

Mandate of the Special Rapporteur on the right to privacy

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2.

In this connection, I would like to bring to the attention of your Excellency's Government the proposed Bill provided to the Ministry of Electronics and Information Technology by the Committee of Experts on Data Protection (hereafter referred to as the "Committee") chaired by Justice B. N. Srikrishna.

According to the information received:

The Committee's work is the most comprehensive undertaking on data protection by any government agency in India, and followed the Supreme Court's August 2017 ruling upholding the right to privacy as a fundamental right.¹

There are many positive features of the Bill such as the 'privacy by design' provision and those relating to only collecting limited personal data, the requirement for a clear, specific and lawful purpose, notification of the kind of data that has been collected, and the explicit consent of the individual. I commend these to your Excellency's Government.

I note the Bill exempts the State from some of these obligations in situations where personal data needs to be processed (collected, stored, used, disclosed or shared) by the Government for one of the following reasons:

- a) For the functioning of Parliament or State Legislatures
- b) For providing individuals with any service or benefit
- c) For issuing any certification, license or permit.

I understand that in these situations, the other safeguards listed in the data protection law are largely applicable, but the Government does not need to take the consent of individuals before collecting or processing their personal data.

I particularly note another exemption that is, where personal data needs to be processed in the interests of the security of the country, or for prevention, detection, investigation and prosecution of any violation of law. Here, the Government is given a

¹ <https://scroll.in/article/888365/the-draft-data-protection-bill-is-a-step-forward-but-nowhere-close-to-what-india-needs>, Smitha Krishna Prasad, Centre for Communication Governance, National Law University, Delhi.

wide exemption from the proposed data protection law. I am aware data processing in these situations must be authorised by a separate law passed either by the Parliament or the State Legislature, and the processing itself should be necessary for, and proportionate to the purpose for which the data is processed. My concern is raised by reports that most surveillance activities currently undertaken in India, whether for national security or law enforcement, are not authorised by the Telegraph Act 1885 and the Information Technology Act 2000 - the two laws that deal with surveillance.² My concern has been heightened by the Government's controversial, albeit now dropped, plan to monitor social communications.

I understand that there are several surveillance programs that are not undertaken under these laws, and in many cases, permit mass surveillance. I have written previously regarding my work in government-led surveillance, providing elements of a draft legal instrument to illustrate best practices in achieving the legitimate aims of national security and law enforcement, and the equally legitimate objectives of protecting human rights – most particularly the right to privacy.³

A law addressing the protection of personal data needs to address such concerns. While the Committee's report acknowledges that the current framework in India lacks sufficient legal and procedural safeguards for individual civil liberties, and that the majority of intelligence-gathering takes place outside the remit of the law minus meaningful oversight, I am concerned that the report recommends that the State enacts a law for intelligence or surveillance activities, which once enforced, exempts all data processing for the purpose of the security of the state and law enforcement from the data protection law.

There are certain provisions within the data protection Bill itself that could be extended to processing of personal data for state security and law enforcement. I am aware that civil society organisations are of the view that the draft Bill obligations requiring entities controlling the collection and processing of personal data (data fiduciaries), to collect and process personal data for limited purposes only, and to ensure accuracy of the data and store it for only as long as necessary, could be made applicable to security and law enforcement activities. In the absence of any compelling reason otherwise, these appear very sensible and reasonable requests for the Bill's amendment.

Similarly, accountability is also important for surveillance activities – not just for those collecting data to ensure transparency and accountability through various methods including maintenance of records and regular audits. These measures could be made applicable for security and law enforcement situations too, with modifications where necessary. The rights of individuals to be notified when the government processes their

² Both contain some provisions that allow for the monitoring and interception of phone calls or communications subject to rules that only allow for targeted interception of communication in specific situations. The Information Technology Act also allows for monitoring and collection of network traffic or information in the interest of cyber security but not include surveillance of actual communication.

³ SRP Correspondence 25 January 2018 on the Indian Government White Paper on Data Protection.

personal data and to access that data could also be available on a conditional basis, once the surveillance activities are completed.⁴

I would very strongly recommend that the new data protection law be taken forward as part of a package which would also include a law governing the activities of, and introducing much-needed oversight mechanisms for, intelligence and security services as well as for law enforcement. In this way your Excellency's Government would be ensuring comprehensive coverage of privacy in a way compatible with the findings of India's Supreme Court. This would also be consistent with India's international human rights obligations under the conventions it has ratified, including the International Covenant on Civil and Political Rights. Article 17 of this Convention guarantees the respect and protection of the right to privacy.

I note and agree with the Committee's report where it recognises that the relationship between data principals and the State involves a power imbalance. **I would like to see this imbalance addressed by requiring the State to be accountable to its citizens, especially with regard to their personal data and its protection.**

I wish your Excellency's Government well in its important work of developing a data protection framework that will demonstrate India's international leadership in the protection of the fundamental and inalienable right of privacy, and which will impact upon the daily lives of its citizens and others, well into the future.

As I have stated in my previous correspondence, I would be happy to be of any assistance in the process of developing a data protection law for India. **I take this opportunity to again express my interest in receiving an invitation from the Government of India for a country visit during which we would be able to work together on further strengthening protection of the right to privacy in India. I am at your disposal for any other consultation or information.**

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Joseph Cannataci
Special Rapporteur on the right to privacy

⁴ Newslaundry.com Critiques, Unravelling the Data Protection Bill - *Understanding the Bill and the involvement of civil society and the media*, Yesha Paul, Aug 3, 2018 at <https://www.newslaundry.com/2018/08/03/unravelling-the-data-protection-bill>; <https://www.deccanherald.com/national/sunday-spotlight/data-bill-safe-prying-govt-685674.html>