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The Digital Personal Data Protection Act, 2023: Reshaping Privacy Rights in India

~*Saksham Bhardwaj*

Abstract

The Digital Personal Data Protection Act, 2023, marks the first-ever attempt at regulating the collection, processing, and protection of personal data in a progressively digital society in India. This law is based on the constitutional principles set out by the Supreme Court of India in *K.S. Puttaswamy v. Union of India* and seeks to operationalise the right to privacy through a legislative framework. The law ensures certain protections, including consent-based processing, greater rights granted to Data Principals, and stronger accountability mechanisms for major data fiduciaries. However, despite these positive changes, the law comes with certain constitutional and institutional problems. The overly expansive exceptions to government action in Section 17, liberal rules governing data transfer outside of India, and lack of clarity about the board's independence are some examples. As one evaluates the Act, there is both reason to be optimistic and wary. The reasons to be optimistic include the fact that India has finally put a comprehensive data protection law on its statute books; however, reasons to be wary include the fact that some of the most critical provisions of the law may end up infringing upon people's privacy rights.

I. Background: Privacy as a Constitutional Imperative

The enactment of the DPDP Act can be directly attributed to the landmark nine-judge bench ruling in *K.S. Puttaswamy*, which upheld informational privacy and the right to privacy of an



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individual's personal data as a fundamental right under Article 21 of the Indian Constitution.¹ Post the *Puttaswamy* judgement, the legislative vacuum on data privacy was unsustainable from a constitutional standpoint.² Initially, the Personal Data Protection Bill 2019 was enacted after going through rigorous examination by the Joint Parliamentary Committee, but it was later withdrawn and replaced with the present DPDP Act,³ which adopts an approach of administrative simplicity compared with the earlier Bill's more elaborate sectoral framework.

II. Substantive Advances in Consent and Rights Framework

The framework of consent under the Act is its primary rights-enhancing component. Data Principals must give consent that is free, specific, informed, unambiguous and unconditional under Section 6,⁴ and "legitimate use" of personal data by the data fiduciary is possible only in very restricted circumstances under Section 7,⁵ akin to the European Union's General Data Protection Regulation (GDPR).⁶ The data principals are empowered with rights to access, correct, and erase their personal data. Further, the introduction of Significant Data Fiduciaries,⁷ which have stricter obligations, including the requirement to conduct a Data Protection Impact Assessment,⁸ replicates the GDPR's tiered model of accountability and reflects an understanding of varying risk profiles within the digital economy. These measures collectively ensure the constitutional guarantee of informational self-determination

¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

² The Digital Personal Data Protection Act, 2023, No. 22, Acts of Parliament, 2023 (India) [hereinafter DPDP Act].

³ Personal Data Protection Bill, 2019, Bill No. 373 of 2019 (India) (withdrawn 2022).

⁴ DPDP Act, *supra* note 2, § 6.

⁵ DPDP Act, *supra* note 2, § 7.

⁶ Commission Regulation 2016/679, art. 6, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].

⁷ DPDP Act, *supra* note 2, §§ 10–11.

⁸ GDPR, *supra* note 6, art. 35.



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III. Government Exemptions: A Constitutional Fault Line

Section 17(2)(a) of the Act is the most constitutionally dubious provision because it permits the exclusion of state activities undertaken in the interests of national security, public order and sovereignty from the scope and application of the whole Act.⁹ Complete state exemption stands in stark contrast to the three-part test prescribed in the *Puttaswamy* judgement, which is based on legality, legitimate objective and proportionality,¹⁰ as well as *Shreya Singhal*'s principle that restrictions on fundamental rights must be narrowly tailored.¹¹ In comparison to Section 23 of the GDPR, which explicitly states that all derogations based on national security will be subject to a clear provision of law and proportionality.¹² India's unconditional exemption ensures that no such accountability or limitations can be imposed on the surveillance powers of the State. This is the most constitutionally precarious element of the Act, and therefore makes it subject to scrutiny in the apex court.

IV. Cross-Border Transfer and Regulatory Independence

Section 16(1) employs a negative-list model for cross-border transfers: transfers to countries other than those designated as negative by the Central Government are allowed.¹³ This has to be distinguished from the GDPR's adequacy-based model, which mandates a positive finding of comparable protection for cross-border data flows.¹⁴ The attractiveness of this approach for a trade- connected digital economy is obvious. But so are the disadvantages for Data Principals: the right of correction and erasure against a foreign Fiduciary is not exercisable in a meaningful

⁹ DPDP Act, *supra* note 2, § 17(2)(a).

¹⁰ *Puttaswamy*, (2017) 10 SCC 1 ¶¶ 178–180 (India) (articulating the three-part test of legality, legitimate aim, and proportionality).

¹¹ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 (India).

¹² GDPR, *supra* note 6, art. 23.

¹³ DPDP Act, *supra* note 2, § 16(1).

¹⁴ GDPR, *supra* note 6, arts. 44–49 (establishing adequacy decisions as the primary mechanism for cross-border transfers).



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way. No less troublesome is the nature of the Data Protection Board.¹⁵ Whereas the GDPR insists on “complete independence” of supervisory authorities,¹⁶ the appointed officials for the Board are nominated and their tenure fixed by the Central Government.¹⁷ A regulatory agency whose institutional identity derives from the executive branch cannot impartially hear appeals against the executive branch itself.

V. The Way Forward

The DPDP Act, 2023 marks true legislative progress in creating India’s first mandatory data protection law and putting the constitutional guarantees outlined in *Puttaswamy* into statutory rights.¹⁸ However, as it currently stands, the DPDP Act, 2023, displays structural flaws requiring principled legislative reform. There are three key areas for improvement.

First, Section 17 needs amendments to ensure proportionality and independent oversight of the State’s processing activities, in turn making it compliant with the constitutional limits outlined by the Supreme Court in *Puttaswamy*.¹⁹ As things stand, broad exemptions offered to the State without sufficient guarantees remain questionable from a constitutional point of view and go against the very essence of the Act. Second, the cross-border transfer system ought to include an adequate system that would secure the rights of the Data Principals even outside of India’s borders.²⁰ Otherwise, the DPDP Act creates a loophole that can easily be abused by the ever-increasing data flows between countries.²¹ Finally, the Data Protection Boards have to be

¹⁵DPDP Act, *supra* note 2, §§ 3(6), 18–27.

¹⁶ GDPR, *supra* note 6, art. 52(1).

¹⁷ DPDP Act, *supra* note 2, § 18.

¹⁸ *Puttaswamy*, (2017) 10 SCC 1 (India).

¹⁹ DPDP Act, *supra* note 2, § 17; see also *Puttaswamy*, (2017) 10 SCC 1 ¶ 180 (requiring proportionality as a constitutional condition for restrictions on fundamental rights).

²⁰ DPDP Act, *supra* note 2, § 16.

²¹ GDPR, *supra* note 6, arts. 44–49.



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granted autonomy from the Executive and operate independently through an appointment process similar to the one used for appointing members of constitutional institutions.

The rights-based digital economy is more than just a constitutional ideal; it is a matter of governance in a world where personal data is ubiquitous, and AI-driven decisions govern all aspects of people's lives.