DPIIT IPR CHAIR
&
N.C.BANERJEE CENTRE FOR IPR STUDIES
NALSAR UNIVERSITY OF LAW, HYDERABAD

DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE
MINISTRY OF COMMERCE & INDUSTRY,
GOVERNMENT OF INDIA

Data Protection & Privacy

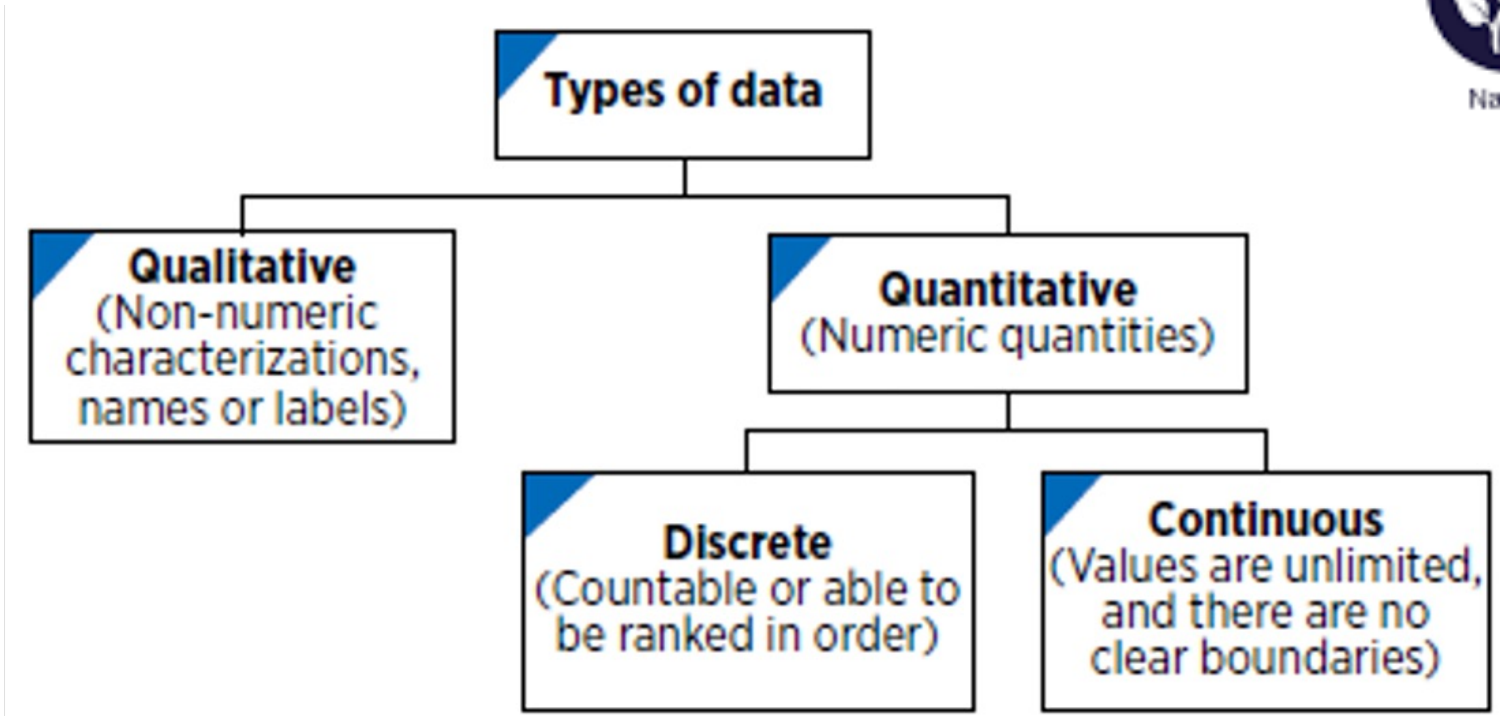
Techno Legal Issues

Advanced Diploma In Cyber Law
NALSAR University of Law, Hyderabad
Contact Class; February 2024.

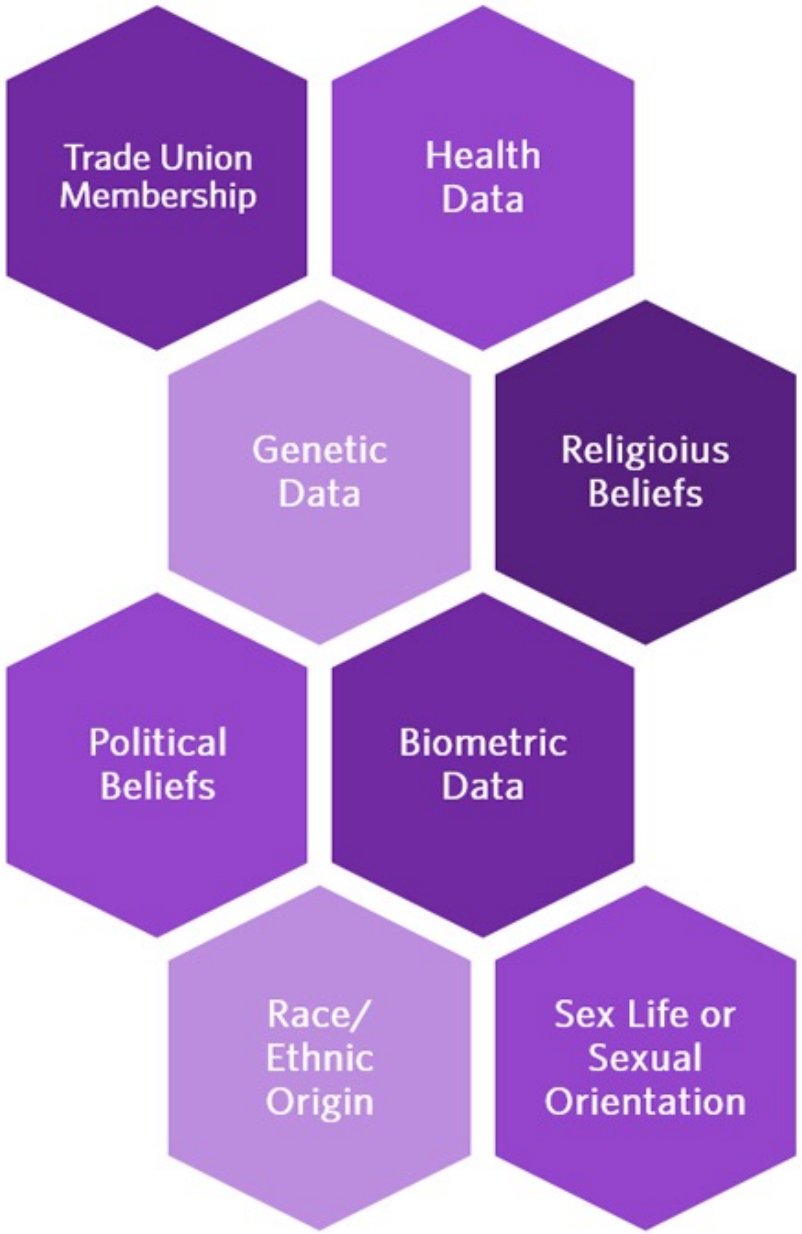
ANINDYA SIRCAR

Data

- Facts and statistics collected together for reference or analysis.
- A set of values of qualitative or quantitative variables about one or more persons or objects, while a datum is a single value of a single variable.



Personal Data



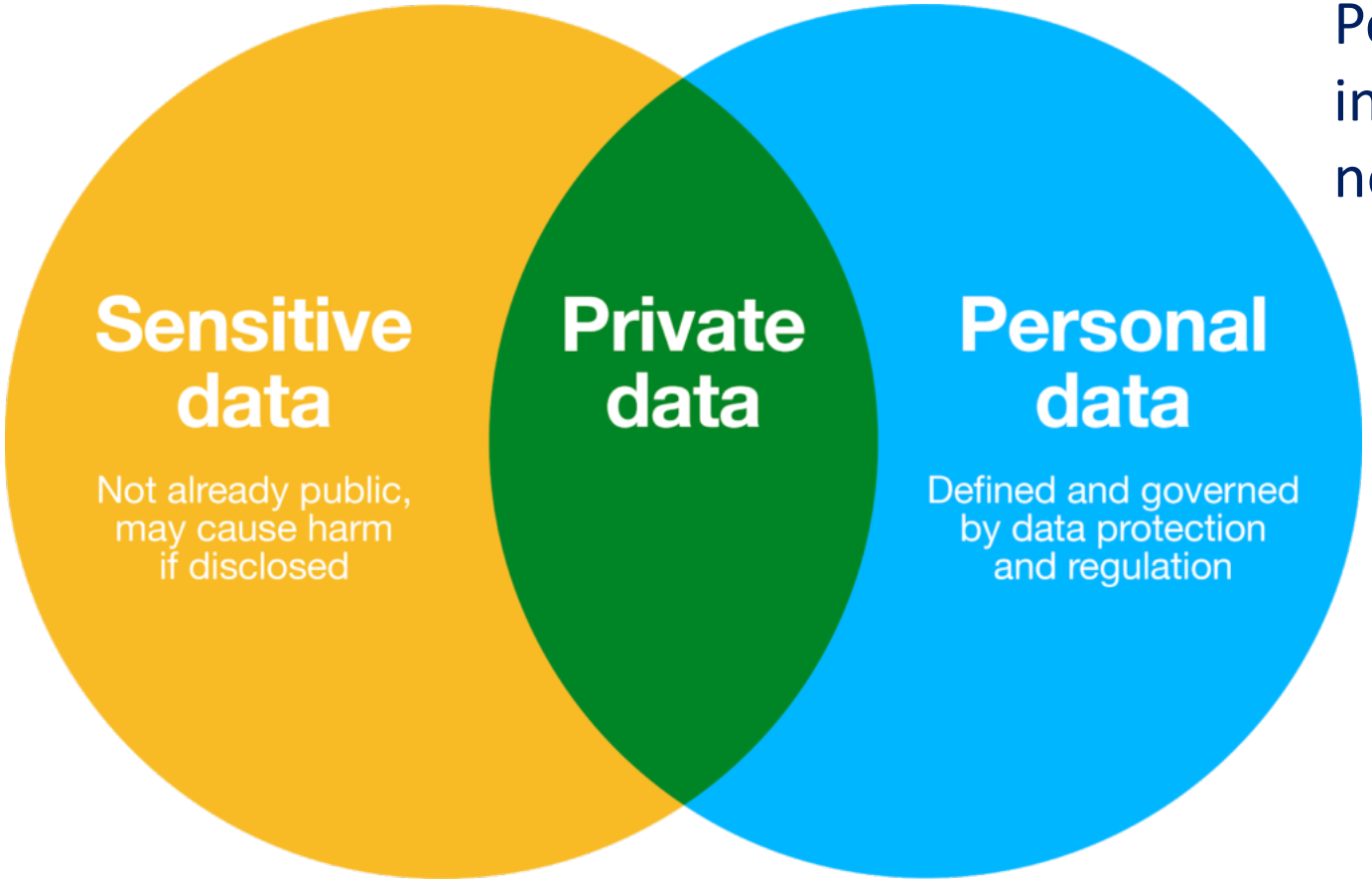
- Personal data is any information that relates to an identified or identifiable living individual.
- Different pieces of information, which collected together can lead to the identification of a particular person, also constitute personal data.
- Pseudonymised data can help reduce privacy risks by making it more difficult to identify individuals, but it is still personal data.
- Information about companies or public authorities is not personal data.
- *"Online identifiers"* includes IP addresses and *"cookie identifiers"* which may be personal data.

Personal Data - Private

The definition of personal information is very broad and it captures a large amount of information:

- a person's name, address, phone number or email address
- a photograph of a person
- a video recording of a person, whether CCTV or otherwise, for example, a recording of events in a classroom, at a train station, or at a family barbecue
- a person's salary, bank account or financial details
- allegations of wrongdoing against a person or details of wrongdoing or offences they may have committed
- details about a person's land ownership or disputes to do with their land
- details about a person's education or education activities, such as what degree they possess or their candidature for a PhD
- the fact that a person is a member, or leader, of an association and their attendance at meetings
- a person's medical details or health information
- a person's fingerprints or blood type
- details about a person's religious or sexual preferences
- details about a person's membership of a trade union or professional body.

Personal Data – Not Private



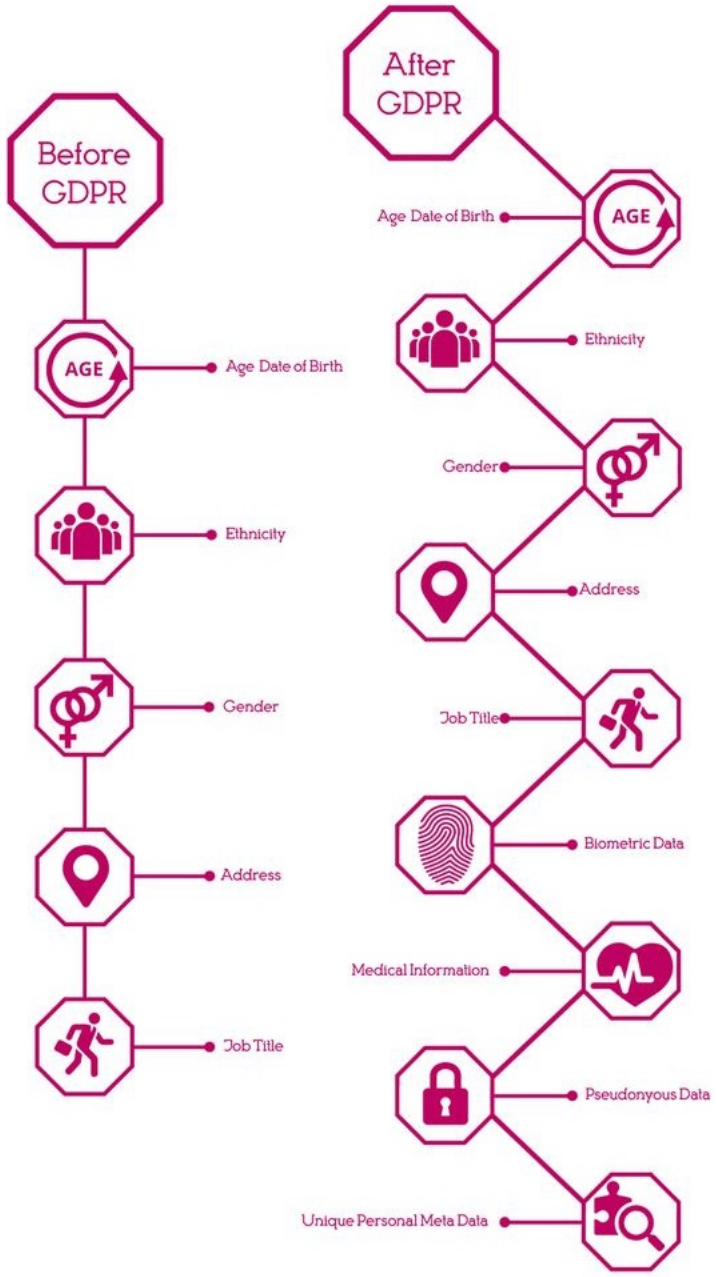
Personal information includes some information that people may not normally consider to be private:

- a work email address or phone number
- opinions given as part of a person's employment
- the fact that a person is the author of a report
- a person's name appearing in work documents
- a letter written in a person's official capacity, such as a letter from the president of a club.

GDPR

(General Data Protection Regulation)

- On May 25, 2018, the **European** General Data Protection Regulation (GDPR) came into effect.
- The political will behind and mandate of the GDPR were driven by the concern that individuals' personal information was being exploited in ways that undermined privacy and, by extension, democracy.
- It was intended to harmonize privacy and data protection laws across Europe while helping EU citizens to better understand how their personal information was being used, and encouraging them to file a complaint if their rights were violated.



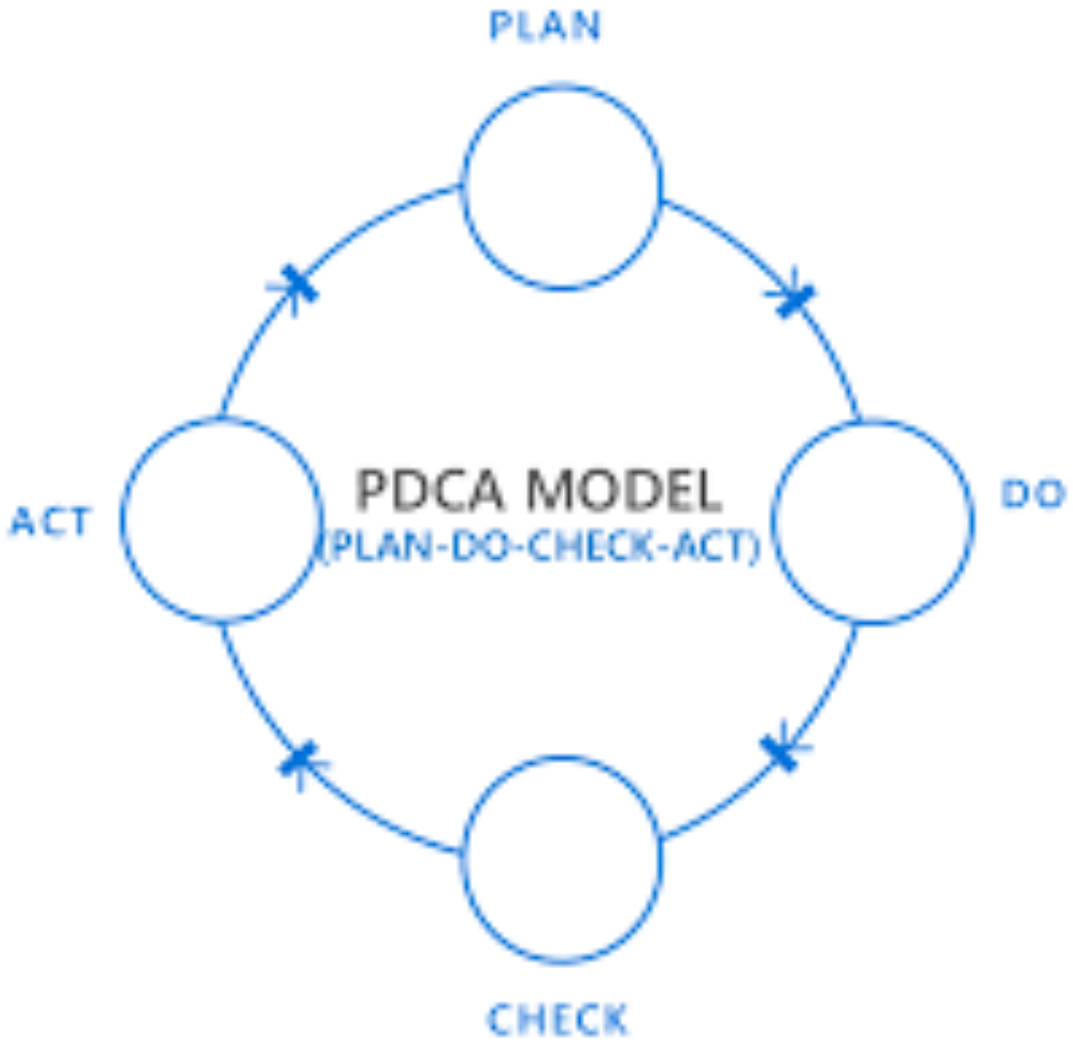
GDPR

(General Data Protection Regulation)

- Specific permission
  - Unless or until you give permission data can't be used for any other purpose or sell it to third parties.
- Privacy by design
  - Should not be asked for data that is not directly needed or relevant for the intended purposes.
- Data portability
  - Here right to ask for any data that a company has about you in a readable format.
- Right to be forgotten
  - Have a right to be forgotten and will be able to ask to delete your data.
  - Two exceptions are:
    - it will not apply to information that there is a legal requirement to keep; and
    - medical record where required.
- Definitive consent
  - There has to be a clear and affirmative consent before private data is processed.
- Information in clear readable language
  - The right of the individuals to get and read the information clearly.
- Limits on the use of profiling
  - Profiling will be allowed with the consent of the person concerned, where permitted by law or when needed to pursue a contract and requires human intervention.
- Everyone follows the same law
  - Everyone abides by the same rules to do business in the EU.
- One-stop solution
  - Only one regulatory body to do business in the EU.
- Adopting techniques
  - Promote techniques such as anonymization, pseudonymization and encryption.

GDPR

(General Data Protection Regulation)



Data Protection & Privacy - UK

Data Protection Act 2018

- The Data Protection Act 2018 controls how your personal information is used by organisations, businesses or the government.
- The Data Protection Act 2018 is the UK's implementation of the GDPR.
- Everyone responsible for using personal data has to follow strict rules called *'data protection principles'*
- They must make sure the information is:
  - used fairly, lawfully and transparently
  - used for specified, explicit purposes
  - used in a way that is adequate, relevant and limited to only what is necessary
  - accurate and, where necessary, kept up to date
  - kept for no longer than is necessary
  - handled in a way that ensures appropriate security, including protection against unlawful or unauthorised processing, access, loss, destruction or damage.

Data Protection & Privacy - UK

- There is stronger legal protection for more sensitive information, such as:
  - race
  - ethnic background
  - political opinions
  - religious beliefs
  - trade union membership
  - genetics
  - biometrics (where used for identification)
  - health
  - sex life or orientation
- There are separate safeguards for personal data relating to criminal convictions and offences.

- Under the Data Protection Act 2018, a UK citizen has the right to find out what information the government and other organisations store about one:
  - be informed about how your data is being used
  - access personal data
  - have incorrect data updated
  - have data erased
  - stop or restrict the processing of your data
  - data portability (allowing you to get and reuse your data for different services)
  - object to how your data is processed in certain circumstances
- One has rights when an organisation is using one's personal data for:
  - automated decision-making processes (without human involvement)
  - profiling, for example to predict your behaviour or interests

Data Protection & Privacy - US

- The US doesn't *(yet)* have a federal-level general consumer data privacy law, let alone a data security law - EU with its GDPR has both!
- However, the Californian Consumer Privacy Act (CCPA), does come close to addressing consumer data privacy at least for California residents.
- There is no single principal data protection legislation in the United States. Rather, a jumble of hundreds of laws enacted on both the federal and state levels serve to protect the personal data of US residents.
- At the federal level, the Federal Trade Commission Act (15 USC § 41 *et. seq.*)
- The US has several sector-specific and medium-specific national privacy or data security laws, including laws and regulations that apply to financial institutions, telecommunications companies, personal health information, credit report information, children's information, telemarketing and direct marketing.
- The US also has hundreds of privacy and data security among its 50 states and territories, such as requirements for safeguarding data, disposal of data, privacy policies, appropriate use of Social Security numbers and data breach notification.

Data Protection & Privacy - US

- **US Privacy Act of 1974**
  - Right of US citizens to access any data held by government agencies. And a right to copy that data.
  - Right of citizens to correct any information errors
  - Agencies should follow data minimization principles when collecting data – least information *"relevant and necessary"* to accomplish its purposes.
  - Access to data is restricted on a need to know basis – for example, employees who need the records for their job role.
  - Sharing of information between other federal (and non-federal) agencies is restricted and only allowed under certain conditions
- **HIPAA** (Health Insurance Portability and Accountability Act, 1996)
  - To regulate health insurance.
- **GLBA** (Gramm-Leach-Bliley Act, 1999)
  - Protects non-public personal information, which is defined as any *"information collected about an individual in connection with providing a financial product or service, unless that information is otherwise publicly available".*
- **COPPA** (Children's Online Privacy Protection Act, 2000)
  - Regulates personal information collected from minors.
  - Prohibits online companies from asking for personal information from children 12-and-under unless there's verifiable parental consent.

HIPAA

(Health Insurance Portability and Accountability Act)

- A US law designed to provide privacy standards to protect patients' medical records and other health information provided to health plans, doctors, hospitals and other health care providers.
- The main purposes of HIPAA
  - Privacy of health information,
  - Security of electronic records,
  - Administrative simplification,
  - Insurance portability.
- Provides detailed instructions for handling a protecting a patient's personal health information.

Data Protection & Privacy - US

State	*Right to Delete?*	*Right to Access?*	*Right to Correct?*	*Private Right of Private Action?*	*Broad Definition of PII?*	*Businesses covered*	*Status*
California	Yes	Yes	No	$750/consumer (breaches)	Yes (Probabilistic)	Revenues over $25 million	In effect : 01/01/2020
New York	Yes	Yes	Yes	$750/consumer	Yes	All	Pending
Maryland	Yes	Yes	No	No. (Only through AG.)	Yes (Probabilistic)	Over $25 million	Pending
Massachusetts	Yes	Yes	No	$750/consumer	Yes (Probabilistic)	Over $10 million	Pending
Hawaii	Yes	Yes	No	No	Yes	All	Pending
North Dakota	No	Yes	No	Limited	No	Over $25 million	Pending

INDIA: Existing Framework

- General Application
  - Information Technology (Reasonable Security Practices and Sensitive Personal Data or Information) Rules, 2011
- Govt. Collection of Data
  - Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016
  - Aadhaar (Data Security) Regulations, 2016
- Banking Sector
  - Credit Information Companies (Regulation) Act, 2005
  - Credit Information Companies Regulations, 2006
  - Circulars of Reserve Bank of India including KYC circulars
  - Master Circulars on credit cards, etc.
  - Master Circulars on Customer Services
  - Code of Bank's commitment to Customers
- Telecom Sector
  - Unified License Agreement issued to telecom service providers by the Department of Telecommunications
  - Telecom Commercial Communication Preference Regulations, 2010
- Healthcare Sector
  - Clinical Establishments (Central Government) Rules, 2012
  - Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

INDIA: Justice B N Srikrishna Bill

- The Government of India constituted a committee, chaired by Justice Srikrishna (retired), Supreme Court of India in August 2017 to design and draft data protection laws for India.
- The committee after a year of deliberations and public consultations has released a draft bill titled *'The Personal Data Protection Bill, 2018'* (Draft Bill).
- After further deliberations the Bill was approved by the cabinet ministry of India on December 04, 2019 as the **Personal Data Protection Bill 2019** and tabled in the Lok Sabha on December 11, 2019.

"Sensitive Personal Data" means personal data revealing, related to, or constituting, as may be applicable—

- passwords;
- financial data;
- health data;
- official identifier;
- sex life;
- sexual orientation;
- biometric data;
- genetic data;
- transgender status;
- intersex status;
- caste or tribe;
- Religious or political belief or affiliation; or
- any other category of data specified by the Authority under section 22.

INDIA: Personal Data Protection Bill, 2019

Decoding the data protection bill

WHAT IT MEANS FOR CONSUMERS

- **DATA** can be processed or shared by any entity only after consent.
- **SAFEGUARDS**, including penalties, introduced to prevent misuse of personal data.
- **ALL** data to be categorized under three heads—general, sensitive and critical.

THE GOVERNMENT & REGULATORY ROLE

- **GOVT** will have the power to obtain any user's non-personal data from companies.
- **THE** bill mandates that all financial and critical data has to be stored in India.
- **SENSITIVE** data has to be stored in India but can be processed outside with consent.

WHAT COMPANIES HAVE TO DO

- **SOCIAL** media firms to formulate a voluntary verification process for users.
- **SHARING** data without consent will entail a fine of ₹15 crore or 4% of global turnover.
- **DATA** breach or inaction will entail a fine of ₹5 crore or 2% of global turnover.

National Data Governance Framework Policy, 2022

- MeitY released the draft National Data Governance Framework Policy on May 26, 2022, inviting the public to provide feedback and comments on the same.

- The key objectives of the Policy are as follows:
  - To accelerate Digital Governance with standardized data management and security standards across the government;
  - To set quality standards, have standard API's and tech standards for management and access of government data and promote expansion of the Indian Datasets Program and non-personal datasets ecosystem;
  - To promote ownership, accountability and transparency in non-personal data and datasets access, providing for sharing of non-personal data only via platforms designated and authorized by IDMO (*defined below*);
  - To build a platform which would allow the receipt and processing of dataset requests;
  - To construct digital government goals and capacity, competency and knowledge in government departments and entities;
  - To create uniform standard based public digital platforms while ensuring privacy, safety and trust of citizens regarding their data;
  - To ensure that citizens are more aware and accordingly have increased participation and engagement with the government.

National Data Governance Framework Policy, 2022

- The Policy is applicable to all such data which is collected and managed by government departments and entities; thus bringing all government departments under its ambit.

- Even state governments are encouraged to adopt the provisions of this Policy, as may be applicable.

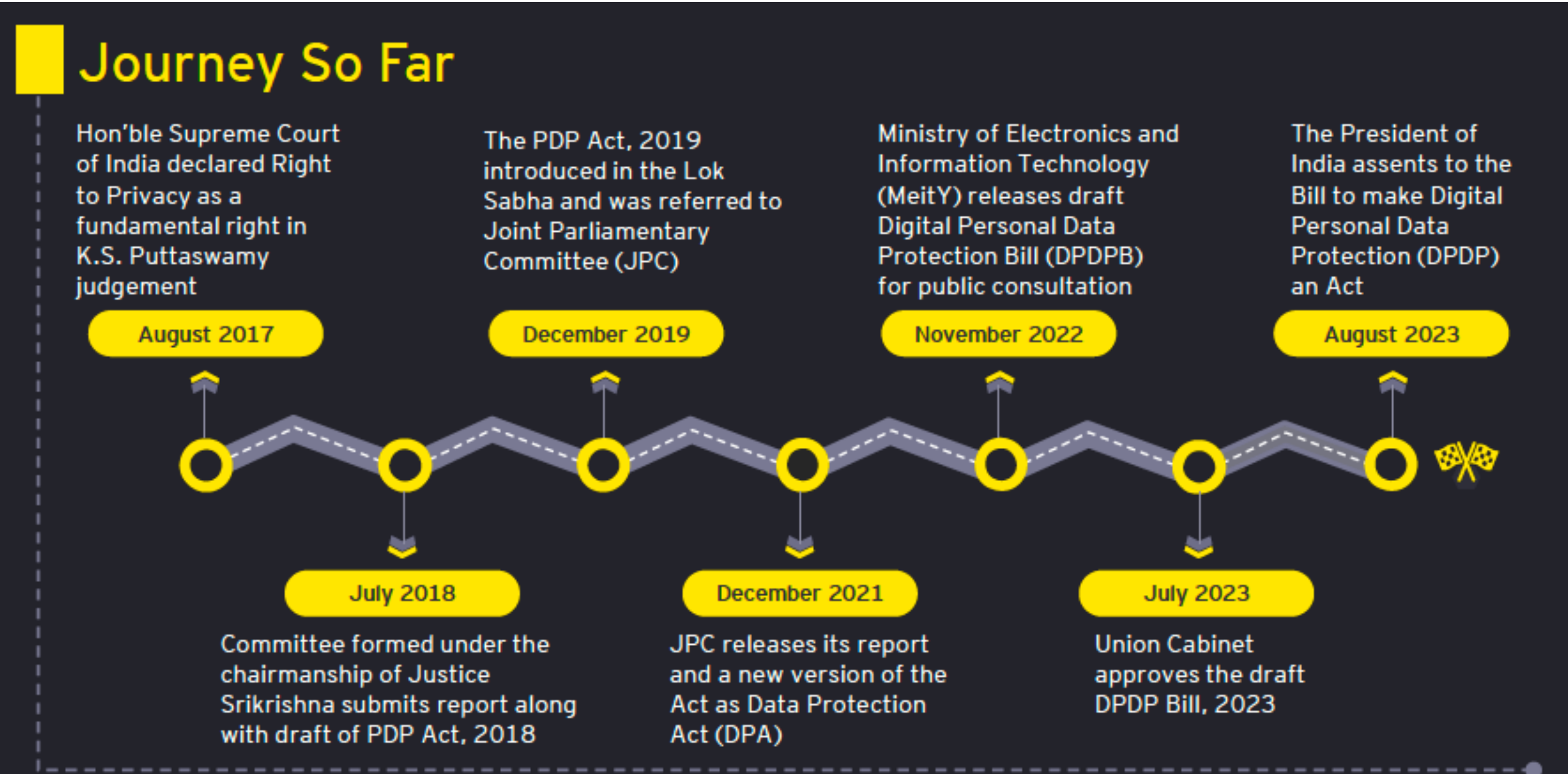
- The Policy is also applicable to non-personal datasets as it proposes to launch an **'India Datasets Program'** which is based on non-personal data.

- The Policy provides certain rules and methods which would ensure that any anonymized data and non-personal data from both the private or government entities can be accessed by the 'research and innovation eco-system', in a safe and accessible manner.

- The Policy provides for setting up of an India Data Management Office **(*IDMO*),** within the Digital India Corporation (**"*DIC*"**) under MEITY, which would primarily be responsible for framing, managing, reviewing and revising the Policy; as well as for developing guidelines, standards and rules under the Policy.

- For effective implementation of the Policy, the IDMO will closely coordinate with the **'Chief Data Officers'** of the Data Management Units (**DMU)** which is set up under every department and ministry of the government and will also provide assistance to all the State-level Data Officers appointed by the State governments.

Digital Personal Data Protection Act, 2023



Key Terminologies

Consent

Organizations should seek a consent, which is freely given, specific, informed and unambiguous indication of the Data Principal's wishes, by a clear affirmative action

Consent Manager

A consent manager represents the Data Principal and takes action on their behalf when granting, managing, reviewing and revoking consent

Notice

Should be clear, itemized and in simple language. Data Principals should have the option to access information in English or in any of the 22 languages (as per Eight Schedule of Indian Constitution)

Data Fiduciary

Any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data

Processing outside India

Government to notify countries to which transfer is not permissible unlike the whitelisting approach under the General Data Protection Regulation (GDPR)

Data Principal

- An individual to whom the personal data relates
- A child, includes the parents or lawful guardian of such a child
- A person with disability, includes their lawful guardian acting on their behalf

Children's Data

For children < 18 years of age, consent from Parents/Guardians is required. Behavioural monitoring and Targeted Advertising is prohibited

Data Processor

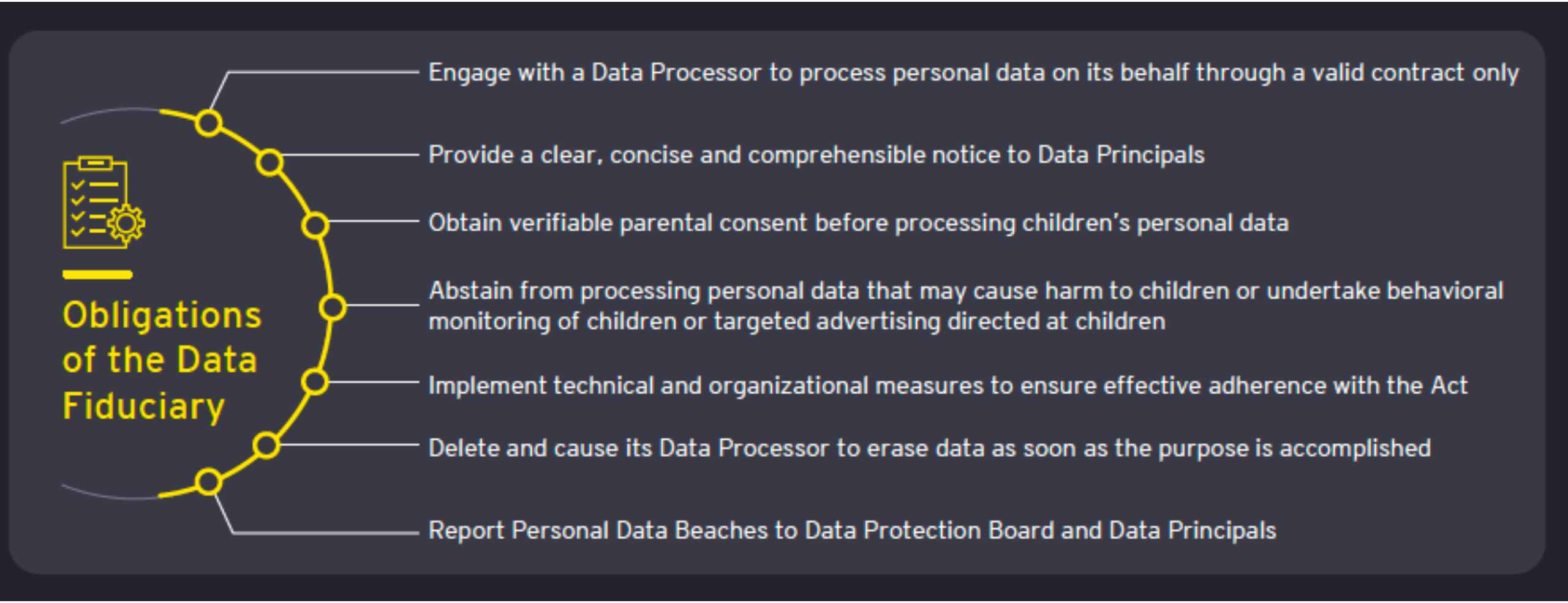
Any person who processes personal data on behalf of a Data Fiduciary

Legitimate Uses

Consent is not expressly needed for situations such as

- Voluntary disclosure by data principal
- Reasonable expectation by data principal
- Performance of function under the law
- Medical emergency among others
- Compliance with any judgment issued under any law
- Threat to public health
- Ensure safety in case of any disaster

Digital Personal Data Protection Act, 2023



Digital Personal Data Protection Act, 2023

Significant Data Fiduciary

Significant Data Fiduciary will be determined based on an assessment which include

- The volume and sensitivity of personal data processed
- Risk to the rights of data principal
- Potential impact on the sovereignty and integrity of India
- Risk to electoral democracy
- Security of the state
- Public order

Obligations of the Significant Data Fiduciary

- Appoint a Data Protection Officer (DPO) based in India
- Appoint an Independent Data Auditor for evaluating compliance
- Conduct Data Protection Impact Assessment (DPIA) & periodic audits

Amendments to Prevailing Laws

Existing IT Act, 2000 and Right to Information Act 2005 are amended as following:

- Article 43(A) (Compensation for failure to protect data) of IT Act 2000 is omitted
- Section 8 (1)(j) RTI Act 2005 is amended to exempt the personal information which allows disclosure for public interest

Personal Data Breach

- A Data Fiduciary is required to protect personal data, including any processing undertaken by it or on its behalf by a Data Processor, by taking reasonable security safeguards to prevent Personal Data Breach.
- In the event of a Personal Data Breach, the Data Fiduciary needs to notify the Board and each affected Data Principal of such breach.
- No specific timeline for reporting the breach
- Data Fiduciaries to inform about the breach in prescribed form

Penalties

- Up to INR10,000 — Breach in observance of duty of Data Principal
- Up to INR200 Crore — Breach in observance of additional obligation in relation to children
- Up to INR200 Crore — Breach in not giving notice of Personal Data Breach
- Up to INR250 Crore — Noncompliance of the provisions by Data Fiduciaries

The Data Protection Board

The Central Government may, by notification shall appoint and establish, an independent board to be called the Data Protection Board of India (Board).

- This Board should consist of a chairperson and other members, who should be appointed by the Central Government
- The Board is entrusted with the task of enforcement, including determining non-compliances, imposing penalties, issuing directions and mediation (to resolve dispute between parties) to ensure compliance with the law
- The Board is enshrined with powers of a civil court and appeals against its decisions lie to Telecom Disputes Settlement and Appellate Tribunal

Ambiguities

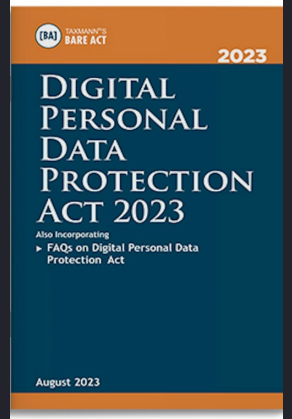
Below mentioned are the ambiguities in the Act:

01 Children's Data
The definition of detrimental effect on well-being of a child as a result of processing their Personal Data has not been specified.

02 Breach Notification
Absence of defined timeline for notifying a Personal Data breach to the Data Protection Board and the affected Data Principal(s).

03 Publicly available data
The Act exempts any Personal Data that is made available publicly, but it does not clarify if the information is made available to public can be used for processing or can be for view-only purposes.

04 Data Principal Request timeline
The Act has not specified a timeframe for Data Fiduciaries to respond to any Data Principal requests.



Key Highlights

- Considering the volume and nature of personal data processed, the Central Government may by notification exempt certain provisions of the Act for a Data Fiduciary or a class of Data Fiduciaries including startups
- When the consent for processing Personal Data was provided before the commencement of this Act, Data Fiduciary needs to provide detailed privacy notice describing the Personal Data collected and the purpose as soon as practicable after the enactment of this Act
- Certain provisions* of the Act will not be applicable for the processing of Personal Data in India of a Data Principal not based in India pursuant to a contract signed with a person outside India
- The Central Government may upon ensuring if the processing is verifiably safe, notify the age above which a Data Fiduciary shall be exempt from applicability of children's personal data obligations
- The Data Principal shall exhaust the opportunity of redressing her grievance with Data Fiduciary before approaching the Data Protection Board of India

Exemptions

The DPDP Act exempts Data Fiduciary from certain obligations (except for being responsible for its data processor and taking reasonable security safeguards) under specified circumstances including

- Processing for enforcing any legal right or claim
- Processing for performance of any judicial or quasi-judicial functions by any Indian court/tribunal or other body
- Processing in the interest of prevention, detection, investigation or prosecution of any offence of any law
- Processing of Data Principals outside the territory of India pursuant to any contract entered into with any person outside the territory of India by any person based in India
- Processing necessary for a merger / amalgamation or similar arrangement as approved by a court or other authority competent

GDPR v/s DPDPA

General Data Protection Regulation (GDPR)	Digital Personal Data Protection (DPDP) Act, 2023
GDPR applies to processing of Personal Data wholly or partly by automated means and to Personal Data which form or will form a part of a filing system	The DPDP Act will apply to digitized personal data and non-digitized personal data which is subsequently digitized
Penalties under GDPR extend to 20 million euros, or 4% of the firm's worldwide annual revenue from the preceding financial year, whichever amount is higher	Penalties under the DPDP Act extend up to INR250 crore
Minors under age 16 need parental consent. Members states of Europe can lower this age to 13 for their regions	Children under the age of 18 need consent from parents/ guardian
Breaches should be notified to the Supervisory Authority within 72 hours and possibly to the affected Data Subjects	The Act does not specify a timeframe for Personal Data breach notification
GDPR does not include right to nominate however provides for the right to portability Organizations have 30 days to respond to a Data Subject request	The Act comprises of an additional right to nominate while omits the right to portability and timeline to respond to the Data Principal requests has not been specified
GDPR lays down specific mechanisms for transferring data to third country such as standard contractual clauses and binding corporate rules	The Act has not identified any transfer mechanisms for transferring Personal Data
Both Controllers and Processors are under the obligation to appoint a DPO in specific circumstance	Only the Significant Data Fiduciary shall have to appoint DPO as a point of contact for the Data Protection Board
Data Controller and Data Processor are required to maintain the records of processing activities (ROPA)	The Act does not include any obligation for Data Fiduciaries to maintain records of processing activities (ROPA)
GDPR does not explicitly specify to provide notice to regional languages	DPDP Act requires the Data Fiduciaries to provide notice in 22 Indian languages in addition to English
Data Protection Impact Assessment (DPIA) is to be conducted by Data Controllers for all the high-risk processing activities	Significant Data Fiduciaries are obligated to conduct periodic Data Protection Impact Assessment (DPIA)

Digital India Act, 2023 (Proposed)

- DIA is aimed at completely overhauling the country's existing Information Technology Act 2000 (IT Act), and make way for a comprehensive and dynamic legislation to regulate digital technologies.

- MeitY, on March 09, 2023, organised a consultation to apprise representatives of the legal and technology industry amongst others, about the broad framework and core tenets of the DIA.

- Key components:
  - Enabling an open internet.
  - Enhanced obligations for intermediaries and other entities on the internet
  - Safe harbour principle under the DIA
  - Ensuring online safety and trust
  - False information
  - Regulating artificial intelligence
  - Regulation for privacy invasive devices
  - Enhanced penalties for cyber-crimes
  - Adjudicatory mechanism

- DIA holds great potential to accelerate India's growth and development in the digital age.

Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.

- A landmark judgment of the Supreme Court of India, which holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India.
- The constitutional foundations of the right to privacy were recognized in the judgement of a number of complaints against the UIDAI,
- The nine-judge bench unanimously held *that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution".*
- it was held that the right to privacy is an intrinsic part of the fundamental right to life and personal liberty under Article 21 (in particular and in all fundamental rights in Part III which protect freedoms in general) of the Constitution of India.
- The Court recognised *'informational privacy'* as an important aspect of the right to privacy that can be claimed against state and non-state actors, but such a right is not an absolute right and may be subject to reasonable restrictions.
- The Court has laid down a test to limit the possibility of the State clamping down on the right, i.e., such an action must be sanctioned by law, it must be necessary to fulfil a legitimate aim of the State, the extent of the State interference must be *'proportionate to the need for such interference'* and there must be procedural safeguards to prevent the State from abusing its power.

WRIT PETITION (CIVIL) NO 494 OF 2012

thank you

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