

THE PROFOUND RAMIFICATIONS OF ONE AMENDMENT

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The deadline for comments on the Digital Personal Data Protection (PDP) Bill, 2022, has been extended till January 2, 2023. The Bill of 2022 incorporates hefty penalties for non-compliance, but which are capped without any link to the turnover of the entity in question.

A major concern is the provision in the Bill which seeks to deny providing any personal information on administration officials under Section 8(1)(j) of the Right to Information Act, citing the protection of “individual privacy”. This poses a serious problem with the right of privacy-vis-à-vis the right to freedom of speech.

This fourth iteration of the law on data protection misses out on the recommendation of the Justice Srikrishna Committee, which was set up in 2017, after the Supreme Court’s Puttaswamy judgment. It ignores the concerns raised by stakeholders about its previous versions. The Joint Parliamentary Committee had suggested more than 80 amendments to the draft PDP Bill of 2019, which was withdrawn in August 2022, citing “extensive changes”.

Under the draft law, all the major actors – data principal, data fiduciaries, and the Data Protection Authority of India (DPAI) – will exercise excessive control. The DPAI will have great independent authority in a regulative area. The selection committee consisting of the Chief Justice of India or her nominee, the Cabinet Secretary, and one person with expertise and reputation in the data technology field will have tremendous power. The unfettered power of the executive over the DPAI only serves to defeat the autonomy of the institution. It is imperative that there be a certain degree of separation between the executive and the regulatory body. Since the DPAI will be entrusted with monitoring and enforcing legal affairs and policy setting, research and awareness, inquiries, grievance handling, and adjudication, this overseeing power is expected to guard fundamental rights. If there is such excessive power, due to the direct intervention and control of the executive ensuring accountability and transparency becomes a big challenge.

This is no casual amendment to the Bill; it has profound ramifications. It will affect the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and play havoc with the tenuous balance between freedom of speech and the exceptional restrictions delineated in Article 19(2). In fact, the first amendment to this effect in the Constitution in 1951 had almost diluted the freedom of speech. Unfortunately, the so-called data protection Bill in the name of protecting privacy is destined to destroy the right to information.

The intended amendment would considerably dilute the institutional independence of the DPAl while removing Section 8(1)(j) of the RTI Act, 2005. The Bill says: “(2) Clause (j) of sub-section (1) of section 8 of the Right to Information Act, 2005 shall be amended in the following manner: (a) The words ‘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’ shall be omitted;...”

In addition, the Bill justifies the exemption from the RTI in the interest of the “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 the preceding sub-clauses”. This Bill enhances the penalty provisions for entities which fail to protect individuals from data breaches. In the name of protecting individuals, the government threatens to impose a fine of up to 250 crore. This will prove a deterrent for filing any genuine complaints. If the exception is allowed in the RTI Act, the amendment proposes to remove the exception.

The ratio of *Madras Bar Association v Union of India* has been ignored in the new draft Bill. The provision of the selection committee in the National Tax Tribunal Act (NTTA) was struck down by the Supreme Court as it comprised more executive members than judicial members. It was held unconstitutional because it contravened the institutional independence of the tribunal. The NTTA empowered the executive to decide transfers, the location, jurisdiction, and constitution of benches. It amounted to excessive executive interference. This principle would not, prima facie, extend to those tribunals which review the actions of independent regulators such as the Securities and Exchange Board of India, the Competition Commission of India, or the Telecom Regulatory Authority of India. Under the DPDP Bill, the selection committee will have a direct link with the executive, but will have no independent authority.

In addition, the DPAl also performs adjudicatory functions. The appellate adjudicatory officers are to be appointed by the board members of the DPAl who are solely appointed by the executive members. Such appointments could undermine the independence of the authority. The RTI Amendment Act, 2019, which brought about similar changes, has seriously damaged the law. Similarly, executive officers will decide the salary, and jurisdiction upon the central government which undermines the independence of the judges. They can be easily struck down.

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