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REPORT

ON

UNSUSTAINABILITY OF NON – PERSONAL DATA IN THE PERSONAL DATA PROTECTION BILL, 2019©* DATED March 11, 2020

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1. Background

The unanimous decision of the Supreme Court of India in *Justice K.S. Puttaswamy (Retd.) v. UOI*[1], upholding privacy as a fundamental right mandated expeditious formulation of a Personal Data Protection enactment. The Committee of Experts constituted under the Chairmanship of Justice B.N. Srikrishna was required to report on the data protection framework for India[2]. The Justice Srikrishna Committee on Data Protection submitted their report[3] along with a draft Personal Data Protection Bill in July 2018 (**"PDPB 2018"**). This draft explicitly kept non – personal data out of the purview of the proposed data protection enactment.

In December 2019, a revised Personal Data Protection Bill, 2019 (**"PDPB 2019"**) was submitted for review of the Parliament. News reports suggested that the Cabinet approved this draft. This PDPB 2019 has now been referred for review by a 30 – member Joint Parliamentary Committee headed by Ms. Meenakshi Lekhi, Member of Parliament ("**JPC**") for further deliberations.[4]

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[1] **AnnexureA-1:** (2017) 10 SCC 1;

[2] **Annexure A-2**: MeitY Office Memorandum No. 3(6)/2017-CLES dated 31.07.2017 'Constitution of a Committee of Experts to deliberate on a data protection framework for India.'

[3] **Annexure A-3:** A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians; https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf

[4] **Annexure A-4**: Press Communique on Joint Committee on The Personal Data Protection Bill, 2019 dated 04.02.2020.

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The PDPB 2019, as with the PDPB 2018 keeps non – personal data, which includes anonymized data outside the purview of the PDPB 2019. However, through a small yet significant modification to the PDPB 2018 (at S.2(B) & S.91), the revised draft attempts to create an opening for Central Government in consultation with the Data Protection Authority to formulate Rules for directing "*any data fiduciary or data processor to provide any personal data anonymised or other non-personal data to enable better targeting of delivery of services or formulation of evidence-based policies by the Central Government, in such manner as may be prescribed*."

This paper is limited to an analysis of the legal implications of the inclusion of S.91 in the PDP Bill 2019, which it concludes is unconstitutional and untenable and harmful to the Nation and its intent to encourage industry, employment and economy.

ANALYSIS

Relevant Provisions

The following provisions play a significant role in analyzing the two provisions that impact non – personal data under the PDPB 2019 (i.e., S.2(B) & S.91). Apart from the provisions under the proposed enactment, it is also imperative to peruse the Statement of Objects and Reasons and the Notes on Clauses in the draft circulated.

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Statement of Objects & Reasons

2. *The proposed Legislation seeks 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"****.* ***(emphasis added)***

Section 2. Application of Act to processing of personal data.

2. *The provisions of this Act,—*

(A) ***shall apply to*** *—*

(a) the processing of ***personal data*** *where such data has been collected, disclosed, shared or otherwise processed within the territory of India;*

(b) the processing of ***personal data*** *by the State, any Indian company, any citizen of India or any person or body of persons incorporated or created under Indian law;*

(c) the processing of ***personal data*** *by data fiduciaries or data processors not present within the territory of India, if such processing is—*

(i) in connection with any business carried on in India, or any systematic activity of offering goods or services to data principals within the territory of India; or

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(ii) in connection with any activity which involves profiling of data principals within the territory of India.

(B) shall not apply to the processing of anonymised data, other than the anonymised data referred to in section 91. (emphasis added)

Section 3. Definitions:

3. *In this Act, unless the context otherwise requires,—*

…

(2) ***"anonymisation"*** *in relation to personal data, means such irreversible process of transforming or converting personal data to a form in which a data principal cannot be identified, which meets the standards of irreversibility specified by the Authority;*

(3) ***"anonymised data"*** *means data which has undergone the process of anonymisation;*

(5) ***"Authority"*** *means the Data Protection Authority of India established under 35 sub-section (1) of section 41*[5];

[5] **Establishment of Authority.**

41. *(1) The Central Government shall, by notification, establish, for the purposes of this Act, an Authority to be called the Data Protection Authority of India.*
(2) The Authority referred to in sub-section (1) shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.
(3) The head office of the Authority shall be at such place as may be prescribed.
(4) The Authority may, with the prior approval of the Central Government, establish its offices at other places in India.

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(11) ***"data"*** *includes a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means;*

(13) ***"data fiduciary"*** *means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data;*

(14) ***"data principal"*** *means the natural person to whom the personal data relates;*

(15) ***"data processor"*** *means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary;*

(28) ***"personal data"*** *means data about or relating to a* ***natural person*** *who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or 35 any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling;*

(30) ***"prescribed"*** *means prescribed by rules made under this Act;*

(33) ***"regulations"*** *means the regulations made by the Authority under this Act;*

91. Act to promote framing of policies for digital economy, etc..

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91. *(1) Nothing in this Act shall prevent the Central Government from framing of any* ***policy*** *for the digital economy, including measures for its growth, security, integrity, prevention of misuse, insofar as such policy do not govern personal data.*

(2) The ***Central Government may, in consultation with the Authority****, direct any* ***data fiduciary or data processor*** *to* ***provide*** *any* ***personal data anonymised or other non-personal data*** *to enable better targeting of delivery of services or formulation of evidence-based policies by the Central Government,* ***in such manner as may be prescribed****.*

Explanation.—For the purposes of this sub-section, the expression ***"non-personal data" means the data other than personal data.***

(3) The Central Government shall disclose annually the directions, made by it under sub-section (2), in such form as may be prescribed.

94. Power to make regulations.

94. *(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the provisions of this Act.*

…

(s) any other matter which is required to be, or may be specified, or in respect of which provision is to be or may be made by regulations.

Notes on Clauses

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Clause 2.—This clause seeks to clarify the application of the Act with regard to personal data of Indians and save for clause 91 would not be applicable to processing of anonymised data.

Clause 91.—This clause seeks to empower the Central Government to frame policies for digital economy in respect of non-personal data.

Whilst the Notes on Clauses would have no bearing in the interpretation of a Statute, the same still gives indication of the intention of Parliament qua each provision. For this limited purpose, the above Notes on Clauses have been extracted.

With respect to Statements of Objects and Reasons, the same is relevant to understand the reason for a Statute, as an external aid in interpreting a statute, as was elucidated by the Supreme Court in *Utkal Contractors and Joinery Pvt., Ltd., v. State of Orissa*[6].

"9. ... A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of

[6] **Annexure B-1**: (1987) 3 SCC 279: 1987 AIR 1454; This view is also affirmed in *Reserve Bank of India v. Peerless General Finance and Investment Co., Ltd.,* (1987) 1 SCC 424 – **Annexure B-2**;

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the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead."

In *Babua Ram v. State of UP*[7], the Supreme Court has affirmed that "*The Statement of Objects and Reasons, as seen eloquently manifests the legislative animation…".*

Non – Personal Data in PDPB 2019 - Unsustainability

Constitutionality: PDP for Personal Data[8]

Applying the rationale of the Supreme Court in *Utkal (supra)*, that the reason for the Statute is manifest from its Statements of Objects and Reasons, using the same as an external aid, in the present instance, the Statement of Objects & Reasons of PDPB 2019 categorically affirms such intent and purpose of the proposed legislation to be solely "***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"*** *(internal quotes removed)*. The substantive provisions from Sections 2(a) to (c) further lend support to this interpretation i.e., that the proposed PDPB 2019 is explicitly an enactment to regulate "**personal data"**.

Section 2(B) and 91 in effect therefore create an exception to the above by providing an opening for regulating non – personal data, which includes anonymized data. The remit of this paper is to evaluate the sustainability of this addition pertaining to non – personal data within the sphere of an

[7] **Annexure B-3**: (1995) 2 SCC 689;
[8] PDPB 2019 is still at a consultative stage with the JPC reviewing its provisions. The research paper is therefore only intended to guide the consultation and ensure informed debate;

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enactment clearly intended solely for regulating personal data and to point to mischief, if any that such addition is likely to result in.

Non – Personal Data in a PDP Bill – Unsustainability

Section 2(B) under PDP 2018, in no uncertain terms kept anonymised data (a sub-set of non – personal data) out of the purview of the proposed legislation. PDPB 2019 modified, the earlier draft under PDPB 2018, to include the exception for adding the new Section 91 (which again was not part of PDPB 2018) to create an exception to the norm of the PDP Bill i.e., that it was only intended for regulating personal data.

The draft under PDPB 2018 read thus:

*"2**(3). Notwithstanding anything contained in sub-sections (1) and (2), the Act** shall not apply to the processing of anonymised data;" (emphasis added)*

The explicit non-obstante clause that this proposed Act shall not apply to anonymised data was deleted and instead the words "***other than the anonymised data referred to in section 91"*** was added.

The only intent and purport of Section 2(B) thus clearly is to save Section 91, which does not pertain to personal data. This apparent force fit also seems unsustainable, as the provision does not set out any substantive law but merely enables the Central Government to formulate regulations for gaining access to non – personal data. The creation of the above exception to the norm intended for a Personal Data Protection enactment, which militates against the very purpose i.e., of data protection appears suspect, as more elaborately dealt with hereunder. It would be advisable for the JPC reviewing

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the provisions of PDP 2019 to take note of the possible mischief and havoc that Section 91 is likely to create and delete this addition. It would be more conducive for India to evaluate a separate legislation for non – personal data, as the intent and purpose of such legislation would be to enable and foster growth and innovation through free flow of non – personal data rather than the restrictive approach to personal data, where the intent and purpose is for protection and restraint.

Section 91 – An Analysis

With PDPB 2019 being a legislation intended for regulating personal data, it is clear tautology to reiterate that the Central Government may form policies for "*the digital economy, including measures for its growth, security, integrity, prevention of misuse, insofar as such policy do not govern personal data"*. Section 91(1) in effect resorts to such tautology by emphasizing and reiterating the above. Whilst sub – clause (1) of Section 91 appears to be an obvious redundancy, it probably was intended to pave the way for the subsequent additions pertaining to anonymised and other non – personal data. The mischief that section 91 read as a whole is likely to cause is discussed hereunder.

With the first sub-clause of Section 91 enabling formulation of "policies" by the Central Government for the digital economy, sub – clause (2) is intended to enable the Central Government (in consultation with the Authority) to gain access to non – personal data including anonymised data. Sub – clause (2) of Section 91 reads thus:

"Section 91(2): The ***Central Government may, in consultation with the Authority****, direct any* ***data fiduciary or data processor*** *to* ***provide*** *any*

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personal data anonymised or other non-personal data *to enable better targeting of delivery of services or formulation of evidence-based policies by the Central Government,* ***in such manner as may be prescribed****.*

Explanation.—For the purposes of this sub-section, the expression ***"non-personal data" means the data other than personal data." (emphasis added)***

Sub – clause (3) of Section 91 further permits Central Government to *"disclose annually"* the "directions" it makes under Sub-section (2) in such form as may be prescribed i.e., that which is prescribed under rules made under the proposed enactment.

Reading Section 91 as a whole, the only interpretation that emanates is that the Central Government may, in consultation with the Authority (which is the Data Protection Authority appointed under S.41) issue annual directions for directing any data fiduciary or data processor to "provide" any anonymised data or other non-personal data. The purpose of such directions, is purportedly "*to enable better targeting of delivery of services or formulation of evidence-based policies by the Central Government*".

Sub-section (2) therefore merely sets out the rule-making power of Central Government without setting out the legislation that enables the same. Such rule – making power also appears to be an annual process, whereby the Central Government is only required to make annual "disclosures" of the directions it formulates.

The interpretation of Section 91, as a whole, merely leads to the following conclusions (i). that Central Government (in consultation with the Authority) may formulate directions; (ii) to gain access to non – personal data including

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anonymised data from data fiduciaries and data processors; (iii) for the purpose of "*better targeting of delivery of services or formulation of evidence-based policies by the Central Government"*. It may be reasonably assumed that such evidence – based policies would pertain to "*the digital economy"* based on sub – section (1) and that (iv). Such gaining of access would be based on directions that Central Government may issue periodically; (v). which directions the Central Government would disclose annually, as may be prescribed.

The entire provision is ambiguous, vague and fanciful, in as much as a mere delegation of rule – making power is couched as a legislation with a vague hint of the same possibly being public interest. Purposes stated i.e., of "*targeting of delivery of services or formulation of evidence-based policies"* neither indicate public interest nor can it be assumed as such. These purposes may expand to include even commercial activities of Government authorities. That the provision is merely to allow for rule – making in itself cuts to the root of the problem that is bound to result in the provision being held to be unconstitutional.

Trite as it is, the mode and manner of the formulation of Section 91 warrats repetition of settled principles that legislative functions have to be exercised only by the legislature and abdication of such authority, even partially is not permissible[9]. This settled position is repeated oft through various pronouncements of the Supreme Court[10].

[9] **Annexure C-1**: In *Re Delhi Laws Act case:* AIR 1951 SC 332;
[10] Refer: **Annexure C-2:** *Harishankar Bagla & Anr. v. State of Madhya Pradesh* (1955) 1 SCR 380; **Annexure C-3:** *Municipal Corporation. of Delhi v. Birla Cotton Spinning and Weaving Mills, Delhi & Anr* (1968) 3 SCR 251; **Annexure C-4:** *A.N. Parasuraman* v. *State of T.N* (1989) 4 SCC 683;

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In Kunj Behari Lal Butail & Ors. v. State of HP[11]*,* the Supreme Court held that it was permissible for "*the object of the enactment"* to be viewed to evaluate if the general rule-making power are intended to carry out the purpose of an enactment.

In the present case, as set out above, the objects of the PDPB 2019 are clear and unambiguous that they pertain to regulation of "personal data". Any form of rule-making therefore ought to be ring-fenced within this scope of the enactment. Expansion of the scope to include the very exception to the objects that is explicitly set out, not only defeats its very purpose but would also result in excessive delegation of powers to executive actions.

In no uncertain terms the Supreme Court laid down in *Global Energy Ltd. v. Central Electricity Regulatory Commission*[12] that *"essential legislative functions cannot be delegated. The delegatee must be furnished with adequate guidelines so that arbitrariness is eschewed."* In the present case the basic level of "legal security" that a law is expected to provide, such that "*law is knowable, dependable and shielded from excessive manipulation"* are clearly missing from Section 91. The structural conditions within which delegated legislation ought to function are absent in its entirety.

Caution against the mischief that such arbitrary powers would result in is elucidated by the Supreme Court in *Devi Das Gopal Krishnan v. State of Punjab*[13]*,* that "*self – effacement of legislative power"* by an "*overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation",* which would result in arbitrary powers in the hands of

[11] **Annexure C-5:** ((2000) 3 SCC 40);
[12] **Annexure C-6:** (2009) 15 SCC 570
[13] **Annexure C-7:** AIR 1967 SC 1895;

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the executive. The Supreme Court went on to hold that "*It is the duty of the court to strike down without any hesitation an arbitrary power conferred on the executive by the legislature.".* That a parent enactment ought to elucidate with certainty and clarity the intent and purpose of the rule-making power delegated and thereby limit such power only for the implementation of such legislative intent is also affirmed by the Supreme Court in *Keshavlal Khemchand & Sons (P) Ltd. v. Union of India*[14]

The applicability of the principles enumerated above, to Section 91 manifests firstly from the said provision being clearly outside the objects and purpose of the very enactment, which is intended to regulate personal data. Further, the entire provision under Section 91 taken as a whole clearly violates every single requirement mandated by the Supreme Court for delegation. No legislative purpose is enumerated. The provision resorts to ambiguous terms and references and leaves it to the executive to not only decide the scope and ambit of the provision but the very power that an executive would wish to exercise with respect to non – personal data. Such open-ended provisions are clearly contrary to basic tenets oft repeated by the Supreme Court in its pronouncements from *Maneka Gandhi* to *Puttaswamy.*

It is settled law with the Supreme Court affirming reiteratively from *Maneka Gandhi v. Union of India*[15] that legislations ought to be "fair, just and reasonable, not fanciful, oppressive or arbitrary"; 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. This

[14] **Annexure C-8:** (2015) 4 SCC 770
[15] **Annexure C-9:** *Maneka Gandhi v. Union of India*: (1978) 1 SCC 248: 1978 AIR 597;

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material delineation in democratic governance is reiterated and affirmed by Justice Bobde in *K.S. Puttaswamy (Retd.) v. UOI*[16].

The Supreme Court held the *principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness* to be a "*brooding omni-presence*", which ensures that the test of reasonableness would be in conformity with constitutional mandates and that any legislation would " *right and just and fair and not arbitrary, fanciful or oppressive*."

Reiterating the principles enunciated in *Maneka Gandhi v. Union of India (Supra)*, the nine – Judge Constitution Bench of the Supreme Court of India in *K.S. Puttaswamy (Retd.) & Anr. v. UOI & Ors.*[17], enunciated the three – fold test 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;"*

Summing up, the objects and purpose of the proposed legislation do not support inclusion of Section 91 and in fact militate against its inclusion; the very provision does not set out the legislative aim or ringfence against excessive assumption of power by the executive; permitting the executive to publish its directions annually only lends to further uncertainties, apart from the vagueness and ambiguity of the entire provision; neither of the purported purposes enumerated in the said provision, of "services to be targeted or the evidence-based policies" give any indication of the scope and limits for rule-making. They neither pertain to specified categories nor do they limit

[16] **Annexure C-10:** (2017) 10 SCC 1;
[17] (2017) 10 SCC 1

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themselves to Union lists. In particular, such wording does not state the legislative aim, implementation of which rules require to be framed. Neither criteria sets out the kind of services, the public interest involved, the need for access to databases and other proprietary content, which are otherwise statutorily protected.

It is also pertinent that the *Notes on Clauses,* which is meant to explain legislative intent categorically states that S.91 is intended to *"empower the Central Government* ***to frame policies for digital economy*** *in respect of non-personal data".* This explanation further supports the contentions above that the legislature is being called upon to abdicate its powers to the executive to not only decide the rules for implementing a law but to actually formulate the same, which is unsustainable in a democratic polity. Absence of clarity and certainty in the scope and legislative aim of Section 91, which merely allows an executive to decide its own powers and to then implement them is patently unconstitutional and bound to be struck down if the provision continues in the proposed enactment.

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Constitutional Guarantees on free trade, commerce & Profession & PDPB 2019

Article 19(1)(g) of the India Constitution extends a constitutional guarantee to protect its citizens' rights "*to practise any profession, or to carry on any occupation, trade or business".* Admittedly, this right accrues only to the benefit of natural persons and more specifically to citizens of India.

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The definitions of data fiduciary and data processor set out above, which apply to "… *any person, including the State, a company, any juristic entity or any individual*…" clearly includes a natural person. For the sake of convenience, the relevant provisions of PDPB 2019 are reproduced hereunder:

PDPB 2019: Sections:

"3 (13). "data fiduciary" means any ***person****, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of* ***processing of personal data****;*

3 (15). "data processor" means any ***person****, including the State, a company, any juristic entity or any individual, who* ***processes personal data on behalf of a data fiduciary****; (emphasis added)*

"*3 (27). "person"* ***includes*** *—*

(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated
or not,
(vi) the State, and
(vii) every artificial juridical person, not falling within any of the preceding
sub-clauses;

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Data fiduciaries or data processors are those involved in their profession, occupation, trade or business of "*processing of personal data"*.

PDPB 2019 targets regulation of use of personal data in business processes. It would therefore need no elaboration to affirm that the undertakings by a data fiduciary or data processor would be trade, occupation of business. In *Narain Weaving Mills. v. Commr. Of Excess of Profits*[18], the Supreme Court elaborated on what amounted to business in the context of trade, commerce and business:

"The word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the others hand, a single and isolated transaction has been held to be conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade."

Further, the very definition clarifies that "*individuals"* would also fall within its fold of "*data fiduciaries*" or "*data processors*". Consequently, such individuals pursuing their profession, occupation, trade or business pertaining to "processing of personal data" would be entitled to the protection, as a fundamental right, accruing to citizens of India under Article 19(1)(g) of India's Constitution.

Such protection, as fundamental right, it would be trite to mention, is not an absolute right but that which is limited by Article 19(6). The corollary also

[18] **Annexure D-1:** Narain Weaving Mills. v. Commr. Of Excess of Profits 1955 S.C.R 952;

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however is that "*Any restriction to the freedom guaranteed under Article 19(1)(g) should pass the test of reasonableness in terms of Article 19(6)"*[19].

Reasonableness & Proportionality

Whilst testing the testing the validity of a law imposing a restriction on the carrying on of a business or a profession, in the light of a circular issued by the Reserve Bank of India (RBI), the Supreme Court affirms the parameters laid down in ***Md. Faruk v. State of Madhya Pradesh***[20] :

(i) direct and immediate impact on fundamental rights of citizens affected by such law;
(ii) larger public interest sought to be ensured in the light of the object sought to be achieved;
(iii) necessity to restrict the citizens' freedom;
(iv) inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public; and
(v) possibility of achieving the same object by imposing a less drastic restraint.

[19] **Annexure D-2**: *Internet And Mobile Association Of India v. Reserve Bank of India* (2020 SCC OnLine SC 275);

[20] **Annexure D-3**: (1969) 1 SCC 853; The Supreme Court also relies on **Annexure D-4:** *Md. Yasin v. Town Area Committee*, (1952) SCR 572, **Annexure D-5:** *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788;

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The "*four-pronged test*" from in *Modern Dental College and Research Centre v. State of Madhya Pradesh*[21] relied on by the Supreme Court in the above judgment, is most pertinent in analysing the validity of Section 91 of the PDPB 2019. In the words of the Supreme Court, these four tests for limiting a constitutional right, are:

*"(i) it is designated for a **proper purpose**;*

*(ii) the measures undertaken to effectuate such a limitation are **rationally connected** to the fulfilment of that purpose;*

*(iii) the measures undertaken are **necessary** in that there are **no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation**; and finally*

*(iv) there needs to be a proper relation **("proportionality stricto sensu" or "balancing")** between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."* (*emphasis added*).

Before undertaking an analysis of Section 91 of the PDPB 2019, in the light of the above findings of the Supreme Court in its judgment of March 4, 2020, it may also be relevant to rely on a few more recent judgments of the Supreme Court.

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[21] **Annexure D-6:** (2016) 7 SCC 353; Relies on: *Aharon Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press, 2012)*;

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In *Anuradha Bhasin v. Union of India*[22], whilst considering the validity of the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017, the Supreme Court held in similar lines, as in *IAMAI's* case above,

"... we may summarize the requirements of the ***doctrine of proportionality*** *which must be followed by the authorities* ***before passing any order intending on restricting fundamental rights of individuals****. In the first stage itself, the* ***possible goal*** *of such a measure intended at imposing restrictions must be determined. It ought to be noted that* ***such goal must be legitimate****. However,* ***before settling on the aforesaid measure****, the* ***authorities must assess*** *the* ***existence of any alternative mechanism in furtherance of the aforesaid goal****. The appropriateness of such a measure depends on its* ***implication upon the fundamental rights and the necessity of such measure****. It is undeniable from the aforesaid holding that only the* ***least restrictive measure can be resorted to by the State****, taking into consideration the facts and circumstances.*

No discussion on the doctrine of proportionality would be complete without touching upon the two most significant judgments that arose from the same set of public interest litigations in *K.S. Puttaswamy* v. *Union of India*[23].

In *K.S. Puttaswamy* v. *Union of India (2017)*[24] (referred to herein as the "**Privacy Judgment")** the three tests on proportionality evolved, are

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[22] **Annexure D-7:** 2020 SCC OnLine SC 25;

[23] The nine-judge decision affirming privacy to be a fundamental right ((2017) 10 SCC 1); and the five-judge decision on the validity of the Aadhaar Act ((2019) 1 SCC 1) – **Annexure D-8**;

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"(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****…" (emphasis added).*

Affirming the tests laid down in *Modern Dental College,* as well as in the Privacy Judgment, a five-judge bench of the Supreme Court held in *K.S. Puttaswamy* v. *Union of India (2018)*[25] (the "**Aadhaar Judgment"**):

*"(a) A measure restricting a right must have a legitimate goal (****legitimate goal stage****).*

*(b) It must be a suitable means of furthering this goal (****suitability or rational connection stage****).*

*(c) There must not be any less restrictive but equally effective alternative (****necessity stage****).*

*(d) The measure must not have a disproportionate impact on the right-holder (****balancing stage****)."*

Analysis of Proportionality of Section 91

Each of the above judgments of the Supreme Court affirm and reiterate the following summed up succinctly in the Aadhaar judgment by Dr. A. K. Sikri J. i.e., that validity of a law limiting or restricting a fundamental right ought to be for a (i) legitimate purpose; (ii). That it is the most suitable for

[24] (2017) 10 SCC 1 – Refer Annexure C-10;
[25] ((2019) 1 SCC 1) – Refer Annexure D-8;

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achieving the goal of such enactment; (iii) that there is no other less restrictive but equally effective alternative and most importantly (iv) that the measure must not be disproportionate in impact on the right holder.

The very first issue to be evaluated therefore is if Section 91 of PDPB 2019 amounts to a restriction of profession, occupation, trade or business of a data fiduciary or data processor and if yes, if such restriction is reasonable. The wording of Section 91 indicates the following:

(i) That Central Government may frame policies for the digital economy, including measures for its growth, security, integrity and prevention of misuse, provided such policies do not govern personal data;

(ii)Sub-section (2) of Section 91 comprises, the following:

a. That Central Government may (in consultation with the Authority)
    i. direct a data fiduciary or data processor
    ii. "*to provide any personal data anonymised or other non-personal data*";
    iii. for purportedly enabling *"better targeting of delivery of services or formulation of evidence-based policies by the Central Government";*
    iv. For which the Central Government is required to prescribe rules.

(iii) Sub-section (3) of Section 91 states that:

a. Central Government:
b. would make an annual "disclosure";
c. of directions issued by it under sub-section (2);
d. in forms prescribed.

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(iv) Explanation to Sub-section (2) also provides a definition for non-personal data to mean *"data other than personal data"*.

This provision is independent of all other provisions under PDPB 2019, as this is the lone ranger dealing with non-personal data. Hence each of the tests laid down by the Supreme Court for testing reasonableness or proportionality rests solely on the interpretation of this provision.

In effect, the Government has, through this provision, attempted to gain unfettered access to anonymised and other non – personal data from data fiduciaries or data processors, as and when they issue directions for the same. The only goal for such intrusion on the fundamental rights of data fiduciaries or data processors is for *better targeting of delivery of services or formulation of evidence-based policies by the Central Government"*. Neither of these stated objectives give any pointer to the actual services to be delivered or the policies that Cen\tral Government intends to formulate based on such access it intends to obtain.

The very process of gaining access to non – personal data including anonymised data amounts to a restraint of trade. Anonymisation, as the very definition in PDPB 2019 indicates, requires application of proprietary technology enabled tools of the data fiduciary and / or the data processors. It is not raw data over which there may not be proprietary rights. It is also not personal data that may be available as a public resource. It is data collected through various business processes and collated into data sets intended for analysis and use for marketing and business development purposes.

Such data itself in many instances would be the product that data fiduciaries may commercialise. Such anonymised data also drives innovation and growth

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for data fiduciaries, involved in development of Artificial Intelligence ("AI") enabled tools or to even evolve AI *per se*. Derivative analytical data is also a valuable product relied on by data fiduciaries, either as a product or service.

The very purpose of aggregation of anonymised or non – personal data therefore is for commercial use. The European Union Regulation on *"framework for the free flow of non-personal data"*[26] refers to the different data activities based on which *"Data value chains"* are built, as "*data creation and collection; data aggregation and organisation; data processing; data analysis, marketing and distribution; use and re-use of data"*.

That claiming access for undisclosed purposes amounts to a restriction on the right of data fiduciaries / data processors is therefore apparent, as Section 91 in effect amounts to depriving them of the very resource that they are trading in or running their businesses on.

Proportionality of such intrusion by the Government into the fundamental rights of data fiduciaries / data processors needs to then be evaluated on the anvil of the tests elaborated by the Supreme Court.

The goal or aim of the intrusion in itself is vague, i.e., to better target services and for formulating evidence based policies. There is not even a whisper of public interest or larger public interest that warrants such intrusion. There is not even a qualifier or clarification on the kind of services for which the

[26] **Annexure D-9:** Regulation (Eu) 2018/1807 Of The European Parliament And Of The Council, of 14 November 2018, on a framework for the free flow of non-personal data in the European Union. *Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1807&from=EN*;

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Government may seek such appropriations. Neither the services nor the formulation of policies spell out public interest.

Finally, the primary thrust of the Supreme Court judgments is on alternative less intrusive process to achieve the same goal. Clearly, what the Government intends to obtain through its directions is of access to proprietary non – personal data collated by data fiduciaries or data processors through directions to be issued based on rules to be formulated by the Central Government in consultation with the Data Protection Authority.

In effect Section 91 fails each of the above tests of proportionality, as it does not set out any legitimate goal intended for public interest warranting restraints on fundamental rights; it fails to explain the rationale behind the provision, which in itself is an exception to the entire enactment proposed for personal data; it does not disclose necessity and fails to demonstrate balance i.e., of no other alternatives except such intrusive methods to gain access.

Constitutional Right of Persons Other than Individuals

The evaluation of Section 91 of the PDPB 2019 herein above pertains to individuals and not the other category of "persons" to whom it may extend. Data fiduciaries or data processors may presumably be corporate entities, association of persons or even the State, according to the definition of "Person" under PDPB 2019.

Whilst Article 19(1)(g) confers a fundamental freedom on citizens to pursue their profession, occupation, trade or business subject to reasonable restrictions that may be imposed as permitted under Article 19(6), Article 301 provides a general security for free trade within the territories of India, with

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Article 302 permitting Parliament to set out reasonable restrictions on the constitutional right under Article 301. Such reasonable restrictions are required to be imposed by law made by parliament in public interest.

The constitutional right provided under Article 301 is open to protection from arbitrary or violative actions and reasonable restrictions imposed by any law enacted by Parliament would be subject to judicial scrutiny. That such scrutiny would extend not only to restrictions that may be imposed on any fundamental rights but also to any constitutional right was upheld by the Rajasthan High Court in *Ram Lal v State Of Rajasthan*[27].

"34. A law may be unconstitutional on a number of grounds. For example, because it contravenes any fundamental rights specified in Part III of the Constitution or is a legislation on a subject which is not assigned to the relevant legislature by the distribution of power made in the 7th Schedule read with connected Articles or on the ground that it contravenes any of the mandatory provisions of the Constitution which imposes limitation upon the power of the legislature,…"

36. Likewise, the constitutional validity of any provision of a Constitution may also be subject to challenge if it operates against the law made by the Parliament or is operative beyond the boundaries of the State. The legislation can also be subjected to judicial review if it suffers from vice of excessive delegation.

37. The challenge to the legislation is not confined to the precincts of contravention of the provisions of Part III of the Constitution but it is open to challenge on multiple grounds inviting invocation of one or more provisions

[27] **Annexure D-10:** 2004 SCC OnLine Raj 472

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of the Constitution having relevance to the subject mentioned. It is in this context, the legislation is also open to judicial review, if process of legislation does not conform to the procedure envisaged under the Constitution."

Further in *IAMAI v. RBI (supra)* the Supreme Court also touches upon the fundamental rights of shareholders and promoters of a corporate entity or other individual citizens in the business ecosystem being violated and the same sustaining maintainability of a challenge under Article 19(1)(g). This would be subject to the limits stated in *Rustom Cavasjee Cooper v. Union of India*[28] that a company is distinct from its shareholders and that *"shareholders may not be entitled to move a petition for infringement of the rights of the company unless by the impugned action his right had also been infringed".*

***

Constitution & Property Rights & PDPB 2019

Legitimate concerns have already been raised with respect to the clear and apparent violation that S.91 would lead to – of proprietary rights of data fiduciaries / data processors, not only to the non – personal data that Government is attempting to gain access to but also to the deprivation of the right owners to its beneficial enjoyment.

[28] *(1970) 1 SCC 248 – Refer Annexure D-2;*

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Article 300A & IPR

Whilst the fundamental right to property under Article 19(1)(f) was omitted through the Forty Fourth Constitutional Amendment, 1978[29], Article 300A was introduced in Chapter IV of Part XII of the Constitution. Property rights to that extent continue to be protected as a constitutional right, though not as a fundamental right. Article 300A, reads thus:

"Chapter IV-Right To Property

300A. Persons not to be deprived of property save by authority of law.—*No person shall be deprived of his property save by authority of law"*

Property rights have been interpreted by the Supreme Court to amount to a human right. Hence whilst it no longer continues as a fundamental right, relevance and importance of protecting property, as a constitutional and human right has been consistently upheld by the Supreme Court. Hence despite property rights no longer forming part of Part III, the right of judicial review of any legislation that would result in divestment of property rights, may be reviewed under the Writ jurisdiction of High Courts, to affirm the vires of such legislation.

In a recent decision on a Civil appeal, the Supreme Court in *D.B. Bassnet (D) through LRs v. The Collector*[30], affirmed that though property rights may have been omitted from Part III of India's Constitution, as a fundamental right, they remain a constitutional right under Article 300A and have also acquired the dimension of a human right. Hence, any law that attempts to

[29] *Effective from June 19, 1979, whereby* Articles 19(1)(f) and Article 31 were deleted from Part III of India's Constitution (dealing with Fundamental Rights)*;*
[30] **Annexure E-1**: (2020) SCC OnLine SC 257;

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divest or deprive owners of property rights will have "*to satisfy the requirements of a validly enacted law in that it should be just, fair and reasonable*".

The Supreme Court relies on its earlier judgment, in *Delhi Airtech Services Pvt. Ltd. v. State of U.P*[31], which interprets "law" under both Article 21 as well as Article 300A and holds thus:

"26. It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression of the Government. Jefferson was of the view that liberty cannot long subsist without the support of property. "Property must be secured, else liberty cannot subsist" was the opinion of John Adams.

Indeed the view that property itself is the seed bed which must be conserved if other constitutional values are to flourish is the consensus among political thinkers and jurists.

...

69. The expression `law' which figures both in Article 21 and Article 300A must be given the same meaning. In both the cases the ***law would mean a validly enacted law****. In order to be valid law it* ***must be just, fair and reasonable*** *having regard to the requirement of Article 14 and 21 as explained in Maneka Gandhi (supra).*

...

[31] **Annexure E-2**: (2011) 9 SCC 354;

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This is especially so, as `law' in both the Articles 21 and 300A is meant to prevent deprivation of rights. Insofar as Article 21 is concerned, it is a Fundamental Right whereas in Article 300A it is a constitutional right which has been given a status of a basic human right."

That State is not entitled to deprive a person of their rights over property without following due process and without paying just recompense is affirmed by the Supreme Court in *Vidya Devi v. The State of Himachal Pradesh*[32]*:*

"10.2. The right to property ceased to be a fundamental right by the Constitution (Forty Fourth Amendment) Act, 1978, however, it continued to be a human right in a welfare State, and a Constitutional right under Article 300 A of the Constitution. Article 300 A provides that no person shall be deprived of his property save by authority of law. The ***State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though not expressly included in Article 300 A, can be inferred in that Article****.*

To forcibly dispossess a person of his private property, without following due process of law, would be violative of a human right, as also the constitutional right under Article 300 A of the Constitution*.*

10.5. ***In a democratic polity governed by the rule of law, the State could not have deprived a citizen of their property without the sanction of law.***

[32] **Annexure E-3**: Civil Appeal Nos. 60-61 Of 2020; Date of Judgment: January 8, 2020;

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The decision in *Tukaram Kana Joshi v. M.I.D.C*[33] is relied on in the above case, namely that:

"6. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the Right to Property seized to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. ***The same cannot be done by way of executive fiat or order or administration caprice.***

7. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension."

Earlier judgments of the Supreme Court which play a role in the decisions set out above are elicited hereunder:

N. Padmamma v. S. Ramakrishna Reddy[34]*,* holds, as under, whilst interpreting Article 300A:

[33] **Annexure E-4**: (2013) 1 SCC 353;

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"17. ……The right of property is a human right. The Act contemplates divesting of right of an Inamdar. It does not contemplate cessation of a right of a co-sharer or recognition of a right in favour of other co-sharer. The right has to be determined having regard to the possession by way of personal cultivation. The word `possession' in such cases should be given a broader connotation. Possession of one sharer would be deemed to be the possession of others. It is a legal concept. This legal concept cannot be held to have been done away with under the Act. ***If a right of property is a human right as also a constitutional right, the same cannot be taken away except in accordance with law. Article 300 A of the Constitution protects such right. The provisions of the Act seeking to divest such right, keeping in view of the provisions of Article 300A of the Constitution of India, must be strictly construed."***

This position is reaffirmed by the Supreme Court in *State of Haryana v. Mukesh Kumar*[35]:

"36. The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been considered in realm of individual rights such as right to health, right to livelihood, right to shelter and employment etc. But now human rights are gaining a multi faceted dimension. ***Right to property is also considered very much a part of the new dimension****."*

The conspectus of the above judgments in the light of section 91 of PDPB 2019 is as under:

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[34] **Annexure E-5:** (2008) 15 SCC 517;
[35] **Annexure E-6:** (2011) 10 SCC 404;

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- That though property right is no longer a fundamental right under Part III of the Constitution, it not only still protected as a constitutional and statutory right but significantly, as a "human right";
- That no person shall be deprived of their right to their property, save by law passed by Parliament;
- That property rights shall not be forcibly deprived to owners by State and any expropriation shall be only through parliamentary law;
- That "law" referred to under Article 300A, as in the case of Article 21, would have to be passed by Parliament and such law should be just, fair and reasonable;
- Such parameters mandate due compensation to be paid and for due process to be followed in depriving ownership rights;
- That such deprivation is warranted for public interest;
- That property rights cannot be deprived through "*executive fiat or order or administration caprice"*.

Each of the above play a significant role in the sustainability of Section 91 of PDPB 2019. The said provision does not law down just, fair or reasonable law, as the State goal or legitimate aim, its intent for depriving persons of their ownership rights over property, the due process that duly protects the human and constitutional rights of owner are all missing. The only goal of the provision being the outcome i.e., of deprivation of property at the whim and caprice of the executive is clearly in violation of settled principles enumerated and reiterated by the Supreme Court. That such violation is furthered through the arbitrariness and ambiguity in the provision is apparent. The discussion on the property rights, which in this instance are intellectual property rights of data fiduciaries and data processors, which would also fall within the ambit of the constitutional, statutory and human rights, protected under the Indian

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legal construct, and that which the impugned provision impacts adversely and harms, is more fully elaborated hereunder.

Property Rights Under Constitution & IPR

Reference to "property" under the above constitutional right encompasses not just land but any form of tangible or intangible property, including intellectual property rights. this is affirmed by the Supreme Court in *K.T. Plantation (P) Ltd. v. State of Karnataka*[36], as under:

"*154. Article 300A of the Constitution of India proclaims that no person can be deprived of his property save by the authority of law meaning thereby that* ***a person cannot be deprived of his property merely by an executive fiat*** *without any specific legal authority or without the support of law made by a competent legislature. The expression* ***"property",*** *in Article 300A, is confined not to land alone;* ***it includes intangible like copyright and other intellectual property and embraces every possible interest recognized by law."***

In *Jilubhai Nanbhai Khachar v. The State of Gujarat*[37], the Supreme Court further affirmed:

"Property in legal sense means an aggregate of rights which are guaranteed and protected by law. it extends to every species of valuable right and interest, more particularly, ***ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it and to exclude everyone else from interfering with it****. The dominion or indefinite*

[36] **Annexure E-7:** (2011) 9 SCC 1;
[37] **Annexure E-8:** 1995 Supp (1) SCC 596;

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right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word ***'property;*** *connotes everything which is* ***subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal;*** *everything that has an exchangeable value or which goes to make up wealth or estate or status.* ***Property,*** *therefore,* ***within the constitutional protection,*** *denotes group of rights inhering citizen's relation to physical thing,* ***as right to possess, use and dispose of it in accordance with law****.*"

...

In a democratic society, every individual needs ***legal protection for the beneficial enjoyment of what he has discovered and appropriated****; has created by his own labour (in wider sense); and what he has acquired under the existing social and economic order subject to law and order."*

That intellectual property rights are also protected under Article 300A is therefore settled law. The protection that the said constitutional right extends is against arbitrary, unfair or unreasonable deprivation of such property by Parliament. Any law enacted by Parliament would be required to meet the threshold for reasonable exercise of its right for public interest. Actions that deprive the property owners of their right to enjoy their property or to benefit therefrom can be sustained only when it meet the strict mandates of just, fair and proportionate law through various judgments of the Supreme Court.

In *K.T. Plantation (P) Ltd. v. State of Karnataka (supra)*, the Supreme Court elaborated the grounds for deprivation of property under Article 300A:

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"*While enacting Article 300-A Parliament has only borrowed Article 31(1) (the "Rule of Law" doctrine) and not Article 31(2) (which had embodied the doctrine of eminent domain). Article 300-A enables the State to put restrictions on the right to property by law.* ***That law has to be reasonable. It must comply with other provisions of the Constitution. The limitation or restriction should not be arbitrary or excessive or what is beyond what is required in public interest. The limitation or restriction must not be disproportionate to the situation or excessive****. (emphasis added).*

The discussions herein above on what amounts to reasonable exercise by Parliament of right to legislate therefore become relevant whilst deciding the proprietary rights of data fiduciaries and data processors from deprivation of their properties through State action. On the doctrine of eminent domain, the Supreme Court holds in *Jilubhai (supra)* "*It is inherent in every sovereign State by exercising it's power of eminent domain to expropriate private property without owner's consent. Prima facie, State would be the judge to decide whether a purpose is a public purpose. But it is not the sole judge. This will be subject to judicial review and it is the duty of the Court to determine whether a particular purpose is a public purpose or not. Public interest has always been considered to be an essential ingredient of public purpose."*

…

The term 'property' in Art.300A receives its true colour and reflection from the context in which State's power of eminent domain or police power is invoked and effectuated."

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Article 300A & PDPB 2019

The findings of the Supreme Court in *K. T. Plantation (Supra)* with respect to the grounds required for deprivation of property also become relevant in the light of the provisions under Section 91 PDPB 2019.

"Public purpose is a precondition for deprivation of a person from his property under Article 300-A and the right to claim compensation is also inbuilt in that article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors.

…

The legislation providing for deprivation of property under Article 300-A must be ***"just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc****. Thus in each case, courts will have to examine the scheme of the* ***impugned Act, its object, purpose as also the question whether payment of nil compensation or nominal compensation would make the impugned law unjust, unfair or unreasonable*** *in terms of other provisions of the Constitution as indicated above.*

Hence any deprivation through Parliament enacted law has to be just fair and reasonable and the doctrine of eminent domain would not give Indian Government any right to circumvent the same. Section 91, by allowing Central Government to gain access to the non – personal data in the hands of data fiduciaries or data processors in effect deprives the right – owner of his

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proprietary rights over such data and its uses. Such deprivation therefore ought to be within the parameters of Article 300A.

A quick look at the proposed provision demonstrates that public interest itself is not spelt out for depriving right – owners of their property.

Section 91 PDPB 2019 seeks access through executive action with no directional provision under the proposed enactment for Government to gain access to non – personal data including anonymized data. The Explanation to S.91 merely provides an alternative i.e., ***"non-personal data"*** *means the* ***data other than personal data"***. Whilst this is similar to General Data Protection Regulation (**"GDPR")**[38] and the European Union (EU) Regulation 2018/1807 on 'Free Flow of Non – Personal Data In The European Union', the impact varies. The EU personal data legislation and the non – personal data regulation aim at protecting personal data in case of GDPR and ensuring free flow of data within the EU with respect to the latter. PDPB 2019 however seeks access to such data without setting out reasonableness, necessity or alternatives. Nothing in the provision gives an inclination of a hint on what the Government intends to introduce by way of regulation.

Further in the present case of PDPB 2019, the extent of Statutory rights that will be affected are significant. It is not just that Copyright protection including of databases, Patent rights protecting algorithms and other aspects of non-personal data including possibly the technology deployed for the same

[38] **Annexure E-9**: Article 4(1) of GDPR defines "*personal data as any information relating to an identified or identifiable natural person*". Article 3(1) of the Free Flow of Non - personal Data in the European Union (Regulation (EU) 2018/1807), which came into effect as of November 14, 2018 and passed by the European Parliament and Council *" non - personal data is defined as data other than personal data as defined in Art . 4(1) of the GDPR". Source:* Pauli Engblom: Managing Right s to Non - Personal Data. Thesis, 74 pages, attachments , XVI pages. Commercial Law. April 2019;

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and laws pertaining to trade-secrets would be affected. The very basis for the enactments and its functioning will be impacted with the overlap.

For instance, S.2(O) of India's Copyright Act, 1957 extends protection to databases as a 'literary work'[39]. Laws of UK and USA also extend copyright protection to computer databases and computer programmes[40].

Copinger and Skone James on Copyright (1991 Edn.) deal with law in the context of compilation and state that 'compilations' are included in 'literary work':

"Trade catalogues are generally compilations, and as such are capable of protection as literary works. On similar principles, a computer database, stored on tape, disk or by other electronic means, would also generally be a compilation and capable of protection as a literary work".

In *Software Copyright Law*[41], David Bainbridge sets out on computer database, as under:

"A computer database is a collection of information stored on computer media. The information may be a list of clients and their addresses or it may be the full text of various documents or it may be a set of co-ordinates relating to a three-dimensional building structure. The range of things which may be included in a computer database is enormous. The information contained in the database may, itself, be confidential and protected by the law

[39] S.2(o): *"literary work includes computer programmes, tables and compilations including computer databases" (internal quotes removed).* The words "Computer databases" were added through the 2000 amendment;
[40] Refer: **Annexure E-10:** *Apple Computer, Inc. v. Franklin Computer Corp.,* 714 F. 2d 1240, 1253 (3d Cir. 1983,) and *Sega Enterprises Ltd. V. Richards* 1983 FSR 73;
[41] Bainbridge. D (1999). Software Copyright Law. Tottel Publishing *(at p.48).*

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of breach of confidence but what of the copyright position The simplest way of looking at a computer database is to consider the work it represents, for example a printed listing of names and addresses, a printed set of documents or a drawing of a building. Those works are protected by copyright as literary or artistic works. It does not matter if the work is never produced on paper and only ever exists on computer storage media."

In the case of *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber,*[42] the Delhi High Court held that a compilation of addresses (as the case here was with regard to mail order catalogues) involved devoting time, money, labour and skills. The Court further held that though the sources were commonly situated, the compilation amounted to a "literary work" wherein the author would have a copyright.

Similarly, in *M/S Vogueserv International Pvt Ltd V. Rajesh Gosain*[43]*,* the Delhi High Court used the modicum of originality test and held:

"*The customer database is protected by copyright as an original literary work (assuming a modicum of skill and judgment is involved in compiling the database, for example, if the telesales staff have to exercise judgment in deciding whether to accept a new customer). Being a compilation, it is a literary work. By storing the information in a database, it has been recorded in 'writing or otherwise' as required by the Act ('Writing' is defined widely and includes any form of notation or code regardless of the method or medium of storage). Even if the database is never printed out on paper, it will be protected by copyright."*

[42] **Annexure E-11:** 1995 SCC OnLine Del 746
[43] **Annexure E-12:** *(2013 SCC OnLine Del 3086);*

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The Database Directive of the European Union and the Council,[44] provides copyright protection to "*databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection*[45]. Article 1: Section 2 of the Directive defines **'database'** to mean "*a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*".

It recognises the importance of extending such protection to databases "*to prevent the unauthorized extraction and/or re-utilization of the contents of a database*", which the Directive states would have "*serious economic and technical consequences*". The Directive also notes that "*the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently*".

Pauli Engblom on 'Managing Rights to Non - Personal Data'[46] elaborates on the various forms of non-personal data including non – human automated data collected through the Internet of Things (IoT) and adverts to the importance of digital data in obtaining a competitive edge.

The European Parliament and of the Council has also brought into effect as of June 8, 2016 its **Directive (EU) 2016 / 943 on the protection of undisclosed**

[44] **Annexure E-13**: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
[45] Article 3 (Chapter II) of the Database Directive;
[46] Pauli Engblom on Managing Right s to Non - Personal Data Thesis, 74 pages, attachments , XVI pages – Refer Annexure E-9;

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know-how and business information (trade secrets)[47] (also referred to as the Trade Secrets Directive) against unlawful acquisition, use and disclosure of trade secrets. Whilst this Trade Secrets Directive intends to protect against misuse through breach of contractual terms, the EU *acquis*[48] indicates, according to Pauli Engblom, that the Trade Secrets Directive will protect data meeting the criteria set out therein and that such data would include undisclosed know - how and business information (trade secrets).

Each of the above are mere indications of the vastness of data covered under the generic non-personal data. To have a mere enabling provision for formulation of rules without a detailed legislation ensuring that there are no undue restrictions or limitations on free flow of non – personal data and / or that proprietary rights covered under multiple legislations are not diluted without due process, may be counterproductive not only for India's thrust on enabling industry and innovation but would also affect the very implementation thereof. This vast expanse of non – personal data in itself mandates that due care and caution ought to be exercised before formulation of laws or regulations and that any such law or regulation ought to be an enabler and not an impediment.

With respect to legitimate State aim, the respective laws governing proprietary rights in themselves lay down checks and balances[49]. India also has in place competition laws to ensure fair competition and an even playing field for encouraging start - ups. The absence of clarity and certainty in S.91

[47] **Annexure E-14** Directive (EU) 2016 / 943 on the protection of undisclosed know-how and business information (trade secrets). *Source: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L0943&from=FR;*

[48] Accumulated legislation, legal acts, and court decisions constituting the entire body of European Union Law;

[49] Such as S.100 of the Patents Act, 1970;

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of the proposed PDPB 2019 and the opacity in the provision, which lends itself to abuse are bound to affect adversely the fledgling industries in emerging technologies in India.

It is clear from the above that were the Government in need of non – personal data from data fiduciaries or data processors for its public interest initiatives it is open to the Government to seek access using existing statutory provisions by paying license fee, if any for the same. To instead provide to itself vague, ambiguous and open – ended rights to issue directions, as and when it needs access, clearly violates all the justiciable and constitutional rights of data fiduciaries and data processors.

The resounding affirmation of rule of law concept in *K. T. Plantation (supra)* with respect to deprivation of property rights affirm the need for constitutional mandates to be followed and highlight the stark absence thereof in Section 91 of PDPB 2019:

"One of the fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the peaceful enjoyment of possession should be lawful. Let the message, therefore, be loud and clear, that the rule of law exists in this country even when we interpret a statute, which has the blessings of Article 300-A."

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International Treaties & PDPB 2019

India has submitted to International Treaties which govern services as well as Intellectual Property Rights. Each of these treaties lay down guidelines for the

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signatories to bring their municipal laws on par with the treaty obligations undertaken[50] and to ensure compliance. An extract from the Supreme Court's decision in *K.T. Plantation (P) Ltd. v. State of Karnataka*[51], sets the stage for the impact of Section 91 PDPB 2019 on India's obligations under International Treaties:

"Deprivation of property may also cause ***serious concern in the area of foreign investment,*** *especially in the context of international law and international investment agreements.* ***Whenever a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements****. Even if the foreign investor has* ***no fundamental right, let them know, that the rule of law prevails in this country****."*

Time and again, the Supreme Court has reiterated the primacy of Rule of law in its decision. It is settled law that International Treaties have persuasive value and would warrant adhesion provided they do not conflict with municipal laws.

The Constitution sets out the following with respect to international treaties and conventions:

[50] This is mandated as treaty obligations would be complied with only to the extent that they are not inconsistent with municipal laws. Refer: **Annexure E-15**: *Maganbhai Ishwarbhai Patel v. Union of India* (1970) 3 SCC 400; and **Annexure E-16:** *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438;

[51] (2011) 9 SCC 1 – Refer Annexure E-7;

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Article 51: Directive Principles: *"State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another".*

Article 73: lays down that the executive power of the Union 'shall extend to "*the matters with respect to which Parliament has power to make laws'* and to *"the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue* ***'of any treaty or agreement"****.*

Article 253: ***Legislation for giving effect to international agreements.*** *- Notwithstanding anything in the foregoing provisions of this Chapter,* ***Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention*** *with any other country or countries or any decision made at any international conference, association or other body."*

The Supreme Court of India in *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*[52] itself noted that the principle of comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction as long as they do not run into conflict with Acts of Parliament. WTO[53] Agreements limit or restrict provisions that are (i) disguised restriction to trade (ii) arbitrary and amount to (iii) unjustifiable discrimination[54].

[52] **Annexure E-17**: (1984) 2 SCC 534
[53] World Trade Organisation;
[54] **Annexure E-18:** Chang-Fa Lo (2013), *The Proper Interpretation of 'Disguised Restriction on International Trade' under the WTO: The Need to Look at the Protective Effect*, Journal of International Dispute Settlement, Vol 4 Issue 1, https://academic.oup.com/jids/article/4/1/111/2193490

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India is a signatory to the General Agreement on Trade in Services ("**GATS**") since it became effective in 1995.[55] In the words of WTO:

"The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

The GATS expressly recognizes the right of members to regulate the supply of services in pursuit of their own policy objectives. However, the Agreement contains provisions ensuring that services regulations are administered in a reasonable, objective and impartial manner."[56]

GATS expressly recognizes the right of Members to regulate the supply of services in pursuit of their own policy objectives but mandates a framework that ensures a reasonable, objective and impartial manner of implementation of such national policies, which do not constitute unnecessary barriers to trade[57]. Failure to adhere to treaty obligations also opens India out to trade sanctions. Waivers from the obligations under GATS do not cover access or violation of services protections in the manner that S.91 envisages[58].

[55] **Annexure E-19:** Consultation Document on the WTO Negotiations Under the General Agreement on Trade in Services (GATS), https://commerce.gov.in/writereaddata/trade/Consultation_document_on_the_WTO_negotiations.pdf

[56] **Annexure E-20:** https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm;

[57] The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm – Refer Annexure E-20;

[58] GATS waivers may be to "*protect public morals or maintain public order; protect human, animal or plant life or health; or secure compliance with laws or regulations not inconsistent with the Agreement including, among other things, measures necessary to prevent deceptive or fraudulent practices".* However even these ought to be based on explicit provisions, which otherwise comply with the mandates under the said treaty.

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Significantly the industry was the forerunner in its clamour for an effective data protection enactment that would meet global standards in general and that of the European Union in particular. This was primarily required, as the need for parity of stringent laws and regulations to protect personal data was mandated under the European Union laws – from its 1995 Directive to its GDPR to permit transfer of data of EU citizens to other countries. For this, the European Union also has an "Approved Country" list – effectively a white list of Countries to which EU citizen data may be transferred. India has not formed part of this list. Enactment of PDPB 2019 is also viewed as a step closer to the possibility of India becoming complaint to receive EU citizen data. Such and other transfers of data to India are viewed as huge business potential for India to harness. Overarching or arbitrary provisions including those giving Government access or exemptions from the provisions of the proposed enactment will only result in denying India its much needed thrust to harness the business potential of data for growing its Industry.

Section 91 of PDPB 2019 does not consider India's obligations to follow the Most Favoured Nation (MFN) and Non-discriminatory principles under GATS. Disclosure or access sought under S.91 may be construed to be a "means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services" under Article XIV of the GATS.

Article XIV of the GATS which discusses General Exceptions provides members with the ability to take measures necessary for certain overriding policy concerns, which are necessary, among other things, for securing compliance with laws or regulations which are not consistent with the provisions of GATS. However, these measures are qualified. They should not

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lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction on trade.

Article XIV of the GATS is extracted hereinbelow:

"General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order; The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety; …"

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The general exceptions do not encompass the situation that section 91 would result in. Section 91, which seeks mandatory access to non-personal data, does not fall within the scope of the exception under (c)(ii) of Article XIV of GATS which allows laws and regulations that are inconsistent, if they relate to the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.

In the WTO page on 'Understanding the WTO: Settling Disputes':[59]

"***Disputes in the WTO are essentially about broken promises****. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.*

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations*.*

…

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. *It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If complying with the recommendation immediately*

[59] **Annexure E-21:** Understanding the WTO: Settling Disputes, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

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proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to retaliate (to "suspend concessions or other obligations"). This is intended to be temporary, to encourage the other country to comply. ***It could for example take the form of blocking imports by raising import duties on products from the other country above agreed limits to levels so high that the imports are too expensive to sell — within certain limits.*** *The Dispute Settlement Body must authorize this within 30 days after the "reasonable period of time" expires unless there is a consensus against the request.*

In principle, the retaliation should be in the same sector as the dispute. If this is not practical or if it would not be effective, it can be in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective."

While no case appears to have been raised where GATS Article XIV(c)(ii) has been invoked, the Appellate Body ruled in *Argentina-Financial Services*

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(2016)[60] that for a measure to be justified generally under Article XIV(c), the respondent must show that:

"1) the measure was designed to secure compliance with ***laws or regulation that are not themselves inconsistent with the GATS****; and*

2) "the measure must be ***necessary to secure such compliance****."*

***

Conclusion

The Central Government has constituted the Kris Gopalakrishnan Committee to evaluate and submit its report on non – personal data. It appears that the hasty addition of S.91 has been done in the proposed PDPB 2019 without awaiting an in-depth evaluation by the said Committee. The PDPB 2018 was also subjected to extensive public consultations and stakeholders and public were afforded the opportunity to review and submit their inputs on the same. This is not the case with the draft of the PDPB 2019. The additions in S.2(B) and S.91 of the PDPB 2019 being untested, apart from the inherent flaws in its construction, the mandate for a transparent and inclusive process also warrants the need for deletion of these unsustainable provisions.

[60] Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*,

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Apart from the fallacy of introducing a single provision pertaining to non – personal data, in a PDP Bill, which does not deal with regulating its processing but to give access to the Government, at its whim and fancy, the draftsman has overlooked the obvious – that the very provision fails the test of constitutionality. Apart from not meeting any of the criteria set out by the Supreme Court on proportionality (considering validity of an enactment would be tested through adherence to all of the criteria enumerated) the provision, which grants unfettered powers to the Central Government with consultative powers to an Authority, intended to deal with personal data, to gain access through mere directions based on rules that it would formulate un to itself, is arbitrary and capricious to say the least.

Even if the provision were to be rewritten, its sustainability within the framework of a PDP Bill is suspect. Any regulation for non – personal data would require elaboration on the category of non – personal data, its use that such regulation intends to govern; protections extended to data fiduciaries or data processors; protection for data principals and exemptions if any, for Government purposes and the grounds therefor. Any access or intrusion on rights would be contingent on Government's alternatives and options. Most significantly, the limits of exercise of such options have to be set out in the enactment itself with only the implementation being left to the rules. The structure of the provision fails even on this aspect, as more fully set out herein.

It would be imperative for the Government to evaluate such a separate legislation, if required, to regulate non – personal data, keeping in mind the necessity, impact and purpose limitations enumerated repeatedly by the Supreme Court. The Report submitted by the Committee of Experts under the

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Chairmanship of Justice B.N. Srikrishna titled *"A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians" that discuss Non-Personal Data"* adverts to the category of non – personal data referred to therein as *"Community Data"*. Whilst explaining the same to be non – personalised data aggregated through a community of individuals, the Report refers to the need for separate legislation to protect the same. This merely points to the nuances to be addressed with respect to various forms of non – personal data and more significantly to the fact that the same cannot and ought not to be clubbed with personal data. To have a hasty addition into a proposed enactment intended for regulating personal data is counter - productive and will merely delay and dilute the implementation of a very important piece of legislation.

There are many reasons that India needs its Personal Data Protection enactment and very few reasons to delay or stifle the same. The primary focus ought to be protection of citizen data and enabling innovation and growth of emerging technologies. Combining both is not unique or contradictory – from the EU Directive of 1995 there has been equal emphasis on protecting personal data and also of enabling industry and growth through data.

India clearly understood the need to study the impact of non – personal data independent of the report of Justice B. N. Srikrishna Committee on Personal Data and hence appointed the Kris Gopalakrishnan Committee. To now scuttle this sensible move by including a provision, which on the face of it is untenable and bound to be struck down, will not only delay the much needed Personal Data Protection enactment but also embroil the proposed enactment in unwarranted litigations.

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The practical and legally tenable alternative is for the Government to delete its additions to the PDPB 2018 in S.2(B) and also S.91 in its PDPB 2019 and to reverse the clock to limit the personal data protection enactment to exactly what its objects and purpose state i.e., to protect personal data and to thereafter evaluate separately the mode and manner of handling non-personal data.

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