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INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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“A CRITICAL ANALYSIS OF INDIA’S DIGITAL PERSONAL DATA PROTECTION ACT, 2023: PRIVACY VS. GOVERNMENT SURVEILLANCE”

AUTHORED BY - SUBALAKSHIMI.T & MAGESH KUMAR. A

Assistant Professor B.Com, LLB (Hons)

Vels Institute Of Science, Technology & Advanced Studies Schools Of Law, Pallavaram,
Chennai

ABSTRACT

Enactment of the Digital Personal Data Protection Act, 2023 may certainly be seen as a landmark achievement with regard to India’s legal regime protecting personal data in the digital environment. The purpose of the law lies in regulation of digital personal data in respect to its collection, storage, and processing. As such, the Act recognizes the rights of Data Principals, i.e., individuals, in the context of the handling of their data and imposes duties on organizations in respect to this type of data. The main purpose of the law is striking the balance between technological advancement and the right to privacy recognized in Justice K.S. Puttaswamy (Retd.). On the other hand, although being progressive and consistent with data protection regulations globally, the DPDP Act has faced much criticism in terms of its attitude towards state surveillance activities. This is because the DPDP Act provides many exemptions to the state on grounds of national security, public order, and sovereignty. There is no judicial review mechanism and regulation from any independent entity, hence making one suspicious about potential misuse and excess of governmental powers.

Keywords: Data Protection, Privacy, Surveillance, DPDP Act 2023, Fundamental Rights, India, Puttaswamy Case.

INTRODUCTION

Rapid development in digital technology has revolutionized the creation, collection, and use of personal data on a global scale. The process of digitization in India through Digital India, Internet connectivity, and e-governance applications has led to the generation of a significant amount of personal data by State authorities as well as by private individuals or organizations. Although digitization has brought about increased efficiency and access, there have been serious implications relating to privacy violation and exploitation of personal data. The introduction of the Digital Personal Data Protection Act, 2023, marks a legislative milestone that seeks to address the rising issues concerning the use of data. The ruling from the apex court of India concerning privacy as a fundamental human right in the landmark judgment of Justice K.S. Puttaswamy (Retd.) vs. Union of India reflects a clear paradigm change in the legal framework of India. Privacy is now explicitly stated to be a component of Article 21 of the Indian Constitution. Besides emphasizing the need for stringent legislation to protect citizen data, the court has also laid down the guiding principles of legality, necessity, and proportionality which would be required for State action affecting privacy. This, in turn, makes the DPDP Act, 2023, a legislative measure to bring into effect these constitutional rights. On its face, the Act endeavors to create a framework based on consent for data processing, delineate the rights of individuals (the Data Principals), and set out duties of organizations processing personal information (the Data Fiduciaries). In addition, the Act contains provisions for the creation of the Data Protection Board. Though all these aspects reflect a forward-looking framework consistent with international standards like the GDPR, the Act has incorporated provisions which have raised a lot of debates. One significant issue revolves around the broad exemptions provided to the State, which allows governmental bodies to circumvent certain requirements of the Act in cases where matters relate to issues like national security, sovereign power, and public order¹. Such exemptions, along with the lack of judicial review and the failure of having regulatory authorities that are independent, pose serious concerns related to government surveillance, creating a dilemma where the interests of individual privacy protection and data collection by the State conflict with each other. Given the above discussion, the objective of this current research paper is to critically examine if the Digital Personal Data Protection Act, 2023 has managed to maintain the balance between privacy and surveillance interests. The research paper will also examine the constitutionality of the Act, and ascertain the consistency of the Act in terms of international data protection standards. Additionally, it

¹ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

will examine whether the Act has been able to protect individual rights from a democratic perspective.

HISTORY OF DATA PROTECTION IN INDIA

The data protection framework in India has developed progressively in line with technological changes and increasing significance of personal data. The first stage involved lack of an explicit right to privacy under the Constitution of India and protection of personal data being provided by piecemeal legislation like the Information Technology Act, 2000, and through judicial pronouncements. But, these proved inadequate in tackling the challenges of contemporary data processing practices in light of the explosive growth of digital technologies, e-commerce, social networking sites, and various government-backed digital schemes. The paradigm shift occurred as a result of the judgment delivered by the Supreme Court in the case of Justice K.S. Puttaswamy (Retd.) v. Union of India, wherein privacy was established as a fundamental right under Article 21 of the Constitution of India. The Supreme Court emphasized the significance of informational privacy in the context of the autonomy and dignity of the individual and articulated the principle of proportionality, according to which any infringement of privacy must be in accordance with the law and proportionate to the end pursued. In line with the mandate set by the Supreme Court, the Indian government launched various legislative proposals with respect to data protection laws. In 2019, the Personal Data Protection Bill was enacted as a comprehensive legislation based on global standards like the General Data Protection Regulation where individual rights and duties of data processors were established. However, it received some criticisms with regard to the wide-ranging exceptions available to government, compulsory data localization, and lack of independent regulatory body. Such factors resulted in repeated attempts to revise the bill before withdrawing it in 2021. As per this judgment, the government took a number of legislative initiatives to frame policies concerning data privacy². This legislation sought to create certain rights for the individual and duties for the processor of personal data. Nevertheless, it has been heavily criticized due to certain aspects, including the wide exemption clause for government agencies, data localization, and regulatory autonomy. After this, a new framework was launched by the government, recognizing the need for a balanced approach to be taken in respect of innovation, economic development, and privacy protection. This led to the passing of the Digital Personal Data Protection Act, 2023, which is the first legislation in India dedicated to the topic of digital

² Digital Personal Data Protection Act, No. 22 of 2023, INDIA CODE (2023).

personal data. While this Act is a major step forward as far as data governance is concerned, it is also an indication of the conflict faced by India regarding privacy versus state interests. The evolution of data protection law in India reveals that there is an incremental change from a piecemeal approach to data regulation to a more systematic regime, primarily due to the impact of technology, the judiciary, and international trends. The Indian Constitution, during its initial years, did not recognize the right to privacy as a fundamental right. The issues that had to do with personal data were addressed by statutes and court decisions. As India went through rapid digitization through the growth in internet usage, mobile phone connectivity, e-governance programs, and digital platforms, the issue of the exploitation and commercial use of personal data came into the limelight. In addition, the proportionality test was formulated by the Supreme Court, whereby the interference of the state in an individual's right to privacy had to meet certain tests, including legality, necessity, and proportionality. This made it mandatory for the government to introduce legislation regarding data protection in order to give effect to the constitutional principles of privacy. The result was that the B.N. Srikrishna Committee was appointed to study the issue of data protection. One of the important milestones achieved by India in its endeavor for providing adequate data protection is the landmark ruling of the Indian Supreme Court in the matter of Justice K.S. Puttaswamy (Retired) v. Union of India, where it was established that the right to privacy is a fundamental right under Article 21 of the Indian Constitution. It is not just the right to privacy that has been given the status of a fundamental right, but the significance of informational privacy as an element of individual dignity has also been emphasized. Later legislative developments indicated a move towards the adoption of a simpler and more adaptive legal framework, keeping in view the requirement to facilitate innovation, ease of operation, and efficient governance along with considerations for privacy protection. This ultimately led to the introduction of the Digital Personal Data Protection Act, 2023, which is the first piece of Indian legislation solely dealing with digital personal data protection. The prominent among them include the adoption of the principle of data processing on the basis of consent, rights of an individual, and duties of data fiduciaries³. To conclude, it would not be wrong to state that DPDP Act, 2023 can be regarded as one of the landmark laws in data protection legislation in India. However, the emergence of data protection legislation in India also highlights the problem of maintaining a balance between the privacy of an individual and interests of the State when there is a case of surveillance and national security.

³ Digital Personal Data Protection Act, No. 22 of 2023, INDIA CODE (2023).

Important Aspects of the DPDP Act, 2023

The Digital Personal Data Protection Act, 2023, provides an organized and up-to-date way of regulating digital personal data in India. The act endeavors to put people first when it comes to data regulation and also tries to hold those responsible for managing data accountable. These are some of the important aspects of the act. The Digital Personal Data Protection Act, 2023 provides a legal framework to regulate the processing of digital personal data in India. This law shows that there is a paradigm shift in the regulation of data. A very significant aspect of this law is the regulation of digital personal data, which refers to both digitally processed data as well as digitized data. Another very important feature of this law is that it defines the terms of Data Principal and Data Fiduciary. These two terms clearly establish the nature of relation between data principal and data fiduciary. As per this law, personal data can only be processed after obtaining the free, informed, and specific consent of the data principal. This makes the individuals more autonomous and gives them more control over their data. Moreover, this law has provided certain rights to the individuals. Not only does the Act empower people with rights, but it also lays down some important responsibilities for the Data Fiduciaries, requiring them to ensure data security and avoid any breaches as well as process data only for lawful purposes⁴. In this respect, the Data Protection Board of India can serve as a regulatory institution for enforcing laws, resolving disputes, and imposing penalties. Nonetheless, its independence is questionable. As another relevant aspect, the Act allows data transfers to other countries that have been identified by the Indian government, facilitating the digital economy of the country across borders. At the same time, one of the controversial aspects of the Act is the wide power vested in the Government of India for issuing exemptions to its agencies from the provisions of the Act on the grounds of national security and public order, among others. The Digital Personal Data Protection Act, 2023 has created a framework for regulating digital personal data in India that represents the movement towards a rights-based and accountable regulatory regime. One of the unique features of this law is its scope of application, which includes not only the collection of personal data online but also those that have been digitized. This law contains two crucial concepts: Data Principal and Data Fiduciary, which refer to the individuals and organizations involved in the processing of personal data, respectively. The law has adopted the principle of consensual processing, which implies that any data may be used only if there is a free and specific consent from the individual to whom such data pertains. Besides, the Act confers several rights on individuals, such as the right to access, correct, and

⁴ Information Technology Act, No. 21 of 2000, INDIA CODE (2000).

delete their personal data and the right to file a grievance against the data fiduciary. Besides the rights of individuals, the Act also places strict duties upon Data Fiduciaries so as to ensure that any processing of personal data is carried out in a safe, just, and legal manner. These duties include using adequate security measures, protecting personal data from any unauthorized breach of privacy, and limiting its use only to prescribed purposes. The creation of the Data Protection Board of India can be seen as the establishment of a body to ensure compliance with the provisions of the Act, investigate complaints about any alleged infringement of personal data protection laws, and even impose sanctions against offenders, albeit there are some doubts about its autonomy and efficacy. Nevertheless, among the other aspects that have made this Act highly controversial and highly important, is the extensive discretion provided to the state to grant exemptions from the provisions of the Act on the basis of issues like national security, sovereignty, and public order. While this aspect raises questions regarding the abuse of such discretionary powers, it does highlight the challenges faced when seeking a balance between privacy and the interests of the state.

Features of the DPDP Act, 2023

The Digital Personal Data Protection Act, 2023, has brought in a new structure of regulating personal digital data within India. This Act tries to keep the individual at the center of all decisions concerning data governance, along with bringing accountability of companies holding such data into the picture. Here are some of the features of the Act, elaborated upon in detail:

This clause is indicative of a move towards recognition of the right of an individual to exercise autonomy over his/her information. This means that individuals will have knowledge about how their information is gathered, the purpose of its collection, and the period during which the information will be held. There are some "legitimate uses" for the Act under which consent will not be necessary, as is in the case of State activities, and it once again poses the question of convenience versus privacy⁵.

Rights of Individuals

Individuals gain from the act as they have been conferred certain rights over their personal data. These rights are necessary to ensure that there is accountability in the process of data management. Right to Information: The individual's right to receive information pertaining to

⁵ Id. § 33 (penalties and enforcement).

his/her personal data – why it was collected, how it will be processed, and to whom it will be provided. Right to Data Correction and Deletion: If such information is inaccurate and no longer required, then individuals can ask for its deletion or correction. Right to Redress: Individuals have the opportunity to complain against the data protection laws. Through these rights, individuals get involved in the data world actively.

Duties of Data Fiduciaries

The Act places strict duties upon organizations referred to as Data Fiduciaries when processing personal data. The duties place the responsibility on data fiduciaries to process personal data in a proper manner by taking measures to ensure that such actions are secure, lawful, and ethical. Reasonable measures should be put in place to ensure that data breaches or data leaks are prevented and that in case there is a data breach, the right persons are notified immediately. Personal data should be used in accordance with its intended lawful and specific purpose. This duty is very vital in ensuring trust in digital technologies.

Privacy Protection

Advantages of the Act In some ways, the DPDP Act aligns with international practices such as the General Data Protection Regulation: User Focus: Consent plays a key role. Liability: Firms incur liabilities for non-compliance. Transparency: Clear requirements for data processors This suggests that there is a move towards improving information privacy in India⁶.

Surveillance by the Government:

Issues: While there are some positives, the Act does have aspects that cause concern, namely: Wide Government Exemptions The Central Government has the authority to exempt any of its agencies from the provisions of the Act for reasons like: National Security Public Order Sovereignty These are ambiguous concepts. Another controversial feature of the Digital Personal Data Protection Act, 2023 pertains to surveillance by the government and access to personal information. The Act has been framed mainly to protect personal privacy but, at the same time, also enables the Central Government to grant its agencies exemptions from compliance with various aspects of the Act on the basis of considerations like national security, sovereignty, maintaining public order, and prevention of offences. While these are legitimate aims of any democratic nation, the provisions have not been clearly worded to define limits within which these powers may be exercised. In view of this, it appears that there could be an

⁶ Personal Data Protection Bill, 2019, No. 373 of 2019 (India).

unlimited exercise of power of surveillance, where personal information could be subject to monitoring without restrictions. Moreover, the lack of any judicial oversight or authorization procedures raises these fears further. In contrast to other regions, where there must be prior permission from a judge or the process must pass through independent organizations for the surveillance activities, the framework followed in India through the Act gives more discretionary powers to the executive branch. The balance of power thus becomes disproportionate when compared to the right to privacy as guaranteed under Justice K.S. Puttaswamy (Retd.) v. Union of India. Here, it was explicitly held that any violation of privacy had to pass three criteria of legality, necessity, and proportionality. Moreover, the dangers of mass data collection and analysis cannot be overlooked. With the growing dependence on digital systems to govern, distribute benefits, and enforce laws, the state has access to immense personal data. If there are no stringent safeguards put in place, there is the danger that the state may employ its capabilities to impose a ‘chilling effect’ on basic civil rights like freedom of speech and expression⁷. Thus, although surveillance can be defended in certain specific contexts, there are legitimate concerns regarding the system set up by the DPDP Act.

Suggestion and Recommendation

Though the Digital Personal Data Protection Act, 2023 is undoubtedly an important milestone in creating a formal data protection framework in India, some essential enhancements are required to guarantee that the Act strikes a proper balance between individual privacy and the interests of the State. The recommendations that follow strive to achieve these objectives. The passage of the Digital Personal Data Protection Act of 2023 marks a substantial achievement in the quest for the creation of a formal system for data protection in India; however, there are some improvements that must be made in order for the law to fully reflect the proper balance between individual privacy and State interest. Below are some recommendations. The second aspect which needs to be incorporated pertains to the presence of some kind of judicial or independent oversight system. If any governmental entity is going to access one’s personal data through surveillance, then this must be granted only after an independent authorization by some judicial or independent body in accordance with Justice K.S. Puttaswamy (Retd.) v. Union of India. In addition, it is important that greater independence and autonomy of the board be achieved. There are already apprehensions about the potential for its interference by the executive branch. Independence of the appointing process, term of office, and functions will

⁷ The Data Protection Bill, 2021 (India) (withdrawn).

lead to better performance and credibility. Other recommendations that can help improve current data-processing practices include the need for more transparency and accountability when it comes to how data is processed. Both the private sector and the government need to issue periodic transparency reports on the amount of data collected, processed, and shared. In addition, there exists a dire need for the promotion of data literacy and awareness. There are many individuals who do not know about their rights and what it means when they share personal data. Programs from the government and educational institutions can help individuals make sound choices. Moreover, the law must have more robust measures in place regarding the protection of highly private personal data such as health, financial, and biometric data. These will help ensure that there is no undue risk to people's welfare. Lastly, India may also learn from global practices related to data protection such as the General Data Protection Regulation with regard to practices such as data minimization and purpose limitation, as well as regulatory oversight by independent authorities. In summary, whereas the Draft Data Protection and Privacy Bill 2023 provides an initial legal framework for data protection in India, the success of the law requires further reform in addition to its implementation in accordance with constitutional values. The success of the Draft Data Protection and Privacy Bill 2023 in the future is dependent on balancing the two principles of individual rights and institutional responsibility.

Conclusion

In summary, the enactment of the Digital Personal Data Protection Act, 2023 is a significant achievement for India as it moves towards the establishment of a robust regime for data protection in the digital age. The new law constitutes an attempt to acknowledge the right to privacy that has been established in the landmark case of Justice K.S. Puttaswamy (Retd.) v. Union of India through a framework of consent and accountability, while also accommodating governance and economic needs. Nonetheless, the statute has several flaws. The extensive exemptions for the state, the lack of judicial supervision, and the issue of the independence of the enforcement body could lead to a possibility where the legislation could be used by the government to invade personal privacy. This may have serious implications on the purpose of privacy protection and also raise constitutional issues of proportionality. Consequently, even though the DPDP Act, 2023 creates a solid base, it should be seen as an ever-evolving structure instead of the ultimate solution. Its effectiveness will ultimately depend on its implementation, interpretation, and subsequent evolution. Protecting citizens' rights by securing their information and upholding the balance between protecting individuals and exercising State

powers will play a decisive role in maintaining the country's democratic nature amidst the new technological reality. It is only through the adoption of the right attitude to data protection, one focused on human rights and accountability, that future challenges can be addressed successfully. Nevertheless, in spite of all the progressive aspects that characterize the DPDP Act, 2023, there are still many problems associated with the right balance between the rights of an individual and state powers. The presence of extensive exemptions and the lack of effective judicial control may lead to the overuse of powers and potential abuse of personal information by the officials and authorities. All these aspects can be seen as a violation of the basic constitutional principles of necessity and proportionality. As a result, taking into account all the advantages of the Act discussed above, one may conclude that the new DPDP Act provides the appropriate foundations for future legal and regulatory practices. Nevertheless, the effectiveness of the act depends significantly on the way the legislation works in the context of further implementation, interpretation, and amendment processes. It is important to maintain the proper balance between technology development and people's rights and freedoms.

