

Session Briefs: Exploring Policy Issues in the Digital Technology Arena

October 10-11, 2019

IIAS Shimla

Session 1 // The economics of data // October 10, 2019 // 10:10 - 11:40

Presentations:

- 1) *Tax challenges arising from digitalisation*, Suranjali Tandon, NIPFP
- 2) *Experimental approaches to understand consumer privacy and business advantage*, Dhvani Yagnaraman, Busara Center for Behavioural Economics

Speakers:

- 1) *Moderator* - Renuka Sane, NIPFP
- 2) Subhashis Bhadra, Omidyar Network
- 3) Bhusan Jatania, IDFC Institute
- 4) Shishir Jha, IIT Bombay

The advent of digital technologies and Internet-based business models has elevated data to the status of a vital resource. The activities of generation, collection, processing and trading of data have collectively given shape to a ‘data economy’, one where access to and control over personal and non-personal information is a key driver of value. The response of legal regimes thus far has been through the enactment of data protection legislations that seek to recognise and protect the privacy rights of individuals in personal data. However, outside of such privacy-related concerns, questions regarding the ‘ownership’ of data remain. This also gives rise to concerns regarding the method and feasibility of quantifying the monetary value of data.

Meanwhile, corporations and data controllers are able to rely on intellectual property and contract law frameworks to exercise economic rights over data, particularly in the case of non-personal data, such as raw machine data or aggregated and anonymised personal data.

As indicated by the recent Economic Survey for 2018-19, the government is increasingly viewing data as a ‘public good’. Deliberations are underway to establish a comprehensive ‘data governance framework’ for the nation, to pursue a national data dividend of sorts. Amidst such debates that seek to broaden the legal conception of data, it would be valuable to examine what models and frameworks of regulating data can be considered. Should individual ownership rights over data be recognised in the law? If so, to what end and in what form?

Issues for discussion:

- 1) What are the benefits and drawbacks of recognising ownership rights in data? Would such a concept lead to (a) enhancing an individual's ability to control their data or benefit from their data, (b) lead to fairer and more equitable distribution of wealth in the digital economy?
- 2) How is the political economy of data taking shape in India, given that the Indian government is increasingly viewing data as a capital resource, access to which can fuel economic growth. What are the regulatory concerns in this context?
- 3) How should data be valued? Can and should user's be compensated if their data is used to derive commercial gain?
- 4) How do we accurately measure how much companies are benefiting from "free" data? Should the use of "free data" models be circumscribed in any manner?
- 5) Is India's taxation and competition law framework sufficiently equipped to handle the challenges of the data economy? What needs to change in law and practice?

Session 2 // Approaches to privacy regulation // October 10, 2019 // 12:00 - 13:30

Presentations:

- 1) *Fiduciary relationships as a means to protect privacy: Examining the use of the fiduciary concept in the draft PDP Bill, 2018*, Trishee Goyal, NIPFP
- 2) *Regulatory governance and the PDP Bill, 2018*, Renuka Sane, NIPFP

Speakers:

- 1) *Moderator*: Ajay Shah (NIPFP)
- 2) Suyash Rai (Carnegie India)
- 3) Malavika Raghavan (Dvara Research)
- 4) Smitha Prasad (CCG, NLU Delhi)
- 5) Amlan Mohanty (Google)

The debate around data protection has occupied a central position in India's policy and legal space with the Supreme Court affirming the fundamental right to privacy in *K.S Puttaswamy v. Union of India* and the Government constituting the (Retd.) Justice Srikrishna Committee to draft India's data protection law (the "PDP Bill"). The Srikrishna Committee released the much awaited draft bill on data protection in July 2018. Among other things, the Bill sets out key protections pertaining to the collection, processing and use of personal data of individuals (referred to as data principals) and seeks to protect them from related harms. While the Bill adopts a fairly comprehensive set of data protection principles and lays down a number of substantive rights for data subjects, particularly in relation to data processing by private entities, it has been criticised for the position taken in several key areas such as the requirement to store a copy of all personal data within India, creating wide exemptions for government use of data, failure to initiate surveillance reforms, as well as the structure, design and the powers of the data protection regulator.

Issues for discussion:

- 1) While the failure of a purely consent-based data protection framework has often been highlighted, does the approach adopted by the PDP Bill differ in any significant way?
- 2) Does the PDP Bill sufficiently account for the data ecosystem in India for instance, the lack of technology know-how amongst the population, and issues such as state and regulatory capacity?
- 3) Has the Data Protection Authority(DPA) been given a suitable mandate, in terms of clarity, feasibility and consistency of objectives? Given the challenges of building high capacity regulatory agencies in India, and the scale of regulatory landscape in India, how should the DPA pursue its regulatory objectives effectively?
- 4) What are the issues with the regulatory structure and design suggested by the PDP Bill, if any? How can we ensure transparency and independence within the DPA with the adjudicatory wing being housed within the DPA?

Session 3 // Regulating emerging technologies // October 10, 2019 // 14:45 - 16:15

Presentations:

- 1) *Comparison of India and US on consumer protection regulation in the fintech space*, Tarunima Prabhakar, UC Berkeley
- 2) *Adoption and regulation of facial recognition technologies: Why and why not*, Smriti Parsheera, NIPFP

Speakers:

- 1) *Moderator*: Pratik Datta (Shardul Amarchand Mangaldas)
- 2) Anubha Sinha (CIS)
- 3) Urvashi Aneja (Tandem Research)
- 4) Vidushi Marda (Carnegie India)
- 5) Pranav Roach (Hughes Satellite)

The digital ecosystem is a dynamic arena with a rapid pace of innovation and growth. In sectors ranging from telecom to e-commerce, from payments to health, we are seeing the creation of new markets and disruption of old ones. This comes with an accompanying set of regulatory questions and challenges, including those regarding the effects of new technologies on citizen rights. Often the Indian government's first response to any new technologies is to view them with suspicion - particularly where this may cause recalibration of the citizen-state relationship. This often leads to disproportionate and extremely interventionist regulatory responses, which may affect both citizens and industry negatively. So how can regulatory systems be designed that could provide space for development of new technologies while still dealing with the numerous interests that a state must protect? How can one provide sufficient freedom to the market to regulate itself while dealing with issues such as state security, enforcement of rights, etc? In this context, the session will consider

where do we, in India, stand in our institutional landscape for regulating and facilitating new technology, and where we need to go from here.

Issues for discussion:

- 1) How do current regulatory frameworks limit the adoption and growth of emerging technologies in India? Does India stand to lose out on the potential benefits of new technologies on this account or is it preferable to adopt a cautious approach, given the state capacity issues and socio-economic status of the country?
- 2) How should one determine when and how to establish new regulatory frameworks for emerging technology? What principles should guide the adoption of command and control / co-regulatory / self-regulatory methods of regulation?
- 3) How is the political economy of technology taking shape in India, including on parameters like inclusiveness, competitiveness and innovation, and how are regulators responding to it?
- 4) How does one regulate for competition related issues in emerging fields? Can existing competition law frameworks work in the global technology arena? Do we need to consider new models of cooperative growth - such as by instituting mandatory data sharing in emerging data intensive fields?

Session 4 // Online content regulation // October 10, 2019 // 16:30 - 18:00

Presentations:

- 1) *Regulatory responses to online harms*, Varun Sen Bahl, NIPFP
- 2) *Trends in copyright infringement and enforcement*, Megha Patnaik, ISI

Speakers:

- 1) *Moderator*: Faiza Rahman (NIPFP)
- 2) Pranesh Prakash, Public Interest Technology Fellow, New America
- 3) Sachin Dhawan, Facebook
- 4) Prashanth Reddy, Vidhi Centre for Legal Policy
- 5) Nehaa Chaudhari, Ikigai Law

The safe harbour framework has been an important factor behind the growth of the digital economy and enabling the democratic exchange of information on the online space. Yet, concerns such as fake news, hate speech, online harassment and obscenity and the difficulties in investigating and punishing cross-jurisdictional cyber crimes have confronted states with complex policy questions regarding the role and responsibilities of online platforms. The dominance and reach of large online platforms only amplifies these issues.

In December, 2018, the Ministry of Electronics and Information Technology released the (Draft) Information Technology (Intermediaries Guidelines (Amendment) Rules, 2018 (Draft

Rules) for public comments. The Draft Rules seek to impose a range of substantive obligations on intermediaries, including requirements for larger intermediaries to establish a physical office in India; ensuring traceability of the originators of information; proactive identification of illegal content, and providing information and technical assistance to Government agencies.

While many acknowledge the need to mitigate online harms, the Draft Rules have been criticised by civil society and industry, particularly on grounds that they impose censorship obligations on private entities, compromise the privacy of users, and place disproportionate costs on businesses.

Issues for discussion:

- 1) In the absence of any statutory changes to the safe harbour framework in the IT Act over the last ten years, much of the law making in this area is being done by courts. To what extent is this desirable?
- 2) Is there a need to reconsider existing safe-harbour principles to address emerging online harms? What is the range and scope of obligations that should be placed upon online platforms to mitigate online harms?
- 3) What is the appropriate form of such regulation? To what extent should private parties be required to ``police’’ the Internet? What checks and balances are required to ensure that any private censorship is necessary and proportionate?
- 4) Is there a need for more granular regulation of different types of digital platforms and other digital entities?
- 5) How can one balance the competing interests at play in this arena - civil liberties (primarily speech and privacy), state interests and the right to carry on business?

Session 5 // Digitisation // October 11, 2019 // 09:30 - 12:30

Presentations:

- 1) *Digitisation of the skills ecosystem*, KP Krishnan, Ministry of Skills and Development
- 2) *Electronic medical records in India: Legal framework and regulatory issues*, Harleen Kaur, NIPFP
- 3) *Modernising India’s land records: Challenges and the way forward*, Devendra Damle, NIPFP
- 4) *Improving India’s parliamentary voting and record keeping*, Pranesh Prakash, New America Fellow

Speakers:

- 1) *Moderator*: Subhashis Banerjee (IIT, Delhi)
- 2) Ajay Shah (NIPFP)

- 3) Ashish Aggarwal (NASSCOM)
- 4) Akriti Gaur (Vidhi Center for Legal Policy)

Over the last few decades, digitisation has been viewed as one of the primary ways in which to enhance transparency and accountability of government institutions, and improve service/benefit delivery to citizens. Digitisation has also enabled a number of benefits to the private sector, not least by enabling various efficiencies. The rising levels of digitisation and digital adoption, though noteworthy, have not been completely successful in bringing the bottom layers of the pyramid under the coverage of digital benefits. Digitisation brings with it the possibility of creating digital haves and have nots, which could act to further exacerbate existing social and political inequity. The increasing potential of automation and AI also points to the possibilities of significant social restructuring as labour markets are impacted.

In this context, the session will seek to examine how digitisation is taking place in various sectors in India and the challenges in these contexts. How can one navigate between the problems associated with low state capacity and technological solutionism? The session will focus on digitisation in the field of health regulation, the regulation of land markets, the use of cryptocurrencies and parliamentary accountability, and will seek to understand the current state of affairs in each of these sectors as well as the possible steps that could be taken to further goals of empowerment, inclusiveness, transparency and enhanced efficiencies.

Issues for discussion:

- 1) How can digitisation help in economic development? What are the fundamental roadblocks that have occurred and could occur in this context?
- 2) What improvements in state capacity are required to enable us to fully realise the benefits of digitisation?
- 3) How are new forms of digitisation likely to affect state-citizen relations? Given the increasing linkages between the state and private sector in this space (eg: how the Aadhaar ecosystem is mandated by the government and then used by the private sector), do existing regulatory models sufficiently recognise and protect the rights of citizens?
- 4) Are the currently envisioned technological interventions (eg: use of blockchain to create immutable, decentralised records) sufficient to overcome various systemic issues in so far as digitisation is concerned? How do we avoid falling into the trap of technological solutionism?