



## **Event Report of the Data Law in India Conference**

**6th April 2024**

**Lecture Room – I Annexe, India International Centre, New Delhi – 110003.**

The Conference on Data Law in India was organised by the Centre for Law, Regulation, and Technology (CLRT), BML Munjal University (BMU) at the India International Centre on 6<sup>th</sup> April 2024. The Conference dealt with the following two major issues.

### **1) Is India’s Personal Data Protection Legislation adequate in safeguarding citizens ‘privacy’?**

In the Indian context, there is a requirement to increase awareness around data privacy and privacy as a whole. This activity is more important for sensitive sectors such as banking and healthcare. The legislation is also scrutinised under the lens of the *Puttaswamy* judgment to understand whether it satisfies the requirements of choice, equity and autonomy. The legislation has provisions to promote autonomy but there is a requirement of awareness amongst the populace to exercise equity and the competition controllers might be required to improve choice. Another area of deliberation where the legislation needs to improve is the area of children’s privacy. Currently, the legislation seems inadequate to tackle issues pertaining to the privacy of underage users. In addition to this, the legislation also lags in the stringent application of the purpose limitation principle. This in turn requires the legislation to promote transparency in the data processing and necessity should be a prerequisite for processing non-consensual processing of data.

### **2) What is the optimal framework for utilizing non-personal data for public welfare in India?**

Much responsibility falls on the shoulders of the government to create an ecosystem which promotes efficient utilisation of non-personal data. While the government is required to intervene in the creation of this ecosystem, a balance must be struck between government intervention and market freedom. Excessive intervention by the government can demotivate

the economy from effectively utilising data for its flourishing. Instead of intervention, the government should take strides to promote data-sharing ecosystems, make investments, and create required mandates to protect the rights of the people. For India to emerge as a leader in the race of tech it is also important to create suitable frameworks to welcome new technologies such as Artificial Intelligence. This would not only improve the economy but also assist in improving the quality of life in the country. To achieve these goals, it is essential to take a holistic approach. The concept of data touches upon multiple domains of law such as IPR. Therefore, it is necessary to update all the variables in this equation to achieve optimal outcomes for the country.

## **INTRODUCTION**

In her inaugural address, Prof Payal Malik underscored the economic characteristic of the technology underlying multi-sided platforms. Economies of scale and scope, and network effects characterise digital platforms and have become defining features of their business model. The value of data, therefore, has increased significantly. This phenomenon throws up challenges for privacy, competition and data governance. Through several examples, she presented a convincing case to address market failures arising out of the market power of players in data-driven businesses. As a result, the legal framework needs to be tailored to address such challenges. Prof Malik appreciated the effort of the CLRT in organising a much-needed discussion on data and its multi-faceted interaction with law and regulation in the Indian context.

## **PANEL I - PERSONAL DATA PROTECTION IN INDIA: ASSESSMENT OF THE LEGISLATION**

### **INTRODUCTION**

While personal data protection has been in the spotlight globally for almost a decade, the new Digital Personal Data Protection Act (DPDP Act) 2023 has brought the conversation to our doorsteps in India. Given that the European Union has been the torchbearer in the discussion around data protection with its General Data Protection Regulation regime. It is essential to understand the implications of the new data protection regime in the Indian context which possibly has its own variables added to the entire dialogue around data protection. What needs to be seen, is how well the new Indian legislation has taken these variables into account.

### **DISCUSSION**

For an effective assessment of the law, the DPDP Act must be analysed on multiple pedestals. Given that the law would involve multiple sectors across India, it is pertinent to note that in India there is a lack of certainty around the understanding of data privacy amongst various sectors. While some sectors have high maturity on the topic, some are yet to be sensitised about it. Therefore, it is important that sensitive sectors such as banking/finance and healthcare understand the gravity of personal data protection. In this regard, appointing Chief Information Security Officers would be a step in the right direction. At the same time, a sectoral unit which is highly active in privacy protection and has been a driving force behind the DPDP Act in India is the Global Capability Centres in India which are responsible for processing the data of foreign nationals who are not present in India.

The *Puttaswamy* judgement and the BN Srikrishna Committee report provide us with important tools of analysis under the guise of equity, choice, and autonomy in the realm of data privacy vis-à-vis the legislation. The idea of autonomy in the digital realm allows an individual to practice autonomy in the use of one's data. In this regard, the DPDP Act has provisions regarding the requirement and withdrawal of the consent of the data subject which furthers the idea of autonomy. Speaking of equity, while people can exercise autonomy, it becomes difficult when there is a lack of knowledge about an individual's rights regarding data. This becomes obvious when we see that the privacy policy and the terms of the notice of a service provider are largely ignored by people before using their services. The reason behind this is the complexity of such policies and notices. The concept of choice on the other hand might require

an intervention from state machineries such as the competition controller. Currently, the digital markets are highly concentrated in India which deprives consumers of choices. Therefore, an intervention by the competition controller might be a fruitful activity to promote sprouting up of competitors.

Another important facet of legislation which needs to be accentuated is children's privacy. Children form a significant portion of digital platform users, which will only increase with innovations such as virtual reality. This will be followed by more underage users sharing their personal information online thereby increasing the probability of online grooming and paedophilia. To safeguard children from these threats, it is suggested that online communities which cater to underage audiences should not have chat community features which can connect them with adult audiences. Additionally, there should be distinct servers for handling the data of underage and adult users whereby the data of the former should be dealt with sensitive policies. Underage users form the most vulnerable group in the digital realm. In this regard, the DPDP Act is vexed with shortcomings. These include the lack of focus on a comprehensive regime for children's privacy protection which can be inferred from the sporadic provisions on children's privacy and the use of undefined vague terminology such as "detrimental harm".

Speaking of shortcomings of the legislation, they do not end with children's privacy protection quandary. For instance, the Act lacks the principle of purpose limitation. The only time this principle is invoked is when the Act talks about consensual processing. Additionally, the idea of continuing control over one's data even after parting with it is not touched upon by the Act. In its absence, the Act should impose stricter transparency requirements on entities dealing with data. Moreover, the Act lacks the proportionality principle while talking about non-consensual data processing. Even while dealing with non-consensual processing of data, necessity should be a requirement. In addition to these issues, due consideration was given to the dispute resolution mechanism. Here it was noted that the dispute resolution body appointed by the Act does not have the informational capacity to deal with a sector like data processing.

While we do have data privacy legislation with us in India now, it is equally important to help the populace understand the importance of data privacy. When there is a lack of understanding among people about data privacy, they tend to alienate from it rather easily. A common example of this becomes evident when people accept the terms and conditions of a platform without delving into them. This only proves that concepts such as having control over

our own data and self-management of privacy are utopian at best. This situation then leads to privacy harm. The privacy regime should understand that privacy harm is a concept much broader than deepfakes, discrimination, identity theft etc. For the creation of a robust regime to curb privacy harm, it is essential to analyse under what facet of property personal data falls. Given that it is impossible to give away the rights attached to personal data, it cannot be considered to fall under the literal definition of property. Therefore, it must be understood that personal data is an inalienable concept. Hence a data privacy regime should always have this idea in its heart to effectively achieve its goals.

## **QUESTIONS**

### **1. What are your thoughts on the current data protection board under the Act?**

**Answer:** The Rules have shown significant improvement in terms of the powers of the Board. Further, the focus is on settlement and quick resolutions of the Board. However, the Board has been empowered with too much discretion to settle matters with fiduciary companies and organizations that directly go against the tenets of data protection, i.e., control, autonomy, and choice.

### **2. Considering the Indian cultural context, and sharing of the photographs and videos of children by parents on social media etc., how do you think that laws like the Data Protection Act in India can come into effect?**

**Answer:** The children's parents need to be literate about data privacy. It is necessary to have stricter reprimands for children as to how data is processed, stored, and retained. As an example, Byju's clearly stated when children's data is taken for educational purposes, such data is to be deleted within one year from the purpose being met. The importance of parents being digitally literate is emphasised as the consequence of the same would lead to mental stress for children.

### **3. Has the Act left too many things for delegated legislation? And whether such delegated legislation will lead to more certainty or uncertainty in the implementation of the legislation.**

**Answer:** The legislation provides rule-making powers to the executive to define the Board, its term of service, and removal. It was stated that this power should have been

provided within the Act itself. However, providing this rule-making power shall not cause a very serious problem. On the contrary, it was observed that considering the technical nature of the legislation, it is imperative that a large amount of rule-making power would vest with the executive.

## **PANEL II – NON- PERSONAL DATA FOR WELFARE: IN SEARCH OF THE OPTIMAL FRAMEWORK**

### **INTRODUCTION**

Non-personal data comprises information unrelated to individual identities. It reflects societal trends, economic indicators, and machine-generated insights, fueling innovation and policy decisions. However, its wide usage raises questions on ownership and regulation. Defining frameworks for non-personal data governance is crucial, involving considerations such as copyright and trade secret protection. Moreover, as artificial intelligence relies heavily on this data, managing its intersection with AI adds complexity. Understanding and effectively governing non-personal data is essential for leveraging the digital age's transformative potential.

### **DISCUSSION**

Non-personal data has huge implications for economic development if leveraged successfully. It can be divided into three broad categories of individuals, companies, and governments, each with subsets of personal and non-personal data. For an effective utilisation of data, we must break free from traditional interpretations of data and instead use expansive definitions. The Open Government Data Initiative is one good example of a successful ecosystem-building initiative. In furtherance of this, the government should strive to make data utilisation simpler without imposing excessive control. This idea of simplification should also be considered while making laws and policies for economic growth.

This highlights the responsibility of the government in the digital era. It is important to strike a balance between government intervention and market freedom. Excessive government intervention has the potential to demotivate market players to harness the power of data. Therefore, government intervention should largely be in the form of investments and growth-oriented projects. It is crucial to learn from past experiences whereby economic projects

experienced failure due to high government control. That being said, the government should engage in setting standards for data storage and sharing to foster interoperability and efficient utilisation of data. Here, a step in the right direction would be mandating data-sharing initiatives for large companies to catalyse ecosystem development and economic growth. Additionally, laws and investments should be aimed at prioritising growth and reducing government intervention to fully realise the potential of non-personal data in economic growth.

The larger umbrella under which the above discussion comes is the advancement of the technology framework in India. Therefore, efforts are required to create a robust framework welcoming emerging technology. Speaking of emerging technologies, Artificial Intelligence (AI) is the talk of the town globally. Data is at the centre of the discussion around AI which would allow in shaping the future of the interaction between brands, companies, and government entities. It is also important to understand that technological advancements are not only useful for flourishing businesses but also for the citizens. Illustratively, the direct benefit transfer schemes in Gujarat suffered from inefficiencies in meeting the citizens' expectations. Effective utilisation of the right technology could have tackled the situation efficiently, ultimately benefitting the citizens. Moreover, without the right technology resources are squandered, hindering effective implementation, and yielding subpar outcomes for citizens.

In the current Indian scenario, the technological framework is dragging its feet while being compared to other jurisdictions such as China. China has taken a considerable lead in the AI landscape. Some issues that stand out in this regard are the lags in infrastructure development and research funding. At the same time, it is necessary to curb issues affecting data-sharing models, data ownership rights, and data misuse. Therefore, a well-defined marketplace for data can act as a solution to these issues. Such a marketplace would allow companies to ethically share anonymized personal data and non-personal data to promote AI innovation.

It is at this stage, important to emphasise that a framework for an effective AI landscape or to thrive in the digital era requires a systemic overhaul. While data is the soul of the digital era, other regimes are also required to be adequately transformed to work in synergy with the digital framework of India. For instance, intellectual property (IP) laws have a significant involvement with personal or non-personal data and AI. In AI systems multiple litigations have surfaced in 2023 based on IP infringements. This puts a question mark on the current IP regime and its adequacy to tackle AI issues. Hence, for an effective model for non-personal data, it is

necessary to involve all the stakeholders in the discussion. This would involve, among others, economists and relevant organisations. Additionally, the relevant legal framework, such as the IP laws, needs to evolve. It might also be worthwhile to look into a new framework to regulate AI activities rather than relying only on the Information Technology Act of 2021.

## **QUESTIONS**

- 1. Should welfare considerations in new technology and regulation prioritize just expanding access or also include redistribution, especially for marginalized groups?**

**Answer:** While economists often emphasize the absence of absolute truths, historical patterns provide valuable insights. The idea that India is inherently different and requires unique economic laws is challenged, such claims have been made by many countries throughout history. The evolution of markets over the past three centuries, emphasizes the need for policymakers to understand the current situation in India within this broader historical context. Additionally, while some may view low prices or free products as indicators of consumer welfare, a more nuanced examination is needed, considering the broader ecosystem of sellers and producers. Moreover, the economic basis of certain policies, such as the promotion of small artisans through initiatives like ONBC (presumably the One Nation One Business Card initiative) should be challenged. Lastly, the policymakers must refrain from viewing India's circumstances as unique. Instead, a mindset of cautious experimentation, learning from the outcomes of new policies and adjusting them over time should be adapted.

- 2. What is going to happen in the context of technology regulation, non-personal data regulation?**

**Answer:** There are various challenges and shortcomings in the realm of inclusivity and technology. The need for internal inclusivity initiatives within the company despite its progressive ethos must be acknowledged. The historical exclusionary nature of technology, emphasizing the divide between those with access and those without, particularly evident during the pandemic must be understood. Access to technology and know-how emerge as critical factors, while understanding the pervasive biases in data, particularly concerning AI applications is a shortcoming. Illustratively, skewed data



sets affect outcomes, such as the lack of diverse genetic data in medical research and gender disparities in loan distribution. Proactive measures are required to address biases, looking into the establishment of ethical codes or legal frameworks to guide decision-making and mitigate biases in AI models might be a fruitful activity. At the same time the complexity of the issue cannot be ignored, especially the challenges of identifying and rectifying biases in data and AI systems once deployed.

**3. In cases where community welfare surpasses individual rights, should the state intervene to mandate data sharing, particularly in the context of intellectual property rights and AI?**

**Answer:** There is a complex interplay between AI, intellectual property rights (IPR), and welfare considerations. The necessity of human oversight in AI systems emphasizes the ongoing relevance of human involvement despite technological advancements. Illustratively, AI now also has a role in our judicial system and sentencing procedures. In such situations, the intervention of a human judge is of utmost importance. Even with compulsory licensing in AI, it's a double-edged sword, particularly in terms of welfare implications. AI-generated works potentially infringe on copyright, highlighting the need for legal clarity and protection. Welfare considerations must factor into decisions regarding data sharing and IPR, with a nuanced approach necessary to navigate the complexities of different contexts. Therefore, the maximization of welfare hinges on understanding the diverse interactions between non-personal data and various legal frameworks.

**4. How can we enhance the proposed framework, such as the Kris Gopalakrishnan Committee Report?**

**Answer:** Data markets in India are small but not failing, but they need a boost to grow. Early e-commerce is a good example here, as it took off after big investments. An "inflection point," like a major event or initiative, could help data markets too. This inflection point can come either from the government or private players in the market. In addition to this, it might be worthwhile to look into the Data Empowerment and Protection Architecture (DEPA) to tackle issues related to data sharing and liability. It can help create a secure environment for companies to share data as they currently feel a stench of fear while doing so. The DEPA, powered by confidential computing technology, ensures data remains secure and inaccessible to unauthorized parties,

enabling safe data sharing. This approach could foster innovation by allowing the amalgamation of multiple datasets to create unique AI solutions in India. Lastly, there can also be a confidential clean room framework for data sharing. These clean rooms would comprise training and inference cycles. The key idea is to remove personal data elements before the inference cycle, ensuring privacy protection.

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