

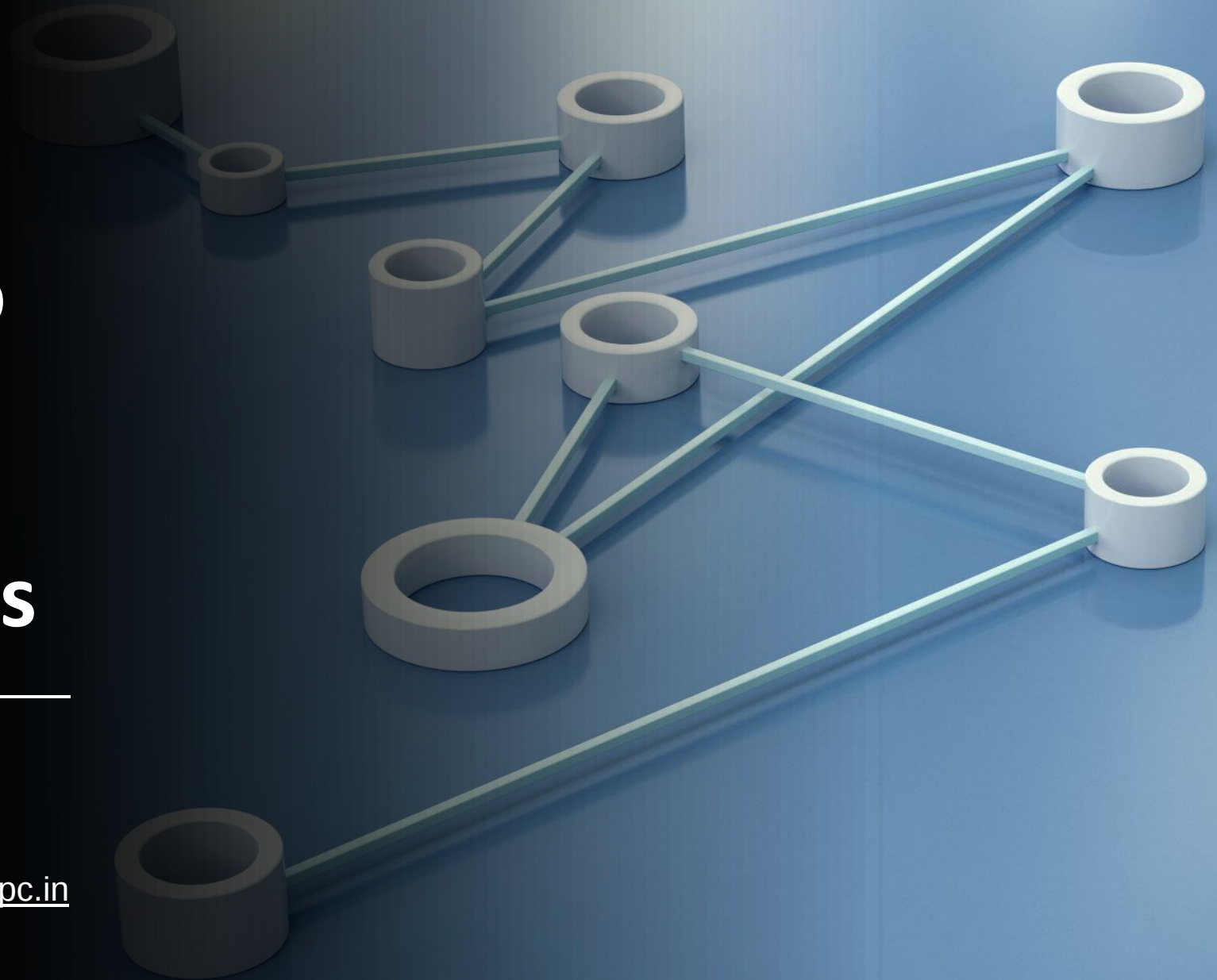


Introduction to basic concepts of Data Protection Laws

16th December 2022

Naavi

www.naavi.org : www.fdppl.in : www.fdppl.in



Data Protection and Privacy

- In the present context, we are discussing data protection law as an **instrument of protecting the Right to Privacy**.
- Otherwise, Data Protection could also mean
 - Protecting Non Personal Data
 - in which case it is the topic of Information Security.
- Data Protection in the context of Privacy **includes** protecting Personal Data
 - But the role of “Notice”, “Consent” etc..goes beyond mere protection of data.
 - Personal Data Protection Law is geared to protect the Privacy though we may name it as Digital Data Protection Act only.
 - Hence there is a need to understand the concept of Privacy without which we cannot debate the law in depth.

What is Privacy?

- Privacy is a “Desired Democratic Right” in a society that respects freedom
 - Earliest reference is reported from the Indian texts of the 12th and 14th century, by Narayan Pandit in documents such as “Hitopadesha” and “Panchatantra”, developed to educate the sons of the King of Pataliputra
 - The texts are said to contain the statement “Sarve sve grihe raja” (every man is a king in his own house)
 - These words were reflected in the Supreme Court case of Kharakhsingh Vs the State of UP where the judgement recalled the concept “Every man’s house is his castle” and attributed it as an English Common law maxim.

What is Privacy?

- Section 509 of the IPC, 1860, makes it a crime to intrude into the privacy of a woman.
 - Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, **or intrudes upon the privacy of such woman**, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.
- In 1888, Chief Justice John Edge of the Allahabad HC observed, “In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be Indian custom of privacy valid in law.”
 - Indicates that IPC provision was not imported from England is very much an Indigenous introduction

Modern Debate on What is Privacy?

- The modern global history of Privacy points to 1891 when an American Lawyer Samuel Warren and Louis Brandeis described the right to privacy in an article as the “Right to be let alone”.
- We can segregate this concept of Privacy be into different types
 - Physical Privacy ...physical freedom
 - Mental Privacy... freedom of thinking without disturbance
 - Neuro Privacy... freedom from intrusion into the physical brain activity

What is Privacy?..

- Operationally these basic types can manifest as Communication privacy, Information Privacy, Behavioural Privacy etc.
- This raises questions such as
 - Should Personal Information be considered part of Privacy?
 - Is it Information Privacy?
 - This will be an **Extraction based approach** to Privacy...regulation of collection and use of personal information
 - Should **aggregation of data** be considered as intrusion to privacy?
 - This will be an **observation based approach** ...regulation of Surveillance, Profiling
 - Should **dissemination** be considered as intrusion to privacy?
 - Is this Communication privacy
 - Should **Personal behaviour or attitude** be considered part of Privacy?
 - What I eat? Where I go? What are my sexual preferences? reading preferences? Political opinions? Religious views? etc

What is Privacy?.. ..Naavi's Dilemma

- Is Privacy a Right that can try to moderate the behaviour of others?
 - A Right of mine should not infringe the independent Right of another
 - My desire to act anonymously should not create a security threat to another
 - ..the classic clash between Right to Privacy and Right to Information or Right to Security
- Profiling is a human trait.
 - The moment we see a person, our brain creates a picture of him including what I expect him to be.. Can this be curtailed?
- If after profiling, I communicate accordingly
 - I see you are hungry and say “I have a chocolate to sell”
 - Is it profiling and monetization?
 - If so, Can I regulate this response by law?
- In Cambridge Analytica, what was wrong?
 - Profiling without permission or Profiling per-se? or using the profile for building an advertising campaign for Trump

What is Privacy?.. ..Naavi's Dilemma

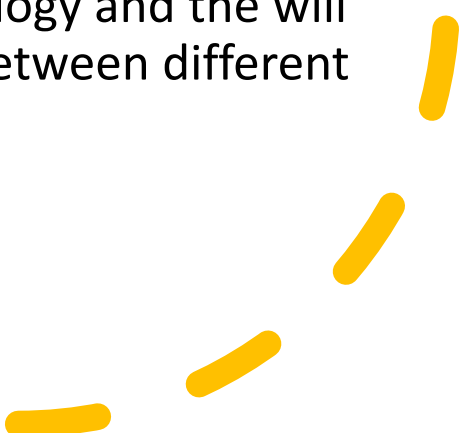
- What is the basis of Business?
 - Identify the market need and supply
 - Requires understanding of consumer behaviour through observation
 - This is what Privacy calls as “Profiling”
- If Profiling is privacy intrusion and is banned,
 - then the fundamental aspect of Marketing through consumer behaviour analysis, market segmentation, structuring the advertisement communication addressing the requirement of the audience etc are all illegal.
- Is this the end-objective of Privacy Regulation?
 - Should we find a harmonious solution?

What is Privacy?.. ..Naavi's Dilemma

- What is the basis of Governance?
 - Identify the needs of the citizens and provide a solution.
 - Includes provision of basic facilities like health and education
 - Securing the society
 - Law Enforcement
- Resources are always limited and hence benefits need to be rationed.
- Rationing means identifying beneficiaries and Identifying beneficiaries means profiling as well as prevention of false claims
- Law enforcement includes prevention of crimes and Intelligence activities
 - Includes Surveillance
- Can Privacy legislation stop the powers of the Government to identify and provide direct benefits to the society or to watch over criminals?

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Is it possible to Protect Privacy of a Person

- And also protect
 - The **Right to Security** of another person by profiling and automated decision making?
 - The **Right to conduct business** of an entity with the use of personal data?
 - The **Right to efficient Governance** with surveillance?
 - Yes. It is possible provided we have a proper understanding of Privacy and Technology and the will to recognize the need for harmony between different stake holders
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What is Privacy?.. ...Naavi's Dilemma

- Can Privacy be defined by identifying a set of harms that may be caused?
- Suggested definition of Privacy through definition of Privacy harm
- “Privacy Harm” means any wrongful and adverse impact on the body, mind or property of an individual and includes
 - a) Physical or Mental injury
 - b) Loss, distortion or theft of identity
 - c) financial loss or loss of property
 - d) Loss of reputation or humiliation
 - e) Loss of Employment or source of income
 - f) Threat to life and property including causing harassment or subjecting to extortion
 - g) Causing discriminatory treatment in the society.
 - h) Psychological or Neurological manipulation which alters the ability of an individual to take autonomous decisions

What is Privacy?.. ..Naavi's Dilemma

- We Can define the Right to Privacy as a Right to security against the set of defined harms?
 - Every Person shall be entitled for to claim a reasonable compensation against Privacy harms such as
 - a) Physical or Mental injury
 - b) Loss, distortion or theft of identity
 - c) financial loss or loss of property
 - d) Loss of reputation or humiliation
 - e) Loss of Employment or source of income
 - f) Threat to life and property including causing harassment or subjecting to extortion
 - g) Causing discriminatory treatment in the society.
 - h) Psychological or Neurological manipulation which alters the ability of an individual to take autonomous decisions

P.S: "Protected Person" excludes certain category of persons such as illegal residents in India

Privacy Debate in Indian Judiciary

What is Privacy?

- **Constituent Assembly Debate: 1948**
 - Mr. Kazi Syed Karimuddin moved an amendment to protect individuals from unreasonable search-and-seizures, on the lines of the American and Irish Constitution.
 - although Dr B. R. Ambedkar pointed out that this clause is present in the Criminal Procedure Code, he accepted the amendment, calling it a 'useful proposition' which must be 'beyond the reach of the legislature'. However, the right to privacy did not find a definite and explicit place in the Constitution.

What is Privacy?

- **M P Sharma Vs Satish Chandra (1954: Supreme Court)**
 - The case related to search and seizure of documents of some Dalmia group companies following investigations into its affairs.
 - Following an FIR, the District Magistrate issued warrants, and searches were consequently conducted.
 - In writ petitions before the Supreme Court, the constitutional validity of the searches was challenged on the grounds that they violated their fundamental rights under Articles 19(1)(f) and 20(3) — protection against self-incrimination.
 - In M. P. Sharma vs. Satish Chandra, the 8-judge bench of the Supreme Court held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of privacy. They opined that the Constitution does not include language similar to the Fourth Amendment of the US Constitution, and found no justification to import the concept of a fundamental right to privacy in search-and-seizures, through what they called a 'strained construction'.

What is Privacy?

- **Kharak Singh vs State of UP (AIR 1963) ,**
 - Kharak Singh was arrested for dacoity but was released due to a lack of evidence. The Uttar Pradesh Police subsequently brought him under surveillance, which was allowed under Chapter XX of the Uttar Pradesh Police Regulations.
 - Kharak Singh then challenged the constitutional validity of Chapter XX and the powers it conferred upon police officials, as it violated his fundamental rights under Article 19(1)(d) (right to freedom of movement) and Article 21 (protection of life and personal liberty).
 - The 6-judge bench held that domiciliary visits at night was unconstitutional, but upheld the rest of the Regulations. More importantly, the bench held that the right of privacy is not a guaranteed right under the Constitution.
 - “an unauthorized intrusion into a person’s home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man
 - an ultimate essential of ordered liberty, if not of the very concept of civilization”.
 - Privacy as a Right to Physical distancing

What is Privacy?

- **R. Rajagopalan Vs State of Tamil Nadu (1995 AIR),**
- Supreme Court held
 - “the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21.
 - It is a ‘right to be let alone’.
 - A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters.
 - None can publish anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical.....

What is Privacy?...

Current Concept-

Puttaswamy Judgement

24th August 2017

- **J Chelmeshwar**
 - “In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy....
 - Definitional uncertainty is no reason to not recognize the existence of the right of privacy....”.
- **J Chandrachud**
 - “Privacy, in its simplest sense, allows each human being **to be left alone** in a core which is inviolable.”
 - “In an age where **information technology** governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world.”
 - While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.”
 - (Is let alone? And left alone? ...Mean the same?...like the Supreme Court debate on whether “Any” or “All” in law are same? In the demonetization debate)

Defining Privacy..
Puttaswamy
judgment-Justice
Chandrachud

- **J Chandrachud**

- *“This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit...”*
- *We may, for one reason or another, wish or be compelled to reveal such information,*
 - *but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.”*

Information Privacy

- The judgement brought the focus on the concept of
 - Information Privacy
 - Protection of Privacy therefore boils down to “protecting the information” that “protects the right to be left alone”
 - This is the bridge between Privacy Protection and Data Protection.
 - Has made it necessary for us to distinguish “Personal Data” from “Data” in general and accord special protection so that “Privacy” is protected for those for whom the constitution accords protection.

Privacy is a Fundamental right

- The Puttaswamy Judgement declared
 - Privacy is a fundamental right and is part of Right to life under Article 21
 - Subject to reasonal Restrictions under Article 19(2)
- It is therefore an obligation on the Government to protect the Right to Privacy
 - It is an obligation of the rest of the society to be guided by the statutory laws enacted by the Government for Privacy Protection.
 - In India the law related to Information Privacy is ITA 2000 and will be supplemented by PDPA 2021.
 - Kerala High Court opined that the right to privacy should also be considered as an obligation of the private sector

Global perspective of Privacy

- The logic for Privacy across the globe is same
 - To Protect the Right to Privacy of the Citizens of a country
 - In DIFC it is to protect the business in the zone
 - In some countries it is part of the Constitution
 - In some countries it is derived like in India as part of the Constitutional principles supplemented by Data Protection Laws.
- In many countries Privacy Protection laws first emerged as laws to protect the citizens against excessive surveillance by the Government which was undemocratic (Nazis of Germany)
- With the advent of “Digital Era”, the concerns of Privacy extended to “Information Privacy” and also to the “Private Organizations”

But.. Feeling
“Left Alone”
is essentially
a state of
mind of an
individual

- A person may feel free from interference even in a crowded local train
- A person may long for interaction with human beings in a Covid induced social distancing
 - Physical Privacy is different from Mental Privacy
- The challenge has been to find the means of protecting the Right to Privacy of the population of crores of individuals whose state of mind is in a constant flux through one law.

Privacy as A Right of Choice

- The impossibility of protecting the “State of Mind” of an individual by law has resulted in the right of privacy being redefined
- ***Right of an individual to decide how his/her personal information may be used by others***
 - How it can be collected, processed or disclosed

The Current operating definition

- Right to Privacy Means
 - *“Right of self determination of a natural person on sharing personal data specifying how the personal data may be used by the recipient and shared with others.”*
 - Naavi

Right to Neuro Privacy

- Right to Privacy as we understand now extends upto the Right to a mental status of an individual feeling “Being Left Alone”
- The control is to regulate the Personal information that is shared with third parties
- Psychological manipulation that makes a person part with personal information which he otherwise does not want to..
 - Is considered unacceptable
- Bringing a change of mind through external influences though involving sophisticated psychological suggestions is covered under the present laws
 - Eg: Cyber Hypnotism, Blue Whale Game, Dark Patterns etc
 - Direct or indirect interference in the mental space through manipulation of “Neuro Data” which changes the Right of Choice at the source level is beyond current laws and needs to be covered under a separate law extending to “Neuro Rights Protection”.

How Privacy Protection became the responsibility of the industry

- Personal Information is Data
- Data is an essential input to the decision making in a business and
- Data is a raw material to the Data Business
 - Privacy protection has become part of “Data Protection” in the IT industry

Concerns in Privacy invasion for commercial purposes

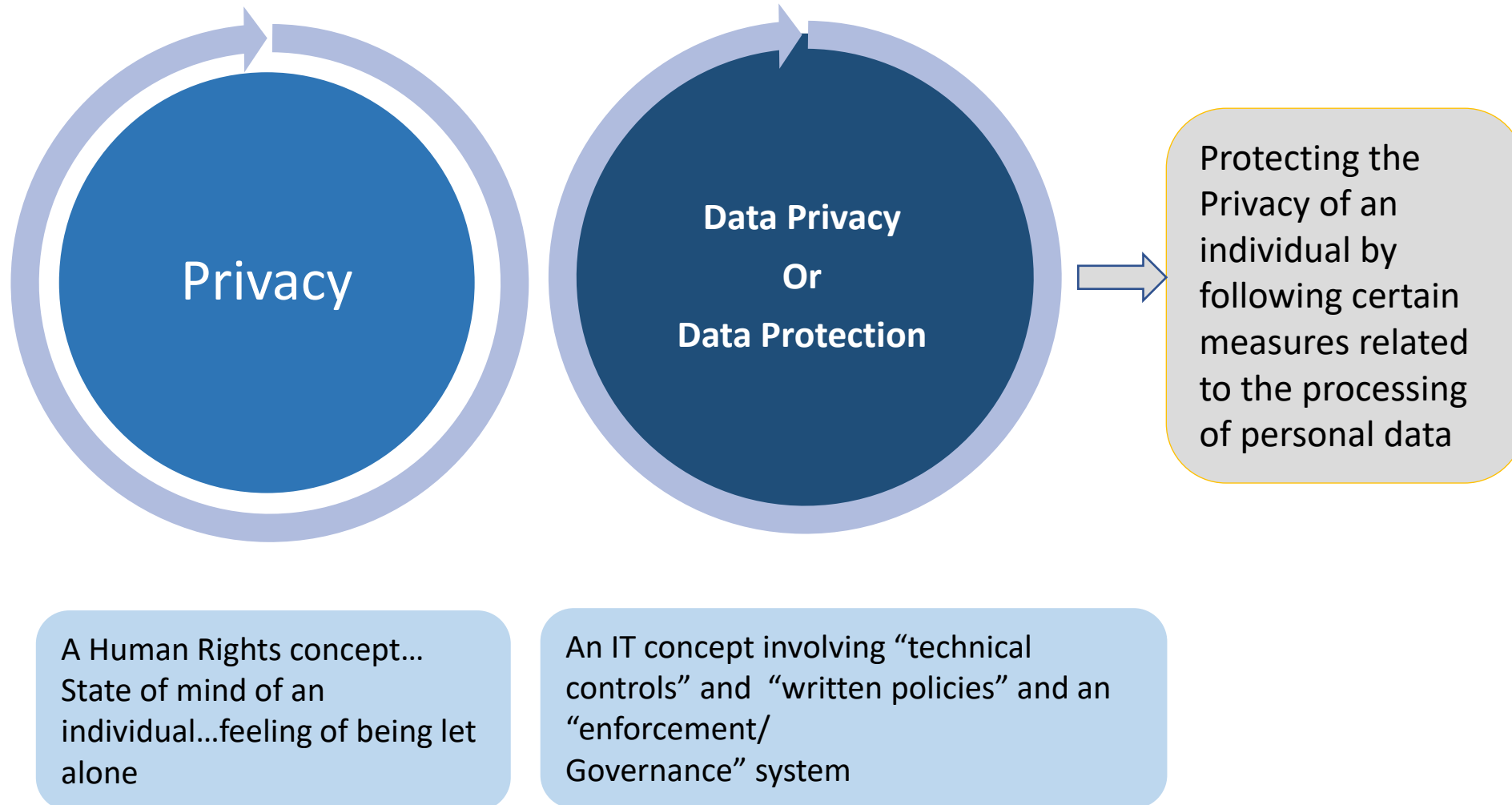
- Currently the world is dominated by technology
 - Google, Face Book, Apple, Amazon etc control a large part of information with embedded personal information
 - Used for commercial exploitation such as “Advertising”
 - “Profiling” is an inherent part of this advertising and marketing activity
 - Profiling requires “Collection of personal information” and “Processing of the data”
 - Artificial intelligence and Data Analytics have emerged as new science in the society
- Data Protection laws need to be in harmony with the industry and Government through designing of appropriate laws

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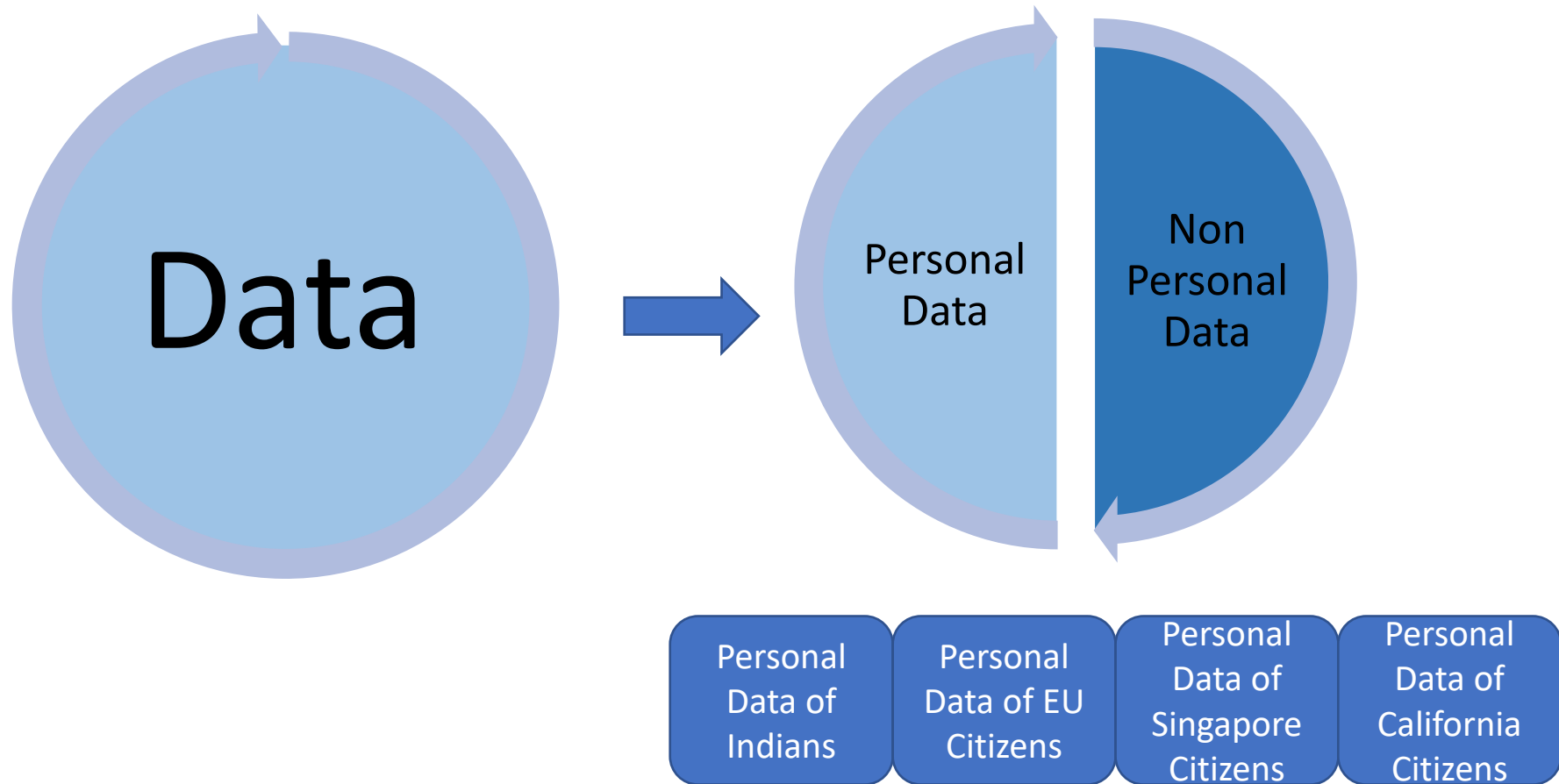
Right to Privacy has inherent conflicts

- Privacy essentially is a prevention of disclosure
 - Right to Information is a contrarian concept
 - Cyber Security is a duty of the Government and requires reasonable surveillance
 - Law Enforcement needs empowerment for intelligence gathering and forensic investigations
 - Law has to manage the conflict with business needs and the needs of Governance
 - Data Protection Law cannot therefore be a perfect fit for Privacy Protection as per the perspective of a Privacy activist
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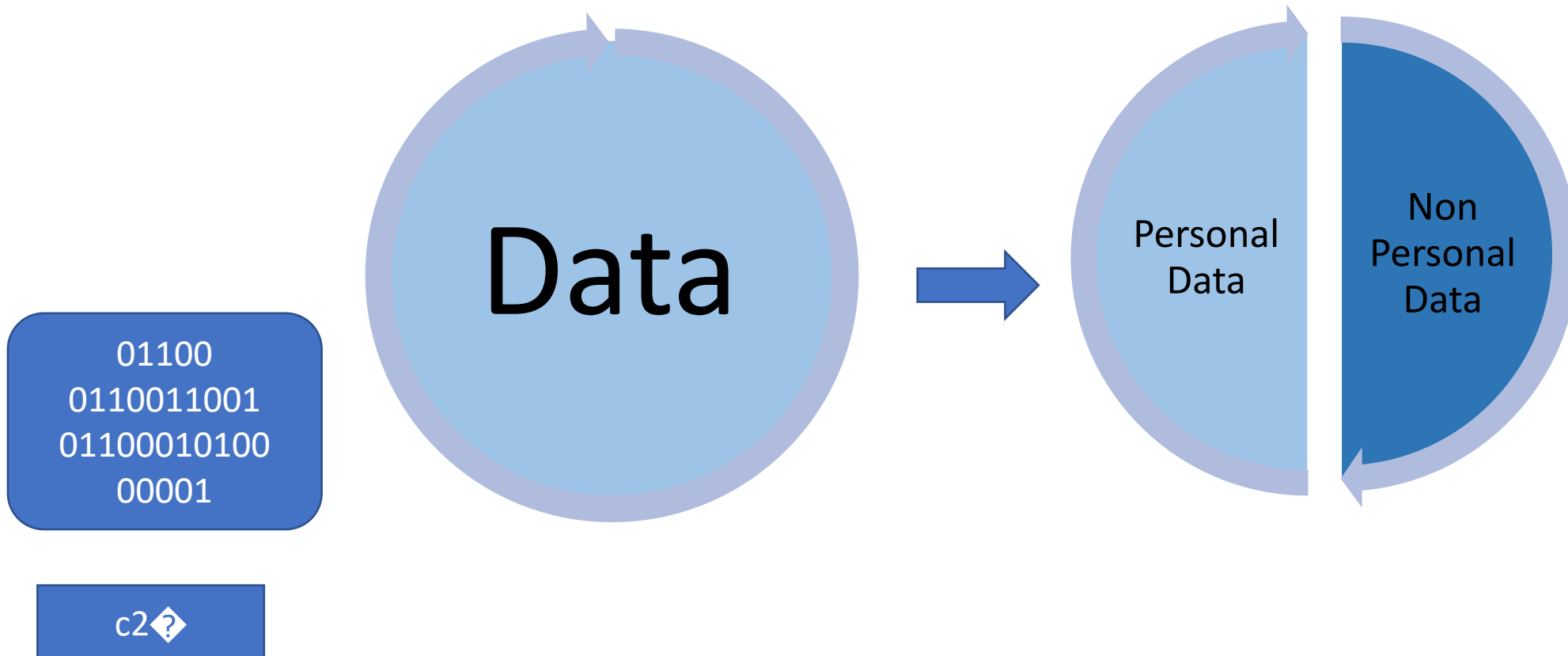
Privacy of an individual and Data Privacy



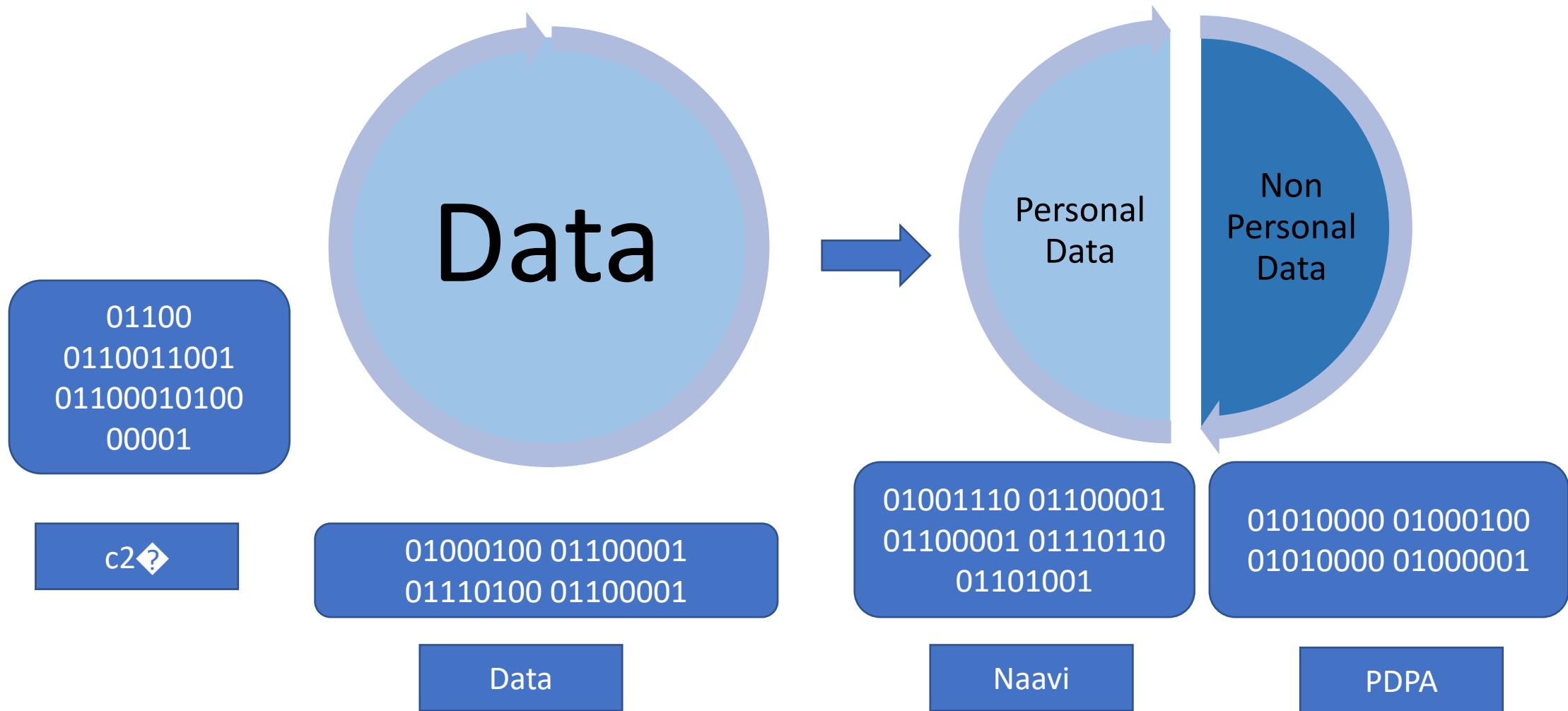
Data Categories from Protection perspective



Avatars of Data...

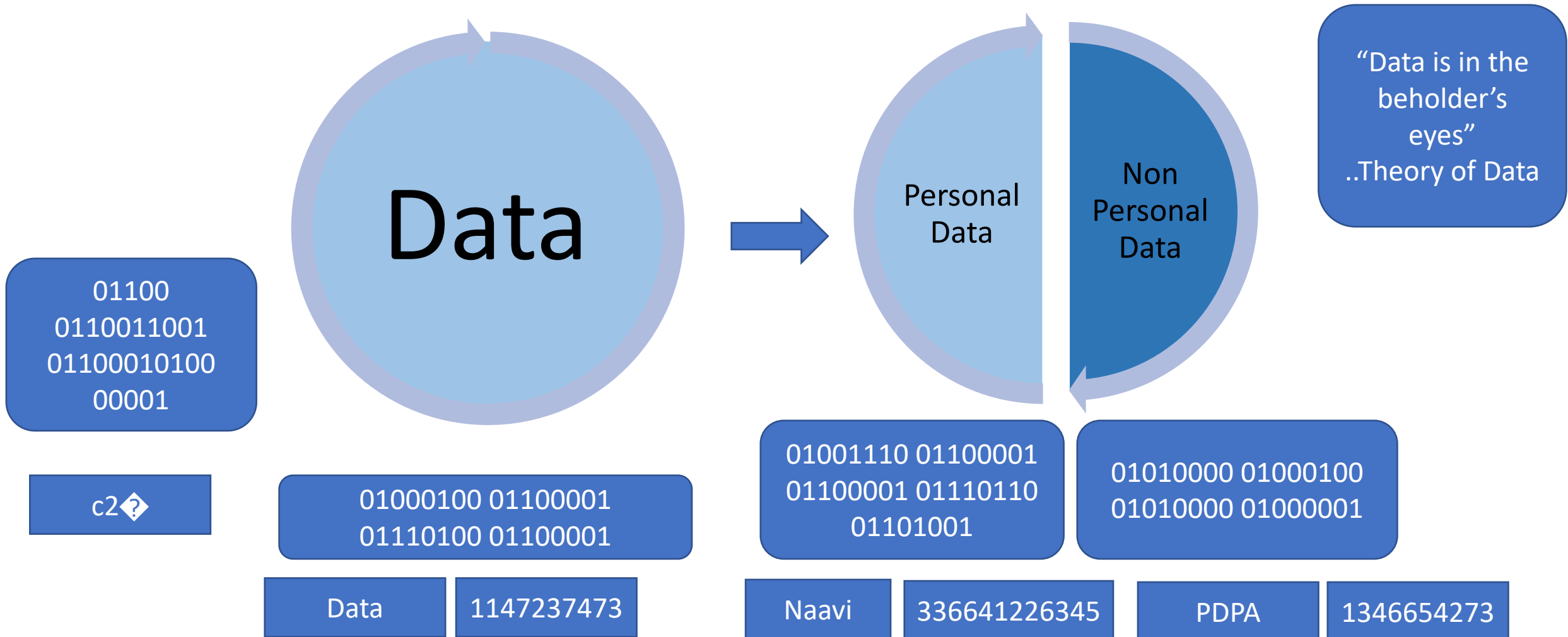


When binary data is organized, they acquire a capability to be interpreted by device into Text or otherwise



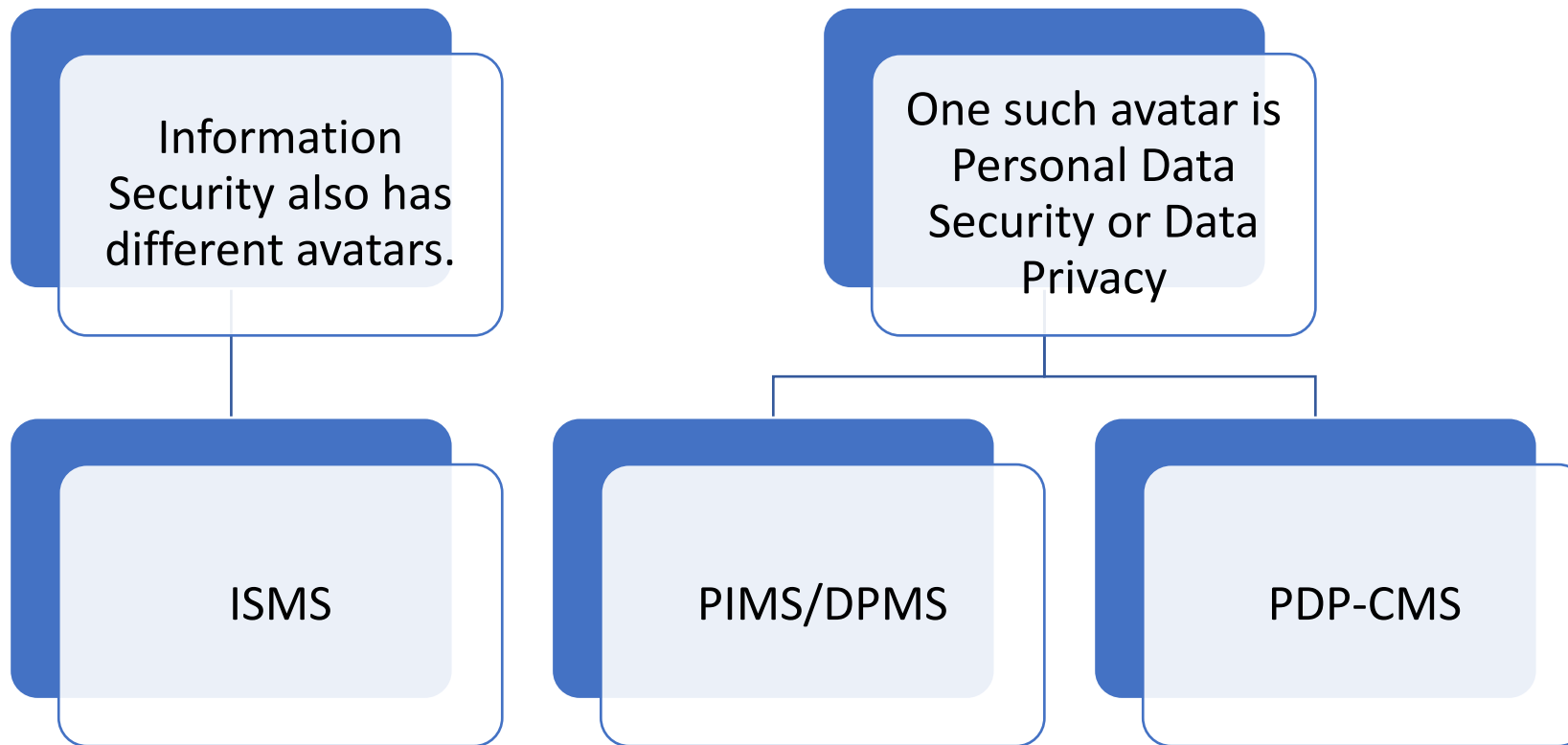


Which Data is Personal or Non Personal or which data interpreting device to be used is the Choice of the human

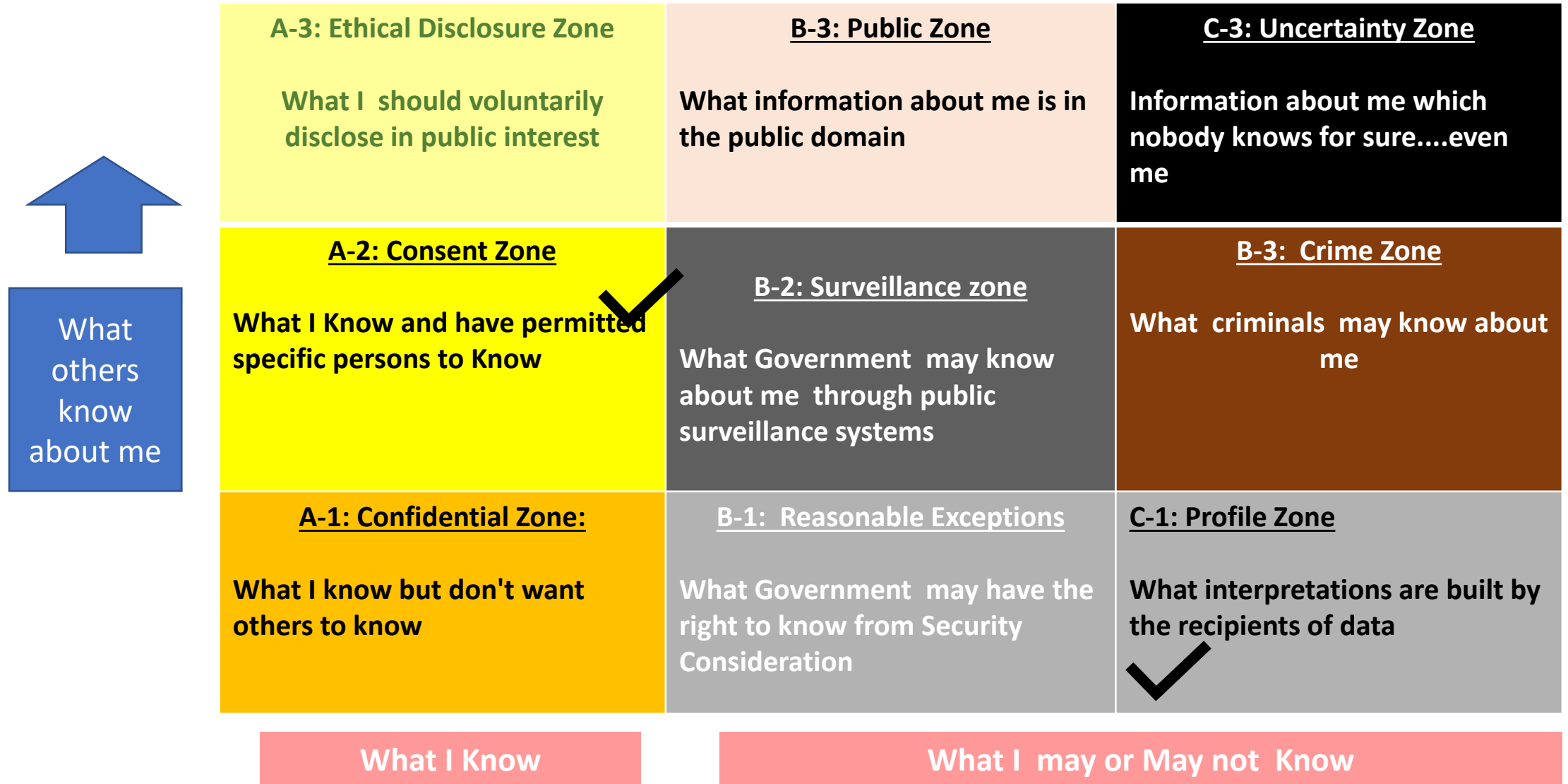




Evolution of ISMS...



Personal Information Grid



Limitation of Data Protection Regulation

- Consent may not be possible in all circumstances
- In online transactions, “Consent” may not be properly authenticated
- What is personal data requiring consent may be contested
 - Joint ownership and community ownership is required
- IPR may interfere with the Right of Ownership if data

Approach to Data Protection in different countries

GDPR is a cross industry approach

- Personal data processing is regulated across all sectors

US adopted a Sectoral regulatory approach

- Now adopting to the General across the

India is adopting the hybrid approach

- Recognizes cross industry approach in PDPB 2021
- Supplements it with ITA 2000 and sectoral guidance

Template for study of Data protection laws

Applicability and Key definitions

Exemptions

Principles of Processing

Rights of Data Principals

Children Data

Accountability and DPO

Data Breach Notification

Cross Border Transfer

Penalties

Regulatory and Grievance redressal structure

Applicability

What is personal data and Special Categories of personal data?

- Does it include finance information? Meta Data?
- Are there “Core Identity Parameters” and “Ancillary Identity parameters”?
- What is a biometric?

Jurisdiction

- Extra territorial jurisdiction
 - Foreigners in the legislating country? Or Residents in Foreign Country?

Non Personal Data

- Anonymisation of Personal Data

Living and Non Living

Data Controller/Fiduciary/Processor/Consent Manager

Exemptions

For processing or Consent or Security

- Government, Law Enforcement
- Judiciary
- Legitimate interest
- Medical emergencies
- Other person's rights
- Special business requirements such as employment, mergers, information security, fraud prevention etc

Derogations for cross border transfer

- Adequacy
- Intra Corporate transfers.. With consent? (Binding Corporate Rules)
- External transfers through Standard contract clauses

Principles of Processing

Lawful, fair and transparent processing

Purpose specific collection

Minimal Collection

Quality,

Minimal retention

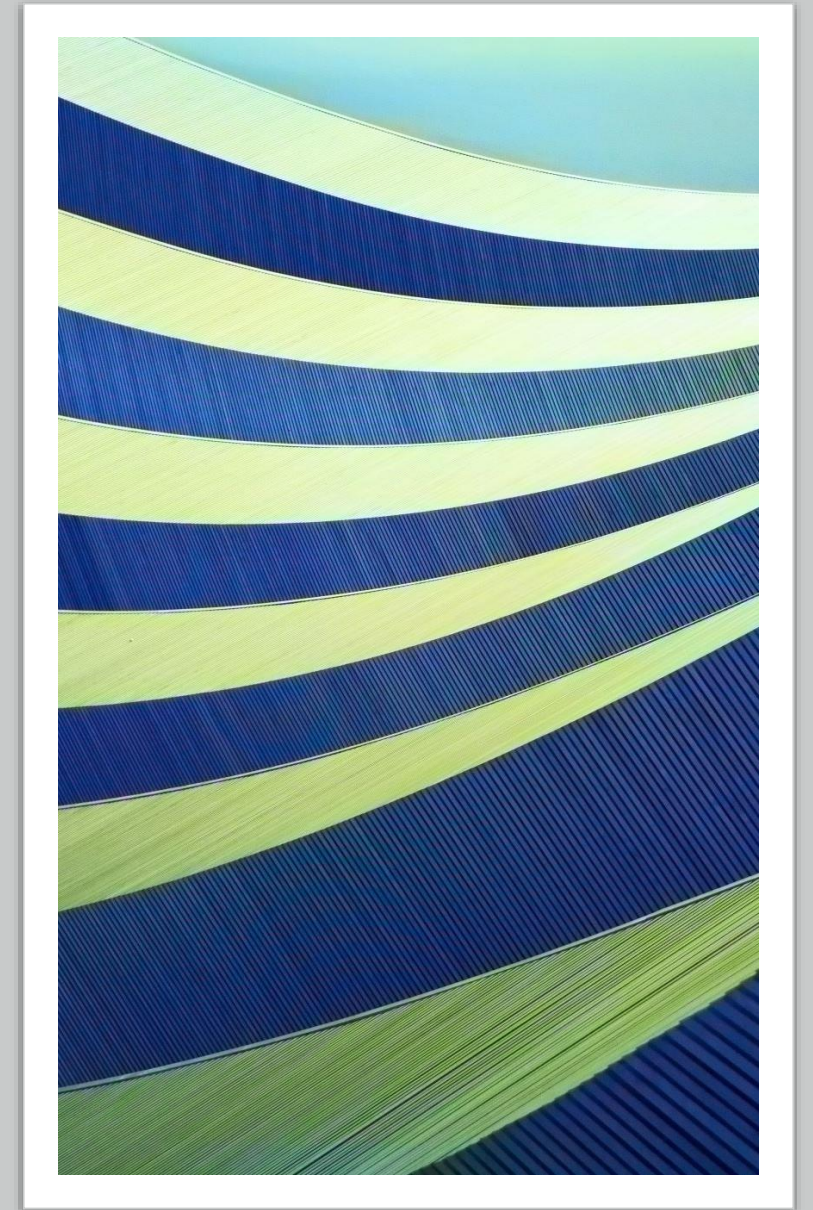
Security

Accountability

Lawful basis-Consent, legitimate interest, Vital interest of a data subject, performance of a contract of which the data subject is a party, public interest, Security

Rights of Data Principals

1	Right to access
2	Right to accuracy
3	Right of portability
4	Right to erasure and/or Right to forget
5	Right to withdraw consent
6	Right for a reasonable grievance redressal system



Children Data



Who is a child

- 13 years, 16 years or 18 years?
- Rights of a natural guardian vs Legal guardian
- Natural guardian in case of separated parents

How do we verify the age?

- When do we verify the age?
 - Only when the service is meant to be used by children?

Providing a child service to an adult and adult service to a child by error have different consequences

Accountability and DPO

Record of Processing

Privacy By Design

Privacy by Design Policy

Compliance By Design



Data Breach Notification



To the Regulatory authorities



To the data subject



How quickly?



What information?



Means...email, post, advertisement?

Cross Border Transfer

Type of restrictions

- All data? Sensitive data? Critical data?
- With consent or explicit consent or under legitimate interests? Medical emergencies? etc

Is there a sovereign right over citizen's data?

Contract between the Data Exporter and Data Importer

Privacy Shield

- Right of surveillance and national security of the receiving country?
- Should national security interests be subordinated to the commercial interests?

Penalties

Should it be on the basis of the type of violation?

Should it be a graded penalty structure?

Should it be linked to the turnover?

What is turnover...local country or global?

How do we compute global turnover in respect of inter connected companies?

Regulatory and Grievance redressal structure



vi

Supervisory authority/ DPA

- One man executive or a Committee of experts

Quasi Judicial entity

- Adjudicator
- Should he be independent? Or under the DPA?

Appellate Tribunal

- Should it be at the level below High Courts or above High Courts?
- Whether the Chair person be a Retired Judge? Or one who is eligible to be a Judge?... But is only a lawyer
- Should there be technical members?... What credentials?

Courts

- Civil and Criminal

Ombudsman, Mediation and Arbitration



How Does
DPDPB 2022
address the
issues?

Highlights

Simpler

- 30 sections instead of 98

Focus on Digital Personal Data Protection

- No Non Personal Data or Privacy Protection obligation
- Manual processing not included

Harm definition curtailed

- Bodily harm, distortion or theft of identity or harassment or prevention of lawful gain or causation of significant loss

Withdrawal of Consent consequences on the data principal

Deemed Consent recognized

- Includes employment, Publicly available data, information security etc

No Definition
of Sensitive
information..
(in the Act)

Sensitive information not defined

Significant Data Fiduciary may be
designated on the basis of

- a. the volume and sensitivity of personal data processed;
- b. risk of harm to the Data Principal;
- c. potential impact on the sovereignty and integrity of India;
- d. risk to electoral democracy;
- e. security of the State;
- f. public order;

Notice and Consent

Notice can be in separate documents.

- Notice for Internet Banking can be printed on the physical application form

Consent

- “To be “Freely given”..but no reference to Indian Contract Act
- Parts of consent may be invalidated if it is in contravention of the Act
- Consent Manager role continued



Obligations simplified

Significant Data Fiduciary needs to

- Appoint a Data Protection Officer
- Appoint an Independent Data Auditor
 - If an Independent data auditor can be appointed, DPO also can be external?
- Undertake DPIA and Periodic Audit

Reasonable efforts to maintain accuracy

Reasonable Security Practice

Appropriate Technical and Organizational measures

Grievance Redressal mechanism to be made available

Verifiable identity of the parent in case of consent for minor required



Rights have been Simplified

Rights to information and Right to correction and erasure retained

Right to portability and Right to Forget removed

Right to Grievance Redressal added
Right to Nominate added

Duties of Data Principal added

- Shall not register false complaint
- Shall not suppress identity information or provide false information
- Shall provide verifiable identity for exercising rights.

Usual Criticism

Cross Border Transfer...

- Adequacy principle to be used

Exemptions

- Given both to Government as well as Private Sector
- May notify different categories of data fiduciaries like start ups as exempt

How Will DPB function?

Details yet to be announced

DPB will monitor the industry to determine non compliance

May also receive complaints from the Data Principals

Will investigate through its officers and award penalties

- Like the Adjudication officer in the ITA 2000 scenario
- But with Suo Moto action and not waiting for the victims to contact them.

Appeal will go to the High Court.

- May be the model will be similar to ITA 2000 Governance
- With a dedicated team of regulators watching the industry
- Regulations may continue to be issued by the Ministry.
- DPB May get the assistance of a committee of experts to assist them in their decisions.

DPB will encourage Alternative Dispute Resolution

DPB may also encourage “Voluntary Undertaking” ... like plea bargaining?

Summary

- Privacy Protection is a fundamental Right which is sought to be achieved through a system of protection and Governance of Personal Data
- Different countries adopt different approaches to data protection...sectoral or across the board protection
- General principles include purpose based collection with appropriate consent and security against misuse.
- Compliance is essential to avoid the huge penalties which most laws prescribe.
- Understanding the laws and designing the technical controls are the need of the day



Android App on Google PlayStore
Gateway to www.naavi.org

Thank You

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