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Research Article

Critical Analysis of Digital Personal Data Protection Act, 2023 with reference to Right to Information Act, 2005

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ABSTRACT

Mahatma Gandhi once said, "The real Swaraj will come not by the acquisition of authority by a few but by the acquisition of capacity by all to resist authority when abused"[1]. From secrecy of information (under the Official Secrets Act, 1923) to right to information, the RTI has evolved from the Freedom of Information Act, 2002 to the Right to Information Act, 2005. RTI aims to ensure 'energetic' and 'effective' performance by 'public authority' for better governance. As such, the Constitution of India does not explicitly grant it but it is implicit in the Freedom of Speech and Expression[2] read with Right to Life[3] and supported by Constitutional remedies[4] to approach the courts. Dynamic interpretation of these provisions, over a period of time, has led to the advancement of RTI in India.

Keywords: Transparency, Privacy, Digital Personal Data, Information, Data Protection Board

Genesis of Transparency Law

Definition of Transparency: "The degree to which information is available to outsiders that enables them to have informed voice in decisions and/or assess the decisions made by insiders."[5]

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10, December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time that Fundamental Human Rights should be universally protected. Article 19 of the Declaration states that

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[6]".

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on 16 December 1966 and came into force on 23 March 1976. By May of 2012, the Covenant had been ratified by 167 states. The Covenant elaborates further the civil and political rights and freedoms listed in the Universal Declaration of Human Rights.

Article 19(2) of the covenant states that

[1] YI, 29-1-1925, p. 41
[2] Article 19(1)(a) of the Constitution of India
[3] Article 21 of the Constitution of India
[4] Articles 32 and 226 of the Constitution of India
[5] Florini, Ann Ed. The Right to Know: Transparency for an Open World. Columbia University Press: New York, 2007
[6] Article 19 of Universal Declaration of Human Rights

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice[7]".

Introduction

The Digital Personal Data Protection Act, 2023 is an important piece of legislation. The previous Personal Data Protection Bills of 2019 & 2022 being ascribed to numerous amendments, laced with several issues relating to data localization, transparency, compliance intensive, etc., had been withdrawn by the Central Government (**CG**). The said Bill came into being after the Supreme Court, in **Justice K.S. Puttaswamy vs. Union of India**[8] upheld the 'Right to Privacy' as a part of the Fundamental Right 'Right to Life' enshrined under Article 21 of the Indian Constitution and had suggested the Central Government to put in place an Act/regime for protection of Personal Data. The main problem with the nine judges bench ruling in the above-said case is that after proclaiming privacy as a Fundamental Right, it has not defined privacy. It is now left to all adjudicators to give multiple interpretations in order to understand the term.
On August 11, 2023, the President of India granted assent to the highly anticipated Digital Personal Data Protection Act, 2023. The legislation has been in the making since 2018 and finally became an Act after multiple deliberations and rewrites. However, much of the rewriting and discussions happened outside the public eye. The reasons for withdrawing a previous iteration of the bill were not made public. Even the public comments on the 2022 version of the Bill, which eventually became the Act, were not released by the government. There is every possibility that after passing The Digital Personal Data Protection Act, the Right to Information Act which is a useful tool that empowers citizens to hold the government to account, will be rendered almost worthless.

1. Objectives of Digital Personal Data Protection Act, 2023

As the preamble of the Digital Personal Data Protection Act states that
"An Act to provide for the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes and for matters connected therewith or incidental thereto"[9].
There are two main terms used in the said Act which are 'data' and 'digital personal data' which are protected under this Act. The Digital Personal Data Protection Act, 2023 seeks to address a range of issues related to data processing, privacy, and individual rights. It is part of India's effort to establish a comprehensive framework for data protection in the digital era. It offers a promising blueprint for future where technology serves humanity. Now this Act is India's most comprehensive statute in the field of privacy, bringing in a much-needed framework for assuring individuals visibility and control over their online personal data. The DPDP Act borrows significantly from the European General Data Protection Regulation (GDPR), with some foundational deviations.

Applicability and Scope:

- The Act applies to the processing of digital personal data within India, whether collected online or digitized from offline sources.
- It extends its jurisdiction to processing data outside India if it's intended for offering goods or services within India.

Consent and Lawful Processing:

- Personal data can only be processed for lawful purposes, and the consent of the individual is required.
- Exemptions from consent include specified legitimate uses, such as voluntary data sharing by individuals and processing by the State for licenses, permits, benefits, and services.

The Right to Information Act, 2005

Historical Background

Genesis of RTI law: In Raj Narain vs the State of Uttar Pradesh[10] it was held by the Supreme Court of India
"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries.

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[7] Article 19(2) of International Covenant on Civil and Political Rights (Adopted on 16th December, 1966)
[8] (2017) 10 SCC 1, AIR 2017 SC 4161
[9] Preamble of Digital Personal Data Protection Act, 2023
[10] 1975 AIR 865, 1975 SCR (3) 333

They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security".

The Supreme Court ruled that Right to Information will be treated as a Fundamental Right under Article 19. The Supreme Court held that in Indian democracy, people are the masters and they have the right to know about the working of the government. Thus, the government enacted the Right to Information Act in 2005 which provides machinery for exercising this fundamental right.

In 1986, The Supreme Court in L.K Koolwal v. State of Rajasthan and Ors.[11], Para 3 of the judgement states that:

"A Citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy which existed in the old times that the State is not bound to disclose facts to the citizens or the State cannot be compelled by the citizens to disclose facts, does not survive now to a great extent. Under Article 19(a) of the Constitution there exists the right to freedom of speech. Freedom of speech is based on the foundation of the freedom of right to know. The State can impose and should impose the reasonable restrictions in the matter like other fundamental rights where it affects national security and any other allied matter affecting the nation's integrity".

According to the judgement, freedom of speech and expression provided under Article 19 of the Constitution implies Right to Information, as without information the freedom of speech and expression cannot be fully used by the citizens. According to Thomas Jefferson "Information is the currency of democracy," and critical to the emergence and development of a vibrant civil society.

The Act is one of the most important Acts which empowers ordinary citizens to question the government and its working. This has been widely used by citizens and media to uncover corruption, progress in government work, expense-related information, etc. The primary goal of the Right to Information Act is to empower citizens, promote openness and accountability in government operations, combat corruption, and make our democracy truly function for the people. It goes without saying that an informed citizen is better equipped to keep a required track on governance instruments and holds the government responsible to the governed. The Act is a significant step in informing citizens about the activities of the government.

All Constitutional authorities, agencies, owned and controlled, also those organisations which are substantially financed by the government comes under the purview of the Act. The Act also mandates 'public authorities' of union government or state government, to provide timely response to the citizens' request for information.

Analysis of Definitions under the Acts

DPD Act covers only such personal data of an individual which is available with any agency in digital form or non-digital form and digitized subsequently. The main purpose of enacting this law is to protect the individual from any misuse of personal data by the agencies that collect the personal data of such individuals for lawful purposes. However, on the other hand, the definition of 'Information' given under the RTI Act is used extensively. The said definition covers all the information available with the government functionaries in the form of record/document as well as in digital form subject to the certain exemptions. Since exemption clause has already been given under RTI Act, therefore, it can be said that both these Acts serve different purposes.

Analysis on the point of consistency with other law

As per Section 38(1) of the DPDP Act, all the provisions of this Act shall be in addition to any other existing law and not in derogation of any other law for the time being in force. On bare interpretation of the above-said section, it is clear that the provisions of this section are only in addition to other transparency laws enacted in India. But on the other hand, Section 38(2) of this Act states that

"In the event of any conflict between a provision of this Act and a provision of any other law for the time being in force, the provision of this Act shall prevail to the extent of such conflict"[12].

The text of this section give overriding effect to the provisions of the Digital Personal Data Protection Act, 2023 on all the transparency laws in case of conflict. On the interpretation of this section it is clear that in case of conflict with any other provision of other law, the overriding effect of this section is only limited to the extent of such conflict. It means as and when the question arises to disclose the digital personal data of an individual held by any govt. functionaries under the RTI Act, the provision of Section 38(2) of the DPDP Act shall be invoked.

Analysis of Procedure to be adopted

The Central Government by notification, for the purpose of this Act, shall establish a board to be called the Data Protection Board of India. The board shall consist of a Chairperson and such number of other Members as the Central Government may notify. The Chairperson and other Members of the board shall be appointed

[11] AIR 1988 Raj 2, 1987 (1) WLN 134

[12] Section 38(2) of Digital Personal Data Protection Act, 2023

by the Central Government. The Chairperson and other Members shall hold office for a term of two years and they shall also be eligible for re-appointment. The main functions of the Board shall include:
a) general superintendence and giving direction in respect of all administrative matters of the Board.
b) authorise any officer of the Board to scrutinise any intimation, complaint, reference or correspondence addressed to the Board.
c) authorise performance of any of the functions of the Board and conduct any of its proceedings, by an individual Member or groups of Members and to allocate proceedings among them.
According to Section 28(1) of the DPDP Act, the board shall function as an independent office and as far as practicable it shall be a digital office. According to this section the office of the board shall receive any complaint in respect of any data breach in digital form and process and dispose it of digitally means the complainant can file the complaint with the Board through online mode only and the same will be processed (allocation of ticket no. and opportunity of hearing) and disposed of through online mode only. As per the report published on Datareportal in early 2024[13] there were 751.5 million people in India have access to the internet facility which constitutes internet penetration in the country was stood at 52.4 percent.
In this scenario where the number of people with internet access is very low, the proper implementation of the DPDP Act which accepts complaints in digital form will not serve its purpose effectively. On the other hand, the Right to Information Act provides for a simple procedure of filing of application on a plane page for seeking information which is more easier process for the common man. Further, there is no mechanism to identify the misuse of individual personal data by any government functionary or further transfer of personal data to other agencies for any purpose. Moreover, the process of filing a complaint with the Board regarding any data breach is very complicated which is almost impossible for masses who are uneducated. For filing any complaint firstly, they must have information about the data breach of their personal data and secondly, they have to approach some intermediary to file a complaint against such breach which makes the process a more laborious task, especially in the case of uneducated persons.
On the other hand, Section 6(1) of the Right to Information Act, 2005 permits the information seeker to submit an RTI application in both modes i.e. in writing as well as electronically which makes the process of obtaining information very easy for the applicants. Further, Section 6(1)(b) provides that the State Public Information officer shall render all reasonable assistance to the information seeker where such request can not be made by him/her in writing for any reason. However, no such provision is made in the Digital Personal Data Protection Act, 2023 to enable the process of filing complaints easy.

Establishment of Board and Authorities under both Acts

According to section 19(2) of the DPDP Act, the Board shall consist of one chairperson and other members and their appointment will be made by Central Government in such manner as may be prescribed. However, on the other hand, Chief Information Commissioner and Information commissioners were earlier appointed by the President on the recommendation of a committee that consisted of the Prime Minister as Chairperson of the Committee, a Leader of Opposition in the Lok Sabha and a Union Cabinet Minister to be nominated by the Prime Minister.
The appointment criteria in both Acts were completely different. The Right to Information Act provided a transparent and effective way of appointment of commissioners who may exercise all such powers and do all such acts and things which may be exercised or done by the Central Information Commission autonomously without being subjected to directions by any other authority under this Act. However, the government through a recent amendment i.e. Right to Information Amendment Act, 2019 has changed the criteria of appointment and term of office in respect of CICs and SICs. On the other hand, all the members of the Board under the DPDP Act shall be appointed by the central government which means the board may use its power as per direction of the central government and not autonomously. Further element of biasedness in appointments can not be ruled out which is not a good sign for the justice delivery system. There are high chance that the powers of this Board can be used by the Central Government as a weapon like other authorities (Eg. CBI, ED, and vigilance) to settle their political gains.

Analysis of Exemptions under both Acts

Section 17(2)(a) of DPDP Act[14] empowers the central government to exempt instrumentalities of the state by way of notification. However, similar exemptions are also available under the RTI Act which exempts the Intelligence and Security organization specified in the Second Schedule of the Act.

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[13] https://datareportal.com/reports/digital-2024-india (visited on 10/10/2024)

[14] "The provisions of this Act shall not apply in respect of processing of personal data– (a) by such instrumentality of the State as the Central Government may notify, in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence relating to any of these, and the processing by the Central Government of any personal data that such instrumentality may furnish to it".

"Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government:
Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section:
Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request[15].
The bare language of sub-section (a) and (b) of section 17(2) indicates that the central government has widened the scope of the DPDP Act. It gives all the power in the hands ofthe Central Government to notify any state instrumentality or organization to keep out of the ambit of this Act. The government can have access to the sensitive personal data of any individual like biometrics, demographic details, location, etc. in the name of integrity and security of the state or for research, archiving or statistical purposes which is a violation of the Right to Privacy enshrined under Article 21 of the Indian Constitution. This provision empowers the central government to keep any agency or organization out of the ambit of this Act. Further, these exemptions can result in misuse of individual personal data like biometrics linked to their Aadhaar cards. The cases of online fraud have increased at a very fast pace, especially after the pandemic which indicates the misuse of digital personal data available with the agency. Hence, it is desirable that all agencies, without any exemption, be within the ambit of the DPDP Act, so that misuse of the personal data of individuals can be prevented.

Analysis of Amendment made to certain Acts

Section 44(3) of the DPDP Act[16] has amended the section 8(1)(j) of the RTI Act, 2005 "**information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:**
Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person".

Section 8(1)(j) of the RTI Act substituted as
"(j) information which relates to personal information".
The amendment to section 8(1)(j) of the RTI Act therefore exempts all personal information. It does away with the exceptions carved out within the section based on which personal information could have been supplied. The amendment has completely undermined the Right to Information Act. It abridges the discretionary powers of authorities performing duties under the RTI Act to decide whether personal information needs to be disclosed in large public interest or not. Further, if the PIO or Appellate Authority wants to disclose the information in large public interest, the same cannot be disclosed in terms of section 44(3) of DPDP Act, 2023. The exemption clause under the Right to Information is given under Section 8 of the Act. Further, these clauses are guidelines to the adjudicators that the personal information of individuals can also be disclosed if the large public interest outweighs the private interest. There are hardly any cases where the personal information of an individual is disclosed to a third party in large public interest which causes unwarranted invasion on the privacy of the individual. Due to the amendment of section 8(1)(j) of the RTI Act, all the information that can be supplied under RTI Act will be denied arbitrarily by the Public Information Officers and Appellate Authorities by merely quoting the section 44(3) of the DPDP Act without giving the justification or reasoning for the decision arrived at. The amendment has taken away the discretionary powers of the adjudicators to decide the cases of supply of 'personal information' on merits.

Conclusion & Suggestions

The Right to information is a weapon available in the hands of citizens to fight against corruption. The central government has proposed various amendments to the Act from time to time to undermine the objectives of this Act. NGOs, Social workers and RTI activists strongly opposed the proposed amendments from time to time but this time government has successfully amended the most potent and relevant section (section 8) of the RTI Act. Earlier also The Right to Information (Amendment) Bill, of 2013 proposes to remove political parties from the ambit of the definition of public authorities which faces strong opposition from RTI Activists. The matter regarding removal of political parties from the ambit of the RTI Act is subjudice before the Supreme Court of India. These amendments are harmful to the Rights available to the common man to fight against

[15] Section 24(1) of the Right to Information Act, 2005

[16] In section 8 of the Right to Information Act, 2005, in sub-section (1), for clause (j), the following clause shall be substituted, namely: — "(j) information which relates to personal information;".

corruption. The Right to Information Act is the most effective and successful Act among all other transparency laws till now which gives power to the citizen to curb the corruption and arbitrary power of the government functionaries. The amendments made in the transparency laws from time to time indicate that the government is not in favor of citizens to be informed about their policies and the transparent functioning of its functionaries.

It is evident that both these Acts were passed to serve different purposes. It is needless to mention here that Right to Information Act is a weapon in the hands of citizens to curb corruption. The RTI Act was passed to achieve the purpose of transparency, openness, and accountability and to contain corruption. The main objective of the Right to Information Act is to secure for citizens to access to information under the control of public authority. The Right to get information is not absolute but is limited by certain exemptions given under the Act. On the other hand, the Digital Personal Data Protection Act protects citizens against misuse of their Digital Personal Data by any third party or agency.

Suggestions

1. Both these Acts serve different purposes and they should be interpreted in such a manner so that both Acts can be complementary and supplementary to each other's. One Act should not infringe or transgress the domain of another Act so the objectives and purposes of both Acts can be met
2. The DPDP Act should not undermine the objectives and purpose of the RTI Act by amending the relevant section (section 8) of the RTI Act as it not only abridges the discretionary powers of various authorities under the Act but also frustrate the purpose of the RTI Act for which it was passed.
3. No government agency should be exempted from disclosure of information to avoid misuse of personal data and to promote transparency.
4. Complaint filing should be made easy in DPD Act, 2023 as online filing of complaints is the only mode available in the Act. Both online as well as offline modes of filing complaints should be available.

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