DATA PROTECTION IN INDIA

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INDIA IS RAPIDLY TRANSFORMING INTO A DIGITAL SOCIETY

The 21st century has witnessed such an explosive rise in the number of ways in which we use information, that it is widely referred to as **'the information age'**

Digital India
Power To Empower

This digital revolution has permeated India as well. Recognizing its significance, and that it promises to bring large disruptions in almost all sectors of society, the Government of India has envisaged and implemented the **"Digital India"** initiative

With nearly 450 million Internet users and a growth rate of 7-8%, India is well on the path to becoming a digital economy, which has a large market for global players

WE ARE WITNESSING A DATA REVOLUTION ACROSS THE WORLD

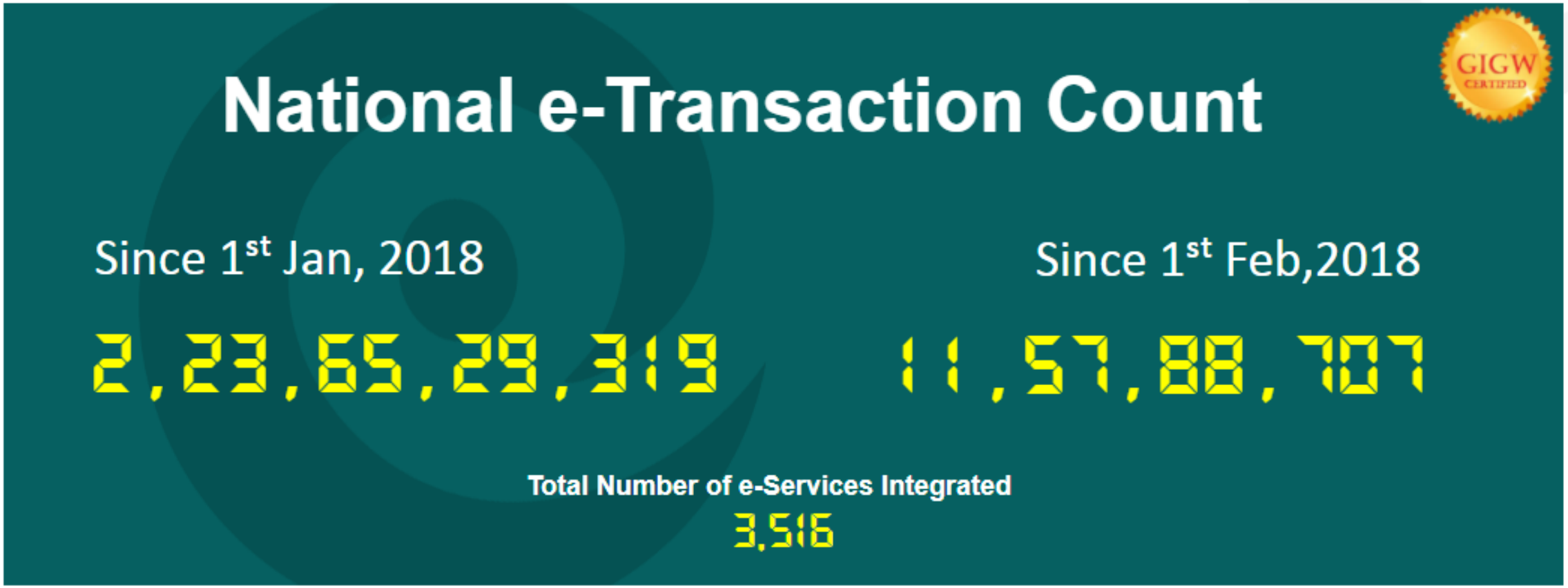
While the transition to a digital economy is underway, the processing of personal data has already become omnipresent. **The reality of the digital environment today, is that almost every single activity undertaken by an individual involves some sort of data transaction or the other.**

Some of the largest companies in the world today are data driven !!

The Internet has given birth to entirely new markets: those dealing in the collection, organization, and processing of personal information, whether directly, or as a critical component of their business model.

'Uber', the world's largest taxi company**, owns no vehicles**
'Facebook', the world's most popular media owner, **creates no content**
'Alibaba', the most valuable retailer, **has no inventory**
'Airbnb', the world's largest accommodation provider, **owns no real estate**

GOVERNMENT ONLINE SERVICES ARE ALSO GENERATING ENORMOUS DATA



http://etaal.gov.in/

WHILE WE REAP ITS BENEFITS, PROTECTION OF DATA IS VITAL

While data can be put to beneficial use, the unregulated and arbitrary use of data, especially personal data, has raised concerns regarding the privacy and autonomy of an individual. This was also the subject matter of the landmark judgement of the **Supreme Court, which recognized the right to privacy as a fundamental right.**

Without data protection…

Increased surveillance

Profiling of individuals

An Impact on individual independence

Government of India has constituted a Committee of Experts to study various issues relating to data protection in India and suggest a draft **Data Protection Bill**. The **OBJECTIVE** is to **"ensure growth of the digital economy while keeping personal data of citizens secure and protected."**

DATA PROTECTION WILL STEM FROM A LEGAL FRAMEWORK

Instrumentally, a firm legal framework for data protection will:

I. Keep personal data of citizens secure and protected
II. Act as the foundation on which data-driven innovation and entrepreneurship can flourish in India

A White Paper has been drafted on what shape a data protection law must take. The White Paper outlines the following:

- ✓ *Issues that Committee members feel require incorporation in a law*
- ✓ *Relevant experiences from other countries and concerns regarding their incorporation*
- ✓ *Certain provisional views based on an evaluation of the issues vis-à-vis the objectives of the exercise*
- ✓ *Specific questions for the public*

EXPANDING SCOPE OF EXISTING DATA PROTECTION REGULATION

IT Act 2008, Section 43 :

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.

Expanding existing scope

The upcoming Data protection regime will widen the scope by offering a **comprehensive data protection framework** which shall apply to processing of personal data by any means, and to processing activities carried out **by both the Government as well as the private entities- not only Body Corporate.**

GLOBALLY, THERE ARE CONTRASTING MODELS & APPROACHES TO DATA PROTECTION

The EU model provides a comprehensive data protection law for processing of personal data

In EU, the right to privacy is a fundamental right which seeks to protect an individual's dignity. The European Charter of Fundamental Rights (EU Charter) recognizes the right to privacy as well as the right to protection of personal data

The EU possesses **a comprehensive data protection framework** which applies to processing of personal data by any means, and to processing activities carried out **by both the Government as well as the private entities**, although there are certain exemptions such as national security, defence, public security, etc.

In the US, privacy protection is essentially a "liberty protection" i.e. protection of the personal space from government.

First, unlike the EU, there is no comprehensive set of privacy rights/principles that collectively address the use, collection and disclosure of data in the US. Instead, there is limited sector specific regulation.

Second, the **approach towards data protection varies for the public and private sector**. The activities and powers of the Government vis-à-vis personal information are well defined and addressed by broad, sweeping legislations such as the Privacy Act; the Electronic Communications Privacy Act etc. For the private sector, certain sector-specific norms exist e.g. The Federal Trade Commission Act (FTC

FACTORING IN DIVERSE APPROACHES ACROSS THE WORLD, INDIA MAY ADOPT A HYBRID AND NUANCED APPROACH

The US model allows collection of personal information as long as the individual is informed of such collection and use. However it has been viewed as inadequate in key respects of regulation.

Criticized for being excessively stringent, and imposing many obligations on the organisations processing data.

India must find the <u>right balance</u> so as to take advantage of a data-driven ecosystem but with all reasonable restrictions

India must factor out the pitfalls of other global approaches

India's potential to lead the world into a digital economy making use of its existing strengths in information technology, demographic dividend, and its need for empowerment based on data-driven access to services and benefits

Supreme Court of India, in its decision has held privacy to be fundamental, yet believes that it needs to be limited by reasonable restrictions

KEY PRINCIPLES AROUND DATA PROTECTION IN INDIA

A data protection framework in India must be based on the following seven principles

Technology agnosticism

- The law must be technology agnostic. It must be flexible to take into account changing technologies and stan

Holistic application

- The law must apply to both private sector entities and government. Differential obligations may be carved out in the law for certain legitimate state

Informed consent

- Consent is an expression of human autonomy. For such expression to be genuine, it must be informed and meaningful.

Data minimization

- Data that is processed ought to be minimal and necessary for the purposes for which such data is sought and other compati pur

Controller accountability

- The data controller shall be held accountable for any processing of data, whether by itself or entities with whom it may have shared th data

Structured enforcement

- Enforcement must be by a high-powered statutory authority with sufficient capacity. This must coexist with appropriately decentralized enforceme mech

Deterrent penalties

- Penalties on wrongful processing must be adequate to ensure deterrence

TO ACHIEVE THESE PRINCIPLES OF DATA PROTECTION IN INDIA, A WHITE PAPER HAS BEEN DRAFTED

Parts of the White Paper

Scope and Exemptions

The territorial reach of the law; the contours of personal data; the application of the law to the private and the public sector; the entities regulated by the law; the activities regulated by the law; cross border flow of data; and data localization.

Grounds of Processing, Obligation on Entities and Individual Rights

Obtaining an individual's consent prior to such processing, and examines the manner in which an entity can obtain valid and informed consent. It also examines the need to legally demarcate grounds other than consent on the basis of which personal data may be processed

Regulation and Enforcement

Regulatory models including: (a) the 'command-and-control' approach; (b) the 'self regulation' approach; and (c) 'co-regulation' approach. This Part also discusses the need for a separate and independent authority to oversee the implementation and enforcement of a data protection law

WHAT IS HAPPENING AFTER RELEASE OF THE WHITEPAPER

Public comments are solicited on what shape a data protection law must take.

Public Consultation have been conducted in various cities in the month of January: New Delhi, Hyderabad, Bangalore & Mumbai.

On the basis of the responses received, and the collective aim of both protecting and empowering citizens, a comprehensive Law for the country shall be drafted.

EMERGING REQUIREMENTS FROM THE STATES & UTs

For effective implementation of the data protection regime, It is required that all the stakeholders:

- Align their polices with the requirements of Data Protection
- Encourage adoption of Privacy by design principles
- Explore the possible Consent requirements at time of data collection.

THANK YOU

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