



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

The 2023 Digital Personal Data Protection Act: Evaluating its Strength in Protecting Citizen Data

Kermina Minoo Patel^a

^aGLS Law College, Ahmedabad, India

Received 29 August 2023; *Accepted* 20 September 2023; *Published* 25 September 2023

In the era of digital transformation, where personal data has become an invaluable asset, the need for robust data protection laws is more crucial than ever. The volume of data that is being collected by different industries in India is a gold mine that the giants of the industries are sitting on and this data must be protected by the law. Several data theft incidents in the country highlight the desperate need for specific legislation for data privacy and protection in India. The Supreme Court (SC) in 2017 through their landmark case, K.S Puttaswamy v Union of India¹ made the 'Right to Privacy' a fundamental right under Art. 21 of the Indian Constitution and under it acknowledged 'informational privacy'. After the 'Right to Privacy' was recognized as a fundamental right, the government of India set up a committee of experts on data protection under the chairmanship of retired justice B.N Srikrishna to formulate an act to protect the personal data of the citizens and thus various drafts of the Personal Data Protection Bill starting rolling out in the following years. After five years and four iterations of the Bill, The Digital Personal Data Protection Bill, 2023 received the assent of the President on the 11th of August, 2023, and has now become The Digital Personal Data Protection Act, 2023 (hereinafter referred to as the Act). In this article, we will understand the need for data protection, examine different aspects of the Act, and discuss the legal lacunas in the Act which will have to be addressed in the future.

Keywords: *data protection, consent, privacy policy, specified purpose.*

¹ Justice K S Puttaswamy v Union of India (2017) 10 SCC 1

INTRODUCTION

Before the Act was introduced, the only shields for the protection of online data were the Information Technology Act, 2000 (IT Act), its rules of 2011, and the Bureau of Indian Standards which contain provisions for data protection, breach, and, standardization. The IT Act provides the bare minimum protection of online data, Section 43A² of the IT Act provides for compensation for failure to protect data, and various sections deal with punishments for different cyber crimes, which include identity theft and violation of privacy and, Section 72³ provides a penalty for disclosure of confidential information without consent. Such bare minimum and vague regulations were not enough to protect the data of the people of the country. Entities that gather, collect, and, use the personal data of the people have to be regulated with stricter laws that will not let such entities handle data arbitrarily.

In recent years, India has witnessed exponential digitization; with talks about the Digital India Act, the government is now realizing the need to regulate data in the country, especially the personal and confidential data of the people. The Act will address privacy concerns, reduce cyber security threats, and instill confidence in businesses and their customers. The Act will create transparency and accountability for entities that collect data; this will ensure that the entities know that they are responsible for the data they collect from the citizens.

THE DIGITAL PERSONAL DATA PROTECTION BILL 2023: HIGHLIGHTS OF THE BILL

The implementation of this Act is revolutionary, it can be seen that the Act derives inspiration from the European Union's General Data Protection Regulation (GDPR) in defining terms like 'personal data'⁴ 'Data Fiduciary'⁵ 'Data Processor'⁶ & 'Data Principal'⁷. The Act establishes

² Information Technology Act 2000, s 43 A

³ Information Technology Act 2000, s 72

⁴ Digital Personal Data Protection Bill 2023, s 2(t)

⁵ Digital Personal Data Protection Bill 2023, s 2(i)

⁶ Digital Personal Data Protection Bill 2023, s 2(k)

⁷ Digital Personal Data Protection Bill 2023, s 2(j)

comprehensive responsibilities on the Data Fiduciaries, a collection of rights for individuals whose personal data is gathered and utilized which include the right to be notified of the purpose for which their data is used through a notice by the Data Fiduciary, The right to access information and the right to have their data deleted. It introduces obligations concerning the limitation of purposes for data usage and the corresponding obligation to erase the data once the intended purpose has been fulfilled. The legislation also establishes an overseeing body known as the Data Protection Board of India (Board). This Board holds the authority to investigate grievances and levy fines. Following are the key highlights of the Act:

SCOPE OF THE ACT

The Act will apply to the processing of all personal data which is in the digital form/ has been later digitized. This will include to processing of any data related to any citizen of India and the processing is taking place overseas. This is an essential clarification to ensure that the personal data of any Indian citizen is not misused anywhere. The 'processing' of data means 'a wholly or partly automated operation or set of operations performed on digital personal data, and includes operations such as collection, recording, organization, structuring, storage, adaptation, retrieval, use, alignment or combination, indexing, sharing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction.'⁸ The Act will cover such processing that is done for commercial purposes, as the Act states that it excludes data that is processed by an individual for personal or domestic purposes. The Act has included another interesting aspect which states that any information that is made public by the person who owns that information will be excluded from the purview of this Act.

DATA FIDUCIARIES AND THEIR OBLIGATIONS

A 'Data Fiduciary' is an entity to whom any citizen of India i.e. 'Data Principal' gives control over their personal data with their prior consent. Thus according to the Act, the Data Fiduciary will have control over the means of processing and the purpose for which it will be processed.

⁸ Digital Personal Data Protection Bill 2023, s 2(x)

Section 5⁹ of the Act talks about 'Notice' the inspiration of which has been taken from the GDPR present in the European Union. It is one of the most important obligations of the Data Fiduciary where it is mandatory to display a notice at any stage in any internet transaction where personal data will be collected. The Notice shall inform the Data Principal about the kind of information that is being collected and the purpose for which it is being collected. The purpose shall be a lawful one and shall not be forbidden by any law.

Another important aspect and obligation of the Data Fiduciary is consent which has been mentioned under section 6¹⁰ of the Act, which states 'The consent given by the Data Principal shall be free, specific, informed, unconditional and unambiguous with a clear affirmative action, and shall signify an agreement to the processing of her personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose.' This is a very tightly knit sub-clause for consent. The section further states that the request for consent shall be presented plainly and understandably in English or any other language specified in the eighth schedule of the constitution. At the same time, all Data Principals shall have the right to withdraw their consent at any time and it must be done with the same ease as when the consent was provided by them. Once consent is withdrawn, the Data Fiduciary will lose control over that data and it will have to inform its 'Data Processor' who processes the data on behalf of that Fiduciary to cease processing of such data.

DATA PRINCIPALS AND THEIR RIGHTS

The Act presents a specific list of rights for data subjects, which is narrower in scope when compared to the broader rights outlined in the GDPR. The Act ensures individuals' entitlements such as the right to access, the right to have their data corrected or deleted, and the right to receive prior notification before giving consent. Consequently, certain rights like the right to data portability, the right to object to processing beyond consent-based reasons, the right to be forgotten and the right to avoid fully automated decision-making are absent.

⁹ Digital Personal Data Protection Bill 2023, s 5

¹⁰ Digital Personal Data Protection Bill 2023, s 6

The Act introduces two different rights 1) the right to ‘grievance redressal’¹¹ involving the provision of a readily available contact point by the Data Fiduciary to handle complaints from the Data Principal, and the right to ‘appoint a nominee’¹² enabling the data principal to assign someone who can assert their rights if they become unable to do so due to death or incapacity.

EXEMPTIONS UNDER THE ACT

Under section 17, the Act provides for various exemptions. The Act states that it will not apply to certain cases where the processing is done for enforcing a legal right/claim, processing of personal data by any court or tribunal or any other body in India which is entrusted by law with the performance of any judicial or quasi-judicial or regulatory or supervisory function, the processing is necessary for amalgamation/merger/arrangement or reconstruction of two or more companies. There is a special provision provided for startups under section 17(3) which states ‘The Central Government may, having regard to the volume and nature of personal data processed, notify certain Data Fiduciaries or class of Data Fiduciaries, including startups, as Data Fiduciaries to whom the provisions of section 5, sub-sections (3) and (7) of section 8 and sections 10 and 11 shall not apply.’¹³

DATA PROTECTION BOARD

The powers of the Board include the ability to accept and investigate complaints made by Data Principals. However, this can only occur once the principal has exhausted the internal procedure for addressing grievances established by the relevant Data Fiduciaries. The Board can issue legally binding directives against individuals or entities that violate the law. It also possesses the authority to issue immediate actions for rectifying a data breach. This includes the imposition of financial fines and the power to direct parties toward ADR (Alternate Dispute Redressal) mechanisms.

¹¹ Digital Personal Data Protection Bill 2023, s 13

¹² Digital Personal Data Protection Bill 2023, s 14

¹³ Digital Personal Data Protection Bill 2023, s 17(3)

Although the Board is conferred with 'equivalent powers as vested in a civil court' – encompassing the summoning of individuals, admission of evidence, and examination of documents, the Act expressly excludes recourse to civil courts for the application of its provisions. This essentially establishes a practical constraint on an effective judicial remedy, mirroring the relief granted by Article 82 of the GDPR.¹⁴ The Act provides the opportunity for any individual affected by a decision made by the Board to file an appeal before an Appellate Tribunal. This Tribunal is specified as the Telecom Disputes Settlement and Appellate Tribunal established under other Indian legislation.

KEY ISSUES WHICH MUST STILL BE ADDRESSED IN THE FUTURE: The introduction of this act is revolutionary and this is the first time such strong data protection laws are going to be implemented in India, thus there are certain key issues and legal lacunas that the Act will have to address in the future

The scope of the Act does not extend to Artificial Intelligence (AI): The Act does not explicitly mention AI in any section/ clause. The current Act is silent about the implications of this act on AI. It should be noted that a certain provision in the law seems to facilitate the development of AI trained on personal data; the Act excludes from its application most publicly available personal data, as long as it was made publicly available by the data principal. Thus this in turn saves AI and lets it process information available in the public domain. Technically it can still be said that the Act will apply to AI models process data as long as the criteria in the Act are fulfilled. There is no express inclusion or exclusion of AI from the purview of the Act.

Notice under Section 5 must be tighter knit: The notice clause mandates a Data Fiduciary to explicitly state the purpose of processing, the rights and their enforceability of the Data Principal, and how the Data Principal may complain to the Board. This is not enough information; the Data Principal must be informed in detail under the notice provided by the Data Fiduciaries. One main aspect which has been avoided under the notice clause is informing the Data Principal about who has access to their data, and will the data be shared with any other

¹⁴ General Data Protection Regulation 2016, art 82

Data Fiduciaries/ third parties. The Act does provide a provision for this but cleverly has put the obligation on the Data Fiduciary to only disclose such information if it is specifically requested by the Data Principal.

Governments' overwhelming power under the Act: The Act empowers the Government to establish the Data Protection Board as an independent agency that will be responsible for enforcing the new law. The Board will be led by a Chairperson and will have Members appointed by the Government for a renewable two-year mandate. This has faced criticism as the entire Board will be appointed by the government, it is preferred if the Board will not have any government interference/influence.

The provisions of the Act will not apply on matters that the Central/State Government may notify, in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order, or preventing incitement to any cognizable offense relating to any of these, and the processing by the Central Government of any personal data that such instrumentality may furnish to it.¹⁵ Under section 16 of the Act, the Central Government may, by notification, restrict the transfer of personal data by a Data Fiduciary for processing to such country or territory outside India as may be so notified.¹⁶

CONCLUSION

The journey of the Bill, obtaining the President's assent and transforming it into an Act, has undeniably presented a dual-edged sword. On one hand, the enactment of this legislation holds the promise of more effectively regulating the ever-expanding cyberspace, potentially curbing the frequent occurrences of cybercrimes that have plagued our digital landscape. It signifies a vital step forward in the ongoing battle to safeguard digital privacy and security.

However, it is impossible to ignore the fact that the Act appears to have been rushed into implementation shortly after its introduction in 2023, without affording it the thorough parliamentary review that was vehemently advocated for by the opposition. This haste has left

¹⁵ Digital Personal Data Protection Bill 2023, s 17(2)(a)

¹⁶ Digital Personal Data Protection Bill 2023, s 16

a conspicuous trail of certain gaps and legal lacunas that still require attention and resolution. These unresolved issues could potentially undermine the very objectives the Act seeks to achieve.

As the Act begins to take root and influence the dynamics of the Indian cyberspace, it will undoubtedly be an intriguing process to observe. The challenges and complications stemming from these identified gaps in the legislation will likely surface, necessitating swift and effective action by the government. How these issues are addressed will play a pivotal role in determining the long-term success and impact of the Digital Personal Data Protection Act 2023. It is incumbent upon the authorities to ensure that the Act evolves to fulfill its intended purpose, safeguarding the interests and data of our citizens in an ever-evolving digital landscape.