Centre for Information Policy Leadership
Hunton Andrews Kurth LLP

CIPL Breakfast Briefing

India's Draft Data Protection Law: Key Elements and Potential Impacts

14 March 2019, London

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A Global Privacy and Security Think Tank

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BRIDGING INDUSTRY & REGULATORS
BRIDGING PRIVACY AND DATA DRIVEN INNOVATION

ACTIVE GLOBAL REACH

70+ Member Companies

We **INFORM** through publications and events

We **NETWORK** with global industry and government leaders

5+ Active Projects & Initiatives

We **SHAPE** privacy policy, law and practice

We **CREATE** and implement best practices

20+ Events annually

15+ Principals and Advisors

ABOUT US

- The Centre for Information Policy Leadership (CIPL) is a global privacy and security think tank
- Based in Washington, DC, Brussels and London
- Founded in 2001 by leading companies and Hunton Andrews Kurth LLP
- CIPL works with industry leaders, regulatory authorities and policy makers to develop global solutions and best practices for data privacy and responsible use of data to enable the modern information age

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CIPL Work Streams 2019

Mission – Developing global solutions for privacy and the responsible use of data to enable the fourth industrial revolution

Corporate Digital Responsibility (Accountability Plus)

- Accountable AI/Machine Learning
- Implementing Accountability
- Incentivising Accountability

Responsible Global Data Flows

- Data transfer mechanisms: CBPR, PRP, BCR, GDPR Certifications, and Privacy Shield
- Global interoperability between transfer mechanisms

CIPL is the global partner for business leaders, regulators and policy makers on privacy and information policy issues

Regulator Engagement

- Effective Data protection Regulation and Constructive Engagement ("Regulating for Results")
- Regulatory Sandbox
- Official Guest Status at APEC Data Privacy Sub-Group

Regional Initiatives

- US Privacy Framework
- EU: GDPR and ePrivacy
- Other Regions: Canada, Latin America, Asia-Pacific and India

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Speaker Presentation

Ms. Rama Vedashree
CEO of Data Security Council of India

- Former Vice President, NASSCOM
- DSCI under her leadership is pursuing a Cyber Security Industry growth charter to make India into a global hub for cyber security and grow to 35B$ by 2025.
- Rich and varied experience of 28 years in the Industry Director in Microsoft Global Services, and Vice President, GE India.
- Experienced in IT consulting, Strategic Accounts and Business Development, e-Governance projects and Business Development for Infrastructure projects and Health and Water Sectors at GE.
- Member of many committees of Government of India, including the Data Protection Committee, Cloud Expert Group and Financial Inclusion Advisory Board.
- A Gold Medalist from University of Hyderabad, she has also completed an Executive Education program from Harvard, and a short program in High Performance Computing from Cornell University

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India Personal Data Protection Bill, 2018

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Introduction

Justice K S Puttaswamy v. Union of India

- Unanimous view that Right to Privacy is a **fundamental right under Article 19, 21, 20(3), 25**.
- Existence of Informational Privacy expressly recognised.

Justice SriKrishna Data Protection Committee

- Set up under the Chairmanship of Former Supreme Court Justice B.N. SriKrishna to study various issues relating to data protection in India, make specific suggestions on principles underlying a data protection bill and draft such a bill.

Draft Protection of Personal Data Bill, 2018

- The bill has gone through the public consultation process.
- Presently, the ownership of the bill is with the Ministry of Electronics and Information Technology, awaiting to be tabled in the parliament.

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Current Framework for Data Privacy in India

Information Technology (Amendment) Act, 2008

Amended the IT Act, 2000 and expanded the scope of the Act.

Section 43A – "Where a **body corporate** possessing, dealing or handling **any sensitive personal data or information** in a computer resource which it owns, controls or operates, **is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person**, such body corporate shall be liable to pay damages by way of compensation to the person so affected."

Section 72A – "Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing **personal information** about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain **discloses, without the consent of the person concerned, or in breach of a lawful contract**, such material **to any other person**, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both."

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The Information Technology (Reasonable Security Practices and Sensitive Personal Data or Information) Rules, 2011

Sensitive Personal Information

Password, Financial info, Physical, Physiological & Mental health condition, Medical records & history, Biometric

Privacy Principles

Privacy Policy, Choice & Consent, Collection & Use Limitation, Retention, Access & Correction, Security, Disclosure and Address Discrepancies & Grievances

Reasonable Security Practices

- Security Program having managerial, technical, operational & physical controls commensurate with assets being protected
- ISO 27001 or Codes of Practices by industry associations approved by the Government (self-regulation)
- Audit once a year by independent auditor approved by Government

Support & help to citizens	**Adjudicating Officer:** Power to direct compensation of up to INR 50 Million, Civil Court for more compensation
Redress of grievances	A Body corporate has responsibility to appoint **a grievance officer**

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Draft Protection of Personal Data Bill, 2018

Change in Terminology

- "Data Subject" and "Data Controller", have been reformulated as "Data Principal" and Data Fiduciary", to emphasize greater accountability and trust between the two.

Personal Data

- Personal data has been defined on the parameters of identifiability. The definition does not specifically mention any particular form of data or attribute. The bill expressly mentions the exclusion of anonymised data from the application of the law.

Extra-Territorial Application

- The applicability of the law will extend to data fiduciaries or data processors not present within the territory of India, if they carry out processing of personal data in connection with (a) any business carried on in India, (b) systematic offering of good and services to data principals in India, or (c) any activity which involves profiling of data principals within the territory of India.

Grounds for Processing Personal data

- The legal ground for processing under the bill include: (a) consent, (b) functions of state, (c) compliance with law or order of court/tribunal, (d) for prompt action in case of emergencies, (e) purposes related to employment and (f) reasonable purposes of the data fiduciary.

Grounds for Processing Sensitive Personal Data

- The legal grounds for processing SPD under the bill include: (a) explicit consent, (b) functions of state, (c) compliance with law or order of court/tribunal, (d) for prompt action in case of emergencies for passwords, financial data, health data, official identifiers, genetic data, and biometric data.

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Draft Protection of Personal Data Bill, 2018

Horizontal Application

- The proposed bill applies to both government and private entities.

Data Principal Rights

- The bill provides the data principal with the (a) right to confirmation and access, (b) correction, (c) data portability and (d) right to be forgotten.

Transfer of Personal Data outside India

- Section 40 (1) mandates storing one serving copy of all personal data within the territory of India.

Transfer of Critical Data outside India

- Central government can classify any sensitive personal data as critical personal data and mandate its processing exclusively within India.

Penalties, Remedies and Offences

- The bill lays down penalties under chapter XI of the bill, ranging from INR 50 Million or two per cent of total worldwide turnover to INR 150 Million or 4% of the total worldwide turnover. The Data principle has the remedy to claim compensation for harm suffered as a result of any violation of any provision in the bill from the data fiduciary or the data processors. Offences related to personal data can invite imprisonment up-to 3 years and those related to sensitive personal information can invite imprisonment up-to 5 years.

Transparency and Accountability Measures

- The Data principle has the remedy to claim compensation for harm suffered as a result of any violation of any provision in the bill from the data fiduciary or the data processors. Offences related to personal data can invite imprisonment up to 3 years and those related to sensitive personal information can invite imprisonment up to 5 years.

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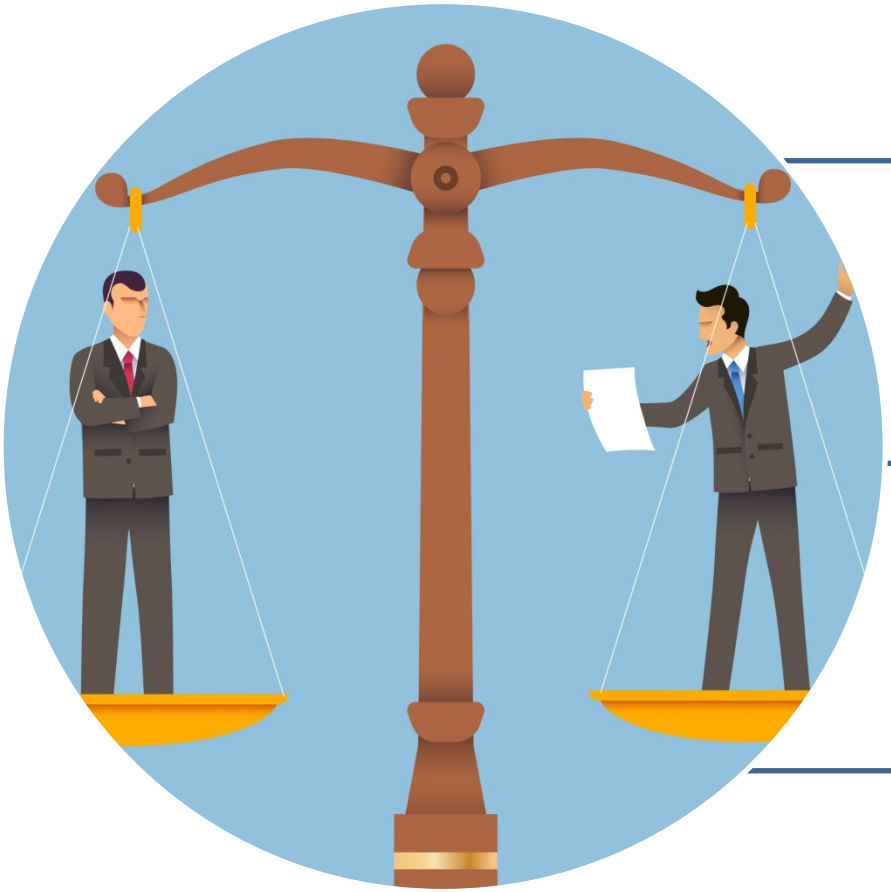
Draft Protection Authority of India



The bill establishes an independent authority empowered to oversee the enforcement of the bill.

The adjudication process will be looked after by the adjudication wing of the Authority.

The authority is to perform a wide variety of functions and powers including: issuing codes of practices, setting criteria for data audits, issuing directions, creating awareness, etc.

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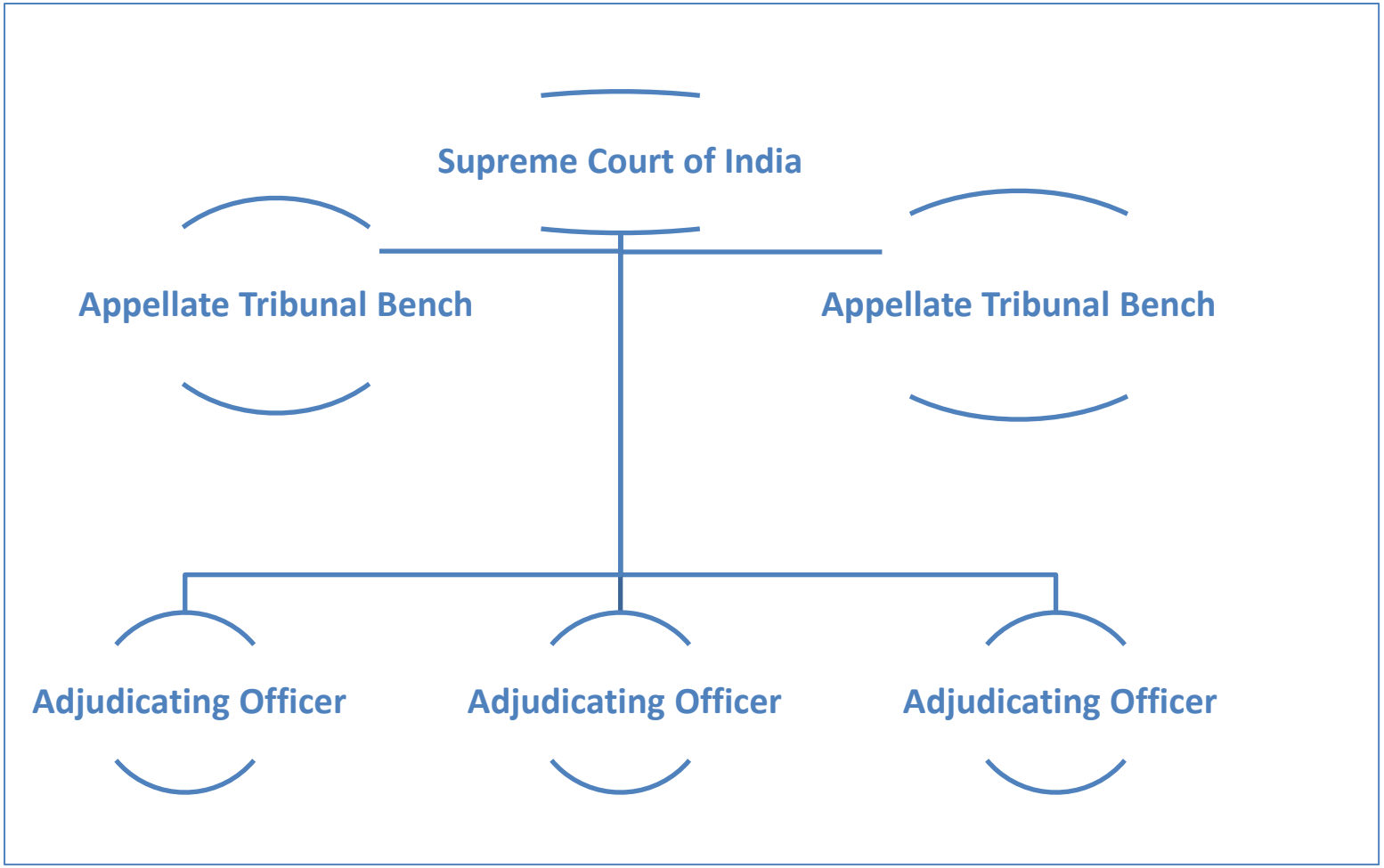
Adjudication Structure



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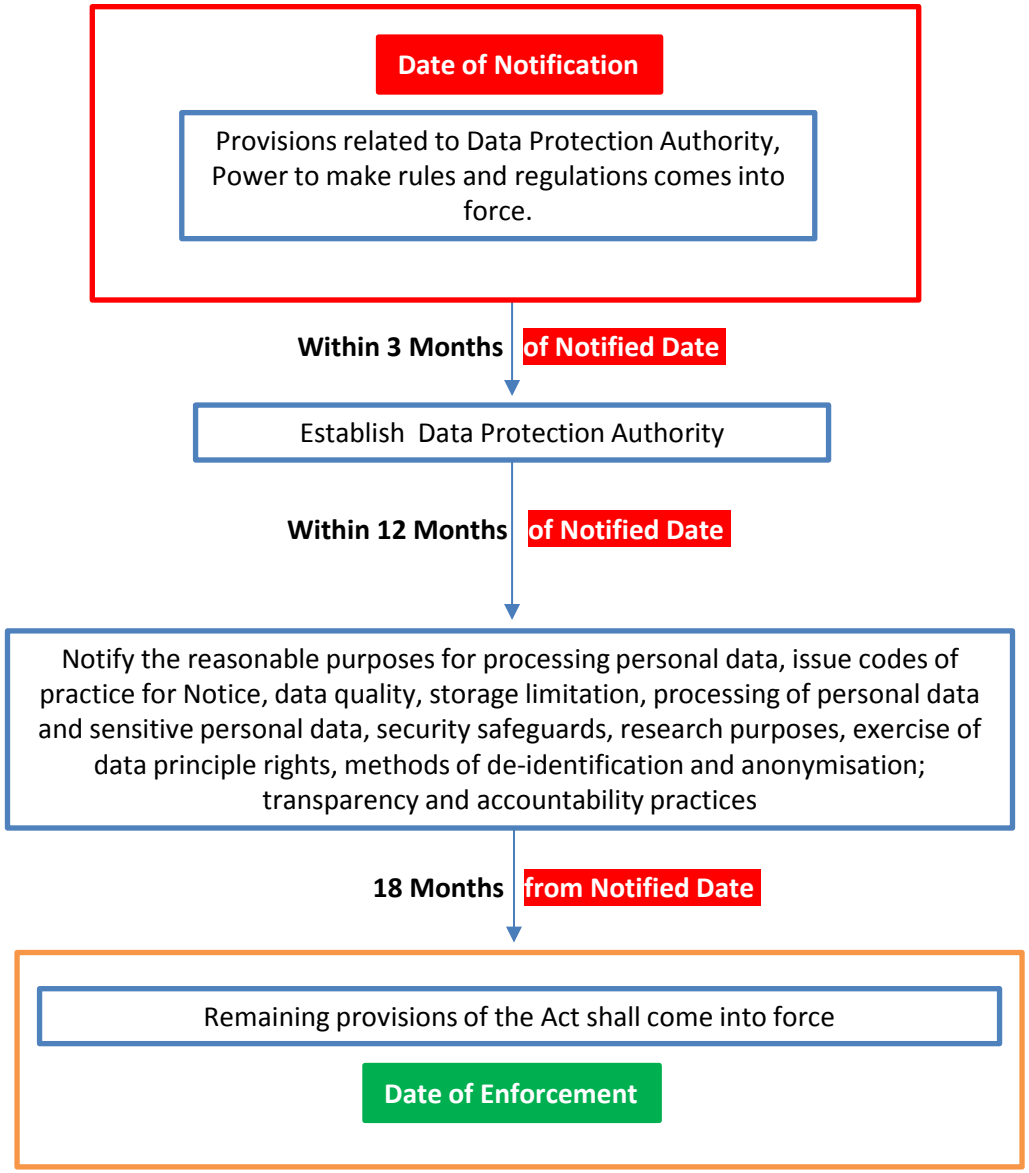
Transitional Provisions

The date of notification shall be within 12 months from the date of enactment of the act. Refer the diagram for the timeline to follow.

The date of enforcement of section 40 (restrictions on cross-border transfer of personal data would be notified by the central government).



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8 Key Differences from GDPR

1. Controller need not share the names and categories of other recipients of the personal data with the data subject.

2. Data retention period is not mandated.

3. Source of information need not be shared with the data subject if the data was not collected directly from the data subject.

4. There is no mandate for the controller to share the existence of automated decision making, including profiling.

5. Upon subject access request, a summary of information of personal data alone shall be shared with the data subject.

6. Right to erasure is not recognized.

7. Breach need not be communicated directly to the data subject but to the DPA.

8. At least one serving copy of the processed data should be stored in India.

Q&A

- **Belson Devarajan**, Legal Counsel, Data Privacy, Accenture
- **Riccardo Masucci**, Global Director of Privacy Policy, Intel

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Questions

Is the draft law creating the right environment for cross-border data flows?

What would the impact of the data localisation provision be on organisations?

Will companies be able to leverage their past and on-going compliance efforts (i.e. GDPR) to implement India's law?

Do you think the draft law is creating the right environment for innovation and AI related technologies?

Which provisions are currently the most debated within the government and will be most debated in parliament?

What is the political timeline on this? Is there any risk the law could be shelved?

How would this new law position India regionally and globally in the data protection ecosystem?

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Useful links

India Personal Data Protection Bill, 2018

https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf

Ministry of Electronics and Information Technology Page on India's Data Protection Framework

http://meity.gov.in/data-protection-framework

Data Security Council of India Page on India's Data Protection Framework

https://www.dsci.in/content/data-protection-framework-india

CIPL Comments on India's Draft Data Protection Bill

https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_comments_on_the_indian_ministry_of_electronics_and_information_technology's_draft_data_protection_bill_2018.pdf

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