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INFORM ENGAGE IDEATE

ON AN UNEVEN KEEL: PRIMER ON SURVEILLANCE AND RIGHT TO PRIVACY IN INDIA

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1 Introduction

Surveillance as statecraft finds its roots in history, where social theorists have conceptualised various institutional designs and measures to monitor the actions of citizens for both defined and undefined purposes. One defined and legitimate purpose is to preserve national security, but the current state of surveillance reform in India is on an uneven keel between national security and privacy. Adding to this, recent technological developments have completely changed the surveillance architecture, where the tools have become more intrusive and damaging to our democratic safeguards. For instance, the episode of Pegasus snoop gate reveals that hacking operations can happen without even the target knowing about it.

As apex court in Puttaswamy Judgement¹ recognised privacy as a fundamental right, this primer will explore where we fall short on balancing the right to privacy and state interest, i.e., national security and provide recommendations to restore the balance.

2 Caveats in Draft Data Protection Bill, 2021

In December 2019, the Personal Data Protection Bill 2019 (PDP Bill) was introduced in the Indian parliament by the Minister of Electronics and Information Technology, and it was referred to the Joint Parliamentary Committee (JPC) for fine-tuning through consultation with various stakeholders. The JPC, after two years of deliberation over the PDP bill, tabled its report and draft Data Protection Bill, 2021 (DPB 2021), in the 2021 winter session of the parliament. While the committee had provided some significant suggestions to the PDP Bill, surveillance concerns discussed in this section remained and exorbitated to an extent.

¹Justice K. S. Puttaswamy (Retd.) and Anr. Vs Union Of India And Ors. AIR 2017 SC 4161

2.1 Distant from Puttaswamy Judgement I mandate

In Puttaswamy judgement I, the apex court recognised privacy as a fundamental right under Article 21. In addition to that, the apex court also stated that privacy has both negative content and positive content. The negative content ensures that the state doesn't infringe on the individuals' life, liberty, and privacy without meeting the threefold requirement, i.e., legality², necessity³ and proportionality⁴. The positive content obligates the state to take all necessary measures to protect the individual's privacy. Thus, the apex court commended the government to develop a robust data protection regime for the nation. The apex court stated that the regime must balance individual interests and legitimate concerns of the state like national security, public order etc. While the objective of the PDP Bill was to protect the privacy of individuals relating to their personal data, the DPB 2021 has included "to ensure the interest and security of the state" as one of the objectives, diluting the mandates of Puttaswamy judgement I. The expansion of the objective also makes the data protection regime obsolete from holding the state accountable to unlawful surveillance.

Our Recommendation

The objective of the data protection bill must not deviate from the Puttaswamy Judgement I mandate, i.e., to balance individual interests and legitimate concerns of the state like national security, public order etc. Therefore, the objective of the data protection bill 2021 must be restored to its 2019 version i.e., to protect the privacy of individuals relating to their data period.

²Existence of law

³Need, defined in terms of a legitimate state aim

⁴Rational nexus between the objects and the means adopted to achieve them

2.2 State exemptions

Clause 35, the most contested provision of the PDP Bill 2019, which provides a blanket exemption to the government with regard to the applicability of the PDP Bill, is legitimised by the JPC committee report. The committee finds roots from Article 19 of the Indian constitution, and Puttaswamy judgement I to legitimise national security has a significant state concern for which clause 35 is a proportionate measure. Though the committee approves clause 35, they also recommend a need for just, fair, reasonable and proportionate procedure to be introduced for the exemption process to safeguard the individual's right to privacy. While this is a positive step toward the right direction, the scope of sub-clause on "such procedure" and the conditions provided, i.e., just, fair, reasonable and proportionate procedure, remains wide. In addition, without proper direction on constitution, composition, and accountability, this sub-clause again provides room for arbitrary powers of government in developing procedures.

In addition to clause 35, clause 36 provides a blanket exemption from provisions of Chapter II except section 4, Chapters III to V, Chapter VI except section 24, and Chapter VII for processing of the data for prevention, detection, investigation and prosecution of any offence or any other contravention of any law for the time being in force.

While clause 35 allows the government to exercise its discretion to decide exemption, clause 36, by default, excludes legal enforcement agencies and other government agencies from the above-discussed provisions. This once again provides room for surveillance on discretion without any legitimate oversight. Besides, this provision remains unchanged in the JPC version of the DPB 2021.

Our Recommendation

- The DPB 2021 must contain adequate checks and balances with respect to the State's access to data, which must be in line with the apex court's three-part test of legality, necessity, and proportionality, as enshrined by the Puttaswamy judgement I.

- The DPB 2021 must list specific instances or purposes and discuss procedural accountability to reduce the potential misuse of state exemptions.

3 Caveats in surveillance reform

Under legal grounds of the Indian Telegraph Act, 1885 [Section 5(2)] and Information Technology (Amendment) Act, 2008 (Section 69), the state can intercept, monitor, and decrypt any information for protecting sovereignty, national security, friendly relations with international governments, integrating public order etc. But this regulatory framework of surveillance poses caveats that cause implications to the citizens and undermine the democratic fabric of the nation. The caveats also cause fall through the crack, where it provides room for state actors to perform targeted surveillance at their discretion without appropriate checks and balances.

For instance, definitions such as in the interest of "sovereignty and integrity", "security of the State", "friendly relations with foreign states", "public order" remain broadly defined. In the absence of a robust regulatory architecture for surveillance, this broadly worded clause would cause unintended consequences like misuse of the exemption for performing unlawful surveillance. In addition, lack of clarity in these terminologies also provides leeway to the state to operate in opacity. Similarly, the current surveillance reform has provided excessive powers to the executive in terms of accountability without parliamentary or judiciary oversight.

Our Recommendation

- Key terminologies such as national security, public order, etc., and principles like proportionality, necessity, suitability, legality, etc., must be defined tightly while minimising fall through the cracks due to narrowness.
- Parliamentary oversight is necessary over surveillance policies, expenditure, administration, and operations of various intelligence agencies subjected to secrecy.
- The reform must provide procedural safeguards to be followed by the legal enforcement agencies, competent authority, judiciary, and parliamentary committee.

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