



# Information Fiduciaries

AND INDIA'S DATA PROTECTION LAW

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## 1. INTRODUCTION

In July 2018, an expert committee appointed by the Indian Government published a draft Personal Data Protection Bill<sup>2</sup> (PDP Bill), along with a detailed report containing the committee's recommendations and reasoning for the various provisions of the draft Bill. Currently, Indian data protection law is comprised of a 'confidentiality' requirements<sup>3</sup> and rules under the Information Technology Act of 2000.<sup>4</sup> These rules have met criticism since they first came into force, and despite having been in place for eight years, are yet to be enforced in any meaningful way. As a result, the PDP Bill – which draws much of its strength from the Indian Supreme Court's landmark judgment upholding the fundamental right to privacy<sup>5</sup> – is a welcome addition to the debate on privacy and data protection in India.

The report that accompanied the PDP Bill<sup>6</sup> - A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians (Report), discusses the different approaches to privacy law and regulation adopted across the world, broadly classifying them into three categories based on the EU, US and Chinese models. The committee notes that the aim of the Report and the PDP Bill is to create a fourth path of sorts for data protection in India, one that can be a model for other countries in the Global South. In the course of this exercise, one of the concepts that the committee picks up from American scholars, is that of treating data controllers or processors<sup>7</sup> as 'fiduciaries'.<sup>8</sup> However, there is little discussion on what the duties of a fiduciary should be, or what aspects of the Bill elaborate on these duties.

This paper will explore these concepts in greater detail, first by understanding the concept of an 'information fiduciary' as suggested by Jack Balkin, and examining whether the same understanding will be relevant and applicable in the context of Indian constitutional law (and the right to privacy and freedom of speech and expression).<sup>9</sup> The next section of the paper will delve into a deeper discussion on fiduciary duties and fiduciary law, particularly to understand the Indian perspective. The paper will then explore the idea of 'data fiduciaries' in the proposed Indian law, and how fiduciary duties could be imported into data protection law and jurisprudence, based on existing legal principles and best practices in India and abroad.

<sup>2</sup> Draft Personal Data Protection Bill, 2018.

<sup>3</sup> A number of sector-specific regulations applicable particularly to the financial and health sectors state that personal information of customers / patients (respectively) must be considered confidential. The regulations in the financial sector are often issued as notifications and circulars, for instance by the Reserve Bank of India. In the case of the health / medical sector, the main body of regulation is the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.

<sup>4</sup> Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

<sup>5</sup> *Justice KS Puttaswamy and Ors vs Union of India and Ors* (2017) 10 SCC 1 (Supreme Court of India).

<sup>6</sup> Committee of Experts under the Chairmanship of Justice B.N. and Srikrishna, 'A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians' [https://meity.gov.in/writereaddata/files/Data\\_Protection\\_Committee\\_Report.pdf](https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf) accessed 28 May 2019.

<sup>7</sup> While traditionally, Indian law has not distinguished data processors and controllers in much detail, the PDP Bill proposes to do so – distinguishing between data fiduciaries and data processors. For the purpose of this paper, the terms 'data controller' and 'data processor' will be used as they are under the European Union's General Data Protection Regulation (Regulation (EU) 2016/679)

<sup>8</sup> Jack M Balkin, 'Information Fiduciaries and the First Amendment' (2015) 49 U.C. Davis Law Review 1183.

<sup>9</sup> Balkin draws upon the conflict between the right to free (commercial) speech under the First Amendment in the US, and approaches to data protection law, in coming to his conclusion that online service providers should be treated as information fiduciaries. However, Indian Constitutional jurisprudence on fundamental rights to privacy and freedom of speech differs from the US approach in some aspects, and this conflict may not be as apparent under Indian law.

## 2. INFORMATION FIDUCIARIES IN THE U.S.

While the concept of a 'fiduciary' has existed for decades and even centuries now, the idea of importing this age-old principle in the context of processing of personal data is fairly new. It was originally proposed by Jack Balkin, who developed his theory of information fiduciaries in the digital age between 2014 and 2016.

The impetus for this theory seems to have come from American scholars' suggestions that a comprehensive federal data protection legislation, such as the General Data Protection Regulation<sup>10</sup> (GDPR) in the European Union, or even the Directive<sup>11</sup> that was its predecessor, would be difficult to implement in the U.S. This is not to say that better data protection is not required, but that the form in which the EU regulates the subject may not be feasible in the U.S. given the difference in application of both the freedom of speech and expression, and the right to privacy in the two jurisdictions.<sup>12</sup> Scholars, including Balkin himself, have suggested that rather than one comprehensive data protection regulation, a mix of several approaches, including contractual understandings, the existing sectoral data protection laws and others would work best under the US constitutional scheme.<sup>13</sup>

Balkin suggests that one of the ways in which better data protection can be achieved is by treating a certain set of entities that collect and process personal data as fiduciaries, in the context of the information that they hold about a person. He notes that while having government regulate all matters relating to the use of data by private entities may not be feasible, the exchange and use of certain types of information is a matter of private concern that governments can protect.<sup>14</sup> He refers to the fact that professionals such as lawyers and doctors base their entire service on the information that their clients provide them. These professionals would be liable for violations of professional conduct, if they were to use the personal information to their own benefit – whether by manipulating the actions of the client, selling the information or otherwise. The nature of the social relationships between the clients and the professional opens them up to regulation, even if the specific obligations in question are not explicitly part of the contract of service between these parties.<sup>15</sup>

Balkin suggests that any organisations that (a) hold themselves out to the public as a privacy-respecting organisation to gain the trust of their users; (b) give individuals reason to believe that they will not disclose or misuse their personal information; and (c) are expected not to disclose or misuse the personal information of individuals on the basis of existing social norms of reasonable behaviour, existing patterns of practice, or other objective factors that could justify the individuals trusting these organisations, could be considered information fiduciaries.<sup>16</sup>

<sup>10</sup> Regulation (EU) 2016/679

<sup>11</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>12</sup> Lindsey Barrett, 'Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries' (2019) 42 Seattle University Law Review 1.

<sup>13</sup> See Eugene Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You Symposium: Cyberspace and Privacy: A New Legal Paradigm' (1999) 52 Stanford Law Review 1049; Balkin (n 8).

<sup>14</sup> Balkin (n 8) 1205.

<sup>15</sup> Balkin (n 8) 1205.

<sup>16</sup> Balkin (n 8) 1223–1224.

The fiduciary duties of these organisations would be dependent on the nature of their relationship with the individual users, the reasonableness of trust and the importance of preventing harm to the users / beneficiaries. Such obligations would also not be limited to what the organisations promise in their privacy policies or terms and conditions of use.

Some other key features of Balkin's proposal are as follows. Not all entities that deal with personal information, or even deal with personal information provided to them online will be considered information fiduciaries. These principles would only be applicable to online service providers that monetise the personal information that is provided to them by users, and also meet the criteria discussed above. Some examples of the companies that Balkin considers to be information fiduciaries include Facebook, Google and Uber. However, the fiduciary duties of these information fiduciaries would not be as extensive as those applicable to traditional fiduciaries. One of the reasons for this being that while traditional fiduciaries are not permitted to use the information of their clients except specifically for the purpose of the service provided and to the benefit of the client, the business model of these fiduciaries depends on the client paying for such services. That is typically not the case when it comes to the kind of large online services we see today. In order to be able to effectively administer this information fiduciary model that requires different sets of duties of different service providers, Balkin suggests that companies should be incentivised to voluntarily designate themselves as fiduciaries.<sup>17</sup>

The proposal that certain online service providers in the US should be treated as 'information fiduciaries' in order to protect the interests of their users has gained much traction since Balkin initially proposed it in 2014. Since then rapid changes in technology, and technology policy have taken place, along with new disclosures of privacy-related harms. Grappling with these changes and anticipating new challenges ahead, academics,<sup>18</sup> civil society organisations,<sup>19</sup> and some technology companies<sup>20</sup> have generally embraced the concept.

At the same time, events such as the Cambridge Analytica scandal have resulted in privacy and technology policy issues going mainstream. An increasing number of countries are considering the adoption of data protection regulations, among many other initiatives to 'regulate the internet', so to speak. In the U.S., where there is increasing talk of federal privacy legislation, some scholars have expressed concerns that the information fiduciary model might be 'too little', and that legislation inspired by this model<sup>21</sup> would be inadequate to protect from the scale of harms caused by the industries they seek to regulate.<sup>22</sup>

<sup>17</sup> Balkin (n 8) 1229.

<sup>18</sup> Jonathan Zittrain, 'Facebook Could Decide an Election Without Anyone Ever Finding Out' [2014] *The New Republic* <https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering> accessed 16 June 2019.

<sup>19</sup> Adam Schwartz and Cindy Cohn, 'Information Fiduciaries' Must Protect Your Data Privacy' (*Electronic Frontier Foundation*, 25 October 2018) <https://www.eff.org/deeplinks/2018/10/information-fiduciaries-must-protect-your-data-privacy> accessed 27 May 2019.

<sup>20</sup> 'Balkinization: Mark Zuckerberg Announces That Facebook Is an Information Fiduciary' <https://balkin.blogspot.com/2018/03/mark-zuckerberg-announces-that-facebook.html> accessed 27 May 2019.

<sup>21</sup> For instance, the Data Care Act of 2018.

<sup>22</sup> Lina Khan and David Pozen, 'A Skeptical View of Information Fiduciaries' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3341661 <https://papers.ssrn.com/abstract=3341661> accessed 14 June 2019.

In India, on the other hand, the committee of experts set up to recommend a data protection law has itself adopted the idea of information / data fiduciaries and incorporated it into the proposed data protection law language. In the next section of this paper, we discuss this proposal, and the constitutional position of data protection laws in India, opening up questions about the need for and value of incorporating the idea of an information fiduciary in the Indian data protection ecosystem.

### 3. DATA PROTECTION LAW AND DATA FIDUCIARIES IN INDIA

At the time of writing, the Indian government is pushing for comprehensive data protection legislation that would be applicable across industries, sectors and geographies within India. The last published version of this law is the draft PDP Bill.<sup>23</sup> The government called for public comments on the proposed law, and we now await the new version of the PDP Bill, as the government decides on the next steps in this process.<sup>24</sup>

#### 3.1 Constitutional Position on Data Protection Legislation

The PDP Bill was drafted and published in the aftermath of the Indian Supreme Court's landmark judgment on the right to privacy in *Puttaswamy v. Union of India*<sup>25</sup> (Puttaswamy). In this judgment, the Court upheld and affirmed that the right to privacy does exist as a fundamental right that is guaranteed under the Constitution of India, reading it into the right to life and liberty and the other fundamental rights under the Constitution.

The judgment of the Court itself does not discuss the idea of a data fiduciary, and therefore is not directly related to the subject of this paper. However, as discussed earlier in this paper, the need for 'information fiduciaries' as proposed by Balkin and other American scholars arises from the concern that a data protection regulation would be questionable given the constitutional protections afforded to commercial speech. In this context, it is useful to discuss the judgment in order to understand the position of a central (federal) data protection law under the Indian Constitution.

First, we look at the source of the concerns that American scholars such as Balkin<sup>26</sup> and Eugene Volokh<sup>27</sup> have expressed regarding the feasibility of enforcing data protection law in the U.S. – the protection of commercial speech – from an Indian perspective.

The fundamental right to freedom of speech and expression in India is provided for under Article 19(1)(a) of the Indian Constitution. Article 19(2) then goes on to explain that reasonable restrictions to these freedoms may be permitted, if such restrictions are in the 'interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'.

While the text of the Constitution itself provides only that there is a general right to freedom of speech and expression, the Supreme Court has over the years identified the manner in which different kinds of speech may be protected. Often the Court has used the reasonable restrictions contained in Article 19(2) to do so. The question of commercial speech came up before the Court as early as 1959. In *Hamdard Dawakhana v. Union of India and Others*,<sup>28</sup> a law restricting

<sup>23</sup>The Personal Data Protection Bill, 2018, available at [https://meity.gov.in/writereaddata/files/Personal\\_Data\\_Protection\\_Bill,2018.pdf](https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf)

<sup>24</sup>With the formation of the government, post elections in the summer of 2019, various sources in the Government have now stated that the data protection law will be a priority, and possibly introduced in Parliament in June/July 2019.

<sup>25</sup>*Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* (n 5).

<sup>26</sup>Balkin (n 8).

<sup>27</sup>Volokh (n 13).

<sup>28</sup>*Hamdard Dawakhana & Ors v Union of India & Ors* (1960) 2 SCR 671 (Supreme Court of India).

advertising of certain types of drugs was challenged. Among other things, the Court found that commercial speech could not be granted the full protection of Article 19(1)(a), stating that: “Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to “impart and acquire information about that common interest”. If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Art. 19(1)(a). But if all it does is that it deprives a trader from commending his wares it would not fall within that term”. The Court relied on prevailing judgments of the U.S. Supreme Court at the time, in part, to come to this conclusion.<sup>29</sup>

However, in time the Court’s approach to commercial speech has changed, with subsequent benches interpreting the judgment in *Hamdard Dawakhana* as being limited to the nature of advertisements in question in that case.<sup>30</sup> In 1995, in *Tata Press v. MTNL*,<sup>31</sup> the Court held that ‘commercial speech’ is protected under Article 19(1)(a) of the Constitution. Again, the Court referred to prevailing judgments of the US Supreme Court, in part, in arriving at this conclusion. At the same time, the Court justified the restrictions on commercial speech that were upheld in *Hamdard Dawakhana*, as well as other potential restrictions on advertisements, by noting that they would fall within the ambit of the reasonable restrictions under Article 19(2). The Court did not elaborate upon which elements listed under Article 19(2) would be relevant in such a situation.<sup>32</sup>

However, despite the fact that the broader position on commercial speech in India is similar to that of the U.S., the problems that a privacy / data protection regulation would face in the U.S. are unlikely to crop up in India, because of the manner in which the constitutional right to privacy has been articulated, most recently in *Puttaswamy*.

The Supreme Court of India has historically held that a constitutional right to privacy does exist under Indian law, in several cases, since as early as 1964.<sup>33</sup> In 2017, a nine judge bench of the Supreme Court (the largest ever to decide on the right to privacy under the Constitution) unanimously held that the right to privacy is a fundamental right guaranteed under the Indian Constitution.<sup>34</sup> The right itself is not explicitly mentioned in the Constitution. However, with this judgment it has now been read into Article 21, as well as more broadly, into Chapter III of the Constitution of India. Article 21 of the Constitution provides for the right to life and personal liberty, and Chapter III is the part of the Constitution which identifies the fundamental rights of individuals and citizens of India.

The nine judges discussed the contours of the right – ranging from dignity and bodily integrity, to more specific aspects such as informational privacy – in five different opinions. While the Court did not delve into the question of whether this fundamental right to privacy, can or should be applied horizontally i.e. inter se between two private parties, arguments

<sup>29</sup>The Court relied on the judgment in *Valentine v Chrestensen* (316 U.S. 52), among others.

<sup>30</sup>*Indian Express Newspapers (Bombay) Private Ltd. & Ors. v. Union of India & Ors.* 1985(2) SCR 287 (Supreme Court of India); and *Tata Press v. MTNL & Ors.* 1995 SCC (5) 139 (Supreme Court of India).

<sup>31</sup> 1995 SCC (5) 139

<sup>32</sup>For a detailed discussion on the subject, see Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016) 262.

<sup>33</sup>See *Kharak Singh v. State of U.P & Ors.* AIR 1963 SC 1295. Descriptions of all the cases in which the Supreme Court has discussed and upheld the right to privacy are available at the Centre for Communication Governance at National Law University Delhi, *Fundamental Right to Privacy: 63 Years of Progress*, available at <https://ccgnludelhi.wordpress.com/2017/08/13/h/>

<sup>34</sup>*Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* [n 5].

flowing from *Puttaswamy* can be made to support a data protection law that would enable individuals to enforce their privacy rights against both private parties and the State.

Indian constitutional jurisprudence has pointed to a positive obligation for the State to create a regulatory framework/environment that enables individuals to exercise their fundamental rights meaningfully. For instance, in *Vishaka v. Rajasthan*,<sup>35</sup> where the issue of safety of women at the workplace was brought up, the Court found that a safe working environment is required for the exercise of fundamental rights to carry on any occupation, trade or profession. It also found that “the primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive”. In this case, the Supreme Court itself formulated guidelines to be put in place until the State passed such suitable legislation, relying both on the Indian Constitution, and on international law for this purpose. While the *Puttaswamy* bench does not go so far as to provide guidance on the legislation itself, it does recognise that privacy is both a fundamental right and a common law right, and observes that specifically in the context of information privacy, a data protection law is required to be able to effectively protect an individual’s privacy.<sup>36</sup>

Given that the fact of constitution and mandate of the expert committee had already been placed before the Court during the hearings in *Puttaswamy*, J. Chandrachud, in his opinion, which was signed by three other judges, recommended that adequate laws are in place to protect informational privacy.<sup>37</sup> J. Kaul has also made similar observations referring to past attempts to legislate on the subject, and noting with hope that the expert committee had been constituted on the matter at the time of the judgment.<sup>38</sup>

The above discussion shows that there is no *prima facie* constitutional obstacle to a data protection legislation under Indian law. However, this does not necessarily mean that there is no place for the incorporation of a fiduciary duty in the context of data privacy jurisprudence in India. In the next section, we look at the PDP Bill and its use of the concept of fiduciaries, before moving to a greater examination of fiduciary law, particularly as it is applicable in India.

### 3.2 Indian Data Protection Law and Information Fiduciaries

During the hearings in *Puttaswamy*, the Government of India had suggested that privacy can be protected by way of a data protection statute, rather than as a fundamental right. At the time, the Government referred to a committee of experts that had been set up to study the matter and recommend provisions for a data protection law for India.<sup>39</sup> As mentioned above, the Supreme Court responded to this submission, by recommending that the Government creates an environment that enables individuals to exercise their right to privacy, and that in the context of informational privacy, adequate laws could be implemented for this purpose.

<sup>35</sup> *Vishaka & Ors v State of Rajasthan & Ors* (1997) 6 SCC 241 (Supreme Court of India).

<sup>36</sup> *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* (n 5).

<sup>37</sup> *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* (n 5) 264.

<sup>38</sup> *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* (n 5) 547.

<sup>39</sup> Ministry of Electronics & Information Technology, Office Memorandum on ‘Constitution of a Committee of Experts to deliberate on a data protection framework for India’, July 31, 2017, available at [https://meity.gov.in/writereaddata/files/meity\\_om\\_constitution\\_of\\_expert\\_committee\\_31072017.pdf](https://meity.gov.in/writereaddata/files/meity_om_constitution_of_expert_committee_31072017.pdf)



In July 2018, close to a year after its constitution, the committee of experts published a draft of the Personal Data Protection Bill, 2018, along with a report explaining their recommendations. The PDP Bill is meant to be comprehensive legislation that deals with all forms of processing of personal data by private and State actors. It is applicable to: 'processing of personal data where such data has been collected, disclosed, shared or otherwise processed within the territory of India, as well as processing of personal data by the State, any Indian company, any Indian citizen or any other person or body of persons incorporated or created under Indian law'.<sup>40</sup> It also applies to the processing of personal data outside of India, where the processing is in connection to any business in India, or involves profiling of individuals in India.<sup>41</sup>

In introducing the Bill, the Report recognises that any regulatory framework on the subject must ensure that the rights of the individual are respected, and the existing power asymmetries between individuals and data processors must be mitigated. It suggests that the individual being the focal actor in the matter, be considered a 'data principal'. The Report then identifies trust as one of the fundamental values in a relationship between the 'data principal' and a data controller / processor, noting that this trust is also a hallmark of a fiduciary relationship. Drawing from Balkin's work on information fiduciaries,<sup>42</sup> the Report then suggests that the duty of care that a data controller / processor has in dealing with personal data, makes them a 'data fiduciary'.

The Report, which as a whole focuses not only on data protection, but also on promoting a free and fair digital economy, suggests that pursuant to their fiduciary nature, data controllers / processors must only be allowed to share and use personal data to fulfil the expectations of the data principal, while also pursuing this goal. The committee then indicates that that the PDP Bill, a data protection regime that is based on these principles, will ensure individual autonomy while also making the benefits of data flow available to the larger economy. In an effort to incorporate these principles, the PDP Bill uses the term 'data fiduciary' to describe all persons and entities who would be considered 'data controllers' under other regimes such as the GDPR. A 'data fiduciary' is defined as "any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data".<sup>43</sup> On the other hand, a 'data processor' is any person who processes personal data on behalf of a data fiduciary (not including an employee of the data fiduciary).<sup>44</sup>

However, neither the PDP Bill nor the Report engage in any deeper discussion of why India needs to incorporate the concept of information / data fiduciaries in our data protection law, especially given the differing approaches to the right to privacy and freedom of speech and expression under Indian and U.S. constitutional law. The PDP Bill itself is more of comprehensive law styled along the lines of the GDPR, rather than a principles-based document that allows for the development of 'data fiduciary' law or jurisprudence. The Report does not discuss in much detail what the fiduciary character or duty of care of data processors would entail either. This raises several questions regarding what kind of value the addition of a fiduciary duty would bring to Indian data protection law, and how the concept of fiduciary duties is in effect imported into the data protection law in India. For example, would the entire set of obligations contained in the

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<sup>40</sup> Section 2(1) of the PDP Bill.

<sup>41</sup> Section 2(2) of the PDP Bill.

<sup>42</sup> Balkin (n 8).

<sup>43</sup> Section 3(13) of the PDP Bill.

<sup>44</sup> Section 3(15) of the PDP Bill.

PDP Bill in itself constitute the fiduciary duty? Or, if similar to other laws and regulations in India, would a subset of obligations of these persons/entities be considered the fiduciary duty? A third option, drawing from common law / the law of torts, could mean that there is an unwritten, additional duty of care that these persons/entities must undertake as 'data fiduciaries'.

In order to understand this better, the next section of this paper looks at the general principles of fiduciary law, and how they have been applied in India.

#### 4. FIDUCIARY RELATIONSHIPS AND INDIAN LAW

Fiduciary relationships are relationships where one party provides a specific service to the other, in a manner that requires the recipient of the service to trust / depend on the service provider. The common elements of these relationships are: entrustment of property or power, trust in the fiduciary, and risk to the service recipient because of such entrustment of property or power.<sup>45</sup> These relationships are often characterised by some sort of specialisation of services, and even a pooling of such specialised services, for instance, in the form of a financial institution.<sup>46</sup> Fiduciary law comes into the picture because these relationships often lead to a situation where the service recipients fail to protect themselves from the risk caused by the relationship, and the markets fail in doing so as well.<sup>47</sup> A resulting characteristic of these relationships is that there is a higher cost for the fiduciary to establish trustworthiness.<sup>48</sup> Traditionally, 'fiduciary law' has been developed by way of courts defining various relations as fiduciary relationship and designing the rules that the fiduciary in these relationships must abide by.<sup>49</sup> Today, we also find these rules, and the duties of the fiduciaries codified in the form of standards, principles and even laws and regulations.

The duties of a fiduciary under law typically depend upon the nature of specialisation of the fiduciary and the service provided in a particular fiduciary relationship. However, two broad duties cut across all fiduciary relationships – the duty of loyalty and the duty of care.<sup>50</sup> Other duties include those of confidence, candour and good faith.<sup>51</sup> There are different theories on the determination of the content and scope of fiduciary duties. Some suggest that (barring a requirement under statute) a fiduciary duty is dependent on an undertaking by the fiduciary – it is voluntary, and 'not imposed by law independently of the fiduciary's manifest intentions'.<sup>52</sup> The undertaking itself is construed from manifest words, conduct and circumstances.<sup>53</sup> Others argue that the characterisation of the relationship is central to the determination of whether fiduciary duties are applicable.<sup>54</sup> Fiduciary duties arise where one person receives or undertakes discretionary power over the significant practical interests of another.<sup>55</sup> The scope of the fiduciary relationship and the duties involved can be determined by identifying (a) the capacities held by the fiduciary, (b) the practical interests of the beneficiary, and (c) the particular purposes that are specified or implied in the grant of power.<sup>56</sup>

<sup>45</sup>Tamar Frankel, *Fiduciary Law* (Oxford University Press 2010) 4.

<sup>46</sup>Tamar Frankel, 'Fiduciary Law' (1983) 71 *California Law Review* 795, 804.

<sup>47</sup>Frankel (n 45) 6.

<sup>48</sup>Frankel (n 45) 6.

<sup>49</sup>Frankel (n 46) 804.

<sup>50</sup>Frankel (n 45) 106.

<sup>51</sup>Andrew S Gold and Paul B Miller, *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014).

<sup>52</sup>Justice James Edelman, *The Role of Status in the Law of Obligations*, in Gold and Miller (n 51) 24.

<sup>53</sup>Justice James Edelman, *The Role of Status in the Law of Obligations*, in Gold and Miller (n 51) 24.

<sup>54</sup>Paul B. Miller, *The Fiduciary Relationship*, in Gold and Miller (n 51) 67.

<sup>55</sup>Paul B. Miller, *The Fiduciary Relationship*, in Gold and Miller (n 51) 74.

<sup>56</sup>Paul B. Miller, *The Fiduciary Relationship*, in Gold and Miller (n 51) 75.

In India, as elsewhere,<sup>57</sup> fiduciary law although applied by both courts and statutes, appears under-explored as an area of research. We can however, draw upon the principles laid out by the courts and in various laws, to understand the general direction that has been taken in applying these duties to different parties. The most recent, and definitive discussions of fiduciary duty by the Supreme Court of India is seen in a series of cases dealing with the Right to Information Act, 2005 (RTI Act) – India's freedom of information law. Descriptions of what fiduciary duties involve can also be gathered from several subject- or sector-specific laws and regulations, applicable in the context of trusts, investment advisers and others.

In *Central Board of Secondary Education v. Aditya Bandopadhyay*<sup>58</sup> (Central Board of Secondary Education), the Supreme Court discussed the meaning of the word fiduciary, noting that:

*“21. The term ‘fiduciary’ refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term ‘fiduciary relationship’ is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary.”*

The definition of a ‘fiduciary relationship’ was once again discussed by the Supreme Court in *Reserve Bank of India v. Jayantilal N. Mistry*.<sup>59</sup> Here, the Court set out rules that govern a fiduciary relationship as follows:

*“56. The scope of the fiduciary relationship consists of the following rules:*

*(i) No Conflict rule - A fiduciary must not place himself in a position where his own interests conflicts with that of his customer or the beneficiary. There must be “real sensible possibility of conflict.*

*(ii) No profit rule- a fiduciary must not profit from his position at the expense of his customer, the beneficiary;*

*(iii) Undivided loyalty rule- a fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs*

<sup>57</sup> Gold and Miller (n 51).

<sup>58</sup> *Central Board of Secondary Education & Ors v Aditya Bandopadhyay & Ors* (2011) 8 SCC 497 (Supreme Court of India).

<sup>59</sup> *Reserve Bank of India & Ors v Jayantilal N Mist* (2016) 3 SCC 525 (Supreme Court of India).

*(iv) Duty of confidentiality- a fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.”*

The RTI Act simply provides that where information is held in a fiduciary relationship, such information is exempted from the disclosure requirements under the law unless there is a larger public interest.<sup>60</sup> It does not define or list out the kinds of relationships or duties that would be considered fiduciary in capacity. The courts have in turn used common law principles to define and discuss the nature of fiduciary relationships and duties, in cases such as the above. For instance, in *Central Board of Secondary Education*, the Court identified the following as examples of fiduciary relationships to support this definition: *“a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor or a physically/infirm/mentally challenged person, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a share-holder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer.”*<sup>61</sup>

However, fiduciary law in India can also be derived from laws, regulations and jurisprudence that are contextual, and define certain relationships as fiduciary, or ascribe fiduciary duties to individuals / institutions in certain circumstances. Some of the oldest applications of the principles of fiduciary law can be seen in the context of trusts, and guardians.

Section 88 of the Indian Trusts Act, 1882 (Trusts Act) discusses the nature of obligations of a fiduciary. This section does not limit itself to trusts as described in the Act, rather, it applies to an inclusive list of parties that could be acting in a fiduciary capacity, including a trustee, executor, partner, agent, director of a company, and legal adviser. It provides that where any such person who is *“bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained”*.

The Guardians and Wards Act, 1890, also identifies fiduciaries. Specifically, it provides that a guardian stands in a fiduciary position in relation to their ward, and cannot make any profit out of such position – with the exception of the instrument or other means by which the guardian was appointed.<sup>62</sup> The law goes on to state that the fiduciary relationship extends to any purchase of the ward’s property by the guardian, and the purchase of the guardian’s property of the ward soon after the ward attains the age of majority.<sup>63</sup> This relationship also applies to all transactions between the two as long as the influence of the guardian still lasts, or can be considered recent.<sup>64</sup>

<sup>60</sup> Section 8(1)(e) of the Right to Information Act, 2005.

<sup>61</sup> *Central Board of Secondary Education & Ors. v. Aditya Bandopadhyay & Ors.* (n 58).

<sup>62</sup> Section 20(1) of the Guardians and Wards Act, 1890.

<sup>63</sup> Section 20(2) of the Guardians and Wards Act, 1890.

<sup>64</sup> Section 20(2) of the Guardians and Wards Act, 1890.

Other more recent legislation that deals with fiduciary duties includes the Benami Transactions (Prohibition) Act, 1988. This statute provides an interesting example of the application of fiduciary law. The statute prohibits<sup>65</sup> most 'benami' transactions i.e. transactions where 'property is transferred to one person for a consideration paid or provided by another person'.<sup>66</sup> There is also no general right for a person who claims to be the real owner of the property (by virtue of paying) to recover property from the person in whose name the property is held.<sup>67</sup> However, as an exception to this rule, a right to recover does exist where the person in whose name the property is held is a trustee or fiduciary with respect to the claimant – an exception that does not seem to extend to the original prohibition on such transactions itself.

This exception was discussed by the Supreme Court in *Sri Marcel Martins v. M. Printer*,<sup>68</sup> where the Supreme Court noted that the expression fiduciary capacity has not been defined in any Statute. The Court went on to refer to survey various texts to examine the meaning of the term, finding that *"while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other"*. The Court also observed that the factual context of the relationship between the parties must be considered, in order to determine whether the relationship is based on trust or confidence – which in turn is relevant to determine whether the relationship is fiduciary in nature. In this case, the appellant was held to be a fiduciary in relation to his father and siblings, where property was intended to be transferred to one member of the family, who was meant to hold it on behalf of the others.

Other relationships, even if not specified in legislation, have been recognized as fiduciary relationships in Indian jurisprudence and legal scholarship; for instance, the fiduciary duties of the directors of a company. While directors have been recognised as fiduciaries under common law, and as mentioned earlier under the Trusts Act, the development of Indian law on this subject appears to be limited and somewhat recent. The Companies Act, 1956 did not provide for any duties of directors, leaving the issue instead for the courts to decide on. However, scholars such as Varottil suggest that, while this is customary in common law jurisdictions, the Indian courts have not extensively applied common law to shape directors' duties, including their fiduciary duties.<sup>69</sup> There was some change in the approach of the law, with the Companies Act, 2013, which introduced a number of duties of directors.<sup>70</sup> While the provisions of the law itself do not specifically refer to fiduciary duties, Varottil argues that those duties among this list that require directors to put the interests of the company ahead of their own interest, and prevent conflicts of interest / self-dealing by the directors are fiduciary duties.<sup>71</sup> The Supreme Court has looked into the role of directors and found them to be fiduciaries as well, noting that directors act as fiduciaries when they conduct a board meeting, and as part of their fiduciary duty they cannot

<sup>65</sup> Section 3 of the Benami Transactions (Prohibition) Act, 1988.

<sup>66</sup> Section 2(a) of the Benami Transactions (Prohibition) Act, 1988.

<sup>67</sup> Section 4 of the Benami Transactions (Prohibition) Act, 1988.

<sup>68</sup> *Sri Marcel Martins v. M. Printer*, 2012(5) SCC 43.

<sup>69</sup> Umakanth Varottil, 'Corporate Governance in M&A Transactions' (2012) 24 National Law School of India Review 50.

<sup>70</sup> Section 166 of the Companies Act, 2013.

<sup>71</sup> Umakanth Varottil, 'Codification of Directors' Duties: Is Common Law Excluded?' (*IndiaCorplaw*, 31 May 2014) <https://indiakorplaw.in/2014/05/codification-of-directors-duties-is.html> accessed 5 June 2019.

participate in decisions in their own favour.<sup>72</sup> In *Dale and Carrington Invt. (P) Ltd. and Ors. vs. P.K. Prathapan and Ors.*,<sup>73</sup> the Supreme Court went on to observe that while the directors of a company have been described as agents, trustees and representatives – it is certain that they act in a fiduciary capacity towards the company, and any action they take must be towards the benefit of the company. The Court states that the fiduciary capacity of directors “enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. The duty is owed by them to the shareholders of the company.”<sup>74</sup>

Similarly, while the Advocates Act, 1961 itself does not specify that lawyers have a fiduciary duty towards their clients, the courts have held that lawyers do in fact act as fiduciaries in relation to their clients. In *Chander Prakash Tyagi v. Benarsi Das & Ors.*,<sup>75</sup> the Supreme Court discusses the fiduciary duties of lawyers. The Court referred to the rules of the Bar Council of India,<sup>76</sup> which among other things, provide that an advocate cannot appear or plead for a party if they have at any time advised the opposite party. The Court observed that this rule was in the spirit of the fiduciary obligation of a lawyer towards their client.

In addition to the courts and parliament, Indian regulators have not shied away from incorporating fiduciary principles in exercising their functions either. The Securities Exchange Board of India (SEBI) specifically notes that investment advisers as well as alternative investment funds (AIF) both operate in the capacity of a fiduciary. These regulations refer specifically to the obligations of a fiduciary in situations where there is a conflict of interest.

The SEBI (Investment Advisers) Regulations, 2013 in the description of the general obligations of investment advisers specify that investment advisers shall act in a fiduciary capacity towards their clients and disclose all conflicts of interests, as and when they arise.<sup>77</sup> Whereas the regulations do not clearly specify that the remaining obligations under Regulation 15 are ‘fiduciary’ in nature, they include many functions that fall within the standard definitions of fiduciary duties, including the requirement to maintain confidentiality, maintain an arms-length relationship between its activities as an investment adviser, and its other activities, the requirement to refrain from entering into any transactions (on its own account) that are contrary to the advice provided to its clients.

The SEBI (Alternative Investment Fund) Regulations, 2012 provide that the sponsor and manager of an AIF must act in a fiduciary capacity towards investors, and disclose any conflicts of interests as and when they arise.<sup>78</sup> Managers are required to implement written policies and procedures to identify, monitor and mitigate any conflicts of interests.

<sup>72</sup> *Ram Parshotam Mittal & Ors v Hotel Queen Road Pvt Ltd and Ors* [2019] Supreme Court of India Civil Appeals Bos. 3934 and 3935 of 2017.

<sup>73</sup> *Dale and Carrington Invt (P) Ltd and Ors vs PK Prathapan and Ors* (2005) 1 SCC 212 (Supreme Court of India).

<sup>74</sup> *Dale and Carrington Invt. (P) Ltd. and Ors. vs. P.K. Prathapan and Ors.* (n 73).

<sup>75</sup> *Chander Prakash Tyagi v Benarsi Das & Ors* (2015) 8 SCC 506 (Supreme Court of India).

<sup>76</sup> Regulation 33 of Section II of Part VI of Bar Council of India Rules.

<sup>77</sup> Regulation 15(1) of the SEBI (Investment Advisers) Regulations 2013.

<sup>78</sup> Regulation 21(1) of the SEBI (Alternative Investment Funds) Regulations 2012.

The above is by no means an exhaustive study of fiduciary law in India. However, we do see that there are some recurring themes in these definitions, whether under the Trusts Act, or in Supreme Court case law. For instance, the idea of pecuniary advantage – both laws and case law provide that if there is any pecuniary advantage gained out of a fiduciary relationship, such advantage should go to the person who is the beneficiary of the relationship, not the fiduciary. It is difficult to imagine how such a principle would be implemented in the case of a data / information fiduciary as envisaged under the PDP Bill. According to this interpretation of fiduciary law, if data fiduciaries are making profits from the use of personal information of the data principle, then such profit, to the extent it draws from the fiduciary relationship, must go to the principle. There is at the least potential for conflict between a data principal / data subject's interests and that of data processors and controllers looking to monetise the personal data of these individuals. This interpretation could also lead towards another proposition – that data should be treated like property, allowing individuals to sell their interest in their personal data. However, the PDP Bill, the Report, and most privacy scholars today eschew this approach to privacy law.

The other common theme running through fiduciary law in India is that most fiduciary duties are applicable in relation to property, or control over monetary assets of the beneficiary. For the purpose of protecting personal data however, we are concerned with the use of information by the fiduciary, and not the use of property or investments. It is noteworthy that some Indian fiduciary law is derived from our oldest statute dealing with this subject, the Trusts Act which dates back to 1882 when India was still under British rule. While it is still very much in effect, as many other laws from those times are, scholars have noted that (globally) fiduciary law has only developed to deal with information fiduciaries (such as doctors even) in more recent years.<sup>79</sup> Therefore, it is possible that there is still room to develop fiduciary law as it applies to information fiduciaries, both in the context of protection of personal data and otherwise.

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<sup>79</sup> Frankel (n 46) 796.



## 5. CONCLUSION

We see from the above that several different approaches to fiduciary law and identification of fiduciary duties in specific circumstances exist. This brings us back to the question of how this concept can be applied to data controllers and processors in the Indian context.

First, the data- and advertising-based business models that permit companies to provide their customers or 'users' free services are exactly what Balkin, Zittrain, and others who promote the information fiduciary approach to privacy are targeting. These companies typically use the information provided by their customers to drive some of their revenue.<sup>80</sup> However, one of the core elements of most definitions of 'fiduciary duty' under Indian law is the idea that a fiduciary cannot gain any benefit or advantage from anything that relates to its fiduciary character – presumably, the fiduciary's only gain would be on the basis of fees / payments that it receives from the beneficiary. Therefore, for instance, legal advisors, who act as fiduciaries in relation to their clients, could run their business on the basis of fees for their services, but not make any money by selling the information that their clients provide to insurance companies. Investment advisors are even barred from making investments that conflict with the advice they provide their clients.

Importantly, Balkin suggests that the threshold for information fiduciaries in the digital age should be lower than it is for traditional fiduciaries. Indian fiduciary law does support the idea that different fiduciaries have different types of obligations, depending upon the relationship they have with their clients / beneficiaries. However, the question here will be whether the bar against profiting from the fiduciary character of a relationship is such a core tenet of fiduciary law that it cannot be done away with. If it is possible to modify these principles, new rules will need to be developed in order to enable information /data fiduciaries to operate, while still protecting the interests of their users, and not diluting the value and impact of fiduciary duties.

Another important issue is the form of fiduciary law that will be applicable to data fiduciaries. As discussed earlier in this paper, there are two broad theories to applying fiduciary duty – one is that of voluntary understanding<sup>81</sup> (where the fiduciary duty is based on the expectations set by the relationship between the two parties, and is limited to the parameters of the terms of the relationship), and the second argues that a fiduciary duty is a duty of care, that goes beyond the contractual or legal relationship between parties.<sup>82</sup> This distinction when seen in the context of fiduciary law that is codified, could also lead to related questions – first, whether fiduciaries have the ability to contract out of their fiduciary duties under law,<sup>83</sup> and second, whether common law principles of fiduciary duties will apply in addition to the limited codified principles of fiduciary law.<sup>84</sup> We've seen varying applications of these issues in different contexts in the

<sup>80</sup> Balkin (n 6); Barrett (n 12).

<sup>81</sup> Justice James Edelman, *The Role of Status in the Law of Obligations*, in Gold and Miller (n 51); James J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302.

<sup>82</sup> Paul B. Miller, *The Fiduciary Relationship*, in Gold and Miller (n 51).

<sup>83</sup> Shreya Rao and Vakasha Sachdev, 'Can Trustees Contract out of Fiduciary Liabilities?' (IndiaCorplaw, 25 March 2017) <https://indiakorplaw.in/2017/03/can-trustees-contract-out-of-fiduciary.html> accessed 17 June 2019.

<sup>84</sup> Varottil (n 71).

limited study of Indian fiduciary law in this paper itself, depending on the kind of fiduciaries – trusts, directors etc. – but also on the specific facts of each case.

The Indian PDP Bill would consider all data controllers to be fiduciaries. If we are to move past the initial hurdles of adapting fiduciary law to apply in the context of data controllers who do in fact profit from the processing of data provided to them in a fiduciary capacity (as well as to those who don't), our next question is how this application can take effect and what value it brings to the data protection law. While more study on the development of fiduciary law in India and elsewhere is required to answer these questions, this paper proposes that there are (at least) three ways to consider this question, as follows.

One option is to assume that all obligations that are applicable to data controllers under the PDP Bill are fiduciary obligations – and data fiduciaries can then operate on this understanding with no additional duties. However, it doesn't seem at first look that fiduciary principles would bring any additional value to data protection law, since many countries do have laws similar to the PDP Bill without invoking fiduciary duties.

The second option would be to treat certain larger data controllers as fiduciaries based on the kind of data that they process and / or the scale at which they operate. The PDP Bill's conception of 'significant data fiduciaries' may be useful here. The PDP Bill contains additional obligations applicable to 'significant data fiduciaries', which are to be recognised as such by the regulatory authority on the basis of certain criteria, such as the volume and sensitivity of personal data processed, the turnover of the data fiduciary, the risk of harm resulting from any processing or any kind of processing undertaken by the fiduciary, the use of new technologies for processing and other relevant factors.

It may be useful here to go back to Balkin's proposal to regulate information fiduciaries. The social relationship between the individual and the data processor is the key to Balkin's proposal. He argues that the use of information by these data processors should be subject to regulation because of the nature of the relationship the individual has with the data processor and the trust that the individual places in such data processor. On this basis, he argues that a certain subset of data processors should be considered 'information fiduciaries'. The second option appears to be similar to Balkin's approach, in that both are based on the nature of data processing or relationship between the fiduciary and the individual. However, we would run into some of the same problems we see in the first approach here as well, given that the additional obligations of these 'significant data fiduciaries' are largely codified in the PDP Bill.

A third option might be to continue to apply the obligations under the PDP Bill to all data controllers and processors, while maintaining the option for any processor or controller to be treated as a fiduciary, depending upon the circumstances. This would mean that all data controllers and processors would be required to act in the interest of the individuals whose personal data they process at a minimum. To a large extent it could be said that this duty could be met by complying with the PDP Bill. However, the regulatory and adjudicatory authorities would then be empowered to develop a body of fiduciary law that is dynamic and applicable to processors of personal data in order to protect the privacy rights of individuals.