What India's New Data Protection Law Gets Right and Wrong

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Abstract

India has finally enacted comprehensive data protection legislation after years of deliberation, but the final law differs significantly from both earlier drafts and international standards. The Digital Personal Data Protection Act of 2023, along with recently notified rules and the creation of the Data Protection Board, represents a milestone in Indian privacy regulation—yet one that prioritizes state and industry interests over individual protections.

Parsheera traces the law's origins to concerns around the Aadhaar project and the Supreme Court's Puttaswamy judgment recognizing privacy as a fundamental right. However, the enacted version represents a substantial departure from initial proposals, featuring limited scope (covering only digital data), fewer individual rights, and a notably weak regulatory structure. The transition from a proposed "Data Protection Authority" to a "Data Protection Board" exemplifies this shift, creating an agency with minimal independence and no rule-making powers.

Despite these limitations, Parsheera argues this marks only the dawn of data protection regulation in India, with potential for evolution through judicial intervention, legislative amendments, and the board's own choices in exercising its limited mandate.

Supplementary Resources

- **The Digital Personal Data Protection Act, 2023** by Government of India (Legislation) [1]
- **Legislative Brief: The Digital Personal Data Protection Bill, 2023** by PRS Legislative Research (Legislative brief) [4]
- **Data Protection and Cross-border Data Flows in India** by Smriti Parsheera (Working paper) [2]

- **Personal Data Architectures in India** by Smriti Parsheera (Book chapter) [3]

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Introduction to data protection in India

[00:00:08] Nevin George: Hello and welcome to another episode of Big Ideas. Today we have with us Smriti Parsheera, who is a lawyer and public policy researcher. Smriti's areas of research are in the fields of digital technologies and law and public policy. Um, welcome to the show Smriti and thank you for being here.

[00:00:25] Smriti Parsheera: Thank you.

[00:00:26] Nevin George: So let me start by asking you, what is the big idea you have for us today?

[00:00:30] Smriti Parsheera: Thank you so much. The big idea I'd like to talk about is around the dawn of data protection regulation in India. As many of us would know, India has recently notified the data protection rules, which follows from the law that was enacted about two year, two years ago in August 2023.

[00:00:47] Smriti Parsheera: Uh, and this rule is significant because it is accompanied by the notification of the creation of the new Data Protection Board of India, uh, and it's also comes with the notification of a timeline over the course of the next 18 months on how this law is going to be notified and will come into effect in phases.

Historical context and drivers of data protection law

[00:01:04] Nevin George: So can you help us locate these developments in the context of the law that came out, the act that came out in 2023?

[00:01:13] Smriti Parsheera: Sure. So the act itself is an idea that has been in the making for a very long time and the idea whose time had come for a very long time. And I think the interesting history and the backstory to note there is that the data protection conversation in India has been very intrinsically tied to the conversations around the Aadhaar project.

[00:01:32] Smriti Parsheera: Uh and you know, many of us would recall when the project was notified uh in 2009, 2010, there was a lot of uproar around its privacy implications and the fact that such a huge project around sensitive biometric data was being launched without there being a privacy and data protection framework in the country. And that's really when the first round of conversations around the need for such a law came about. There was a Justice AP Shah Committee that was set up.

[00:01:58] Smriti Parsheera: And in parallel around the same time, there was another set of conversations that were going around given the fact that, you know, the IT services industry in India was booming and there was a lot of data coming into the country, you know, as a part of the outsourcing industry. There a need was being felt by the industry itself that the government needs to have data protection regulation to show credibility to the outside world about the fact that, you know, we are serious about how we manage your data that comes into our country.

[00:02:24] Smriti Parsheera: So really, these were the kind of pressures which were brewing at that point of time, but it didn't materialize uh into a law in, you know, I would call that the first phase of the deliberations around data protection. Subsequently, when Aadhaar was challenged before the Supreme Court and you know, that led to the first Puttaswamy verdict, the right to privacy decision, that became the trigger for thinking about the need and the commitments were given in the by the government in the court saying that, you know, there is a need, we recognize it and we're going to create a credible framework for data protection. And that is really what was the trigger for this law which finally came about in 2023.

[00:02:59] Smriti Parsheera: And again, there, I think it's interesting to know that there is a micro history that has happened in these last five, six years where we saw five, six different versions of the bill come to light. And the version that is really enacted and has now become the law is very different from the versions which were initially proposed and were under discussion uh for the last couple of years. And and I think that switch is significant in terms of, you know, thinking about where the Indian data protection has landed up and also in terms of thinking about some of the rights and powers and you know, the institutional framework and we could talk a little bit more about that.

Puttaswamy judgment and comparison with global standards

[**00:03:34**] **Nevin George:** Yes. So you mentioned Aadhaar and the concerns around its privacy and I've also heard of these discussions, but and this led to the Puttaswamy judgment is what you just told us. So can you tell us how the Puttaswamy judgment and the law as it came out in 2023 compares to other global standard laws of of our time now?

[**00:03:58**] **Smriti Parsheera:** Sure, yeah. And I think before that on the Puttaswamy judgment, I think the interesting thing to note is that, you know, as a part of the judgment, the Supreme Court recognized that there is a there is a positive aspect to the right to privacy and there is a negative aspect, which means that, you know, the one aspect is that the government is not supposed to intervene and interfere in your personal life and, you know, deal with your data in in manners which is uh, you know, in breach of privacy.

[**00:04:22**] **Smriti Parsheera:** But at the same time, there is also a positive obligation to put in place a legal framework which bars others from doing the same. And that is really the trigger for, you know, this law coming about. But as we were just discussing, the law that has been enacted is uh substantially different from the drafts that were under discussion for the last couple of months before that, and it's also different from other laws, whether you look at the laws like GDPR, which is often seen as a gold standard, but also the laws of other countries.

[**00:04:50**] **Smriti Parsheera:** Like I've done some comparative work around the BRICS countries, and we find that the law as enacted in India is very different from those laws as well. And I think the some of the highlights is one, you know, just on the very basic uh concept of the scope of the law. So what we have now is a Digital Personal Data Protection Act. It's not a law that covers all kinds of personal data.

[**00:04:50**] **Smriti Parsheera:** It's limited only to data which is in the digital form. So, you know, analog data, physical records, those will not be covered under the scope of this law.

[00:05:19] Smriti Parsheera: As we go into some of the rights and protections, there again, we see that the law as enacted in India has a more limited set of right and protections under uh, you know, compared to some of the other laws. One of the examples is the missing right to be forgotten, which is again, you know, something on which courts are separately developing jurisprudence in India, but that's not been set as a statutory, right? Similarly, the right to portability, the ability to take your data, uh you know, from one provider and automatically port it in an interoperable manner to another provider. Those are things which have not been explicitly laid down in the statute.

[00:05:53] Smriti Parsheera: And there are many other examples. So I think the other thing to note which is significant in the Indian context is the way in which the government deals with data. And I think that foregrounds the entire, you know, it's it links back to the history which we were talking about on how this law has come about. The two interests which were paramount there was the interest of the state in that context of Aadhaar and widespread collection data and the interest of the industry and giving comfort to the industry.

[00:06:19] Smriti Parsheera: And I think uh many people would agree that the law as finally enacted uh does both of those things very often at the cost of the protection uh and the quality of protection that has been given to uh you know, the end user who is the principal who is supposed to be the ultimate uh beneficiary of that law. So both in terms, I think the other thing to note is again, uh one of the controversial aspects of this law, much discussed, something which changed drastically in the discussion period was the treatment of cross-border data flows.

[00:06:46] Smriti Parsheera: That again, the position we've arrived at is quite different from what we generally see in many other data protection laws where it's common to see certain conditions around restrictions. So either the other country where you transfer the data should have comparable protections or there should be uh, you know, some other conditions are imposed, the consent of the individual, etcetera, a bouquet of rights exists around that. Uh but we were proposing that in one of the earlier rounds of the bills, but eventually the law that has adopted has gone for something which is being called the blacklisting approach.

[00:07:16] Smriti Parsheera: So all kinds of transfers are permitted unless something is restricted by the government, uh transfers to particular countries. And now as the rules have evolved around the law, there's also an additional framework that has been created which allows the government to, you know, by order direct the terms and conditions of transfers to specific countries or to companies which are have dealings with government authorities in other countries. So there are all of these substantive aspects on which uh the law differs and there's also the structural aspects of, you know, how the law is to be implemented, the framework around that where also there are some key differences.

[00:07:50] Nevin George: Okay. You briefly mentioned the Data Protection Board and I believe this will be the regulatory authority for this law. And could you please go into more details about this board? I know you've been working on issues of regulatory governance before.

[00:07:50] Nevin George: Uh could you please tell us drawing from that research, what what what opinions do you have about this board?

Data Protection Board structure and independence concerns

[00:08:12] Smriti Parsheera: I think that is one of the most significant transitions that we saw between the two versions of the bill, the one which was originally introduced in Parliament in 2019, ultimately withdrawn in 2022 and replaced by the bill which became the act. One of the, you know, big changes there was the idea of doing away with the original proposal of having a full-fledged regulatory body which was being called the Data Protection Authority and replacing it with what we now have, which is called the Data Protection Board.

[00:08:41] Smriti Parsheera: And in some research which is ongoing along with Rishab Bailey and Shravani Nag, we look at this question of, you know, does this nomenclature of an authority versus a board mean something in the Indian context? And we find that uh it actually is not something, the term board is not something which is consistently used across laws. So for something like SEBI or IBBI, these are full-fledged authorities which use the term board in their nomenclature. And on the other hand, you have something which is a much weaker regulatory body, something like the Tobacco Board, which comes under very strict control of the government.

[00:08:41] Smriti Parsheera: You know, cannot make its own regulations without government approval, etcetera, where again, the concept of a board is used.

[00:09:19] Smriti Parsheera: So the name board in itself doesn't really, you know, signify the strength or the weakness of the authority. So for what we do in this paper is just try to compare what the powers of the Data Protection Board are against some of the other authorities in India, bodies like the Telecom regulator, the Competition Commission, and SEBI. And we find that normally in Indian context, and this is thinking which, you know, uh goes back to the recommendations of the financial sector legislative reforms Commission where they had very clear thoughts around what it means to be a regulatory authority, what are the kind of powers you have.

[00:09:52] Smriti Parsheera: And one of the ideas they proposed was that a regulatory authority is like a mini state which has, you know, slivers of regulation making, enforcement and adjudication functions. And if you try to apply that to the Data Protection Board, you see a whole set is completely missing because it has no power to make regulations. So the regulations uh will be in the form of rules. All of that control which was initially proposed for this authority was transferred uh and clawed back by the government and they retained that power, whether it's, you know, specifying notices and consent and mechanisms around that, designation of significant fiduciaries, dealing with cross-border flows.

[00:10:27] Smriti Parsheera: A lot of significant issues where in other countries you might see the data protection authority take an interest and actively have that power. Those have gone to the hands of the government and to be decided through rules. So that is a very, very uh significant shift uh in terms of, you know, how this body has been structured, goes to the core of the issue of the independence and questions of accountability of this body.

[00:10:50] Smriti Parsheera: So, you know, it has a smaller mandate and also otherwise if you look at the independence of the body usually judged through mechanisms such as what are the funding mechanisms of the body? Does it have the power to appoint its employees? What are the, you know, mechanisms for the appointment of the board, their terms? On all of these counts, we see that uh the Data Protection Board has, you know, uh is really not what you would expect out of an independent authority.

[00:11:14] Smriti Parsheera: So to take some examples, it doesn't have the power to um set the terms of its own employees. It doesn't have the ability to appoint them without the approval of the government. And and you know, it's not that there is always a clear set template in which this is done by Indian regulators. There is a spectrum with different regulators being more or less independent, but this clearly falls in the domain of being less independent in the way it's been structured.

[00:11:14] Smriti Parsheera: Similarly, there is no financial autonomy, completely dependent on uh grants which will come from the government.

[00:11:44] Smriti Parsheera: So on all those aspects, there is, you know, a clear um step back that was taken when this agency was changed from an authority to a body. Uh but having said that, I do want to note that there are a few positives also which have emerged in the way this uh agency has been structured. One of this is this idea which has been emphasized is the idea of uh the Data Protection Board functioning as a digital office. You know, so it is bound by law to adopt techno-legal measures in its implementation.

[00:12:11] Smriti Parsheera: So whether it's hearing grievances, dealing with complaints, looking doing inquiries, uh penalties, in all of those mechanisms, it's supposed to rely on technology and one expects that that should ordinarily be accompanied by transparency because when you have all this in a digital format, it is easier should the authority choose to be transparent to reach that level of transparency. The other notable thing is that uh very often in regulatory laws in India, we see provisions where the government has the power to issue directions or the government can supersede a particular board.

[00:12:44] Smriti Parsheera: We don't see those uh probably because the powers are so limited that the government doesn't feel the need to do so, but anyway, it's a positive that those kind of restrictions have not been imposed.

[00:12:55] Nevin George: Thank you for sharing that with us. I think for me, as I listen to you speak, I think it's very insightful to think that all boards are not equal and there is a spectrum of boards in terms of how many how much power and authority that each of them are able to exercise. So, thank you for sharing that with us. Um, another thing, now, I think you were mentioning the positive aspects of the board.

[00:12:55] Nevin George: I think uh that nicely segues into my last question, which is about what are the other aspects of this law that are generally positive? Where from where we were, after this law, what are the positive aspects of it?

Positive aspects and future evolution of the law

[00:13:31] Smriti Parsheera: I think just the fact of having the law is such a huge signaling effect uh both to the markets, to the citizens. There has been this, you know, huge confusion for several years, certainly for the last two years, but for several years before that where it was unclear what the regulatory framework is going to be. So companies couldn't, you know, tune their possible compliance management strategies around that.

[00:13:53] Smriti Parsheera: So finally, with the rules being notified with there being a clear, uh, you know, framework on how these different provisions will come into effect, there is a lot of clarity that has come about. Even on the regulatory design and the structure part, despite the limitations that I pointed to, I think it's important to realize that this is only, as I started by saying, the dawn of data protection regulation in India, right? It's only the starting point. And we know from the history of other authorities in India that very often if there is something remiss in the way an agency is structured or it exercises its powers in a manner which is deemed insufficient, you do have the courts.

[00:14:27] Smriti Parsheera: Very often the legislature will step in and make amendments to the law. So we've seen that happen with the Competition Commission of India, which was not notified, didn't come into effect for a very long time because it was being litigated around, you know, how this body should be structured, who should be its members. We've seen that with the Telecom Regulatory Authority, went through a very significant change in its scope of powers with its adjudicatory powers being moved out to another agency, you know, just two, three years down the line after its creation.

[00:14:53] Smriti Parsheera: So those things could happen. And at the same time, the board itself has the power to, you know, even if it's not mandated in the law to be transparent, to voluntarily be transparent in its functioning, to voluntarily, uh, you know, invoke public participation in whatever limited scope of powers that it has. And I think that will really set the tone for what, uh, the public or even the parliament believes is the capability of this, uh, body and in future change perhaps, you know, a few years down the line, the scope of what it's supposed to do.

[00:15:23] Nevin George: So if I've understood what you've said uh correctly, I think you're saying that there are several issues with the law, but it is still a first step in the right direction. And we look forward to a future in which all our data is private and the government does the necessary to do to achieve this goal. Uh thank you for being with us Smriti.

[00:15:44] Smriti Parsheera: Thank you so much.

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