



INCEPTION OF INDIA'S PRIVACY LEGISLATION

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ABSTRACT

*“Privacy is dead, and social media holds
the smoking gun.”*

– Pete Cashmore

As soon as the Cambridge Analytica scandal came to light, the talks of data and privacy breach started doing the rounds. Personal data protection is the need of the hour in today's technology-driven world to prevent any data misuse that could be used for theft, blackmailing, extortion, sexual crimes, or to humiliate a person et cetera. Therefore, a breach of privacy is a prime cause of concern.

Furthermore, after the Supreme Court ruled that the right to privacy is a part of right to life, it became imperative for the government to come up with personal data protection legislation and in advancement of the same, Personal Data Protection Bill 2019 is the first step towards securing the said aim. "The right to privacy is a fundamental right and it is necessary to protect personal data as an essential facet of informational privacy" as envisaged under Personal Data Protection Bill 2019, 2019.

The present analytical essay delves into the prevalent surge of personal data breach activities and examines the Personal Data Protection Bill, 2019, and its salient features.

INTRODUCTION AND BACKGROUND

*“Data is the pollution problem of
the information age, and protecting
privacy is the environmental
change.”*

– Bruce Schneier

The fragile hot air balloon encapsulating privacy infringement was fumed hotter as soon as the *Cambridge Analytica* scandal involving *Facebook* busted; for the air balloon to surface higher up in the sky, for the world to glimpse the gravity of the matter concerning privacy breach. This instance including many other *inter alia*, *Edward Snowden* exposing NSA's surveillance activities, privacy concerns over *Indian Adhaar* use and the recently exposed *Jharkhand's Jamtara cybercrime fraud* advocated the dire need of stricter privacy protection legislation across the globe.

It is an uncontested fact that technology is a double-edged sword wherein, on one side it gives the opportunity of safeguarding one's privacy, however, on the flipside it also plays pivotal role with regards to infringement of



privacy.¹ *Therefore*, in the light of this statement it is imperative to analyse prevalent privacy laws in India.

Personal Data Protection Bill, 2019 - The Inception

The Personal Data Protection Bill, 2019² (hereafter referred as Bill) traces its genesis to the SC judgement, *K. S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.*³ wherein "*right to privacy*"⁴ was recognised as the fundamental right under **Article 21**⁵ of the Indian Constitution⁶ foundation of which rests on the **EU General Data Protection Regulation** (hereafter referred as **GDPR**).⁷

Justice BN Srikrishna Committee- The genesis

The draft of Personal Data Protection Bill, 2018 had been crafted under the chairmanship of "Justice BN Committee"⁸ and was submitted to the Ministry of Electronics and Information Technology.⁹ Furthermore, it is an incontrovertible fact that "*the more technology we bring into our lives, the more our privacy seems to slip*

away", therefore, instances of inappropriate use of personal data and data breach is increasing at an alarming rate. The amount of personal data available onto public domain could lead to worrisome state of affairs and the same could be used for gamut of unlawful purposes viz., unjust political motives, theft, blackmailing, mental and physical torture, humiliation etc.¹⁰

The Personal Data Protection Bill 2019 - Legislative History

Therefore, to have a check on crimes involving data breach and aforementioned offences concerning breach of personal information of citizens, this Bill was first drafted in the year 2018, thereafter, the **Personal Data Protection Bill 2019** was introduced in Lok Sabha¹¹ on **December 11, 2019** for approval by Minister of Electronics and Information Technology, Ravi Shankar

¹ VAKUL SHARMA & SEEMA SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE, LEXIS NEXIS, at 316, 6th ed., (2019).

² LOK SABHA: Bill No. 373 of 2019: The Personal Data Protection Bill, 2019.

³ (2017) 10 SCC 1.

⁴ *Id.*

⁵ *Ram Jethmalani vs. Union of India*, (2011) 8 SCC 1.

⁶ The Constitution of India, Art 21

⁷ *EU's General Data Protection Regulation (Regulation (EU) 2016/679)*.

⁸ *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians*, Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, (February 19, 2020),

https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report-comp.pdf.

⁹ Surabhi Agarwal, *Personal Data Protection Bill Only After New Government Takes Over*, (January 20, 2020),

<https://economictimes.indiatimes.com/tech/internet/personal-data-protection-bill-only-after-new-government-takes-over/articleshow/67374919.cms?from=mdr>.

¹⁰ The Personal Data Protection Bill, 2018, (February 20, 2020), https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf.

¹¹ LOK SABHA: Bill No. 373 of 2019: *The Personal Data Protection Bill, 2019*, (February 19, 2020), http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf.



Prasad.¹² It is pertinent to note that the status of the Bill is pending in the Parliament.¹³

Significance and Relevance of the Bill - The Need?

As Marlon Brand has aptly put, “*privacy is not something that I’m merely entitled to, it’s an absolute prerequisite*”, given the time of aristocratic digital world we are heading towards, realising the significance of personal data protection became necessary. Privacy is not entitlement of any sort¹⁴, but is a condition precedent for right to life¹⁵ enshrined under Article 21¹⁶ of our Constitution.¹⁷ The Bill aims at follows-

...“to provide for protection of the privacy of individuals relating to their personal data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, protect the rights of individuals whose personal data are processed, to create a framework for organisational and technical measures in processing of data, laying down norms for social media intermediary, cross-border transfer, accountability of entities processing personal data, remedies for unauthorised and harmful processing, and to establish a Data Protection Authority of

India for the said purposes and for matters connected therewith or incidental thereto.”¹⁸

ANALYSIS: PERSONAL DATA PROTECTION BILL, 2019

LEGAL REGIME OF PRIVACY LAW- PRIOR TO THE 2019 BILL

It is pertinent to note that the legal weapons to fight data breach and gross violation of data protection under Indian scenario is dealt under **Section 43A** of the **IT Act of 2008**¹⁹, which mandates protection of sensitive personal data and non-compliance in maintaining reasonable safety and security shall bear the liability towards the affected persons.²⁰

Additionally, **Section 72A** provides penal provisions for persons indulging in disclosure of sensitive data relating to unlawful breach of the contract.²¹ However, the Information Technology Act of 2000 did not have provisions concerning protection of the sensitive data of an individual.²² Thus, came **Section 43A** to remedy the situation by

¹²The Personal Data Protection Bill, 2019, MINISTRY: LAW AND JUSTICE, (February 19, 2020), <https://prsindia.org/billtrack/personal-data-protection-bill-2019>.

¹³ Vinod Joseph & Protiti Basu, *The Personal Data Protection Bill 2019 - A Comparison With The 2018 Bill*, ARGUS PARTNERS, (February 19, 2020), <https://www.mondaq.com/india/Privacy/876842/The-Personal-Data-Protection-Bill-2019--A-Comparison-With-The-2018-Bill>.

¹⁴ *Ram Narain vs. State of Bombay*, AIR 1950 9SC 459.

¹⁵ *Malak Singh vs. State of Punjab and Haryana*, (1981) 1 SCC 420.

¹⁶ The Constitution of India, 1952, Article 21.

¹⁷ *Id.*

¹⁸ *Supra* note 8.

¹⁹ *Scope of Section 43 of the Information Technology Act, 2000*, (February 21, 2020), <https://shodhganga.inflibnet.ac.in/bitstream/10603/164562/3/chapter%20ii.pdf>.

²⁰ Information Technology Act, 2011, Section 43A.

²¹ Information Technology Act, 2011, Section 72A.

²² M. Kamble, *Cyber Law and Information Technology*, INTERNATIONAL JOURNAL OF SCIENCE AND ENGINEERING RESEARCH, Vol 4, Issue 5, ISSN 2229-5518, (2013).



putting liability on the wrongdoers involved in disclosure of personal data.²³

Furthermore, "**Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**" came into existence that covered body corporate and persons located in the country only, i.e., India with a list explaining "sensitive personal data."²⁴ *Therefore*, lack of a full-fledged law in the country paved way for the Personal Data Protection Bill, 2019.

GENERAL DATA PROTECTION REGULATION AND PDPB-COMPARITIVE OVERVIEW

European Union's General Data Protection Regulation (GDPR) is regarded as the stepping stone for many countries to come up with their personal data protection laws. Following its footsteps India has drafted the structure of Personal Data Protection Bill (PDPB) relying on the skeleton provided by GDPR with minor differences.²⁵ Under PDPB Bill there is a provision for categorisation of critical personal data from personal data provided this data must be processed using a server which must be

²³ S.S. Rana & Co. Advocates, *Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011*, MONDAQ AI.

²⁴ Information Technology (*Reasonable Security Practices and Procedures and Sensitive Personal Data or Information*) Rules, 2011.

²⁵ *Comparing the Personal Data Protection Bill 2018 with the GDPR*, (February 21, 2020), <https://platform.dataguidance.com/opinion/india-comparing-personal-data-protection-bill-2018-gdpr>.

²⁶ Rohit Mahajan and Shree Parthasarathy, *India Draft Personal Data Protection Bill, 2018 and EU General*

operating in India. Whereas, GDPR doesn't recognise classification among data under the prevalent guidelines and operative provisions, whatsoever.²⁶

Further, with regards to provision about data protection officer under PDP Bill, it is the sole responsibility of data protection authority to raise awareness about related issues. However, under GDPR, it is the responsibility of the officer to train the staff about data breach, to conduct audit and spread awareness about the same.²⁷

PROVISIONS OF BILL - SALIENT FEATURES

THE BILL-DECODED

i) Objectives of the Bill - The Bottom Line

The Bill aims at *protection* and *regulation* of personal data of the individuals and accordingly acts as a watchdog by keeping an eye on data breach.²⁸ The Bill aims at establishing equilibrium among *data utilization* and contemporary *digital economy*.²⁹

ii) Personal Data Protection Bill, 2019 - The Core Principles

Data Protection Regulation A comparative view, PDPB v. GDPR, DELOITTE.

²⁷ *Comparative Analysis: General Data Protection Regulation, 2016 and the Personal Data Protection Bill, 2018*, IKIGAI LAW, , (February 17, 2020), <https://www.ikigailaw.com/comparative-analysis-general-data-protection-regulation-2016-and-the-personal-data-protection-bill-2018/#acceptLicense>.

²⁸ *Id.*

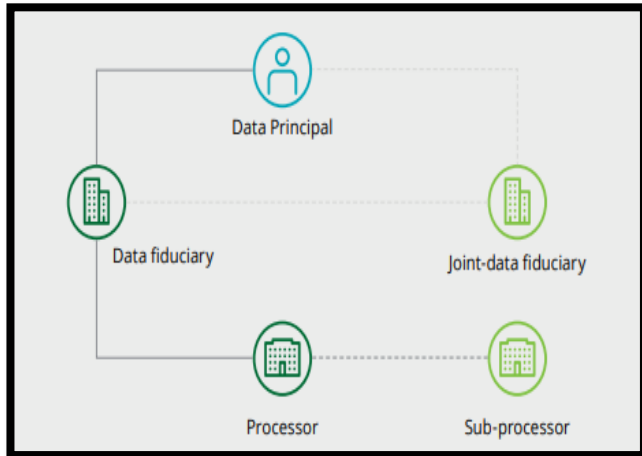
²⁹ *The Data Protection Bill 2018- Analysis*, (January 17, 2020), <https://www.iasexpress.net/data-protection-bill/>.



The objective of the bill rests on the substratum of "obligation to protect data". Its core principle embodies the concept of-

- a) **reasonable** and;
- b) **fair processing**³⁰ of the data duly collected by the "**data fiduciary**"³¹ or "**data processor**".³²

It is the responsibility of data fiduciary to comply with provisions laid down in the Bill in order to thereby ensure full compliance on



behalf of the data processor as well.³³

iii) Personal Data- The Categories

The draft Bill 2019 provides for **two categories** of personal data or information³⁴ as follows seriatim -

- i. Personal data;³⁵
- ii. Sensitive personal data.³⁶

iv) Applicability of the Bill-

The Bill mandates compliance from the *government* and entities named "*data fiduciaries*" and "*data processors*."³⁷ One of crucial aspect of the Bill is its extraterritorial reach which so far was missing in Information Technology Rules, 2011.³⁸ Further, the Bill regulates processing of personal data by the following three categories as follows-

- i. the Government;
- ii. Indian companies;
- iii. Foreign companies dealing with personal data of Indian citizens.

The 2019 Bill also gives central government the power to exercise the right of exemption to any government agency from the application and compliance of its provisions.³⁹

v) Rights of Citizens- The Pillars

The Draft Bill provides for different rights to the individual for data protection, meaning, the individual has a say into deciding who

Image Courtesy: Deloitte

³⁰ Siddharth Vishwanath, *Decoding the Personal Data Protection Bill, 2018, for Individuals and Businesses*, PWC INDIA.

³¹ The Personal Data Protection Bill, 2018, Section 2(13).

³² The Personal Data Protection Bill, 2018, Section 2(15).

³³ Supra note 7.

³⁴ Manas Ingle & Anuj Maharana, *Personal Data Protection Bill, 2018 – An Overview With Brief Analysis*, NOVOJURIS LEGAL, (2018).

³⁵ Personal Data Protection Bill 2019, Sec. 3(28).

³⁶ Personal Data Protection Bill 2019, Sec. 3(36).

³⁷ *India's Personal Data Protection Bill: What We Know so Far*, (February 21, 2020), <https://www.endpointprotector.com/blog/indias-personal-data-protection-bill-what-we-know-so-far/>.

³⁸ Supra note 16, at 7.

³⁹ Prasanna Mohanty, *Personal Data Protection Bill 2019: Unrestrained Power to Central Government may Undermine Privacy*, (January 21, 2020), <https://www.businesstoday.in/current/policy/personal-data-protection-bill-2019-central-government->



could peek into his/her data. The various rights, inter alia, includes the following rights seriatim-

- i.* An individual has given a right to give **consent** before the data could be used for the purposes.⁴⁰
- ii.* An individual has given a right to decide as to who should be given **access** of his/her data.⁴¹
- iii.* Individual can seek **corrections** on any incorrect data collected by the data fiduciaries.⁴²
- iv.* The option of **data portability** is provided for the data to be shared with other agencies at the option of the citizen.⁴³
- v.* Most crucial right given in the Bill is the authority to decide the data to be **forgotten**⁴⁴ which was not provided earlier i.e., **right of deletion**.⁴⁵
- vi.* Data principal shall have the right to **correction** of inaccurate personal information.
- vii.* Right of **erasure**⁴⁶ is given to data principal to have the irrelevant personal data⁴⁷ erased.⁴⁸
- viii.* Right concerning **updating** the old data is given to the individual along with the right to complete the defective and unfinished data.
- ix.* Right to **justification** with regards to non-compliance of the aforementioned rights by the data fiduciaries.⁴⁹
- x.* Right to **restrict** continuation of data disclosures when not necessitated.⁵⁰

vi) Permitted Instances for Processing Personal Data

[C] Personal data⁵¹ means data that concerns with the identity of any person.⁵² This Bill provides grounds when processing of personal data can be done.⁵³ The grounds

power-may-undermine-privacy-of-citizens-people/story/392186.html.

⁴⁰ *Id.*

⁴¹ Personal Data Protection Bill 2019, Section 17.

⁴² Vinod Joseph & Protiti Basu, *The Personal Data Protection Bill 2019 - A Comparison With The 2018 Bill*, ARGUS PARTNERS, (February 19, 2020), <https://www.mondaq.com/india/Privacy/876842/The-Personal-Data-Protection-Bill-2019--A-Comparison-With-The-2018-Bill>.

⁴³ *Id.*

⁴⁴ VAKUL SHARMA & SEEMA SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE, LEXIS NEXIS, at 318, 6th ed., (2019).

⁴⁵ Personal Data Protection Bill 2019, Section 27.

⁴⁶ VAKUL SHARMA & SEEMA SHARMA, INFORMATION TECHNOLOGY LAW AND PRACTICE, LEXIS NEXIS, at 319, 6th ed., (2019).

⁴⁷ Google Spain SL, Google Inc. vs. Agencia Espanola de Protecibn de Datos, Mario Costeja Gonzalez, C-131/2, Grand Chamber, 2014.

⁴⁸ Personal Data Protection Bill 2019, Section 18.

⁴⁹ Supra note 8.

⁵⁰ Supra note 36.

⁵¹ Personal Data Protection Bill 2019, Sec. 3(28).

⁵² *Data Privacy Bill 2019: All You Need to Know*, PWC INDIA, (February 20, 2020), <https://www.pwc.in/consulting/cyber-security/data-privacy/personal-data-protection-bill-2019-what-you-need-to-know.html>.

⁵³ Supra note 23.

include, inter alia, consent⁵⁴ of the individual in order to process their personal data.⁵⁵

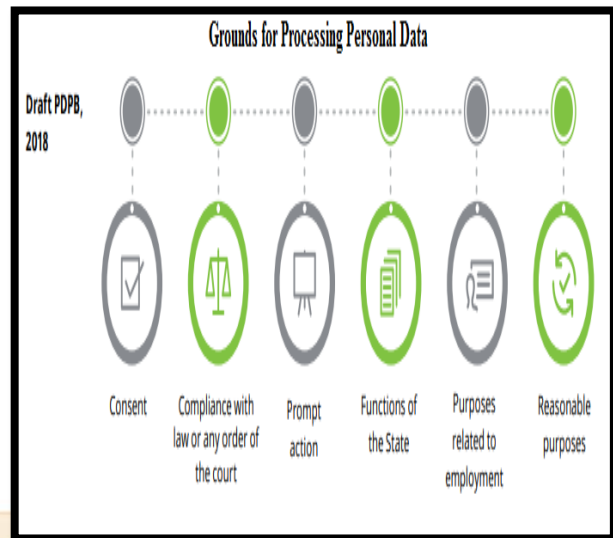
The right to consent is an instrumental requirement in order to protect data breach, therefore, it gives greater decisive power in the hands of the individual to have a say about their personal data processing.⁵⁶

However, there are instances when individual's consent is not required. These instances include the requirement of compliance of court's order, or any judgement.⁵⁷ Further, if the processing of personal data is done for the purpose of rendering functions of legislature or with regards to the requirement of prompt action, then processing of data is not restricted on the ground of consent not obtained.⁵⁸

vii) Grounds for Processing Personal Data without Consent

Notwithstanding, consent is mandatory under section 11, but personal data of *data principal* which is not sensitive personal data can be processed for employment termination or recruitment, assessment of the performance or benefit by *data fiduciary*, provided data principal is the employee of the data fiduciary.⁵⁹

Further, data fiduciary can process personal data for reasonable purposes including, inter alia, identifying fraud whistle blowing



purposes, concerning mergers and acquisition, for recovery of debt and securing network and information security et cetera without the consent of the data principal. The processing of such personal data can be done to secure public interest. However, due regard to be given to the reasonable expectations of the individual concerning processing of his/her data on above listed grounds.⁶⁰

viii) Permitted Instances for Processing Sensitive Personal Data under PDPB, 2018

Under PDPB 2018, data including passwords, status about caste, information relating gender of a person, genetic data, data about biometrics, matters concerning

⁵⁴ Personal Data Protection Bill 2019, Section 11.

⁵⁵ Clearly Gottlieb, *The Indian Personal Data Protection Bill 2018: A View Through the Lens of the EU GDPR*, KHAITAN & Co., (2019).

⁵⁶ *The Personal Data Protection Bill, 2018: Key Features and Implications*, INDUSLAW, (February 21, 2020),

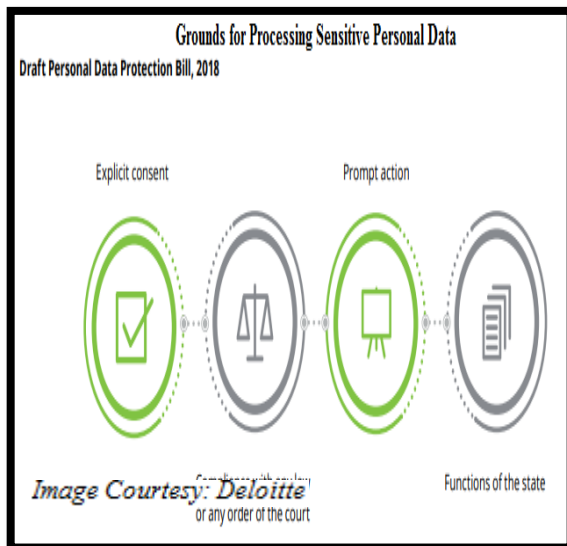
https://induslaw.com/app/webroot/publications/pdf/alerts-2018/Personal_Data_Protection_Bill_2018.pdf.

⁵⁷ *Id.*

⁵⁸ Arun Prabhu & Molshree Shrivastava, *The Personal Data Protection Bill, 2019: An Analysis*, DATA PROTECTION, DIGITAL, INDIA CORPORATE LAW, (2019).

⁵⁹ Personal Data Protection Bill 2019, Section 13.

⁶⁰ Personal Data Protection Bill 2019, Section 14.



financial information, etc are included in "sensitive personal data".⁶¹

However, the word password has been omitted under PDPB 2019.

One of the primary grounds for processing sensitive personal data under PDPB 2018 is, the explicit consent of the individual whose data needs to be processed. Furthermore, this data can be processed if prompt action is required or is done on the grounds of rendering functions of the states or with compliance of any law of the land or the order of the court that could include even a judgement.⁶²

However, it is pertinent to note that grounds for processing sensitive personal data is not

explicitly mentioned in Personal Data Protection Bill, 2019.⁶³

ix) Social Media Intermediaries

One of the important aspects of the Bill include regulation of social media intermediaries. Under the provisions of the Bill, it is mandatory for the intermediaries having impact on electoral democracy and public order are required to opt for voluntary user verification mechanism for all its users in India for its functioning.⁶⁴

x) Redressal Mechanism

Data Protection Authority (DPA) is required to be set up as redressal mechanism to penalise the wrongdoers for the offences committed by them. The authority shall be vested with the powers to safeguard the rights of the persons concerned in the Bill. The authority is required to keep an eye on anyone attempting to indulge in data breach or misuse of personal information of any sort. Appeals from DPA can be made to Appellate Tribunal. Further, appeals from Appellate

⁶¹ Animesh Sarmah, Rashmi Sarma and Amlan Jyoti Baruah, *Brief study on Cyber Crime and Cyber Law's of India*, INTERNATIONAL RESEARCH JOURNAL OF ENGINEERING AND TECHNOLOGY (IRJET), Volume 4 Issue 6, (2017).

⁶² Privacy Bites, *Brief Analysis of The Personal Data Protection Bill, 2018*, (February 21, 2020), <https://privacy.sflc.in/brief-analysis-of-the-personal-d>
Image Courtesy: Deloitte

⁶³ Personal Data Protection Bill 2019, Section 15.

⁶⁴ LOK SABHA: Bill No. 373 of 2019: *The Personal Data Protection Bill, 2019*, (February 19, 2020), http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf.

⁶⁴ *The Personal Data Protection Bill, 2019*, MINISTRY: LAW AND JUSTICE, (February 19, 2020), <https://prsindia.org/billtrack/personal-data-protection-bill-2019>.



Tribunal can be made to the Supreme Court of India.⁶⁵

It is the duty of the authority to secure maximum compliance with the provisions that are mentioned in the 2019 Bill.

It consist of seven persons including a chairman. The members of the DPA should possess expertise in Information Technology and subject of data protection.

IMPACT OF THE BILL - AMENDMENT ON OTHER LAWS

The Bill casts impact on the erstwhile Information Technology Act, 2000 as it requires deletion of provisions concerning compensation payable by companies in the event of failure to protect personal data of the citizens.⁶⁶ Further, it also impacts Right to Information Act, 2005.

PERSONAL DATA PROTECTION IN DIFFERENT JURISDICTIONS

The "California Consumer Privacy Act" (CCPA) came into force on 1 January 2020

by providing a private right of action for damages to the consumers.

CCPA has added California's name as the latest entry on the data protection legislation chart.⁶⁷

Further, new entrants includes Thailand's "Personal Data Protection Act" and Brazil's "Lei Geral de Proteção de Dados" (LGPD) that are set to become effective in the year 2020. Moreover, Brazil's LGPD like India, too, is heavily influenced by EU's GDPR that shall become effective from August 15, 2020.⁶⁸ The Indian Personal Data Protection Bill, 2019 is a progressive step towards fighting the menace of personal data breach.

CONCLUSION

*"If you put a key under the mat for the cops, a burglar can find it, too. Criminals are using every technology tool at their disposal to hack into people's accounts. If they know there's a key hidden somewhere, they won't stop until they find it."*⁶⁹

– Tim Cook

We are a generation that lives in an era where the day starts by checking our phones,

⁶⁵ Kurt Wimmer & Gabe Maldof, *India Proposes Updated Personal Data Protection Bill*, COVINGTON & BURLING LLP: DATA PRIVACY-INDIA, (2019).

⁶⁶ *The Personal Data Protection Bill, 2019*, MINISTRY: LAW AND JUSTICE, (February 19, 2020), <https://prsindia.org/billtrack/personal-data-protection-bill-2019>.

⁶⁷ Lothar Determann & Chetan Gupta, *India's Personal Data Protection Act, 2018: Comparison with the General Data Protection Regulation and the California Consumer Privacy Act of 2019*, UC BERKELEY PUBLIC LAW RESEARCH PAPER, SSRN (2018).

⁶⁸ *Data Protection Legislation around the World in 2020*, ENDPOINTPROTECTOR BLOG, (February 19, 2020), <https://www.endpointprotector.com/blog/data-protection-legislation-around-the-world-in-2020/>.

⁶⁹ Fred Imbert, *Tim Cook takes the Offensive on Privacy: Report*, CNBC, (February 19, 2020), <https://www.cnbc.com/2015/06/03/tim-cook-takes-the-offensive-on-privacy-report.html>.



scrolling feed, updating our day-to-day affairs on various social media platform on priority. These activities ranges from sharing locations, likes and dislikes et cetera. Thus, it is imperative to have a law that restricts and punishes anyone attempting data breach for the concerned data could be used to realise numerous unlawful activities.

Therefore, the researcher is of the view that this Bill is a progressive step towards the dawn of data protection legislation in the country.⁷⁰ It is an uncontested fact that today much of our lives are on social media platforms with gamut of information being available at just a click, thereby, it is indispensable for any government to work towards the protection of personal data of its citizen. Thus, Personal Data Protection Bill, 2019 comes to remedy the situation by providing provisions for safeguarding individual's data by keeping a check on personal data breach and privacy infringement.⁷¹

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⁷⁰ Supra note 23.

⁷¹ Supra note 30.



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