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In data we trust: what's on the table if the new data bill gets passed



Synopsis

India is the world's largest data market after China, yet it doesn't have a privacy law. The latest draft of the Digital Personal Data Protection Bill, which was tabled in Parliament last week, takes us closer to having a legislation.

On August 3, 2022, when the **Personal Data Protection** (PDP) Bill was withdrawn from Parliament, government officials acknowledged the many complexities and serpentine iterations that had crept into the bill through the years.

A senior official from the Ministry of Electronics and Information Technology compared the bill to a broth that had been touched by too many cooks. In short, the bill was spoiled and could not be used in its then avatar.

A year later, Union Electronics and Information Technology Minister Ashwini Vaishnaw has introduced a succinct, simpler version of the privacy bill in Parliament.

Envisioned as an umbrella framework, the bill would provide for processing of digital **personal data** in a manner that recognises the rights of the

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individual, as well as the need to process such personal data for lawful purposes, Vaishnaw said.

Consultations for the bill have been extensive and exhaustive, with more than 21,000 comments and suggestions received from technology and public policy personnel, industry executives and everyday internet users over the last three months.

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But despite these efforts, the introduction of the bill on Thursday saw opposition from several members of opposition parties in the Lok Sabha, with critics calling it weak on user data protection, but with wide-ranging exemptions to the government.

The provisions of the bill aim to give tighter and better control to internet users over the use of their personal information by all kinds of companies and businesses, who will be known as data fiduciaries.

Such data fiduciaries, the bill states, cannot process personal data of any user without their explicit consent.

Companies which process such personal data must obtain consent from the user by giving exact details of the purpose for which the data is collected and delete it as and when this consent is withdrawn.

<p>2011-2014 Ministry of Personnel, Public Grievances and Pensions starts coordinating Draft Privacy Bill's versions dealing with data protection and surveillance reform. Work is halted.</p> <p>OCTOBER, 2012 Justice AP Shah-headed Privacy Committee presents its integral report on international and national privacy standards.</p> <p>JULY 2017 The Ministry of Electronics & Information Technology constitutes a committee of</p>	<p>experts, chaired by Justice BN Srikrishna.</p> <p>AUGUST 2017 SC reaffirms 'privacy' as a fundamental right in Justice KS Puttaswamy vs Union of India.</p> <p>AUGUST 2017 Justice Srikrishna Committee on Data Protection is constituted.</p> <p>JULY 2018 The Srikrishna Committee releases a 176-page report, proposes the Personal Data Protection Bill, 2018 (Draft Bill)</p>
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“The bill is a forward-looking legislation that will have a horizontal application across sectors and will also impact businesses of all sizes,” said Shahana Chatterji, a partner at law firm Shardul Amarchand Mangaldas & Co, adding that the bill strikes “an important balance in protecting users’ rights and promoting innovation in digital businesses”.

The consent architecture provided in the bill is similar to other digital privacy provisions across the world, which also give users more control over their data and how it is processed by corporates, but with the option of getting the data deleted.

<p>OCTOBER 2018 The Ministry of Electronics & Information Technology closes consultation on the Draft Bill.</p> <p>2019 Revised draft of the Personal Data Protection (PDP) Bill introduced in Lok Sabha as PDP Bill, 2019, with recommendations from Srikrishna Committee report, aiming to protect digital and non-digital data.</p> <p>DECEMBER 2019 PDP Bill, 2019, is sent to a joint Parliamentary</p>	<p>Committee (JPC) for review from both Houses of Parliament.</p> <p>DECEMBER 2021 Two years later, the JPC shares its report with a new version of the law – The Data Protection Bill, 2021 (DPB, 2021). DPB 2021 is not placed before the Parliament yet.</p> <p>AUGUST 2022 Minister for Communications and Information Technology Ashwini Vaishnaw is granted permission to withdraw the draft DPB,</p>	<p>2021, from the Lok Sabha.</p> <p>NOVEMBER 2022 The Ministry of Electronics and Information Technology releases the draft Digital Personal Data Protection Bill, 2022, [DPDPB, 2022] for public consultation.</p> <p>AUGUST 2023 The Ministry of Electronics and Information Technology introduces the draft Digital Personal Data Protection Bill, 2023, [DPDPB, 2023] in the Lok Sabha.</p> <p>Source: Internet Freedom Foundation</p>
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The bill has also moved to a “blacklisting” approach for cross-border transfer and processing of personal data, meaning that the government would specify certain geographies where data cannot be processed.

“The default is that we trust them. In the event that there is any signal or sign or evidence that it is an untrusted geography where the DPDP is not being enforced, cannot be enforced, or data processes in that geography are wilfully negligent

of the law, or are violating the law, then that becomes a blacklist,” said Rajeev Chandrasekhar, Minister of State for Electronics and Information Technology.

This is in contrast with the approach taken by other major jurisdictions such as the European Union, where the provision is to identify and whitelist jurisdictions that follow and implement adequate legal standards for processing of data within their geographies.

And though the latest version of the bill suggests a penalty of up to Rs 250 crore per instance of data breach and a maximum penalty of Rs 500 crore for all such breaches, it does away with criminal penalties, including jail terms, envisioned under the older versions.

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“The bill will provide for processing of digital personal data in a manner that recognises the rights of the individual, as well as the need to process such personal data for lawful purposes.”

Ashwini Vaishnaw, Union Electronics and IT Minister



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Data protection board

To ensure that the rights of digital citizens are protected, the government has proposed to set up a data protection board (DPB), headed by a Chairperson.

The DPB has been empowered to, among other things, impose penalties, summon data fiduciaries, inspect the books, accounts and statements, testify company officials under oath and suggest to the government to block internet intermediaries from the Indian space in cases of repeated and severe violations.

Experts believe that the DPDP Bill framework will assign responsibility to various players in the

ecosystem and will also evolve with time.

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for Electronics and IT



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“It is important that we do not have outcomes like the European cookie law, which everyone blindly clicks on, making it useless. So, evolution and engagement with all players is important,” said Anand Lunia, founding partner of investment firm India Quotient.

The EU cookie law, also known as the ePrivacy Directive, is a privacy legislation that requires sites to get consent from visitors before placing cookies on their devices.

Increased compliance burden

The most immediate concerns with the new bill are around the increased cost of compliance that may hurt Indian startups.

“Compliance with the requirement to implement security and technical measures and safeguards to protect data is likely to be both time and cost intensive,” said Rahul Rai, co-founder of law firm Axiom 5 Law Chambers. “Experience from Europe on compliance with GDPR (general data protection regulation) shows that the increased compliance cost affects smaller companies more than larger ones with deep pockets and even deeper experience in crafting compliance measures.”



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The new privacy bill also gives data fiduciaries the option of a mea culpa, which will help them move on from breaches that did not happen through their mistakes.

“It is important to give businesses the chance of moving ahead from mistakes without entangling them in legal processes. If a company voluntarily discloses their data breach, the DPB can impose a certain penalty and other requirements in the form of mandatory policy changes. It will be like a plea bargain provision within the US legal system,” a senior government official said.

Moving away from setting the benchmark for “significant data fiduciaries” by the number of users on their platform, the bill enables the government to define parameters for these on the volume and sensitivity of personal data processes, the risk to users if such data is breached and the risk it causes to the electoral democracy process, or security of state.



“It [the bill] gives sweeping powers to the government and enables it to become a surveillance state.”

Anupam Mittal, founder, Shaadi.com

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Absence of deemed consent

The absence of the provision of “deemed consent” has also taken public and tech policy experts and organisation by surprise. Deemed consent is a legal concept that allows for the processing of personal data without explicit consent when certain conditions are met.

The Information Technology Industry (ITI) Council said that the deemed consent provision was critical for companies processing personal data.

“Further work is needed to ensure the framework provides clear legal grounds for businesses to process data where consent is not possible or technically feasible, such as for the prevention of fraud, ensuring high network security, and for other essential business activities,” said Kumar Deep, ITI’s country director for India.

In the current bill, the provision of “deemed consent” [first introduced in the 2022 version] has been replaced with “certain legitimate uses” where a platform can process data of a person.

Cross-border data transfers

Though the bill allows transfer and processing of personal data transfer to countries or geographies outside India, companies have called for more clarity. “There is little clarity regarding whether mechanisms such as binding corporate rules or contractual clauses can still be operationalised. There also needs to be clarity on the procedures and the factors to be considered by the government while creating the negative list,” said Kazim Rizvi, founder of policy think tank The Dialogue.

The relaxation of cross-border data transfer conditions, however, is being seen as a big win for the industry, Aparna Gaur, leader of intellectual property, technology, media and education practices at law firm Nishith Desai Associates, said.

“The bill also protects the interests of businesses by imposing certain duties on data subjects, such as a duty to not impersonate, file frivolous

complaints, suppress material information, among others. In its current form, the bill provides for a skeletal framework and bestows rule-making powers on the government on various aspects,” Gaur said.

Child protection clauses

However, not everyone is convinced. Some, like Anupam Mittal, founder of Shaadi.com, felt it appeared to be a “hurried bill”. “It also gives sweeping powers to the government and enables it to become a surveillance state. Whether it’s dystopian or not will be determined by the ‘how’, which is conspicuously missing from the bill,” he said.

Mittal also flagged concerns surrounding child gating clauses. Industry experts had opposed the clause defining the age of children as 18 and below.

Officials said that if internet and social media platforms demonstrate that they can process data of children in a “verifiably safe” manner, exceptions can be created and a lower age threshold can be prescribed.

As of now, however, the bill has stringent conditions for processing data of children and parental consent is a must, only with certain exemptions. The bill also states that undertaking tracking and behavioural monitoring of children is prohibited, again with certain exemptions. It also excludes processing of personal data put out in the public domain, which will impact the operation of search engines and AI chatbots.

“How does one get parental approval for everyone? If it’s enforced, every user on any digital service would have to verify that they are not a child. It will break the internet and give companies private data about users, while making life very difficult for businesses,” Mittal said.

Impact of individuals

The Data Protection Board has the power to conduct inquiries, pass interim directions and recommend blocking. Aggrieved parties can appeal against decisions of the board with the designated body — The Telecom Disputes

Settlement and Appellate Tribunal.

“Thanks to the introduction of detailed legitimate use exceptions to consent, categorisation of significant data fiduciary, and the establishment of the Data Protection Board, the law promises to be more robust and suited for current business requirements,” said Namita Viswanath, partner at Indus Law.

However, she said that there are wide powers still reserved for the central government to make exceptions, as under the 2022 version of the bill, raising apprehensions about the potential for unguided and arbitrary rule-making powers.

But at the crux of it all, experts felt that the impact of the proposed data privacy legislation on individuals is significant. “It grants enforceable rights to users, imposes responsibilities on companies, and advocates for the establishment of a Data Protection Board as an adjudicatory entity to address user grievances,” said Ibrahim H Khatri, founder and CEO of privEzi Solutions.

“Organisations are required to provide clear and understandable details about their use of customer information. This transparency is vital for individuals to understand the company’s role in data processing and to exercise their individual rights effectively,” Khatri added.

*With inputs from Suraksha P
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