

EVENT REPORT

WEBINAR ON OPTIMAL GOVERNANCE OF NON-PERSONAL DATA

Tuesday | 11 August 2020 | 15:00-17:00 hours (India time)



*First row (from left to right): Geeta Gouri, Amar Patnaik, Ritesh Pandey
Second row (from left to right): Gowree Gokhale, B.N. Srikrishna, Bipul Chatterjee*

1. Objective of the Webinar

1.1. The Committee of Experts on Non-Personal Data (NPD) Governance Framework headed by Mr Kris Gopalakrishnan recently released its report (Report¹). The Report aims to unlock the immense potential of NPD in creating social, public, and economic value for citizens and communities in India.

1.2. To deliberate on finer nuances of the Report and to seek inputs on CUTS draft comments on the Report, CUTS International organised a webinar, with prominent policy makers, subject experts, Members of Parliament, etc. Following issues were covered in the webinar –

1.2.1. How can we address regulatory overlaps between NPD governance framework, Personal Data Protection Bill 2019, and other existing and upcoming regulations in the areas of e-commerce, competition, and consumer protection?

¹ <https://www.mygov.in/task/share-your-inputs-draft-non-personal-data-governance-framework/>

- 1.2.2. What frameworks for data sharing could be adopted in the Indian context to promote digital economy in the light of growing concerns of unjustified mandatory data sharing and surveillance state?
- 1.2.3. What measures can be taken to protect the interest of data principals, empower them, and ensure adequate grievance redress and resolution mechanisms?
- 1.3. The webinar began with a brief presentation by CUTS International of its preliminary comments on the Report. This was followed by a panel discussion.
- 1.4. The objective of the panel discussion was to come out with a forward-looking agenda for the benefit of Indian economy and its people. The discussion was moderated by **Bipul Chatterjee**, Executive Director, CUTS International. The panellists were–
 - 1.4.1. **B.N Srikrishna**, Former Judge, Supreme Court of India, and Chair, Committee of Experts on Data Protection
 - 1.4.2. **Amar Patnaik**, Member of Parliament (Rajya Sabha) and Member, Joint Parliamentary Committee on Personal Data Protection Bill, 2019 (PDPB)
 - 1.4.3. **Geeta Gouri**, Former Member, Competition Commission of India
 - 1.4.4. **Ritesh Pandey**, Member of Parliament (Lok Sabha) and Member, Joint Parliamentary Committee on PDPB
 - 1.4.5. **Gowree Gokhale**, Partner, Nishith Desai Associates
- 1.5. The webinar witnessed participation from close to 130 participants from across the world, representing different stakeholder groups, including, policy makers and influencers, regulators, industry, academia, think tanks, civil society, and media.²

² Select media coverage of the webinar is available at <https://www.livemint.com/news/india/non-personal-data-protection-law-should-focus-on-citizens-rights-says-b-n-srikrishna-11597169194508.html>, <https://www.thehindubusinessline.com/economy/legal-experts-oppose-govt-committee-report-on-non-personal-data/article32344856.ece>, <https://www.apnnews.com/it-is-pre-mature-to-regulate-non-personal-data-let-the-data-market-develop-first-cuts-international/>, <https://pageoneasia.com/technology/cuts-international-cautions-against-pre-mature-regulation-of-non-personal-data>, and <http://www.smartgovernance.in/pros-and-cons-of-report-on-non-personal-data-discussed/>

2. Summary of the Panel Discussion

The overarching theme that emerged from the Panel Discussion was - this is not the time for regulation or for a regulator. Let the market evolve. If at all intervention is needed, on the limited point of public good with very strict structures; perhaps consider a policy (not a law, just a vision statement or something).

2.1. Conceptual ambiguities and overlaps

2.1.1. The intent of the Report is forward-looking and it has initiated discussions on some underlying issues of digital economy. However, the overall objective and vision of the Report is ambiguous. Several mechanisms and concepts are either overlapping with other regulatory frameworks or are simply vague.

2.1.2. **B.N Srikrishna** highlighted that the Report does not have a clear term of reference. Ambiguities persist with respect to the meaning and wide scope of NPD; need to provide consent for anonymisation of data; distinction between private and public data; rights of individuals over data; import and implications of community data; obligations of data principals; and transfer of NPD across the borders. He also pointed out that the nature of rights over personal data and NPD may be different and called for a bright-line test for distinguishing different types of data.

2.1.3. A fundamental tension exists between aim of the Report and intent of the PDPB, when it comes to protection of data principals, as pointed out by **Ritesh Pandey**. He stated that the Report does not clarify where does inferred data end and non-personal data begin. Further, he highlighted that the Report treats community as a monolithic entity and does not consider intersectional identities of people in Indian community. Pandey also pointed out ambiguities around meaning of data custodians and data trustees. Inability to clearly establish identity of data trustees may adversely impact interests of data principals. **Amar Patnaik** also highlighted ambiguities related to principal-agent relationship, information asymmetry, standard of anonymisation, in the Report.

2.2. Need and scope of regulation

2.2.1. While the Report has attempted to lay down some broad principles, it might be premature to regulate data markets at present, without discounting the need to have broad policy framework. Regulators such as the Competition Commission of India (CCI) may be well placed to address key concerns that may arise.

2.2.2. **Amar Patnaik** cautioned against the need to over regulate the data market, and called for light touch regulation or self-regulation to unlock the value of data. He pointed out that government should focus on developing market at this stage, which includes, ensuring transparency, and reducing information asymmetry. Moreover, the government should pursue open data access policies to enable public to benefit from raw data or metadata, Data should also be used to drive policy decisions and foster evidence-based policy making. He said that there is a need to spend more time to develop proper data markets and think about regulation later.

2.2.3. Patnaik, however, pointed out that CCI may not be in a position to address larger issues and take care of a situation when competition is not a norm but co-operation is, particularly in terms of data sharing. He also raised concerns about conflicts of jurisdiction between different sectoral and sector-neutral regulators and posited that a Memorandum of Understanding to resolve conflicts between different regulators may not be effective.

2.2.4. Arguing against the need for more regulators, **Geeta Gouri** question the need for NPD regulation at this stage. She pointed out that there is a greater tendency of false positives and it might be wise to wait. Once broad rules are set, the CCI should look at entry barriers. For this, the competition law needs to be tweaked, as it has only been amended recently for product markets and not for platform and data markets.³ The CCI needs to build its capacity and expertise. PDPB would be adequate to deal with concerns and risks arising from deanonymisation of data.

2.2.5. To review the case for regulation, **Gowree Gokhale** highlighted the need to understand the problem sought to be resolved. She pointed out that problems could either be – humanity, security and public good related or artificially created/ perceived. There is a need to have a clear policy or a vision statement to understand the problem which is intended to be addressed. For instance, if the objective is to ensure access and availability to data, then issues related to ownership and intellectual property of data may not require focus at this stage. If it is felt that for a public good, guidance is required in the interim, only on that limited point, a policy or a vision statement could be introduced. However, efforts could be made towards standardisation of data sets which could help leverage value of data, over time.

³ Suggestions have been made in CUTS-CIRC submission to the Competition Law Review Committee in this regard, at https://cuts-ccier.org/pdf/CUTS-CIRC_Submission_to_Competition_Law_Review_Committee.pdf and CUTS comments on draft Competition (Amendment) Bill 2020, at <https://cuts-ccier.org/pdf/cuts-comments-on-draft-competition-amendment-bill-2020.pdf>

- 2.2.6. Similarly, **Ritesh Pandey** stated that there was no well-established and demonstrative need as yet for NPD regulation. He noted that regulations that are broad brush and lack nuance may be counter-productive. The PDPB focused on protecting privacy of data principals, is sufficient at this stage.
- 2.2.7. At an appropriate time, to design optimal regulations, benefit from expertise of CCI and Indian tech industry could be taken. Pandey highlighted that the proposed NPD framework may benefit those who have the resources to purchase data. It may consequently stifle competition and harm end user. Therefore, the NPD regulation, when developed, should focus on ensuring equity by design and correcting power imbalance. It should have clear goals and vision, avoid ambiguities, address complex power asymmetries, and foster level playing field.
- 2.2.8. Suggesting that the Report could be a good food for thought, **B.N. Srikrishna** pointed out that there no need to have an NPD regulator as yet. Such regulator should be introduced when there is a risk of market resulting in inequity. He highlighted that regulation should flow from citizens' rights and not the other way round, and suggested that he fails to see why principles of competition law cannot be applied to data markets through suitable amendment and/or creative thinking, to address issues which may be arising. **Bipul Chatterjee** suggested that an overarching National Data Policy can be formulated from where all data related regulation such as personal, non-personal, or other sectors, may flow, at an appropriate time.

2.3. Data sharing and its mechanics

- 2.3.1. The Report lays stress on the need to leverage economic value of data, for which it suggests mandatory data sharing as a key measure.
- 2.3.2. Agreeing with the importance to realise potential of data, **Amar Patnaik** pointed out that monetisation of data is essential in this regard. This is also important for appropriately collecting and capturing data and consequent development of data market, which is currently in its infancy. He highlighted that availability of raw data in public domain is important to ensure development of data markets. System of incentives and disincentives to improve the value of raw data will drive data economy and innovation. Patnaik argued in favour of allowing markets to develop and discovering price of data, and suggested that this is a natural extension of section 91(1) of the PDPB.
- 2.3.3. **Geeta Gouri** pointed out that the Report confuses data markets with platform markets. A platform market is a platform with markets on either side and collects a lot of private data as a result of deployment of algorithms. While

utilisation of algorithms has created their own abuses, and need correction, this is separate from the requirement to foster data markets. The role of a data aggregator is different from that of a platform. It is like any other entity in the market which buys and sells data.

2.3.4. She pointed out while platforms collect a lot of data, they may not have incentives to create a data market, as it is expensive to build a data market, and they may not like to part with data. Consequently, anti-trust remedies like prohibition of data sharing may not suit Indian conditions, and there is a need to allow data portability, sharing and ensure data neutrality, to save time and efforts of collecting data. It is therefore necessary to allow data markets to be developed. Gouri further pointed out that data is quasi-public. It's non-rival but not non-exclusive, as it is possible to decide who will have access to data and the time period of access. Thus, it cannot be called as essential facility (other than data collected by government for specific purposes).

2.3.5. There is a need to work on means of renting, selling, and pricing data. A two-part pricing scheme, with components like membership fee and user fee, could be thought of, she pointed out. The conditions of licensing of data can also be worked out, with different kinds of pricing. In such situation, a universal right for the government to obtain data may not be essential as licensing conditions could carve out exceptions for emergencies situations.

2.3.6. Rather than mandating data sharing, **Gowree Gokhale** pointed out that companies could be motivated to share data for a larger public purpose, such as for achieving environment, social, and governance goals, something which investors also value. She pointed out that it is too early for mandating data sharing as this may also adversely impact Indian start-ups and unicorns. Thus, while there is a need to create a competitive environment, but it is too early to interfere and prescribe mandatory data sharing for economic benefit. However, for solving humanitarian problems, sharing may be considered.

2.3.7. She also touched on the issue of data enrichment and pointed out that data selling may lead to deanonymisation. **B.N. Srikrishna** also highlighted that the NPD framework should avoid providing a blank cheque to the government for making sharing of data mandatory.

2.4. Empowering data principals

2.4.1. The Report draws upon the PDPB to empower data principals. However, it fails to lay down appropriate grievance redress mechanisms for data principals, or

principles which data businesses will need to comply with while collecting and sharing data.⁴

- 2.4.2. **Ritesh Pandey** pointed out that in its current formulation, the Report runs the risk of resulting in tangible harms to data principals and collective harms to committees, as a result of misuse of NPD. A Pandora's box of harm is opened up owing to the existing ambiguities in the Report. Appropriate grievance redress and recourse mechanisms need to be designed.
- 2.4.3. Recalling the triple principle of legitimacy, necessity, and proportionality from the Puttaswamy judgment, **B.N. Srikrishna** pointed out that it will need to be applied carefully in case of NPD as the right to NPD may be originating from Article 21 of the Constitution.
- 2.4.4. Justifying the need for a balancing act and focusing on preventing harm, **Gowree Gokhale** suggested that the NPD framework needs to be fair to both individuals and businesses and acknowledge their symbiotic relationship rather than viewing one against the other.

2.5. Key messages

- 2.5.1. As the data market in India is at a nascent stage, there is no immediate need for regulation of NPD. The optimal regulatory approach would be to first let the market evolve and then regulate it. To leverage the potential of data, it needs to be valued.
- 2.5.2. There is a need to untangle the distinctions between data markets and platform markets. The CCI needs to build its capacity and expertise to review entry barriers in data and platform markets. Appropriate amendment to the competition regulation may be needed.
- 2.5.3. There is a need to explicate the concepts around different data types, data sharing, role of various entities in data markets and fixing accountability, to avoid stifling of innovation.
- 2.5.4. When appropriate, regulation of NPD should be citizen centric and focus on reducing inequities. It should aim to achieve equity by design, correct power imbalance, focus on preventing of harm by misuse of data, and ensuring appropriate grievance redress.

⁴ Some suggestions in this regard have been made in CUTS comments to PDPB, available at <https://cuts-ccier.org/pdf/submission-pdpb-2019.pdf>