

At cross purposes?

The draft Indian Personal Data Protection Bill 2018 appears to be in conflict with the very ideas on which it is based



NISHITH DESAI

Vinoba Bhavne is one person to whom I would give singular credit for my being what I am today — an international lawyer and a globalisation expert. When I was growing up in the 1960s, I heard him extolling the Indian politicians: “15 years ago the slogan was ‘hail India’, today’s slogan is ‘hail the world.’” He always described himself as a global citizen. That sowed the

seeds of a global mindset in me. He was light years ahead of most politicians then and even today. It’s a little sad now; countries are thinking backwards. The recent proposed data localisation and control on data transfer is one such example.

Data is now being touted as the “new oil”, and countries are trying to create trade barriers based on data. Recently, I reviewed the proposed Indian Personal Data Protection Bill 2018 (draft Bill); especially the provisions on data localisation, data transfer, and extra-territorial applicability. In my view, they are excessive when you take into account individual autonomy, the object sought to be achieved and a sustainable digital economy. The Srikrishna Committee, which drafted the report, has itself recognised that India should shape the global digital landscape in the 21st century, and that ensuring protection of personal data and facilitating growth of the digital economy are not in conflict.

But the draft Bill works at cross purposes with this thought process.

Extra territorial applicability: The draft Bill makes the law applicable to offshore entities providing goods and services to Indians. The Supreme Court of India has recognised the validity of extra-territorial provisions only when events outside the territory of India have some impact on the interests, welfare or security of India or Indians. In short, there must be a reasonable nexus not just peripheral. In this context, over-prescriptive extra-territorial laws would not fall within this ambit. If for any reason some countries require some protection, international comity requires that it would be preferable to develop a treaty network on the lines of TRIPS, where countries arrive at minimum protection benchmarks.

Data localisation: I agree that certain critical data may be required to be processed only within India, taking into account security concerns. However,

the requirement of the entire set of personal data collected to be mirrored in India sounds excessive. I’m not sure how my shopping history is critical for the security of India unless I am purchasing guns to be brought in to India. If all countries start mandating localisation, there will be no cloud left. Further, requiring data centres to be in India could increase costs, especially for users and start-ups. They would stand to lose access to globally available resources and cloud infrastructure. Indian residents would also lose out on unique services being provided by foreign companies, such as DNA analysis or certain kinds of artificial intelligence tasks. Some of those entities may not have the wherewithal to localise their data in India.

Data transfer: In the case of data transfer from India to abroad, one of the alternatives the draft Bill provides is that the Indian transferor can only use clauses approved by the Data Protection Authority in its data transfer contracts. There will be thousands of legal agreements which will have to be approved. This provision is taking us back to the licence raj. Rather, since the data fiduciary in India is any case liable for violations, it should be left to the data fiduciary to ensure compliance by foreign parties. The

DPA may suggest model clauses for the industry, but they need not be made mandatory and require approvals.

Let us not forget India has been one of the biggest beneficiaries of global data flows, making it the world’s largest destination for IT and outsourcing services. This has had a ripple effect, causing private sector companies to employ millions of people and increasing service exports multi-fold. Global data flows together have raised the world GDP by 10.1 per cent over what may have resulted in a world without any cross-border data flows. If India sets an example of putting artificial barriers on the basis of data, others will reciprocate the same way.

Over the last several decades, I have witnessed the tussle between businesses wanting to globalise freely and countries trying to impose trade barriers. Everyone recognises the end benefits of minimising barriers, leading to *sarvodaya*, but most don’t want to suffer the temporary pains of the journey. I hope the draft bill is suitably modified to effectuate the true tenor of the Srikrishna committee report.

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CHINESE WHISPERS

A note of thanks



Manipur Director General of Police L M Khaute was full of praise for Delhi Police, especially its elite Special Cell unit, in a recent letter written to Delhi Police Commissioner Amulya Patnaik. In the letter, Khaute named several officers from the Cell and outlined how their co-operation has led to the arrest of many alleged insurgents from the north eastern state. A special mention was a case where the Delhi cops had helped their Manipur counterparts in arresting a man whose alleged audio threat to the state chief minister went viral. While inter-state coordination among police forces is key in solving and preventing crime, the Special Cell, because of the anti-terror operations it carries out round the year, often has to venture way beyond the city borders which leads to turf wars. This time, however, the case was different.

Sending feelers

The Aam Aadmi Party is moving fast in trying to put the Delhi unit of the Congress under pressure to agree to a seat adjustment for the 2019 Lok Sabha polls. On Saturday, the AAP leadership requested former Bharatiya Janata Party leader Yashwant Sinha to contest from the New Delhi constituency. Sinha currently leads the ‘National Forum’. There are leaders, both in the AAP as well as the Congress, who believe the two parties will lose all the seven seats in Delhi in a three-cornered fight against the BJP. The AAP is keen to field credible faces to force the Congress to agree on a seat adjustment.

Remembering veterans

The Bharatiya Janata Party held its national executive meeting over the weekend in New Delhi. With former prime minister Atal Bihari Vajpayee having passed away less than a month back, the leitmotif of the meeting was recalling his contribution to the party as well as nation building. The road leading up to the venue had huge hoardings with Vajpayee’s pictures. Other senior leaders, particularly L K Advani and Murli Manohar Joshi, have largely been forgotten by the party after having been placed in the ‘*margdarshak mandal*’, or mentors’ group, of the party. Even after four years of it having been set up, the group hasn’t held even a single meeting. But with the party remembering Vajpayee, it also ‘remembered’ Advani and Joshi. Hoardings with their photographs rivalled for space with those of Prime Minister Narendra Modi and BJP chief Amit Shah.

A record of salutary economic reforms

Former Prime Minister Atal Bihari Vajpayee’s large heartedness and ability to transcend ideological barriers enabled him to implement far-reaching economic reforms, says the author in the first of a three-part series



RAKESH MOHAN

Former Prime Minister Atal Bihari Vajpayee, who passed away two weeks ago, was noted by his friends and political foes alike for his large heartedness and ability to transcend ideological barriers across the political spectrum. It was these qualities, perhaps, that enabled him to carry out far-reaching economic reforms. Such reforms could not have been implemented successfully without achieving the kind of broad consensus that he always sought across party lines, since his party did not enjoy an absolute majority at any time during his prime ministership.

I did not have the privilege of knowing Prime Minister Vajpayee personally although I was appointed to a whole host of positions by him, including, among others, chief economic advisor to the finance ministry and deputy governor in the Reserve Bank of India. Having chaired the expert committee on infrastructure in the mid-1990s I was also associated with a number of initiatives carried out in the infrastructure sector by his government. In this piece I sketch out the broad sweep of economic reforms carried out by his govern-

ment. Let me start with infrastructure.

Infrastructure

The Vajpayee government undertook major infrastructure initiatives and the transformation of Indian roads can be attributed to him, as a number of commentators have noted. The National Highway Development Project (NHDP), which began with the conceptualisation of the Golden Quadrilateral and the north-south and east-west highways, has already transformed the Indian transportation sector. Investment in this expanded highway programme continues till today. As a complementary initiative, the Prime Minister’s Gram Sadak Yojana (PMGSY) was also started almost at the same time. Thus the needs of the metropolitan national as well as the local rural economy were addressed simultaneously. Both these ambitious programmes could be undertaken simultaneously because they were financed by the bold decision to introduce a fuel cess. Without the cess, funding of these investment programmes would not have been available. Perhaps coincidentally, the infrastructure committee that I had chaired had recommended such a cess as the source of a non-lapsable fund for this purpose. Earmarking tax revenues for any purpose is against normal fiscal orthodoxy: I had argued that the cess was really a user charge, and that won the day against the fiscal purists.

Similarly, a number of commentators have recalled the very significant telecom reform carried out by Vajpayee’s government. Ironically, the problem that occurred in the late 1990s was not dissimilar to some of the problems in recent years. In the initial auction for mobile telephony, a number of companies had bid clearly unrealistically high amounts

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in order to just capture the available licences. It had become obvious that these companies would not be able to pay their committed obligations: if the government had insisted that they comply with their commitments they would have gone bankrupt and the progress of telecom connectivity would have suffered a severe setback. So the government was faced with a conundrum: re-contract with the same companies, giving rise to obvious moral hazard, or restart the telecom allocation process to new companies and set back the telecom rollout. The actual bold solution implemented was to shift to a revenue sharing framework with the same companies: it is a measure of Vajpayee’s political skills that this could be done very smoothly without any accusations of corruption and wrongdoing. The result is now obvious with telecom being the most successful infrastructure story: tele-density in India now exceeds 90 per cent, something that we could not even dream of at the turn of the century.

Membership of the TRAI, among the various appointments that Vajpayee had bestowed on me, allows me to add a footnote to the story. Just after this episode,

the issue of allotting licences for new private sector landline companies arose. Whereas the majority of the Authority voted to again recommend an auction for these new licences I issued a dissent note arguing for a fixed license fee and allotment of many licences so that the new tariffs would not be burdened by the obligation of these new companies to pay off high licence fees. Vajpayee’s Prime Minister’s office happened to agree with my dissent note and that was the policy adopted. This was perhaps the root of the later first-come-first-served policy with which the UPA I government ran into great trouble in the 2G spectrum allocation process. The subsequent adoption of auction processes for spectrum allocation, once again, has resulted in excessively high bids which are now resulting in significant difficulties for the spectrum winners in the form of high debts, which are also inhibiting new infrastructure investment in the sector.

The Vajpayee government initiated broad electricity reform with enactment of the new Electricity Act 2003 which replaced an almost hundred-year-old 1910 Act. I was somewhat associated with this reform as well since the then

electricity minister, the late Rangarajan Kumaramangalam, asked me as the director general of NCAER to have the act drafted. NCAER was reluctant, having no expertise in drafting legislation. This was a bold departure from standard practice where almost all acts of drafted within the government. But Minister Kumaramangalam felt that his ministry’s bureaucracy was unwilling and incapable of an exercise that would result in significant reform, and insisted on NCAER taking up the exercise. We took up the challenge, with the help of the redoubtable Gajendra Haldea who conducted extensive consultations with all stakeholders and submitted a draft to the ministry in less than two years. Unfortunately, Kumaramangalam passed away suddenly after a brief unexpected illness, but was ably succeeded by Suresh Prabhu who piloted the Bill successfully and got it passed in Parliament in 2003 after a lengthy consultative process across party lines and many shades of expert opinion. Among other far reaching provisions, this Act subsumed the earlier legislation that had established electricity regulatory commissions at both the central and state levels. This was yet another example of farsightedness and cross party consultations which resulted in the enactment of forward looking legislation that could modernise the Indian electricity sector. Although the intentions of the Act have not been fully realised, it will remain a landmark legislation in the Indian infrastructure sector for decades to come. (To be continued)

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AS I SEE IT

A Gandhi apology matters

Rahul Gandhi should have apologised for the Sikh killings of 1984 when the Congress party was in power and redeemed himself somewhat



KARAN THAPAR

It’s shameful that nearly 35 years after the Sikh killings of 1984, the Congress party has not found a sensible and truthful way of talking about this event. Alongside the Emergency, it’s the lowest point in the party’s history. Rahul Gandhi’s recent comments in London confirm the impression it’s at a loss.

His statement that Congress was not involved is only narrowly and technically correct. It ignores the bigger question of moral responsibility. Meanwhile, the claim Congress was not involved hinges on the fact we’re not aware of instructions handed down by the party leadership to carry out the pogrom. Three and a half decades is long enough to establish this point.

However, what Rahul Gandhi overlooked is the way the Congress party sought to explain, excuse and even rationalise the killings and the advantage it took of the anti-Sikh mood of the period which, of course, culminated in the killings.

Rahul Gandhi’s statement that when a big tree falls the ground will shake was undoubtedly an attempt to explain, excuse and rationalise what had happened. I won’t go so far as to say he was

condoning the massacre but he certainly ended up minimising it. His attempt was to make it seem understandable. In the process, Congress and its prime minister refused to accept moral responsibility even if they did not actually disown it.

What most people have forgotten is how the Congress election campaign sought to take advantage of the anti-Sikh mood of the period. I vividly recall newspaper advertisements which played upon the antipathy for Sikhs. “Are you scared the border could move to your doorstep?”, was one. “Are you scared of the taxi driver at night?”, was another. At the time most taxi drivers in Delhi were thought to be Sikh.

As far as I know, Rahul Gandhi never apologised for his ‘big tree’ analogy nor did his party express regret for the advertisements. Perhaps they felt their overwhelming victory exonerated them. What compounded matters was that two men who were widely thought to be guilty found places of honour in Rahul Gandhi’s government. This was despite loud calls they should be left out. H K L Bhagat was made a cabinet minister and Jagdish Tytler, a minister of state. Once again, the message was clear. Rahul Gandhi was either oblivious or unconcerned by the damning allegations they faced.

There’s no doubt Manmohan Singh, as Prime Minister, formally apologised in Parliament. He said his head hangs in shame. He could not have been more fulsome and explicit. But given the fact Congress is a Gandhi-led and dominated party what the mother and son have to say will always matter more. They are believed to articulate Congress’ real response. No third person can do it on

their behalf. So what should Rahul Gandhi have said to carry credibility and convey he was fully aware of and also accepted the enormity of what had happened? It’s not hard to devise a form of words he could have spoken. Let me offer a version.

“The Sikh killing of 1984 was a horrible tragedy for which my party, through former Prime Minister Dr. Manmohan Singh, has formally apologised in Parliament. But I accept that no apology can be sufficient. Certain individual members of the Congress party face cases in court and it would be wrong for me to comment on those. But even if individual Congressmen were involved the party itself was not. Yet the killings happened when Congress was in power and my father was Prime Minister. Though I was only a school boy at the time, the Congress party’s leadership always has and always will accept full moral responsibility. No one has or will run away from this. But is the BJP willing to take a similar stand over the Gujarat massacre of 2002? The Prime Minister was chief minister at the time but when questioned in interviews his response is to get up and walk away. Finally, an election victory does not erase the past but it’s worth remembering that the Congress party has won three elections in Punjab since 1984 and presently has a two-thirds majority in the state.”

If I can think of what Rahul Gandhi should have said I’m surprised he could not himself. The problem is that we don’t know how to say sorry. We don’t realise that an apology is also an act of redemption. Pride and prestige prevent us. Consequently, events that could be laid to rest continue to rankle.

LETTERS

A trusted option

Apropos “Post office hopes” (September 7); I want to compliment the government and India Post for launching the much anticipated Payments Bank. People in small towns and villages in particular stand to gain from this. No bank — public or private — has this kind of a network and a ready workforce of more than 3,00,000 trained postmen. A postman in the rural areas is not just someone who brings letters for the people; he is also a trusted friend.

Of course, there are many hurdles to overcome but then which new scheme does not face trouble in the beginning? As you have mentioned, “many rural consumers will continue to prefer human or physical interaction with a bank to the digital-first approach”. Add to this the fact that the trusted postman is like one of their own and the combination would mean they don’t worry about being cheated by middlemen and touts who offer their services for getting the simple folk money from banks. With 170 million customers (already) of the post office savings system, the Payments Bank brings tremendous sense of security because they are dealing with a *sarकारी* institution and not some new bank or a micro-finance set up.

With a little tweaking of RBI’s rules, this scheme is bound to become popular and sustainable.

Krishan Kalra Gurugram

Data matrix

Apropos “Can’t abuse data to impact free choice in India: Ravi Shankar Prasad” (September 8); the government’s firm stand on data privacy and against online platforms abusing data to impact free choice in India should be appreciated by all the stakeholders. But, the fact still remains that despite the government’s tall claims about putting in place some fool-proof mechanism to ensure the safety and security thereof, the nation has been witnessing several unsavoury instances, including the detection of multiple and/or



fake Aadhaar cards.

The report of the Justice B N Srikrishna Committee on data protection in India — categorically suggesting amendments to various laws, including the Aadhaar Act, to provide for imposition of penalties on data fiduciaries for violations of the data protection law — speaks volumes about the real story. Significantly, even the Unique Identification Authority of India was compelled to come out with the cautionary advice to the public at large aimed at effectively safeguarding their respective Aadhaar based data.

However, all our hopes, on this controversial, yet highly emotive, issue are currently pinned at the final verdict of the Apex Court that is expected any time, more so when Chief Justice of India Dipak Misra, who is heading the relevant Bench, completes his tenure on October 2. Who knows, the SC may also come to the rescue of the common man by striking down the

government mandated “universalisation” of the Aadhaar Card Scheme that grossly interferes with our day to day lives.

S K Gupta New Delhi

Recover bad assets

This refers to the report “Panel wants easy capital adequacy norms for PSBs” (September 7). The State-owned banks are incurring losses and hence facing the threat of losing credibility. It is a well-known fact that the diminishing or negative returns that banks are manifesting are due to the slow resolution of the stressed and bad assets, and it is affecting the banking sector and the whole economy. The topmost priority for the banks should be a swift resolution and recovery of the bad assets and improving the quality of the loans and advances.

Remission in the capital requirements, to the extent possible, would enable the banks to expand their loan book, profitability and related financial ratios. This support will help those banks which are under a prompt corrective action plan to deliver better results.

V S K Pillai Kottayam

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HAMBONE

BY MIKE FLANAGAN

