IMPERATIVE FOR REGULATING NON-PERSONAL DATA: A CRITICAL ANALYSIS

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ABSTRACT

With the explosive growth of technology, data has emerged as one of the cornerstones that drives innovation, economic development and societal change. India, the world's most populated country, will be at the forefront of data processing. However, this rapid proliferation of technology has many challenges that must be addressed and regulated accordingly. The enactment of the Digital Personal Data Protection Act 2023 marks a significant step in regulating the processing of personal data. However, the rapid evolution of technology and the increasing reliance on vast reserves of non-personal data for decision-making across various sectors necessitate a broader reevaluation of data protection frameworks. With the rapid advancement of AI, this will only become more difficult, given the unpredictable nature of AI. The proliferation of artificial intelligence technologies has dramatically transformed the dynamics of data processing within the digital domain, presenting formidable challenges to regulatory structures globally. India is positioned as a significant player in data processing of its extensive population and rapidly expanding technological sector therefore the imperative to regulating data processing activities, especially within the AI context. The framework regulating data processing is limited and does not include multiple facets within its scope. In India, the current framework does not regulate non-personal data. Most of the data being processed by Big Tech comes under this category. Different nations have taken different approaches to regulating the same, from regulation to liberalisation.

Since data is now one of the most valuable assets in the world, its regulation is paramount in safeguarding Indian sovereign and commercial interests. This article explores the critical gaps in traditional data protection laws that predominantly focus on personal data, leaving non-personal data under-regulated. The economic risks and broader societal implications of such oversight emphasise the need for a clear definition of data and an effective

regulation of non-personal data. By analysing the value, application, and challenges associated with both personal and non-personal data, this article argues for a hybrid regulatory approach that includes data localisation criteria and explicit disclosures, aiming to enhance transparency and accountability in data processing while fostering a conducive environment for foreign direct investment and economic growth.

Keywords: Artificial Intelligence, Data processing, Non-Personal data.

1. Introduction

Data protection frameworks and regulations have revolved around protecting personal data, in the case of K.S. Puttaswamy (Retd.) & Anr. Vs Union of India & Ors, they are referred to as the Right to Privacy judgement. This decision asserts that the right to privacy is protected as a fundamental right under Articles 14, 19, and 21 of the Constitution of India.[1]

Abiding by the same, the Digital Personal Data Protection Act 2023 was enacted to protect and regulate the processing of personal data. However, with the pace at which technology advances, a broader reevaluation is required to access what constitutes valuable and sensitive data. Currently, the digital economy relies on vast reserves of non-personal data, including anonymised personal datasets and unstructured data that drive decision-making in various sectors such as healthcare, advertisement, financial services, etc. While non-personal, these datasets are pivotal for artificial intelligence systems and machine learning algorithms that feed on big data to optimise processes, predict patterns, and automate decisions.[2] The evolution of how datasets are utilised and the dominance of Big Tech has brought to light significant gaps in traditional data protection laws, which predominantly focus on personal data. Non-personal data, at this juncture, remains under-regulated, leaving a critical area of the digital economy susceptible to exploitation. This oversight poses not only economic risks but also broader societal implications, as the power dynamics of data accessibility and control continue to favour large corporations over smaller entities and individuals.

2. Definition of Data:

Establishing a clear data definition is a fundamental prerequisite for effectively regulating data

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[1] Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors (2017) 10 SCC 1

[2] Finck, M. and Pallas, F., 2020. They who must not be identified—distinguishing personal from non-personal data under the GDPR. *International Data Privacy Law*, *10*(1), pp.11-36.

processing activities. In this context, the new Digital Personal Data Protection Act of 2023 regulates a significant part of data regulation. The Digital Personal Data Protection Act defines the rights and obligations of citizens and data fiduciaries. The Act aims to regulate the processing of digital personal data to uphold an individual's right to privacy while also considering the lawful need for data processing and any incidental uses.

In a modernised world governed by technology, data computing is the most essential aspect that technology makes the most use of. Data is the cornerstone of technology. Data refers to information translated into an efficient format for processing or movement.[3]

However, from an Indian legislative context, the DPDPA provides the appropriate classification. According to Section 2 Clause B of The Digital Personal Data Protection Act, 2023, Data represents information that can be communicated, interpreted, or processed by humans or automated systems, including facts, concepts, opinions, or instructions.[4]

3. Value, Application and Challenges Associated with Data.

The advancement of digital technologies has brought about an era where personal and non-personal data has become one of the most valuable assets for businesses, researchers, and governments.[5] Due to the intrinsic value of data and its implication in the digital economy, the volume, variety, and velocity of data being collected and processed has surged significantly. On a global scale, about 2.5 quintillion bytes of data are generated daily, with 90 per cent of the world's data being produced in the past few years.[6] Big Data and analytics have revolutionised how organisations derive insights and make decisions. Big Data, characterised by its volume, variety, and velocity, encompasses vast amounts of structured and unstructured data generated from diverse sources such as social media, sensors, and IoT devices.

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[3] Vaughan, J. (2019) *What is data? - definition from whatis.com*, *Data Management*. Available at: https://www.techtarget.com/searchdatamanagement/definition/data#:~:text=In%20computing%2C%20data%20is%20information,subject%20or%20a%20plural%20subject. (Accessed: 1 January 2024).
[4] Section 2(b) The Digital Personal Data Protection Act, 2023
[5] *The world's most valuable resource is no longer oil, but Data* (2017) *The Economist*. Available at: https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data (Accessed: 01 January 2024).
[6] Bernard Marr, How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read, Forbes (May 21, 2018), available at https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=5bd8d4e460ba (accessed Apr. 10, 2024).

Big Tech's use of analytics tools enables them to extract meaningful patterns, correlations, and trends from unstructured data, optimising processes, enhancing decision-making, and gaining competitive advantages.[7] Big Data's value lies in its ability to uncover insights and drive innovation across various domains. Firstly, the volume of data enables organisations to discern correlations and patterns that may not be apparent in smaller datasets, thereby enhancing predictive capabilities and decision-making accuracy. [8]Secondly, the variety of data sources facilitates data fusion, enriching analyses and providing comprehensive insights into complex phenomena. Finally, the velocity of data processing enables real-time monitoring, allowing organisations to respond swiftly to market dynamics and emerging trends.[9]

3.1. Use of Artificial Intelligence in Data Processing.

Artificial Intelligence can be distinguished into three types: Artificial Narrow Intelligence, Artificial General Intelligence, and Artificial Super Intelligence(ASI).[10] The use of ASI is a cause for concern because of its super intelligence capabilities and ability to derive meaning from unstructured data.

Machine learning algorithms, powered by Big Data, play a pivotal role in deriving actionable insights and driving intelligent decision-making. These algorithms leverage large datasets to identify patterns, learn from experience, and make predictions without explicit programming.[11] As organisations accumulate more data, machine learning algorithms become increasingly sophisticated, enabling them to uncover nuanced insights and deliver personalised experiences. The pervasive data collection and analysis, often called datafication, have profound implications for individuals, businesses, and society.[12]

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[7] SAS, https://www.sas.com/en_in/insights/analytics/big-data-analytics.html (last visited Apr. 11, 2024).
[8] Eller College of Management, "7 Big Data Benefits That Can Help Improve Decision Making," at University of Arizona, available at https://eller.arizona.edu/ (accessed April 11, 2024).
[9] McKinsey & Company, "Achieving Business Impact with Data," available at https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Analytics/Our%20Insights/Achieving%20business%20impact%20with%20data/Achieving-business-impact-with-data_FINAL.PDF (accessed April 11, 2024).
[10] Escott, E. (2017) *What are the 3 types of ai? A guide to narrow, general, and Super Artificial Intelligence*, *Codebots*. Available at: https://codebots.com/artificial-intelligence/the-3-types-of-ai-is-the-third-even-possible (Accessed: 10 January 2024).
[11] Big Data & Machine Learning (How Do They Relate?), WEKA (Oct. 12, 2021), available at https://www.weka.io/blog/big-data-machine-learning (accessed Apr. 14, 2024).
[12] Randy Bean, How Big Data Is Empowering AI and Machine Learning at Scale, MIT Sloan Management Review (May 8, 2017), available at https://sloanreview.mit.edu/article/how-big-data-is-empowering-ai-and-machine-learning-at-scale/ (accessed Apr. 14, 2024).

4. Regulation of Non-Personal Data.

In India, there is no clear legislative definition for non-personal data; however, under the Ministry of Electronics and Information Technology, a Report by the Committee of Experts on Non-Personal Data Governance Framework Dated 16th December 2020 has formulated a definition for non-personal data. According to the report, "When the data is not Personal Data or the data is without any Personally Identifiable Information, it is considered Non-Personal Data".[13]

Non-personal data encompasses information that does not directly identify individuals. The Committee defines Non-Personal Data based on its origins, including data unrelated to identifiable individuals and anonymised data. Various aspects and examples of Non-Personal Data include data collected by government agencies in public spaces and private data collected by companies within their facilities.[14]

According to the REGULATION (EU) 2018/1807 on a framework for the free flow of non-personal data, the European Union emphasises the need for the free flow of non-personal data. Before this regulation, several data localisations were incumbent on organisations about storing and processing non-personal data. The current regulation removes such data localisation requirements and ensures that authorities may access data for regulatory control.[15] This regulation will positively impact businesses and organisations with average or small market capital.

The Committee of Experts on Non-Personal Data Governance Framework report has followed the same approach. However, the report's recommendations still needed to be implemented. This can be attributed to the fact that currently India ranks 63 out of 190 countries in the "Ease of Doing Business Ranking".[16] Implementation of these recommendations would dissuade FDI investments from tech companies. The regulation emphasises the free flow of non-personal

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[13] Ministry of Electronics and Information Technology, Report by the Committee of Experts on Non-Personal Data Governance Framework (Dec. 16, 2020), available at https://ourgovdotin.files.wordpress.com/2020/12/revised-report-kris-gopalakrishnan-committee-report-on-non-personal-data-governance-framework.pdf (accessed Apr. 6, 2024).
[14] *ibid*
[15] Ministry of Digital Affairs, The Regulation for the Free Flow of Non-Personal Data in the European Union, available at https://www.gov.pl/web/digitalization/the-regulation-for-the-free-flow-of-non-personal-data-in-the-european-union (accessed Apr. 11, 2024).
[16] Embassy of India in the Netherlands, Ease of Doing Business in India, available at https://indianembassynetherlands.gov.in/page/ease-of-doing-business-in-india/# (accessed Apr. 10, 2024).

data, and foreign entities which would like to set up businesses in India would not like to share structured or unstructured databases with the government because of the monetary value associated with the data structures. India's economy is currently on an upward trajectory with optimistic growth projections, making it a desirable foreign investment destination. This can be attested to the fact that while other major economies are slowing down, India is one of the few countries projected to have positive GDP growth over the next few decades. This is because the country presents significant opportunities for market expansion, M&A activity, and the expansion of the scope of various supply chains, thanks to its large and growing market, young workforce, and diverse macroeconomic fundamentals. India's demographics are favourable, as it is one of the largest and youngest workforces in the world. India has a population of over 600 million individuals aged between 18 and 35; among them, 65 per cent are under 35. This advantage is expected to continue until 2055-56 and will peak around 2041, when the share of the working-age population, which ranges from 20 to 59 years old, is anticipated to reach 59 per cent [17]. Therefore, the government has currently emphasised the need to increase FDI but has not implemented measures to dissuade FDI.

5. The Way Forward.

Given the current scenario, policymakers need to adopt a hybrid approach. To regulate non-personal data, it is advisable to establish a structure that includes data localisation criteria and disclosures regarding the processing of said data. This mechanism must require explicit disclosure of intended purposes for non-personal data, improving transparency and accountability in data processing procedures.

Data collected from India need to be processed in India; this can only be achieved through data localisation requirements and a regulatory framework that ensures adequate disclosure of how non-personal data is processed and why it is processed the way it is. Under Indian laws, in April of 2018, the Reserve Bank of India issued an order asking all payment providers to store all information pertaining to payment systems on servers located in India. The Reserve Bank of India (RBI) provided enterprises with a window of opportunity of six months to comply with this order. According to a circular titled "Storage of Payment System Data," payment systems

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[17] Tyagi, A. and Malin, S. (2023) *India's demographic dividend: The key to unlocking its global ambitions*, *India's Demographic Dividend: The Key to Unlocking Its Global Ambitions | S&P Global*. Available at: https://www.spglobal.com/en/research-insights/featured/special-editorial/look-forward/india-s-demographic-dividend-the-key-to-unlocking-its-global-ambitions (Accessed: 05 February 2024).

providers were mandated to store all of their data in systems under the jurisdiction of India's territorial authorities. The data localisation requirement is for the following categories of financial data: end-to-end transaction information, any details relating to payments or settlements that are sent, gathered, or processed as part of a payment message or instruction, customer information like name, Permanent Account Numbers (PAN) Aadhar card numbers, payment sensitive information like beneficiary and customer account information, login credentials like one-time passwords and PINs, Transaction information is a crucial detail that RBI guidelines must protect[18].

This regulation is put in place because of the significant risk associated with the processing of financial data. Although anonymised, such data can significantly impact the Indian economic landscape. Similarly, non-personal data can also significantly affect the Indian economy. Increasing the regulations for processing non-personal data will only aid in protecting Indian economic and social interests.

Conclusion

The discourse on data protection frameworks, spurred by landmark judgments and legislative acts such as the Right to Privacy judgment (K.S. Puttaswamy (Retd.) & Anr. vs Union of India & Ors) and the Digital Personal Data Protection Act 2023 in India, highlights the evolving landscape of data regulation amidst technological advancements. There is a pressing need to broaden the scope of data protection beyond personal data, addressing the vast reserves of non-personal data that fuel AI systems and machine learning algorithms across various sectors. Despite the critical role of non-personal data in the digital economy, it remains under-regulated, posing economic and societal risks. Establishing a clear data definition, including non-personal data, is essential for effective regulation. The exponential growth in data generation and the use of Big Data and AI in processing this data emphasises its invaluable role in innovation and decision-making. However, the lack of comprehensive regulation around non-personal data, as evidenced in India's cautious approach towards non-personal data governance to avoid deterring foreign investment, emphasises the need for a balanced regulatory framework. This framework should ensure transparency, accountability, and safeguarding of economic and

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[18] Singhania, R. (2023) *All about data localisation in India, IR Global*. Available at: https://irglobal.com/article/all-about-data-localisation-in-india-2/ (Accessed: 12 March 2024).

social interests through mechanisms like data localisation while fostering an environment conducive to FDI and technological progress.