

TOWARDS INDEPENDENCE AND ACCOUNTABILITY IN DATA PROTECTION GOVERNANCE?

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(The author is grateful to Dr. Dakshina Chandra (Assistant Professor at National Law University, Delhi) for her help and inputs in developing this paper.)

A*bstract*—Due to the wide range of entities covered, and the number of transactions and functions performed, it is posited that data protection regulation has the most extensive regulatory mandate that any regulator has ever had to take on in India. This makes it important to understand the regulatory conditions that would bring about an efficient enforcement of the substantive right of data protection and informational privacy. A new bill for digital personal data protection was released for public consultation in India by the Ministry of Electronics and Information Technology in November 2022. The Data Protection Board set up by this Bill has been criticised to be heavily government controlled and influenced, thus lacking in independence, accountability and effectiveness. This paper seeks to evaluate the current regulatory structure of the proposed Data Protection Board from the prism of independence, accountability and transparency. In the course of this evaluation, this paper will make a comparison between the regulatory structure laid down in the Personal Data Protection Bill 2019 and Digital Personal Digital Protection Bill 2022 to examine if the regulatory structure has evolved. In doing so, references have been made to literature and developments in other jurisdictions to provide suggestions for future regulatory design of the Data Protection Board of India.

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Keywords: Regulatory Architecture and Governance, Digital Personal Data Protection Bill 2022, Data Protection Board, Srikrishna Committee Report, Independence and Accountability, Responsive Regulation.

ASSESSING THE REGULATORY LANDSCAPE FOR DATA PROTECTION GOVERNANCE IN INDIA

While the right to privacy is not expressly recognised in the Indian Constitution, the Supreme Court has gone to great lengths to establish it by consistently ruling that the right to privacy can be read into the meaning and scope of Part III of the Indian Constitution.²⁶⁰ It is firmly believed by experts and practitioners alike that the Puttaswamy judgement realigned Indian jurisprudence from a narrow conception of the right focussing exclusively on the harms that arise out of privacy violations, to a broader understanding wherein privacy was viewed ‘as a right worth protecting in itself.’²⁶¹

The acknowledgment of informational privacy as a subset of the right to privacy occurs in this context, clearing the path for the creation of specific data protection legislation to safeguard citizens’ rights. The Personal Data Protection Bill, 2019 (hereinafter, ‘PDPB, 2019’) seemed to be the result of more than ten years of privacy law development, which was impacted by domestic and global advancements in technology, informational privacy, and data protection.²⁶² The White Paper on the Data Protection Framework was published in November 2017 by the Committee of Experts on Data Protection Framework for India (‘Srikrishna Committee’). The committee was led by Justice Srikrishna, a former justice of the Supreme Court. The committee, in its report, went on to advocate the creation of a powerful independent regulatory agency that would be in charge of oversight and enforcement, legal matters, setting standards and policies, raising public awareness, conducting investigations, resolving grievances, and adjudication.²⁶³ The 2019 PDPB was retracted as a result of resistance from leaders in the digital economy, members of the civil society, and the supervisory committee set up by the Government. The overarching reasoning behind this was a new data privacy law should not

²⁶⁰ *KS Puttaswamy v Union of India* (2017) 10 SCC 1.

²⁶¹ Anirudh Burman, ‘Will India’s Proposed Data Protection Law Protect Privacy and Promote Growth?’ (Carnegie India, 9 March 2020) <www.carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217> accessed 20 September 2022.

²⁶² Mark Linscott and Anand Raghuraman, *Aligning India’s Data Governance Frameworks* (Atlantic Council, 16 September 2020) <www.atlanticcouncil.org/in-depth-research-reports/issue-brief/aligning-indias-data-governance-frameworks/> accessed 20 September 2022.

²⁶³ Committee of Experts, ‘White Paper of the Committee of Experts on a Data Protection Framework for India’ (2017) <www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf> accessed 21 September 2022.

result in a ‘net loss’ to the Indian economy by cutting down on the growth of businesses, especially start-ups in India.²⁶⁴

The Ministry of Electronics and Information Technology has published the draft Digital Personal Data Protection Bill, 2022 (hereinafter, ‘DPDP Bill’) on 18 November 2022 for public consultation. The proposed law has been through two revisions before this one. The proposed law has been observed to be more open-ended, leaving much to be determined by the Central Government, as compared to its previous versions.²⁶⁵ Additionally, it skips over a number of onerous criteria like data localisation, stricter permission standards for sensitive personal data, fines for global turnover, and oversight of non-personal data.²⁶⁶ It is suggested that the Data Protection Board of India (DPB) serve as a tribunal or a quasi-judicial body for enforcing the proposed law.²⁶⁷

This is considered to be a departure from the previous bills where a data protection regulatory authority had been envisaged.

As we construct regulators and impose cross-sectoral mandates on them, it is crucial to understand how enforcement is carried out in current regulators and whether there is a structural issue with enforcement. This is particularly crucial because India’s state capacity is acknowledged to be lacking, and regulators have often been criticised to be controlling instead of regulating, thus, not imbibing principles of rule of law, particularly due process.²⁶⁸ This has indicated the need to develop new models of regulatory design.²⁶⁹ Entities that collect data for commercial use ranging from small time telemarketers to social media mammoths are expected to fall under the mandate of the envisioned data protection regulator.²⁷⁰ In light of the same, the scope of the regulation by

²⁶⁴ Trishee Goyal and Renuka Sane, ‘Towards Better Enforcement by Regulatory Agencies’ (The Leap Blog, 25 March 2021) <<https://blog.theleapjournal.org/2021/03/towards-better-enforcement-by.html#gsc.tab=0>> accessed 25 October 2022.

²⁶⁵ Centre for Communication Governance, ‘Comments to the Ministry of Electronics and Information Technology on the Draft Digital Personal Data Protection Bill 2022’ (14 December 2022) <<https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/ccg-nlu-comments-to-meity-on-the-draft-digital-personal-data-protection-bill-2022-334.pdf>> accessed 1 December 2022.

²⁶⁶ Arya Tripathi, ‘Digital Personal Data Protection Bill, 2022 – Analysis of the Key Features’ (*Mondaq*, 25 November 2022) <www.mondaq.com/india/privacy-protection/1254806/digital-personal-data-protection-bill-2022-analysis-of-the-key-features> accessed 1 December 2022.

²⁶⁷ Centre for Communication Governance, ‘Comments to the Ministry of Electronics and Information Technology on the Draft Digital Personal Data Protection Bill, 2022’ (14 December 2022) <<https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/ccg-nlu-comments-to-meity-on-the-draft-digital-personal-data-protection-bill-2022-334.pdf>> accessed 1 December 2022.

²⁶⁸ Shubho Roy and others, ‘Building State Capacity for Regulation’ in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Bloomsbury Publishing 2019).

²⁶⁹ *ibid.*

²⁷⁰ Committee of Experts, ‘A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians’ (*MeitY*, 2018) <www.meity.gov.in/writereaddata/files/>

the DPB would be far more wide-ranging than the other established regulators in India.²⁷¹ The regulated entities would be severely disincentivised from entering the market place if they do not think the regulatory process to be fair and transparent, which would severely impact the start-up ecosystem and the ease of doing business in India.²⁷² Thus, there is increased importance on getting the regulatory process of the DPB right.

INDEPENDENCE OF THE DATA PROTECTION BOARD ENVISAGED UNDER THE PDP BILL 2022

One of the most fundamental pillars of any efficient regulatory governance structure is to ensure that the regulator is independent, accountable and transparent, which would guarantee legal certainty.²⁷³ The White Paper on the Data Protection Framework for India emphasised on the importance of getting the institutional design of the regulatory and enforcement structure of the Data Protection Authority right, such that it possesses the capacity to protect individuals from the harmful effects of processing their personal data.²⁷⁴ Further, the Justice B.N. Srikrishna Committee Report highlighted the fact that the regulatory body set up for the purposes of standard setting, monitoring and enforcement and adjudication of concerns arising from processing of personal data of individuals must be a high powered independent regulatory body.²⁷⁵

Considering the significance of historical factors in designing a regulatory body, importance must be given to the fact that India in its post-liberalisation phase saw the set-up of independent regulators such as the Competition Commission of India (CCI), the Telecom Regulatory Authority of India (TRAI) and the Securities Exchange Board of India (SEBI). The independence of regulators from governmental supervision becomes even more important given the fact that these statutory regulators are monoliths performing all three- rule

Data_Protection_Committee_Report.pdf> accessed 2 November 2022.

²⁷¹ Trishee Goyal and Renuka Sane, 'Towards Better Enforcement by Regulatory Agencies' (*The Leap Blog*, 25 March 2021) <<https://blog.theleapjournal.org/2021/03/towards-better-enforcement-by.html#gsc.tab=0>> accessed 25 October 2022.

²⁷² Bogdan Dima, Flavia Barna and Miruna-Lucia Nachescu, 'Does Rule of Law Support the Capital Market?' (*Tyler and Francis Online*, 2018) <www.tandfonline.com/doi/full/10.1080/1331677X.2018.1432371> accessed 2 November 2022.

²⁷³ Financial Sector Legislative Reforms Commission, *Report of the Financial Sector Legislative Reforms Commission Volume 1: Analysis and Recommendations* (Department of Economic Affairs, March 2013) <www.dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf> accessed 2 November 2022.

²⁷⁴ Trishee Goyal and Renuka Sane, 'Towards Better Enforcement by Regulatory Agencies' (*The Leap Blog*, 25 March 2021) <<https://blog.theleapjournal.org/2021/03/towards-better-enforcement-by.html#gsc.tab=0>> accessed 25 October 2022.

²⁷⁵ *ibid.*

making, enforcement and adjudication.²⁷⁶ This necessitates the need for them to function in an accountable and transparent manner.²⁷⁷

Independence of an entity regulating the personal data protection framework in India becomes even more critical due to the contextual and technical nature of privacy rights and the challenges that would emerge from data processing as well as the fact that such a regulator would regulate not just the private sector but the government entities as well.²⁷⁸ The rationale for independent regulators is based on the fundamental argument that economic decisions must be free from any sort of political authority and supervision and must be value neutral. Further, independent regulators must also give priority to technical problems over political ones.²⁷⁹

According to the OECD Guidelines on Creating a Culture of Independence in Regulators, there are five dimensions against which the independence of regulators must be assessed and which protect regulators from undue influence, thus propagating a culture of independence.²⁸⁰

FIVE DIMENSIONS ON CREATING A CULTURE OF INDEPENDENCE

	Five Dimensions of Independence	Explanation
1.	Role Clarity	The responsibilities and functions of the regulator must be clearly spelt out in the relevant legislation. Conflicting mandates result in poor performance. ²⁸¹

²⁷⁶ Anirudh Burman and Bhargavi Zaveri ‘Regulatory Responsiveness in India: A Normative and Empirical Framework for Assessment’ (*Indira Gandhi Institute of Development Research*, July 2016) <www.igidr.ac.in/pdf/publication/WP-2016-025.pdf> accessed 23 December 2022.

²⁷⁷ Smriti Parsheera, ‘Regulatory Governance under the PDP Bill: A Powerful Ship with an Unchecked Captain?’ (*Medianama*, 7 January 2020) <www.medianama.com/2020/01/223-pdp-bill-2019-data-protection-authority/> accessed 20 December 2022.

²⁷⁸ Lalit Panda, ‘The Weight of Secrets: Assessing the Regulatory Burden for Informational Privacy in India’ (2019) 15(1) *IJLT* <www.ijlt.in/journal/the-weight-of-secrets%3A-assessing-the-regulatory-burden-for-informational-privacy-in-india> accessed 2 December 2022.

²⁷⁹ TV Somanathan, ‘The Administrative and Regulatory State’ in Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

²⁸⁰ OECD, ‘The Governance of Regulators: Creating a Culture of Independence: Practical Guidance against Undue Influence’ (2017) <www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf> accessed 3 December 2022.

²⁸¹ Shubho Roy and others, ‘Building State Capacity for Regulation’ in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Bloomsbury Publishing 2019).

2.	Transparency and Accountability	Includes measures which act as checks and balances on the acts of the regulator such as an appeals mechanism, public consultations. ²⁸² Regulators must also make available statistical details with respect to their functioning.
3.	Financial Independence	The requisite funding of the regulator indicates the extent to which the regulator can act independently and perform its functions.
4.	Independence of Leadership	Criteria for nomination, appointment, mandate and termination of the board members should be accountable, transparent and clearly laid down in the legislation. Non-executive members must dominate the composition of the Board. ²⁸³
5.	Staff Behaviour	The methodology employed by regulators to keep and motivate staff members and help them in providing unbiased advice determines the independence of a regulator.

Source- OECD Best Practice Principles for the Governance of Regulators (OECD, 2014)

In light of the OECD Guidelines on independence of regulators, the independence of the Data Protection Board envisaged under the PDP Bill 2022 needs to be determined in terms of the composition, structure, appointment process and functions of the Board. An assessment of the quasi-legislative, quasi-executive and quasi-judicial functions of the Board will be undertaken to analyse the independence, accountability and transparency of the Board. Further, the article will compare these with the structure and functions of the DPA laid down under the PDP Bill 2019 to see if the regulatory structure has evolved.

STRUCTURE OF THE DPB

It was held in the case of *Union of India v R Gandhi*²⁸⁴ that an adjudicatory body must be constituted in a manner which strengthens the faith of the public in its independence and ability. Even though as per Clause 21 of the 2022 Bill, the DPB has been set up to function as an independent body, putting the same into practice will be a challenge given the extent of control and influence that the Central Government exercises over the institutional and functional design

²⁸² Directorate for Public Governance, 'OECD Regulatory Enforcement and Inspections Toolkit' (OECD, 2018) <www.oecd.org/gov/regulatory-policy/oecd-regulatory-enforcement-and-inspections-toolkit-9789264303959-en.htm> accessed 5 December 2022.

²⁸³ Shubho Roy and others, 'Building State Capacity for Regulation' in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Bloomsbury Publishing 2019).

²⁸⁴ *Union of India v R Gandhi* (2010) 11 SCC 1.

of the DPB, in the absence of judicial oversight.²⁸⁵ While the Data Protection Authority under the 2019 Bill was set up as a statutory body, the Data Protection Board under the new bill seems to be set up and controlled entirely by the government.²⁸⁶ The composition of the Board, the terms of appointment, their qualifications, service and removal of its members have been left to be prescribed by the Central Government.²⁸⁷ Further, the Central Government alone is vested with the power to appoint and decide the terms and conditions of service of the chief executive of the Board.²⁸⁸ However, the normal practice is that legislations which create statutory bodies must lay down the composition and qualifications of the board members, contrary to laying them down in additional rules and regulations.²⁸⁹

The approach followed in the 2022 Bill seems to be a departure from the approach followed in the previous bills where the members of the board were to be appointed by the Central Government on the advice of a selection committee.²⁹⁰ The Srikrishna Committee Report had recommended that the selection committee comprise of the Chief Justice of India or their nominee, the cabinet secretary and a field expert.²⁹¹ This would ensure diversity, fairness and transparency in the appointment of members to the Data Protection Regulator. Though, this composition of the selection committee was retained by the 2018 Bill, the 2019 Bill replaced the Chief Justice and the field expert with secretaries to government departments.

The composition of the Board holds even more significance in light of the fact that the success of a regulator in the initial years is determined by the quality of its leadership.²⁹² Since the 2022 Bill does not provide for a selection committee, the members of the Board would be selected solely by the Executive through delegated legislation. The importance of the inclusion of a judicial member in the selection committees to administrative bodies has been

²⁸⁵ Christopher Carrigan and Lindsey Poole, 'Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance' (*Penn Carey Law*, June 2015) <www.law.upenn.edu/live/files/4707-carriganpoole-ppr-researchpaper062015pdf> accessed 5 December 2022.

²⁸⁶ Press Trust of India, 'Significant Controls to Govt under Data Protection Bill to Hit Investments in Data Centres: ITI' *The Hindu* (New Delhi, 28 December 2022).

²⁸⁷ Digital Personal Data Protection Bill 2022, s 19(2).

²⁸⁸ Digital Personal Data Protection Bill 2022, s 19(3).

²⁸⁹ Nishith Desai Associates, 'Digital Personal Data Protection Bill 2022: Analysis and Potential Impact on Business' (24 November 2022) <www.nishithdesai.com/NewsDetails/8453> accessed 30 November 2022.

²⁹⁰ Sonam Saigal, 'New Draft of Data Protection Bill is Fundamentally Flawed, says Justice BN Srikrishna' *The Hindu* (Mumbai, 25 November 2022).

²⁹¹ Committee of Experts, 'A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians' (*MeitY*, 2018) <https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf> accessed 2 November 2022.

²⁹² Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* <www.jstor.org/stable/1410728> accessed 5 December 2022.

stressed upon in the cases of *Rojer Mathew v. South Bank*²⁹³ and *S.P. Sampath Kumar v Union of India*,²⁹⁴ where the courts held that selection committees to quasi-judicial bodies must compulsorily have a judicial member. This has been regarded necessary to safeguard the independence and impartiality of the tribunal since the government could be the litigant in many cases, hence, the need to separate any bias from the adjudication process.

A selection process controlled exclusively by the Government would fill up the composition of the Board with government secretaries and former bureaucrats, which would replicate and further the hierarchies of the government into the structure of a regulator which is ideally supposed to be independent. Independent members on the Board would act as checks and balances and ensure transparency on the Board.²⁹⁵

In this regard, inspiration could be taken from the Information Commissioner's Office (ICO), the designated regulator for enforcement of the Data Protection Act, 2018 in the United Kingdom. The management board of the ICO consists of both executive and non-executive members which would guarantee diversity in leadership and ensure internal accountability.²⁹⁶ Further, we recommend that a selection process led by the judiciary as envisaged under the 2018 Bill should be followed by the 2022 Bill.

FUNCTIONS OF THE BOARD

The Data Protection Board has been vested with mainly adjudicative functions.²⁹⁷ The Board has been set up with the objective of ensuring that the data fiduciaries and data principals are in compliance with the provisions of the Bill and has been given the power to conduct inquiries, summon witnesses, examine evidence, carry out proceedings with respect to the complaints received and levy penalties. Given the expansive range of powers of the Board, it is important to get its composition right such that it functions independent of the influence of the Central Government.

RULE-MAKING POWERS OF THE GOVERNMENT

The role of the regulator under the 2022 Bill has been reduced to mainly that of enforcement and adjudication as compared to the 2019 Bill where the

²⁹³ *Rojer Mathew v South Indian Bank Ltd.* (2020) 6 SCC 1.

²⁹⁴ *S.P. Sampath Kumar v Union of India* (1987) 1 SCC 124.

²⁹⁵ Dvara Research, 'Initial Comments of Dvara Research Dated 16 January 2020 on the Personal Data Protection Bill 2019 Introduced in the Lok Sabha' (*Dvara Holdings*, 2020) <www.dvara.com/research/wp-content/uploads/2020/01/Initial-Comments-on-the-Personal-Data-Protection-Bill-2019.pdf> accessed 30 November 2022.

²⁹⁶ Information Commissioner's Office, 'Management Board' <www.ico.org.uk/about-the-ico/who-we-are/management-board/> accessed 30 November 2022.

²⁹⁷ Digital Personal Data Protection Bill 2022, s 19.

DPA also had the power to issue regulations and specify codes of practice.²⁹⁸ As per the new bill, the Board cannot issue any regulations. According to Section 26, only the Central Government has been given the power to make rules on various issues such as the fair and reasonable purposes where the personal data of individuals can be processed without consent, the manner in which breaches of personal data have to be reported and the method of composition, selection process and qualifications of the members of the Board.²⁹⁹

The power of the Government to exempt state entities from compliance with the provisions for the 2022 Bill has been expanded. As per the JPC Bill, an exemption to a state entity had to be subject to a fair, just and reasonable and proportionate procedure.³⁰⁰ This requirement has been done away with in the 2022 Bill, which would give the government extensive powers to conduct mass surveillance while exempting it of any accountability for the same.³⁰¹

RIGHT OF GRIEVANCE REDRESSAL

Unlike the previous versions of the Bill where there existed a clear demarcation in powers and functions between the DPA, inquiry officer, adjudicatory officer and an appellate tribunal, the 2022 Bill has combined these roles and vested them in the DPB.

Clause 21 of the Bill gives the DPB the power to take action on the issue of breach of personal data upon complaint received from an affected person or on the basis of a reference made to it by the Central Government or State Government or if a data principal was not compliant with Section 16 of the Bill.³⁰² This clause gives the Government undue influence and unnecessary power over the functioning of the Board unlike the 2019 Bill wherein the DPA could on its own motion or upon a receipt of complaint from an affected party initiate an inquiry.³⁰³ Reinstating the suo motu power of the Board to adjudicate on issues of breach of personal data in the 2022 Bill independent from government influence would be significant in cases of substantial non-compliance or mass breach.

²⁹⁸ Personal Data Protection Bill 2019, cl 50.

²⁹⁹ Digital Personal Data Protection Bill 2022, s 26.

³⁰⁰ Joint Parliamentary Committee, *Report on the Personal Data Protection Bill 2019*, explanation (iii), cl 35.

³⁰¹ Indranath Gupta and Parth Naithani, 'An Assessment of the JPC Report on PDP Bill 2019' (2022) 57 (31) *Economic and Political Weekly* <www.epw.in/engage/article/assessment-jpc-report-pdp-bill-2019> accessed 25 November 2022.

³⁰² Personal Data Protection Bill 2019, cl 21(2).

³⁰³ Personal Data Protection Bill 2019, cl 53(1).

IMPOSITION OF PENALTIES

Section 25 of the 2022 Bill gives the DPB the power to levy hefty financial penalties which can extend to a maximum of 500 crores.³⁰⁴ Even though the Board can levy this penalty after giving the accused a reasonable opportunity of being heard and after taking into account several factors such as the nature, duration and gravity of non-compliance, the nature of conduct and likely impact of the financial penalty imposed, the maximum penalty stipulated is substantially much more than what was laid down in the 2019 Bill. Although it is important to create a system for credible deterrence,³⁰⁵ the heavy penalties prescribed could have a mitigating effect on the thriving start-up ecosystem in India. Further, as per Clause 25, the DPB may impose a penalty if it considers the non-compliance to be ‘significant’.³⁰⁶ Since the term ‘significant’ has not been defined in the Bill, unfettered discretion has been vested with the DPB to interpret it.

Maintaining a balance between independence and accountability is one of the primary issues in administrative law with respect to statutory regulatory authorities.³⁰⁷ This balance is measured by the legitimate exercise of delegated legislative powers, fairness and natural justice in quasi-judicial functions and non-discrimination and reasonableness in administration.³⁰⁸ These parameters have not been complied with in designing the regulatory framework of the DPB which has severely weakened the independence of the board. A balancing act between deterrence and development is necessary for which a system of responsive regulation has been recommended which shall be further discussed in the third chapter.

LESSONS FOR FUTURE REGULATORY DESIGN OF THE DPB: TOWARDS RESPONSIVE REGULATION?

It has been observed that the 2022 Bill is based on the Personal Data Protection Commission (hereinafter, ‘PDPC’) envisaged under Singapore’s Personal Data Protection Act, 2012³⁰⁹ while the previous Bills were heavily

³⁰⁴ Digital Personal Data Protection Bill 2022, s 25.

³⁰⁵ Digital Personal Data Protection Bill 2022, s 24.

³⁰⁶ Indranath Gupta and Parth Naithani, ‘An Assessment of the JPC Report on PDP Bill 2019’ (2022) 57 (31) Economic and Political Weekly <www.epw.in/engage/article/assessment-jpc-report-pdp-bill-2019> accessed 25 November 2022.

³⁰⁷ Prabhat Kumar Datta and Susanta Majumdar, ‘Role of Regulatory Agencies in India’s Governance’ (2018) 64(3) Indian Journal of Public Administration <www.doi.org/10.1177/0019556118785426> accessed 25 November 2022.

³⁰⁸ KP Krishnan and Anirudh Burman, ‘Statutory Regulatory Authorities: Evolution and Impact’ (Carnegie India, 4 April 2019) <www.carnegieindia.org/2019/04/04/statutory-regulatory-authorities-evolution-and-impact-pub-78780> accessed 30 November 2022.

³⁰⁹ Personal Data Protection Act 2012.

based on the European Union's General Data Protection Regulation (hereinafter, 'GDPR').³¹⁰

It would be more appropriate for the DPB to be modelled on the GDPR since it values ideals of independence, transparency and accountability in a regulator³¹¹ as opposed to the PDPC which has been explicitly laid out to be a government authority lacking independence.³¹²

The government exercises control over the composition, terms of selection, service and removal of members of the PDPC similar to the DPB.³¹³ It must be noted that the PDPC is not very common among the regulators for data protection since it has jurisdiction over the private sector but not the public sector and hence does not function as a 'watchdog on government'.³¹⁴ Hence, adopting the regulatory approach followed in the PDPC does not seem appropriate for an Indian regulator which seeks to regulate the public sector entities as well. This gives it even more reason to be independent of government control.

This gives rise to the need to look for new approaches for the regulation of regimes for data protection which can better account for these standards in an economy which is primarily data driven. It is argued that responsive regulatory approach which was followed by the DPA under the 2019 Bill must be reinstated in the 2022 Bill to enhance the effectiveness of the DPB.

TOWARDS RESPONSIVE REGULATION FOR A DATA PROTECTION REGULATOR

Responsive Regulation holds great significance especially with respect to issues of data protection and privacy since it retains the flexibility to accommodate for the changes in technology, the improvement of data practices in the

³¹⁰ Arun Prabhu and Anirban Mohapatra, 'The Digital Personal Data Protection Bill 2022 - Part I' (*Cyril Amarchand Blogs*, 23 November 2022) <https://corporate.cyrilamarchand-blogs.com/2022/11/the-digital-personal-data-protection-bill-2022-part-i/#_ftn4> accessed 30 November 2022.

³¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L119, arts 52,58.

³¹² Graham Greenleaf, 'Singapore's New Data Protection Authority: Strong Enforcement Powers and Business Risks' (2012) 121 *Privacy Laws & Business International Report* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251284> accessed 30 November 2022.

³¹³ Warren B Chik, 'The Singapore Personal Data Protection Act and an Assessment of Future Trends in Data Privacy' (2013) 29(5) *Computer Law and Security Review* <www.sciencedirect.com/science/article/abs/pii/S0267364913001374> accessed 30 November 2022.

³¹⁴ Graham Greenleaf, 'Singapore's Personal Data Protection Act 2012: Scope and Principles (With So Many Exemptions, It is only a "Known Unknown")' (2012) 120 *Privacy Laws & Business International Report* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212608> accessed 30 November 2022.

world and provides a cost-efficient way of conducting oversight.³¹⁵ Responsive regulation holds even greater significance in the case of unelected bodies that bear a greater responsibility to be transparent and accountable to guarantee the acceptance of their policies by people who did not directly elect them.³¹⁶ This paper relies on the model of responsive regulation proposed by J Braithwaite, which lays down a pyramid structure of regulatory enforcement tools wherein the most punitive actions have to be undertaken in a progressive manner.³¹⁷

Responsive Regulation incorporates cooperative and participative tools for bringing about enforcement, escalating from persuasion to issuing warning letters to imposing penalties to cancellation of licenses of the regulatees.³¹⁸ Such an approach was incorporated in the enforcement mechanism of the DPA proposed under the 2019 Bill wherein clause 54 of the Bill gave the DPA a range of enforcement tools to resort to in a progressive manner ranging from issuing warnings to penalties to cancellation of registration.³¹⁹ It is recommended that this power must be reinstated with the DPB wherein currently the only method for ensuring compliance with the provisions of the Bill is through imposing hefty financial penalties.³²⁰

What a responsive regulation approach would do is to establish a synergy between punishment and persuasion and thus regulate successfully.³²¹ In this manner, regulatory interventions would begin at the base of the pyramid with non-penal actions which would promote voluntary corrective behaviour by the non-compliant entities. This would then escalate with more punitive actions in case compliance had not been achieved by the prior control efforts. The idea that forms the basis of this approach is that in the first instance, regulators

³¹⁵ William McGeeveran, 'Friending the Privacy Regulators' (2016) 58 Arizona Law Review 959 <www.scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1627&context=faculty_articles> accessed 30 November 2022; Ira Rubinstein, 'Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes' (2011) 6 A Journal of Law & Policy for the Information Society 356 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510275> accessed 30 November 2022.

³¹⁶ Anirudh Burman and Bhargavi Zaveri 'Regulatory Responsiveness in India: A Normative and Empirical Framework for Assessment' (*Indira Gandhi Institute of Development Research*, July 2016) <www.igidr.ac.in/pdf/publication/WP-2016-025.pdf> accessed 23 December 2022.

³¹⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

³¹⁸ Robert Baldwin, Martin Cave and Martin C Lodge, *Enforcing Regulation, Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2011).

³¹⁹ Trishee Goyal and Renuka Sane, 'Towards Better Enforcement by Regulatory Agencies' (*The Leap Blog*, 25 March 2021) <<https://blog.theleapjournal.org/2021/03/towards-better-enforcement-by.html#gsc.tab=0>> accessed 25 October 2022.

³²⁰ Rishika Rangarajan, 'Enforcement Functions of Indian Regulatory Bodies: Legislative Mapping of Key Regulators' (*NLS Regulatory Governance Resources*, 2021) <<https://static1.squarespace.com/static/6059f4f5b533f02b83a1e21a/t/6156cce514e2325131e0f17d/1633078502627/Enforcement+powers+of+Indian+regulators+%282%29.pdf>> accessed 30 November 2022.

³²¹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

should provide self-regulatory solutions to regulatees.³²² Upon non-fulfillment of the requisite goals the regulator should move up the pyramid, through enforced self-regulation to command regulation with discretionary punishment and end with command regulation with non-discretionary punishment.³²³

Thus, the responsive regulation approach is a democratic ideal which conceives responsiveness as flexibility of restorative options for self-enlightened entities and punitive actions for deviant entities. Inculcation of such an approach in a data protection regulator would equip the authority to not restrict itself to only post-breach sanctions, which can many a times be too little and too late for those whose personal data has been misappropriated.³²⁴ This implies that the regulator must employ such tools prudently, proportionately, and impartially on an assessment of the behaviour of regulated actors in deciding whether a less interventionist or more interventionist approach is required.³²⁵

Responsive regulation in the context of privacy has been emphasised upon by *McGeeveran* due to the many benefits that it brings about such as the flexibility to deal with the ever-fast changing technology, discharge of oversight roles and responsibilities in a cost-effective manner and the consequential enhancement in the data practices followed in the real world.³²⁶ The world's leading data protection regulator, the Information Commissioner's Office in the UK had adopted a responsive regulatory action policy which functions using a system of pragmatism and prioritisation.³²⁷ Taking inspiration from these developments in other developed countries, it makes sense for India to follow their path and adopt a responsive approach for its data protection regulation framework. The Srikrishna Committee Report had recommended the same by providing the data protection regulator with an entire toolkit of powers for responsive regulation.³²⁸

³²² M Raghavan, Beni Chugh and Nishanth Kumar, 'Effective Enforcement of a Data Protection Regime: A Model for Risk-based Supervision Using Responsive Regulatory Tools' (*Dvara Research*, November 2019) <www.dvara.com/research/wp-content/uploads/2019/12/Effective-Enforcement-of-a-Data-Protection-Regime.pdf> accessed 30 November 2022.

³²³ Robert Baldwin, Martin Cave and Martin C Lodge, *Enforcing Regulation, Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2011).

³²⁴ M Raghavan, Beni Chugh and Nishanth Kumar, 'Effective Enforcement of a Data Protection Regime: A Model for Risk-Based Supervision Using Responsive Regulatory Tools' (*Dvara Research*, November 2019) <www.dvara.com/research/wp-content/uploads/2019/12/Effective-Enforcement-of-a-Data-Protection-Regime.pdf> accessed 30 November 2022.

³²⁵ John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884, 886.

³²⁶ William McGeeveran, 'Friending the Privacy Regulators' (2016) 58 *Arizona Law Review* 959, 980.

³²⁷ UK Information Commissioner's Office, 'Regulatory Action Policy' <www.ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf> accessed 30 November 2022.

³²⁸ Committee of Experts, 'White Paper of the Committee of Experts on a Data Protection Framework for India' (*MeitY*, 2017) <www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf> accessed 21 September 2022.

We are well cognisant of the fact that a responsive regulatory approach requires vesting the authority with adequate discretion to be able to carry out the requisite enforcement actions. However, in order to safeguard against unguided and unfettered discretion, it is important to implement a system which though grants regulatory discretion, also maintains statutory checks to guide the discretion of a data protection regulator.³²⁹

This paper argues that a model for pro-active data protection regulation and enforcement must possess three attributes - independence, accountability and transparency. The degree of responsiveness of regulators is also measured according to these parameters,³³⁰ making an approach of responsive regulation the right fit. As per the OECD benchmarks, these are extremely significant to its effectiveness and credibility and are currently lacking in the regulatory structure of the DPB.³³¹

ACCOUNTABILITY AND TRANSPARENCY OF THE DPB

The 2022 Bill does not incorporate provisions which create a sufficient mechanism for the accountability of the Board to the concerned stakeholders. Hence, requisite measures guaranteeing the accountability of the regulator should be laid down in the primary legislation itself instead of leaving this responsibility to discretion of the DPB or to delegated legislation which is what has been done in the 2022 Bill.

The decisions of the Board are appealable to a High Court with appropriate jurisdiction, which creates an incentive mechanism for the Board to function more transparently, lest it be challenged legally. As stated by Mr. Rajeev Chandrasekhar, the Minister of State for Electronics and IT, this makes the Board responsible for establishing its credibility through performance and does away with allegations regarding its independence.³³² However, concerns regarding independence of the Board from government influence simply cannot be substituted for and redressed with a system for appeals against the decisions of

³²⁹ Raesa Vakil, 'Indian Administrative Law and the Challenges of the Regulatory State' in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Bloomsbury Publishing 2019).

³³⁰ Shantanu Dixit and others 'The Electricity Governance Toolkit: Bench-Marking Best Practice & Promoting Accountability in the Electricity Sector' (*UN Climate Technology Center and Network*, 1 June 2007) <www.ctc-n.org/resources/electricity-governance-toolkit-benchmarking-best-practice-and-promoting-accountability> accessed 30 November 2022.

³³¹ Vrinda Bhandaria and others 'Response to the White Paper on a Data Protection Framework for India' (*National Institute of Public Finance and Policy*, 2018) <www.macroeconomy.nipfp.org.in/PDF/BKPRS2018WhitePaperResponse.pdf> accessed 30 November 2022; Cary Coglianesi, 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy' (*OECD*, 2012) <www.oecd.org/regreform/regulatory-policy/1_coglianesi%20web.pdf> accessed 30 November 2022.

³³² Press Trust of India, 'Data Protection Bill - With New Bill, Government cannot Violate Privacy: IT Minister' (*The Hindu*, 2022) <www.thehindu.com/news/national/data-protection-bill-govt-cant-violate-privacy-of-citizens-personal-data-access-only-in-exceptional-situations-says-mos-it/article66190888.ece> accessed 30 November 2022.

the Board. Though the appellate mechanism will serve to increase the accountability of the Board, it does nothing to ensure that the regulator does not act as a puppet of the government.

The 2022 Bill does not account for robust accountability measures such as public consultations which would guarantee that the enforcement tools vested with the Board are made use of in a fair and transparent manner.³³³ This impacts the accountability and effectiveness of the Board since there does not exist any feedback loop to examine whether the Board's performance is in compliance with its objectives.³³⁴ On the contrary, clause 50(4) of the 2019 Bill required the DPA to consult with other regulators and the public in specifying codes of practice to be followed.³³⁵

A deliberative model of making regulations had been recommended by the FSLRC wherein the regulators must follow certain procedural requirements for holding consultations such as making publicly available a cost benefit assessment of the decisions of the regulator.³³⁶ Such a model will make the regulator substantially engage with the comments and suggestions of the different stakeholders.

SEPARATION OF POWERS BETWEEN ENFORCEMENT AND ADJUDICATION WING

The principle of separation of powers was used to justify the creation of a separate adjudication wing within the DPA under the 2019 Bill where the position of an adjudication officer was created separate from the enforcement wing. Such a distinction between the enforcement and adjudicatory functions of the DPA was recommended by the Srikrishna Committee Report which noted that in order to ensure independence and accountability in the functioning of the DPA, the adjudication wing of the DPA should “function at an arm's length from the wings dealing with legislative and executive enforcement matters.”³³⁷

³³³ Smriti Parsheera, 'Regulatory Governance under the PDP Bill: A Powerful Ship with an Unchecked Captain?' (*Medianama*, 7 January 2020) <www.medianama.com/2020/01/223-pdp-bill-2019-data-protection-authority/> accessed 20 December 2022.

³³⁴ M Raghavan, Beni Chugh and Nishanth Kumar 'Effective Enforcement of a Data Protection Regime: A Model for Risk-based Supervision Using Responsive Regulatory Tools' (*Dvara Research*, November 2019) <www.dvara.com/research/wp-content/uploads/2019/12/Effective-Enforcement-of-a-Data-Protection-Regime.pdf> accessed 30 November 2022.

³³⁵ Personal Data Protection Bill 2019, cl 50(4).

³³⁶ Committee of Experts, 'A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians' (*MeitY*, 2018) <https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf> accessed 2 November 2022; Trishee Goyal and Renuka Sane, 'Towards Better Enforcement by Regulatory Agencies' (*The Leap Blog*, 25 March 2021) <<https://blog.theleap-journal.org/2021/03/towards-better-enforcement-by.html#gsc.tab=0>> accessed 25 October 2022.

³³⁷ Committee of Experts, 'White Paper of the Committee of Experts on a Data Protection Framework for India' (2017) <www.meity.gov.in/writereaddata/files/>

In departure from the principle of separation of powers implemented in the 2019 Bill, the DPB has been entrusted with both adjudication and enforcement functions under the 2022 Bill. Considering the large number of data fiduciaries and data principals in the system, it is expected that the regulator would be faced with a lot of complaints. Hence, not having the same set of officers perform both enforcement and adjudicatory functions would enhance the effectiveness of the Board and avoid a conflict of interest. Such a division of responsibilities would enable each wing to focus on their own functions while also acting as a check on the functioning of the other wing. This accompanied with a strong feedback loop between the two wings would enhance the effectiveness of the Board.³³⁸

CONCLUSION

From the analysis carried out in this paper, it is evident that reconsideration is required in designing the regulatory structure of the DPB in a manner that it champions principles of independence, accountability, transparency and effectiveness. The 2022 version of the Bill has severely compromised on these principles as compared to the earlier versions of the Bill through giving the government undue control and influence over the composition, manner of appointment, service and removal of the members of the Board, vague and broad exemptions without any safeguards and a lack of separation of powers between the quasi-legislative, quasi-executive and quasi-judicial functions of the Board. A recurring theme throughout the course of the Bill is a lack of clarity accompanied with excessive delegation.³³⁹ Thus, it can be observed that the Board is a captive of the government which is extremely problematic.

Since the DPB has been entrusted with the task of safeguarding the fundamental right to privacy of individuals not only against private entities but also the executive, the independence of the regulator assumes even greater significance. An independent and robust regulator like the one proposed under the 2018 Bill should be reinstated.

It is important for India to learn from international experiences in this regard and move towards building an autonomous regulator which possesses the requisite capacity to regulate across sectors. It is recommended that the DPB must resort to a participatory and consultative approach which embodies the principles of responsive regulation.

[white_paper_on_data_protection_in_india_171127_final_v2.pdf](#)> accessed 21 September 2022.

³³⁸ Anil Sasi and Soumyarendra Barik, 'What India's Draft Digital Privacy Law says and How it Compares with Data Protection Laws Elsewhere' *The Indian Express* (New Delhi, 23 November 2022).

³³⁹ *ibid.*