspect and not be permitted to even formulate legal provisions.

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Even a brief look at the DPDP Bill, 2022 demonstrates the excessive delegation whereby most powers and authority even to law down the law of the land stands vested in and delegated to the executive. This fallacy therefore stands foremost in the list of modifications to be made to the draft. Removing ambiguity and ensuring certainty would be the second wish list item.

Consent & Deemed Consent

Chapter 2 sets out the obligations of the data fiduciary for processing digital personal data and enumerates illustrations for 'consent' and 'deemed consent'. The concept of informed consent and more importantly, 'purpose limitation' for the data collected from an individual stands completely decimated through the 'deemed consent' provisions.

Firstly, the construct of an 'opt – out' of giving consent for all parameters and to only accept essential terms, as is already the norm under the General Data Protection Regulations ("**GDPR**") ought to have been incorporated within the consent provisions. This is not done. Instead the deemed consent provision read with the illustrations not only permit collection and retention of personal data without such an opt – out provision but actually gives the service providers the mandate to refuse services if an individual refuses to part with personal data. The deemed consent provision also permits in effect a service provider to retain and use personal data beyond the purpose for which such data is

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collected. A case in point is the illustration of booking a table. Whilst a mobile number may be required for such booking there is no purpose justification for a restaurant to retain such details after the meal is completed. To do so defies consent and purpose limitation provisions that form the bedrock of any privacy legislation.

Recommendation: The 'opt – out' provision except for essential data collection and processing to be captured within the consent provisions and deemed consent to be deleted.

Data Breach Notifications – Penalties & Compensation

Data breach notifications to users, as well as Government agencies is a welcome addition. However, in addition to penalties for non – compliance, provisions for compensation to such data breach victims ought to be included in the DPDP Bill, 2022.

As set out above, Section 43A IT Act sets out the penalties for data breaches and one of the remedies available to a victim presently, is to approach the Adjudicating Authority under the said Act, under Section 46 IT Act. With the passing of a personal data protection law, Section 43A IT Act would stand repealed and consequently the remedy through Section 46 IT Act would also no longer be available to a victim.

If no alternative such as a remedy from the Data Protection Board, which is an authority envisaged under the DPDP Bill, 2022, is provided

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for, then victims are left only with the alternatives of a civil court, which is a long and expensive process.

Provision not only for heavy penalties but of compensating victims therefore ought to be incorporated in the law and simple and cost effective alternatives for recovery of such compensation also ought to be provided.

Children's Data

The proposed Section 10 DPDP Bill, 2022 purportedly sets out the 'additional' protections with respect to processing of child data. The said provision in sub – clauses (1) to (3) places certain strong restraints with respect to child data including for parental consent and restraint against processing of personal data of a child that would cause harm to such child and from tracking or behavioural monitoring of children or targeted advertising directed at children.

Whilst strong fetters appear to have been placed, all of these stand negated by sub – clause 4, which permits for all of the above three restrictions to be inapplicable for processing of child data ***"as may be prescribed"***. Hence in effect, through subordinate legislation, the executive is permitted to negate the restrictions laid down by parliament. This too, where the parent Act neither lays down the grounds or basis for such exercise of powers by the executive nor gives

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even an indication of the instances when such reversal is to be permitted.

Recommendation: This provision giving unfettered powers to the executive is untenable and ought to be deleted.

Rights & Duties of Data Principals

This is the first draft that seeks to penalise the data principal i.e., the individual whom the law is intended to protect. The grounds for imposition of penalty are set out at Section 16. The very first sub – clause itself is demonstrably ambiguous and open – ended. To place such an onerous penalty on a data principal may itself act as a chilling effect and deter data principals from seeking their remedies.

Recommendation: It would be expedient to delete the penalty imposed against data principals.

Exemptions

Section 18 sets out the grounds for exempting the applicability of the provisions of the DPDP Bill, 2022 in certain circumstances. Of this Section 18(2) in particular is untenable, in as much as it vests the right to exempt on the Central Government instead of spelling out that which is exempted within the provisions of the law itself. In effect therefore the executive under subordinate legislation is permitted to override parliament enacted law.

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Recommendation: Section 18(2) and (3) to be deleted. In the event that any other kind of exemptions apart from those in Section 18(1) are needed, the same to be spelt out in the proposed enactment itself and not delegated.

Similarly the extensive powers vested with Central Government under Section 18(4) also to be deleted and timelines prescribed for deletion of data by Government also.

Data Protection Board

The autonomous Data Protection Authority has been replaced by the Data Protection Board ("**Board**") in the DPDP Bill 2022. Even the powers and functions are not fully defined and are left to the Central Government to decide.

The Central Government also falls within the definition of 'Person' and with the Board in effect functioning under the control of the Central Government, for complaints against the Central Government, the same would act as a judge in its own case. This is contrary to principles of natural justice apart from being in blatant violation of democratic principles.

Recommendation: Enumeration of powers and functions of Board in the Act; making the Board an autonomous authority and not one

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functioning under the Central Government; and enumerate the process for conduct of proceedings and imposition of penalties in the Act itself.

Introduction of Mediation and alternate dispute resolution is a welcome move. However the Act itself ought to set out the process and mode and manner instead of leaving it open – ended for the Board to elaborate.

Penalties

Section 25 read with the schedules set out the penalties that may be imposed by the Board. The quantum of such penalties have been questioned by many. The concern may be that even the seemingly large penalties may be too small for big technology whereas it would be onerous for start - ups or small entities.

Recommendation: Hence reversal to GDPR standards may be considered for quantum of penalties. Penalties against data principals to be deleted.

Power under Section 27 to amend schedules cannot extend to modifying penalties or caps. Else the power to override parliament enacted law would stand vested in the Central Government.

Amendments to RTI

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Section 30 sets out amendments *inter alia* to the Right to Information Act, 2005. ("**RTI**") These suggestions have no bearing to a privacy enactment. The RTI enactment serves a critical purpose with respect to seeking information including of individuals when warranted. The deletions recommended to Section 8(j)(1) and the proviso would militate against the rights of individuals to seek information particularly of individuals in public offices.

Recommendation: The amendments proposed to RTI Act to be deleted.

Conclusion

Ensuring protection of individual rights and balancing the requirements of industry against abuse by them of personal data is critical to a robust personal data protection enactment. To formulate a draft that neither protects individuals from corporate or Government excesses does not spell out a robust privacy legislation.

Exemptions and protection of governance requirements are essential but the same ought to be proportionate. Any such exemptions ought to be clearly laid down within the parameters of the parent Act and not be left to subordinate legislations.

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