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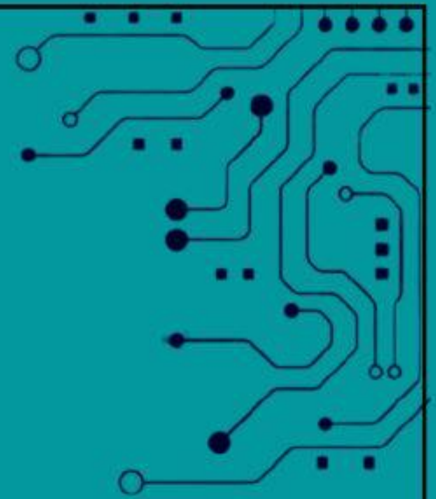

PANEL DISCUSSION ON

DIGITAL PERSONAL DATA PROTECTION BILL, 2022

17th Dec 2022

4:00 pm

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INTRODUCTION

The Draft **Digital Personal Data Protection Bill**, **2022** ("Bill"), has been released recently by the Central Government, which has entered the stage of public consultations initiated by the Ministry of Electronics and Information Technology. The Bill is one of the most consequential and anticipated legislations to be introduced in a long time and has come under immense scrutiny for its all-exempting provisions for the government, its deemed consent regime, and the new Data Protection Board that it constitutes. In leading the discussion on digital privacy, the Law and Technology Committee, in collaboration with the Indian Journal on Law and Technology, organized a panel discussion to address the Bill's shortcomings and suggest a way forward. The panel comprised the finest minds in the technology law sector, having the following members:

1. Ms Sriya Sridhar, Legal Manager at Setu.
2. Ms Malavika Raghavan, Senior Fellow at the Future of Privacy Forum.
3. Mr Vivek Reddy, Senior Advocate, Supreme Court of India and Telangana High Court.
4. Mr Divij Joshi, Doctoral Researcher, University College London.
5. Mr Jaideep Reddy, Counsel in the TMT Division, Trilegal.

Divij Joshi moderated the panel, whose discussions covered the following **three** broad themes:

1. Scope and Definitions of the Bill
2. The Deemed Consent Regime
3. The Data Protection Board ("DPB")

This report will first provide an Executive Summary of the discussion, followed by providing a structured report of each speaker's main ideas.

EXECUTIVE SUMMARY

The panel began on a comparative note, with each panellist comparing the Bill to previous iterations of data protection regulations introduced in India. While there existed unanimity among the panellists that the Bill provided a much-needed departure from the overly prescriptive nature of its previous iteration, multiple concerns were brought to light. While some panellists highlighted a lack of conceptual clarity in the expansion of the scope of delegated legislation, others brought out concerns regarding potential sectoral conflicts between the Bill and other entities such as the Reserve Bank of India ("RBI") and the Securities and Exchange Board of India ("SEBI") that have already constituted their own data protection regime. In introducing their concerns, the panellists agreed that the Bill has been perceived positively by the corporate sector due to the rolling back of various regulations present in the previous iterations, given that compliance costs would reduce.

First, the panel discussed the Bill's scope and applicability. Mr. Jaideep Reddy expressed that High Courts may ultimately shape several aspects of the scope and definitions of the Bill, given that they are the DPB's appellate authority. In his remarks, he discussed the inclusion of automated processing of digital personal data in the Bill and the potential exclusions from that scope. Ms. Raghavan stated that the introduction of concepts like "deemed consent" and "automated processing of digital personal data" introduce serious ambiguities that limit application to both the number of people and the types of data processing included under it.

Second, the panel discussed the implications of the package of rights contained in the Bill on common people. Mr. Vivek Reddy and Ms. Sridhar spoke on this topic and had unanimity over two issues. *First*, they agreed on the demerits of a drastic change, instead proposing iterative steps towards long-term change to be a better way ahead. *Second*, they agreed that while the Bill makes some progress on certain longstanding issues, it leaves out key things such as the right to be forgotten or algorithmic fairness. Mr. Vivek, however, proposed that some issues left out in the Bill could be addressed in the upcoming Digital India Act.

Third, the panel discussed the deemed consent regime contained in the Bill. The panellists agreed that the deemed consent regime was flawed. Ms. Sridhar argued that this regime would be prone to exploitation, given the availability of a residuary mechanism of taking deemed

consent u/s 8(9) of the Bill. She highlighted that deemed consent would only increase confusion in regulation. Finally, she also pointed out how the same could be irrelevant for certain sectors such as fintech who never take refuge under such a provision. Mr Vivek Reddy also argued that the open-ended meaning of the term "public interest" in the provision, along with the expansive scope of delegated legislation is undesirable. Further, he highlighted the inconsistency between requirements of notice and the provisions on deemed consent. Ms. Raghavan added to this criticism, highlighting the importance of the regulatory structure that the Bill proposes. Finally, she concluded that enforcement will be the true test of the bill.

Lastly, the panel discussed the Bill's regulatory structure. Mr. Jaideep Reddy highlighted the lack of *suo moto* powers available with the DPB, along with the possibility of using the DPB as a sandbox for the general digital functioning of tribunals. In addition to the lack of *suo moto* powers, Ms. Raghavan listed areas of improvement in the structuring of the regulator under the Bill. For this purpose, she used the example of SEBI to highlight how successful regulators have a quasi-judicial body separate from the executive, which is absent here. She concluded that the structure of the regulator was not a result of state capacity but rather political will. Ms. Sridhar also highlighted the need for harmonizing legislations in the future to prevent a tussle between data regulators and other sectoral regulators such as RBI and SEBI.

The panel then answered questions from the audience, followed by a vote of thanks from the Convenor and Joint Convenor of the Law and Technology Committee.

I. Opening Remarks

Shikhar Sharma, Convenor of the Law and Technology Committee, welcomed the panellists on behalf of the Indian Journal of Law and Technology and the Law and Technology Committee.

Mr. Joshi introduced the purpose and agenda of the discussion. He highlighted that this panel serves as a platform to have a dialogue on what an Indian data protection law should look like. He stated that the panel shall attempt to unpack Bill from a policy perspective, discussing what should be removed and what should stay. He introduced the rest of the panel and asked all panellists for their opening statements. He asked them to use their statements to respond to the prompt "Is the Bill any different from its previous antecedents, and is the Bill more suited to the Indian digital economy as some commentators have considered it to be?".

Mr. Jaideep Reddy highlighted that this Bill iteration is less prescriptive, but was cautious about classifying it as either 'good' or 'bad'. He opined that the manner of rule-making done via changes to the final bill would determine the ultimate shape of the bill. He sensed a more positive attitude among businesses for this iteration, whereas there may be a different lens from an individual perspective.

Ms. Sridhar agreed with Mr Jaideep Reddy on the conception of the Bill as being positive for businesses but noticed that one of the key differences between the Bill from its previous iterations and the regime of Sensitive Personal Data Rules in the Bill's previous iteration is the amount of detail that it leaves to delegated legislation. This, she highlighted, raised issues of separation of powers. She noted that the notifications released under the Bill would be key. The notifications would make everything, from individual rights to corporate compliance, difficult to track. She also highlighted the lack of conceptual clarity in the Bill which she believes stems from a lack of conceptual clarity. She highlighted the same through the bills confusion of consent managers as data fiduciaries given that consent managers neither decide the purpose of nor the means of processing of data. Finally, She also highlighted a foreseeable clash between sectoral regulations. This is concerning since RBI has gone ahead and decided to create its own data protection regime.

Mr. Vivek Reddy highlighted that the Bill is a big deviation from previous bills. The Srikrishna Committee's Bill is widely considered the best one, but he considered that it would've been a compliance havoc. He noted that there is debate on whether the GDPR has increased privacy or created data bureaucrats instead. The Srikrishna Committee's Bill would've been unimplementable in India, and this Bill marks progress from it. He agreed with Ms Sridhar that there is significant conceptual confusion in the Bill, but argued that it is still a good departure from that of the Srikrishna Committee. Ideas such as those of dual compliance, a galaxy of rights, and the discretion of the regulator have been rightly cut. The Srikrishna Committee had effectively copied the GDPR and added to it. Implementing their version would have been like putting a Rolls Royce on a village road.

Ms. Raghavan said that the Bill isn't a data governance bill. It is completely different from that of the Srikrishna Committee's, and also can't be read in isolation. There would be the Digital India Bill and the Draft Telecom Bill that are released soon, and the government's idea is to bring a package of legislations as the EU did. She noted that the primary difference between India and the EU lay in the former's dramatic scaling down of regulatory ambition. She highlighted that the Bill is not undertaking a delegation of powers to the regulatory body, and that they remain with the Central Government. On sectoral authorities, she highlighted that the global experience is that the main authority must have competence, which the authority proposed under the Bill doesn't. The Bill is functioning as a regime of deemed consent. She highlighted that the limited rights from Srikrishna Committee's Bill have fallen away. This is hardly a data governance bill, and perhaps the Digital India Act will prevent this Bill from being a toothless tiger.

Mr. Joshi highlighted the revised scope of this legislation within the new digital governance ecosystem, which is comparable to the Data Act and other regulations that the EU has introduced with its digital package. The scope of the Bill has been altered. No longer does it distinguish between sensitive and personal data, non-personal data, and personal data. Concepts of anonymization and pseudonymization, which had distinct regulatory regimes within the GDPR, also do not find a mention here. He sought responses on the implications of the scope of the Bill from the panellists.

II. Scope of the Bill and its Definitions

Mr. Jaideep Reddy highlighted a few changes in the scope of the Bill from its earlier iterations. *Firstly,* there is a clear emphasis on automated processing of digital data, which wasn't present to this extent earlier. Offline and manual processing of information was covered to an extent under the previous draft. This Bill has carved out that space for those discussions. There will, however, be arguments over whether something is digital or not. There will also be some turf debate on what is automated and what is digital, and people will argue edge cases. *Secondly,* another area of scope is extraterritoriality and the coverage of foreign entities. A nexus test is often used in connection with goods or services provided to Indian persons or their profiling. The Bill contains a lesser threshold than other rules that legislations like the Consumer Protection Act, 2019 use (the Consumer Protection (E-Commerce) Rules, 2020). Jurisprudence on the issue indicates that there needs to be a nexus. The question of whether a foreign company offering one-off services to India would be covered is a debate that still remains. *Thirdly*, the question of scope is whether something amounts to data/personal data at all. It is possible to undertake a carve-out for publicly available personal data, such as the footage from CCTV cameras. The question of its free use remains, for the question of the reasonable expectation of privacy would have to be addressed. Personal data is defined as identifying a person based on that data. Earlier definitions necessitated the presence of this information in combination with other data. The exclusion of this term gives us more leeway for processing. If you have someone's email that doesn't say their name, is that no longer personal data, and can it be processed? On another database, it may be linked with a name. Interestingly, there is also a provision for appeal to the High Court from the Data Protection Board. Eventually, High Court jurisprudence could lay down guardrails around these rules.

Mr. Joshi highlighted that jurisprudence is necessary here. He questioned the utility of definitions such as that of "personal data" u/s 2(13) of the Bill that necessitate personal identification, given that a lot of automated processing happens using big data or Artificial Intelligence that doesn't need specific identification. He highlighted that privacy law may need to go beyond these definitional questions of determining what's data and what's not. He asked the panellists to consider whether the Bill is future-looking, given the types of technologies being adopted on the internet.

Ms. Raghavan highlighted that the Bill is one step forward and back on definitions. She stated that combinatorial data is a fundamental part of modern data processing. She agreed with the removal of categories such as personal/sensitive-personal data within the Bill, arguing that a watertight separation among them was difficult to draw. This may be a positive move, for all data is being protected instead of only personal/sensitive personal data. There could, however, be two things that make one doubt this interpretation. *First,* the Bill has introduced an idea of harm, which is very problematic compared to the modern privacy jurisprudence and the way it has evolved over the last 300-400 years. The list of harms bears no resemblance to what we think of as privacy harms, maybe only identity theft. *Second,* on personal data processing, she stated that the starting definition on which it hinges is the automated processing of digital personal data, and if the Bill is passed like this, it won't apply to many people and types of data processing.

Mr. Joshi concluded the discussion on the definitions offered under the Bill and asked the panellists to discuss whether the reduced scope of the package of rights would be harmful to common people.

III. IMPLICATIONS OF THE PACKAGE OF RIGHTS ON COMMON PEOPLE

Mr Vivek Reddy highlighted under the IT Act, 2000 there were privacy rules for which there was an adjudicatory officer and a Cyber Appellate Tribunal, which has been subsequently abolished. He emphasized upon the need to focus on where we are right now. We are currently on step 1 and are working towards an ideal privacy regime. We need a robust data protection law, and therefore cannot press the accelerator to go straight to 180 from 0. He stated that whenever we have pressed the accelerator, for example, with regards to the Arbitration and Conciliation Act, 1996 or the Competition Act, 2002 we have had to make several adjustments because our dream vision didn't work out and we had to eventually limit rights. GDPR was the product of several iterative processes before it, such as the Article 29 Data Protection Working Party. One of the factors behind the fall in Europe's GDPR was compliance issues. He opines that the Bill is the place to start, and slowly build state capacity. This Bill doesn't include the right to be forgotten and data portability. Srikrishna Committee's Bill created an adjudicatory authority, which had to be occupied by an officer who has some experience in constitutional law, privacy law, etc. Even law firms are finding it difficult to find such officers. He

commented that we must look at issues of state capacity before introducing bills that will end up being paper tigers.

Ms. Sridhar highlighted that the omission of having a separation between sensitive and non-sensitive data is a positive change from the data principals since their rights would not only apply to sensitive data. She highlighted that this separation is beneficial as it makes regulation easier. A final determination on this, however, can be made with greater clarity after six months of the Bill coming into effect. There will be preemptory compliance by companies, and they will incorporate it within their contracts and businesses. Borrowing from Mr. Vivek Reddy, she agreed that we cannot go from 0 to 180 immediately. She says, however, that there are some things the Bill could have incorporated but didn't. One of these is the concept of algorithmic fairness, which could have been included as a part of privacy notice requirements. From a user perspective, she holds, it was the right thing to do. On the right to be forgotten, given the absolute confusion among High Courts, she was hoping for some criteria in the Bill. These were small steps that the Bill could've taken, but didn't.

Mr. Vivek Reddy believed that algorithmic fairness was a complex issue and could be a part of the Digital India Act. On data localization, the Bill undertakes a big improvement as compared to its earlier iterations. He highlighted that India has been a beneficiary of data globalization – our outsourcing industry in Bangalore, Hyderabad, Pune and Chennai was established due to the cross-border flow of data. Any form of data patriotism could hurt Indian consumers and small businesses.

Mr. Joshi concluded the discussion on the implications of the rights in the Bill on common people and asked the panellists to move to the next theme of discussion, which concerns the regime of deemed consent under the Bill.

IV. DEEMED CONSENT REGIME

Mr. Joshi highlighted that the Bill uses deemed consent as a basis for processing information. When he read the 2017/19 drafts, he was impressed with the standards they used to determine consent, which were drawn from the Indian Contract Act, 1872 and were also based on contract law jurisprudence. In this Bill, the standards have moved to the other side, where consent is

considered deemed. There have also been changes in the framework on how notice is to be provided. He considered that it is teleologically difficult to determine how to provide consent if notice isn't served on you.

Mr. Vivek Reddy stated that instead of deemed consent, there could have been the use of the term "legitimate ground for processing". It is, however, quite open-ended, given the use of the term "public interest" (Section 8(8)) to provide and the things that are left to delegated legislation. It is unclear as to what all can come within the deemed consent regime. He highlighted that questions on public interest-based processing are many, given the general ambiguity surrounding when the deemed consent regime would be applicable. In a deemed consent framework, there is language confusion in the Bill on how it applies.

Mr. Jaideep Reddy stated that if there is deemed consent, it is considered that you have indeed given consent. He pointed, therefore, towards the inconsistency between requirements of notice and the provisions that deem consent to having been taken. A notice can, however, be given after the processing. He highlighted that the data principal has a right to call for a query on their data using their Right to Information, and civil society will have to work on seeking accountability.

Mr. Joshi stated that even broader exemptions on processing have been provided u/s 18 of the Bill. Under deemed consent, Central Government can provide for all situations where processing can be undertaken without notice on the data principal. While the 2017 Draft of the Bill spoke of the language of necessity and proportionality, that's not present here.

Mr. Vivek Reddy stated that he agreed with the Srikrishna Committee on this principle. If data processing had to be done, it must be done in a necessary and proportionate manner, and by law. Any government, however, would have been quite reluctant to read such requirements in the Bill. On deemed consent, he pointed out that even GDPR has a component called contractual necessity, where data can be processed without notice on the data principal. The complete exemption that the Bill offers to the state, however, is its biggest drawback.

Ms. Raghavan highlighted that the Bill is a bit better as compared to its previous iterations. She stated that the Bill is clear that if you're processing foreigners' data with a foreign company, this framework does not apply. On deemed consent and the public interest exception, she stated

that there is a whole bouquet of things for which it can be given. It is unclear what is left. Section 8(9), she highlighted, is an interesting and audacious clause. You can then prescribe further fair and reasonable purposes for all areas where there can be deemed consent. This is very concerning. She highlighted the danger in moving from the grounds of processing to the deemed consent regime. She also discussed the importance of the regulatory structure that the Bill proposes, for enforcement will be the true test of the Bill. A statutory body is being created for the enforcement of its framework, which is the DPB. This body, of course, will be "state" under Article 12 of the Indian Constitution, which would have to address the plethora of ambiguities that are present in the Bill.

Ms. Sridhar highlighted that the deemed consent regime is redundant at best and dangerous at worst. She stated that no entity, in practical terms, relies upon deemed consent provisions to process data without consent. RBI and SEBI have already made their regime, which applies to the financial sector. She highlighted that deemed consent could have been excluded with regards to the processing of children's data. There is a residuary ground u/s 8(9), which also creates space for exploitation. It doesn't make anything easier to navigate and introduces a lot more confusion. She stated that while the rest of the world is dealing with nuanced issues such as how to regulate dark patterns, as we are quite behind in the types of conversations about data processing.

Mr. Joshi concluded the discussion on the deemed consent regime and requested the panel to move to the next theme of discussion, which is the regulatory structure that the Bill proposes.

V. REGULATORY STRUCTURE

Mr. Joshi proposed that the structuring of the body to ensure the presence of regulatory capacity has not been done properly and that this will have significant implications for the enforcement of rights.

Mr. Jaideep Reddy highlighted that the regulatory structure will depend on complaints that affected persons or the Government of India makes to the DPB, for it doesn't have the power to take *suo motu* cognizance. Appeals from this body will be to the High Courts, which will be instrumental in shaping jurisprudence. He contrasted this body with the Central Consumer

Protection Authority, which has *suo motu* powers. It is, therefore, only a reactive body. When people feel their rights are being violated, they will have to approach it. He also highlighted that the body will be digital in nature, meaning that it will have filings and hearings in a digital manner. This can serve as a sandbox for other adjudicatory bodies.

Mr. Vivek Reddy highlighted that data breaches can be there, and the Computer Emergency Response Team ("CERT") is present in India to address such issues. In situations of data breaches, an entity needs to notify three entities: the user, CERT, and the DPB. He noted that the trigger to initiate proceedings with the body is low and the penalty that it may impose is high. He noted that while the earlier bill had a discretionary notification mechanism, this one has a mandatory one.

Ms. Sridhar highlighted that Section 21 of the Bill states that the Board will function as an independent body. Its composition u/s 19(3) is such that all its members are appointed by Central Government. She stated that the triple notification structure isn't futile, but is rather useful. She highlighted the utility in the harmonization of legislations, for the tussle between this body under the Bill with RBI and SEBI is foreseeable. Commenting on the account aggregator framework she pointed out how account aggregators who would be consent managers under the bill are already regulated by the RBI. Therefore, requiring them to mandatorily register with the DPB could cause degree of a tussle among regulators with regards to consent managers.

Ms Raghavan stated that in previous versions, the DPB had been given five powers including rule-making, ~~,~~monitoring and enforcement. In the Bill, the opportunity could have been learn from the experience of - countries like Indonesia and Thailand, which considered ways in which lower-capacity countries could still have cost-effective mechanisms to be able to handle inquiries and grievance handling. She pointed towards successful regulators like SEBI, which have a separate adjudicating wing. She suggested that a quasi-judicial body should ideally be separated from the executive, but this one isn't. It doesn't have any rule-making function, only an enforcement function. Further, ~~it~~ she highlighted that the DPB -cannot take *suo motu* action in most cases, except in the peculiar situation where a data principal breaches their responsibilities~~,~~ (for which Section 16(3) can be referred to). She argued that the problem is not of state capacity problem, instead being one of political will.

Mr. Joshi concluded the discussion on the Bill's regulatory structure and began the Question-Answer session.

VI. QUESTION-ANSWER SESSION

The first question concerned the implications of the processing of data outside India and its implications for localization.

Mr. Vivek Reddy stated that data is more secure if it is outside India. He stated that data protection legislations should not focus on data localization. Previous legislations were driven by patriotic concerns, which this Bill doesn't do.

Ms. Sridhar agreed with the proposition that the liberalization of data localization is good in many ways. But with regards to payment and cards data, she stated that it will be localized. She also remarked that it is ironic we borrow the adequacy framework from the EU which does the same. However, India itself would not qualify for an adequacy decision from the EU given the broad governmental exceptions under this bill and lack of criteria for surveillance.

The second question concerned structural safeguards with the processing of information by the government.

Ms. Raghavan stated that the safeguards of necessity and proportionality in the use of governmental exceptions haven't been placed, which may also open up a constitutional challenge. Therefore, this requires setting up a body that can balance between the state's desire for data and the citizen's right to privacy.

The third question concerned the implications of the Bill on the digital public goods ecosystem.

Ms. Sridhar highlighted that all ecosystems are quite nascent, and even the participants and regulators are unaware of its contours. In terms of long-term impact, she stated that it's not likely that the bill would significantly impact this given that each of these are subject to very

detailed guidelines and standards with respect to data protection She did, however, foresee potential friction among different regulators.

The fourth question enquired about compensation schemes when the rights of data principals are violated.

Mr. Jaideep Reddy stated that the jurisdiction of civil courts is barred (Clause 22), and whether it was intentional to bar someone from going to civil courts to seek compensation is unclear, since Section 43A of the Information Technology Act, 2000 currently contains a compensation provision. He stated that he didn't have an immediate answer to the status of the compensation regime under the Bill.

Ms. Raghavan stated this was the same debate that came up in a similar clause in the Aadhar Act, 2016, a portion of which was struck down by the Supreme Court. She expressed hope that we won't have to wait for litigation to solve this drafting problem.

Shikhar Sharma and **Siddharth Johar,** Convenor and Joint Convenor of the Law and Technology Committee respectively, delivered the vote of thanks, and concluded the Panel Discussion.

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