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## Digital Personal Data Protection Act 2023 in light of the European Union's GDPR

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*Privacy being a moral and fundamental right is not a new concept in India and at a global level. Our country, with its massive digital population of close to 700 million active internet users has finally got its first privacy legislation, the Digital Personal Data Protection Act 2023 (DPDPA Act) after anticipation and patience, The landmark judgment of Justice K.S Puttaswamy (Retd.) & Anr v Union of India (2017)<sup>1</sup> popularly known as the Aadhaar case set the intention to have dedicated privacy legislation in the country. This article deals with the new privacy legislation with an in-depth discussion of its salient features and possible concerns. It further deals with a comparative analysis of the same with the European Union's (EU's) General Data Protection Regulation (GDPR) which is considered as the world's strongest set of data protection rules and acts as a perfect guiding principle for all the countries to take an inspiration.*

**Keywords:** *digital personal data, data, privacy, eu, gdpr.*

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<sup>1</sup> Justice K.S Puttaswamy v Union of India (2017) 10 SCC 1

## INTRODUCTION

*“It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage.”<sup>2</sup>*

- Willes, J., in *Millar v Taylor*

Privacy as a moral and fundamental right<sup>3</sup> is not a new concept, and its importance is well estimated. Expanding its ambit to the digital world, it is the right of individuals, as in the words of Westin, in his famous book ‘Privacy and Freedom’ as the claim of individuals, groups, or institutions to determine for themselves, how and to what extent information about them is communicated to others.<sup>4</sup>

But, how do we ensure this right is being protected at any cost? Coming up with a cure for a disease is not always an easy task, especially when a term like ‘privacy’ is dynamic and its interpretation also varies with the progression of society. Keeping up with its never-giving-up spirit, India has finally gotten its new privacy law, The Digital Personal Data Protection Act 2023 (DPDPA), issued by the Ministry of Electronics and Information Technology (MeitY).<sup>5</sup>

The DPDPA aims to create a regulatory framework for the processing, storage, and transfer of digital Personal data, either collected online or offline which was then digitalized.<sup>6</sup> It has prescribed rules and set accountability for various companies or Data Fiduciaries to comply

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<sup>2</sup> *Millar v Taylor* [1769] 4 Burr. 2303

<sup>3</sup> Jyoti Panday, ‘India’s Supreme Court Upholds Right to Privacy as a Fundamental Right- and It’s About Time’ (*Electronic Frontier Foundation*, 28 August 2017) <<https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time>> accessed 18 September 2023

<sup>4</sup> Luisa Rollenhagen, ‘Alan Westin is the father of modern data privacy law’ (*Osano*, 8 September 2020) <<https://www.osano.com/articles/alanwestin#:~:text=In%20%E2%80%9CPrivacy%20and%20Freedom%2C%E2%80%9D,was%20revolutionary%20in%20its%20approach>> accessed 18 September 2023

<sup>5</sup> Karan Saini, ‘Digital Personal Data Protection Law Raises Questions About Consistency With Right to Privacy Ruling’ (*The Wire*, 22 August 2023) <<https://thewire.in/rights/digital-personal-data-protection-law-raises-questions-about-consistency-with-right-to-privacy-ruling>> accessed 18 September 2023

<sup>6</sup> Ashneet Hanspal et al., ‘India: Analysis of The Digital Personal Data Protection Act, 2022’ (*Mondaq*, 4 January 2023) <<https://www.mondaq.com/india/data-protection/1267190/analysis-of-the-digital-personal-data-protection-act-2022>> accessed 18 September 2023

while elaborating on the rights and duties of the data holders or Data Principals, non-fulfillment of which attracts heavy penalties.<sup>7</sup>

Digital Data refers to any form of information or content that is stored in, or processed, in a computer system or computer network. <sup>8</sup> Dedicated legislation on personal data in itself is enough evidence to establish the kind of power it holds today; given we have deeply delved into the digital realm. Digital interactions have become frequent and integral, to the extent that it is capable of holding and controlling the identity of an individual to the world at large. The book by Westin “Databanks in a Free Society” has deeply addressed this issue wherein he mentioned the ever-increasing practice of computerizing personal records, and suggested the need for laws to be adapted to safeguard the rights and prevention of breaches of those rights, well in time.<sup>9</sup> The new legislation mentions that digital personal data should be used only for the purpose for which it is collected and that too, should be lawful, fair, and transparent, and hence, it restricts its unauthorized use, giving a sense of rightful ownership to the data principals.

The landmark judgment Justice K.S Puttaswamy (Retd.) and Anr v Union of India (2017) popularly known as the Aadhaar case, formed the precedent of this particular intention of the legislation, wherein the Supreme Court, although validating the much contested Aadhaar Act, clearly recognized the right to privacy as a fundamental right protected under Article 21 of the Indian Constitution, where the emphasis was given on the importance of protection of personal data from unauthorized use. The judgment also reflected the need for data protection laws to safeguard individuals’ privacy.

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<sup>7</sup> ‘The draft Digital Personal Data Protection Act 2022 released: Here are top points to note’ (*The Indian Express*, 21 November 2022) <<https://indianexpress.com/article/technology/tech-news-technology/digital-personal-data-protection-bill-2022-released-8276193/>> accessed 18 September 2023

<sup>8</sup> Adv Swati Sinha, ‘Data Protection Law in India- Needs and Position’ (*Legal Services India*, 25 November 2022) <<https://www.legalserviceindia.com/article/1368-Data-Protection-Law-In-India.html#:~:text=The%20Act%20defines%20'data'%20as,and%20may%20be%20in%20any>> accessed 18 September 2023

<sup>9</sup> Rollenhagen (n 4)

Later on, in 2018, the Supreme Court expanded its earlier judgment and declared the Aadhaar project, a biometric-based national identification system, should not infringe on the right to privacy, emphasizing the importance of obtaining informed consent for data collection and processing.<sup>10</sup> Hence, it is safe to say that the new legislation has inculcated some salient features that shall be systematically examined further in this research article.

## **SALIENT FEATURES OF THE DIGITAL PERSONAL DATA PROTECTION ACT 2023**

The legislation represents a significant stride towards comprehensive data protection and privacy rights in India. In this research article, we delve into the key features of the act, examining its fundamental principles, obligations imposed on data fiduciaries and processors, data principles, among other potential stakeholders, and its mechanism for enforcement and compliance.

### **The following are the key aspects of the Act:**

**Language and structure of the Act:** The language and structure of the Act have been kept simple, to aid a clear understanding of all the provisions, keeping in mind the technical nature of the subject matter and its scope. It sets out various definitions like Data fiduciary, Data principal, data processor, gain, loss, harm, etc. These definitions help in a comprehensive understanding of the scope and nature of its provisions in the Act. The Act negates any unauthorized collection of personal data by the data fiduciaries and allows the processing, storage, or transfer of data, as per relevant provisions, only for the purpose for which it is collected.

**Underlying Principles:** The principles on which the Act is based provide a solid foundation for responsible and ethical data handling practices. It sets out clear accountability towards those in charge of personal data by setting out rules and procedures to be followed. Fundamental

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<sup>10</sup> Kishita Gupta and Shristi Suman, 'Constitutional validity of Aadhaar Act in the case of Justice K.S. Puttaswamy (Retd.) and Anr. Vs. Union of India' (*iPleaders*, 14 September 2022) <<https://blog.iPLEADERS.in/justice-k-s-puttaswamy-retd-and-anr-vs-union-of-india/>> accessed 19 September 2023

principles such as the Right to privacy and ownership/ consent of the data principle form the spine for the structure of the data protection regime under the Act.

**Consent and Individual Rights:** The Act highlights the importance of the consent of the data principals to have a claim over their digital data, in the form of various provisions related to obtaining and managing consent, examining the requirements for valid consent and the rights granted to individuals, such as the Right to correction and Erasure of Personal data, it however, does not grant right to data portability and right to be forgotten to the data principal.

**Data Protection Board of India and Enforcement:** The provision for the establishment of a robust Data Protection Board of India is a very crucial one, for effective enforcement mechanisms. The Board, which is to be set up by the central government, is well-empowered with authority and plays an important role in overseeing compliance with the data protection provisions and ensuring the enforcement of individuals' privacy rights.

**The following are the key aspects of the board and the enforcement mechanism:**

The composition and manner along with terms of appointment of the Data Protection Board of India will be prescribed by the central government, which has raised questions on the independence of the board, which shall be discussed in greater detail, further in this article.

It is envisioned as an Independent regulatory body responsible for monitoring and enforcing data protection laws. Its main role includes regulating and supervising data controllers, data processors, and other relevant entities, along with handling complaints and disputes related to data protection violations. Moreover, it is empowered to issue Orders and impose Penalties in cases of non-compliance with the Act's provisions, which can go up to 250 Crores, and varies, based on the nature and severity of the violation. The Act also mandates organizations to promptly notify the board and affected individuals in the event of a data breach. The order by the board can however be challenged in High Court in case of any dispute.<sup>11</sup>

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<sup>11</sup> Hanspal (n 6)

**Significant Data Fiduciary:** The Act has recognized an additional category as Significant Data Fiduciary based on several factors such as sensitivity, volume, potential impact, etc. for which the central government has been empowered for classification. The provision has provided additional obligations for significant data fiduciaries as it recognized the importance of safeguarding certain kinds of data. Measures such as periodic Audits by an Independent Data Auditor and Data Protection Impact Assessments have been undertaken.

**The Penalty on Data Principals:** For the first time in the history of the data protection legislation in India, duties such as not registering a false grievance or complaint have been imposed on the data principal, the violation of which could result in penalties of up to 10,000 Rupees, which should be seen as a progressive step towards achieving equity and justice as it would discourage data principals from lodging false grievances and would avoid unnecessary wastage of time and resources.<sup>12</sup>

**Provisions regarding Grievance Redressal:** There have been sufficient provisions for grievance redressal that strengthen the confidence in safeguarding the data protection rights of the data principals in case of a breach of provisions of the Act. The data protection officer acts as the connecting link for grievance redressal. The data principals have the readily available means of registering a grievance with a Data fiduciary and those who are not satisfied with the response may register a complaint with the board.

**Alternate Dispute Resolution:** The provision for Alternate dispute resolution (ADR) is a progressive step for the addition of an efficient dispute resolution mechanism, which says that the board if it thinks fit, can direct this method to be adopted through mediation.

**Progressive Legislation:** The Act has used the pronouns 'she' and 'her' as a way to express its positive support and promote women's empowerment. These were some of the highlight features by incorporation of which the legislation aims to ensure transparency, accountability,

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<sup>12</sup> Harsh Walliat et al., 'Digital Personal Data Protection Act 2022: Juxtaposing the old and the New' (SCC Online, 16 December 2022) <<https://www.scconline.com/blog/post/2022/12/16/digital-personal-data-protection-bill-2022-juxtaposing-the-old-and-the-new/>> accessed 22 September 2023

and individuals' control over their data while striking a delicate balance between the legitimate interests of organizations and the broader goal of technological progress and development.

## **GENERAL DATA PROTECTION REGULATION & DIGITAL PERSONAL DATA PROTECTION ACT 2023: DRAWING PARALLELS AND FINDING DIFFERENCES**

General Data Protection Regulation or GDPR can be considered as the world's strongest set of data protection rules.<sup>13</sup> Brought by the European Union, these are comprehensive data privacy and protection regulations implemented on May 25, 2018. The law lays down stringent regulations regarding how any organization, whether within the EU or outside, collects, processes, and safeguards personal data and allows more extensive control over personal data to individuals. It was designed in a manner such that it would harmonize data protection regulations across all European Union member states and as such they were given the ability to make their own small changes to suit their own needs.<sup>14</sup>

GDPR's significance increases as it empowers individuals with new rights over their data. These rights include the right to access their own information, the right to be forgotten, and the right to know how their data is being used. It ensures that not only there is explicit and informed consent sought before the collection of such data, but also there are robust security measures and prompt reporting of data breaches. Non-compliance with GDPR would result in substantial fines, making it a compelling force in the global data privacy scene, setting a high standard for data protection practices worldwide. Digital Personal Data Protection Act, 2023 while a different legislation, has a lot of similarities as well as differences to the EU's General Data Protection Regulation.

### **The similarities are as follows:**

**Exclusion of Anonymized Data:** Anonymization requires the use of mathematical/technical methods to distort data adequately and irreversibly for the purpose of ensuring that

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<sup>13</sup> Matt Burgess, 'What is GDPR? The summary guide to GDPR compliance in the UK' (*Wired*, 24 March 2020) <<https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018>> accessed 19 September 2023

<sup>14</sup> *Ibid*

(re)identification is not possible.<sup>15</sup> Although not exclusively mentioned, the Digital Personal Data Protection Act 2023 suggests that it shall not be applicable to anonymized data<sup>16</sup> similar to Recital 26 of GDPR which expressly mentions that it does not apply to anonymized data as it no longer falls into the category of 'Personal Data'.

**Consent:** Consent is a fundamental part of the DPDP Act, 2023 as well as GDPR. Both, the Act as well as GDPR requires data fiduciaries to gain free, explicit, and informed consent from the data principals to process their personal data while ensuring that it is for a legitimate purpose. The Act further requires that the consent request by the data fiduciary shall be provided in several languages at the option of the data principal<sup>17</sup>.

**Data Processing without Consent:** Although consent is a major foundational principle of the Act, it still provides certain exceptions where the data fiduciaries can process the personal data of the data principals without their consent, for legitimate purposes. Section 17 of the Act provides these exceptions which include medical emergencies, rendering any service or benefit to the data principal by the State or carrying out any duty imposed by law, etc. This is similar to GDPR which allows data fiduciaries to process the personal data of the data principals without their consent in cases where it is necessary such as for a contract, legal obligations, vital interests, public authority, etc.

**Data Protection Officer:** The Digital Personal Data Protection Act, 2023 provides for the categorization of data fiduciaries into significant data fiduciaries (SDF) under Section 10, which in turn compels the data fiduciary to appoint a Data Protection Officer. Data Protection Officers are responsible for ensuring that the company is complying with the data protection regulations.

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<sup>15</sup> Deborshi Barat, 'It's Personal: A Roadmap for Data Mapping in Digital India' (*S&R Associates*, 13 September 2023) <<https://www.snrlaw.in/its-personal-a-roadmap-for-data-mapping-in-digital-india/#:~:text=The%20DPDP%20Act%20does%20not,application%20of%20the%20DPDP%20Act>> accessed 25 September 2023

<sup>16</sup> *Ibid*

<sup>17</sup> Rachit Bahl et al., 'Indian Data Protection Law versus GDPR – A Comparison' (*AZB & Partners*, 18 August 2023) <<https://www.azbpartners.com/bank/indian-data-protection-law-versus-gdpr-a-comparison/#:~:text=Hence%2C%20the%20GDPR%20contains%20broader,of%20any%20personal%20data%20br each>> accessed 25 September 2023



These officers also exist under Article 37 of GDPR although they are not limited to a certain class of data fiduciaries.

**The differences are as follows:**

**Categorization of Data:** The GDPR classifies personal data into a further subset, namely special categories of personal data<sup>18</sup>. Each of these categories is subject to varied compliances under the Regulation, however Digital Personal Data Protection Act, 2023 does not provide such subsets. All personal data have similar compliances under the Act.

**Offline Data:** Certain data of data principals are also stored offline, although this does not mean it is not personal. GDPR ensures that all personal data of a data principal is protected and hence encompasses even offline data. The Act, however, under Section 3 clearly states that it shall only apply to personal data collected in digital form or non-digital form which is digitized subsequently.

**Requirement for Notice:** Privacy notices to data principals are mandated under the Act as well as GDPR. While under the Act, these notices need to describe the personal data asked for, its purpose, grievance redressal, and consent withdrawal and are only required to be given when the ground for the processing of personal data by the data fiduciary is consent, these notices are required to be provided under the Regulation at the time or even before collection of personal data regardless of the ground for processing it. It also further specifies several mandatory details to be included in such privacy notice including but not limited to contact of data protection officer, details of cross-border transfer, period of retention, etc.

**Consent Managers:** While the GDPR and the Act both recognize the consent of individuals as one of the legal bases for processing personal data, the latter has introduced the novel concept of 'consent managers'<sup>19</sup>. These are people registered with the Data Protection Board who act as

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<sup>18</sup> Supratim Chakraborty et al., 'India: Comparing the Digital Personal Data Protection Bill, 2022 and the GDPR' (*Data Guidance*, 23 January 2023) <<https://www.dataguidance.com/opinion/india-comparing-digital-personal-data-protection-0>> accessed 19 September 2023

<sup>19</sup> *Ibid*

a single point of contact to allow data fiduciaries to manage their consent through platforms easily accessible.

**Jurisdictional Data Transfer:** The Act as well as the Regulation provides for the transfer of personal data by data fiduciaries to different countries, although while GDPR provides very specific restrictions on such data transfers such as conditional transfers, the Act has relatively fewer restrictions and data can be transferred outside India freely, except to countries in negative list which would be published by the Central Government.

**Data Breach Notification:** Data Breaches are a serious threat to the personal data of data principals and hence, the Act mandates that a data fiduciary must inform the Data Protection Board as well as all affected data principals of any personal data breach through a notice. Such notices are also mandated by the Regulation, although GDPR only obligates it if the impacted data principal is at high risk.

**Data of Children:** Data collected from children is treated differently under the Act as compared to GDPR. The Act is more stringent about the personal data of children and prohibits behaviour monitoring and targeted advertising of children. It also ensures that there is verifiable parental consent to the collection of personal data of children while prohibiting data processing which is detrimental to the well-being of a child. GDPR does not expressly mention or prohibit any of the above.

However, the Act is not of some significant concerns and debates among stakeholders, which shall now be discussed in detail.

### **CONCERNS ABOUT THE DRAFT PERSONAL DATA PROTECTION ACT 2023**

Among various concerns, there are a few significant contentions that have been raised regarding some of the provisions mentioned in the Act, which are mentioned below:

**The Ambiguity between Automated and Digitalized Data:** The Act defines the scope of the offline data i.e. it comes under the ambit of the legislation when it is digitized but that excludes a chunk of automated data out of the ambit of the Act.

**Right to data portability and Right to be Forgotten removed:** The Act does not provide these basic rights<sup>20</sup> which have been backed up as strong rights in landmark cases. Right to data portability means obtaining and transferring data from data fiduciaries to data principals for their use and allows the owner to have more control over their data. The Right to be forgotten empowers the data principals to have the right to remove or erase personal information, they no longer wish to be accessed by others.

**Packaging implied/ non-consensual consent as ‘Deemed Consent’:** The Act allows the data fiduciary to assume the consent of the data principal if the processing is considered necessary as per certain situations such as for the performance of any function under a law, for the benefit of the state, in case of some medical emergency, in employment purposes and specified public interest purposes such as national security, fraud prevention, etc.<sup>21</sup> But that does not save this provision from the attack of sharp criticism from various stakeholders and interested parties, one argument based on its ability to satisfy the Puttaswamy test.<sup>22</sup>

### **Data Protection Board of India - Is It an Independent Body?**

Instead of the previously proposed Independent Authority, the Act has come up with the provision for setting up the Data Protection Board of India, but there have been a lot of debates on the independence of the board, which has now been referred to as a mere controlling tool in hands of the central government, as the government has been empowered in regards to the constitution and functioning of the board, along with other provisions. Hence, there have been a lot of concerns about this blanket power to the central government giving a Surveillance state tint to it.<sup>23</sup>

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<sup>20</sup> Personal Data Protection Bill 2019, art 19

<sup>21</sup> Hanspal (n 6)

<sup>22</sup> Vallari Sanzgiri, ‘What are The Consequences Of ‘Deemed Consent’ Provision In The Data Protection Act?’ (*Medianama*, 15 December 2022) <<https://www.medianama.com/2022/12/223-dpdp-bill-2022-deemed-consent-understanding-consequences>> accessed 24 September 2023

<sup>23</sup> Hanspal (n 6)

## CONCLUSION AND SCOPE OF IMPROVEMENT

In the Digital Personal Data Protection Act 2023, there is room for improvement to address various concerns, as has been dealt with in great detail before, to meet the expectations and its target. One of the major concerns about the Act has been the excessive power of the central government under various provisions. Hence, that could be improved and worked upon.

Provisions, particularly those related to consent and obligations could be simplified. The Act is very narrow when it comes to covering the aspects of safeguarding the privacy of individuals, as its major focus is the personal data defining personal identity will lead to Identity Theft, excluding various other concerns related to privacy violation issues.

Hence, it can be said that this framework fails to make the protection of privacy, its primary objective, which is the need of the hour. Instead, it just focuses on the processing of digital personal data.

To sum up, the Act represents a significant milestone in India's efforts to establish a comprehensive legal framework for protecting personal data and privacy. The above-made suggestions would prove highly fruitful in increasing the effectiveness of the legislation. A well-crafted and balanced data protection law would not only protect individuals' privacy rights but also foster a trusted and innovation-friendly environment for business and contribute to India's participation in the global digital economy.