

Data Sharing of Non-Personal Data- A plausible redistribution at play

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The longer version of the paper titled, 'Exploring the Constitutional Tenability of Data Sharing Policies', laid down one way to look at the constitutional arguments that may be applied to the recommendations of the Draft Non Personal Data Committee Report, 2020, relating to community ownership of data and data sharing methods. It also provided a global and broader perspective to situate the idea. In this policy brief, I summarise the arguments and focus on the aspects that the framers of the law must keep in mind to balance rights and further the objectives of equitable distribution of data.

Constitutionalism for Data

The current societal development is marked by datafication, data proliferation and conversations surrounding it. The Rights discourse is also undergoing an interesting churn and attenuation so that we can be assured our rights and freedoms, extant or new, within or without technology. One such conversation relates to the questions of equity and stakes that surround Data, its flows, concentration and accumulation. This is a recognition that arises not just in the domain of competition law but also as a broader concern for international trade and domestic industrial development at the level of states and regions. It is to acknowledge, think about and devise policy strategies from this perspective that data is often characterised as a resource. There are many ways to look at data as a resource such as by employing a political economy lensⁱ captured in the proposition that “*the world economy is transitioning from a phase of container shipping to one of packet switching, where the largest and most important cross-border flows are data not physical goods*” or viewing data as a ‘*factor of production*’ and a ‘*new economic resource*’.ⁱⁱ What these ideas bring to fore is the lack of a corresponding discourse around economic rights which results in an uncritical acceptance of ‘free’ data outflows, and data hoarding as the most remunerative business model for most large digital companies. To revisit the status quo, states are mulling over various strategies and developing policy documents to regulate and tap into this resource. Two examples of emerging policy

prescriptions are data sharing and community ownership of data. Jurisdictions such as European Unionⁱⁱⁱ and India^{iv} are considering various levels of access to private data for public use. Whenever the conflicts arising out of technological use have implicated constitutional norms, constitutions have been robust to answer such questions. We seek to discuss here one such way of looking at the governance regimes surrounding data. The regulatory arrangements highlighted may beget constitutional questions because of the shift in perception of data, from a private resource to a public or common one. Further, such access to data and ownership regime may be opposed on the touchstone of infringement of the fundamental right to carry out trade and practice profession as the *de facto* holders of data may consider the aforementioned policy prescriptions an unreasonable intrusion into the business practices.^v The exposition aims to read Article 39 (b) along with Article 31C of the Constitution of India (Constitution) to determine the constitutional consideration of data sharing policies being envisaged in India and how they will further the same, once enacted into law.

Distributive justice and the Constitution of India

There is an increased attention and realisation that civil-political and socio-economic rights do not exist in silos, neither are they mutually exclusive and nor are they hierarchically distributed.^{vi} These rights form the crux of governance and protected freedoms for

citizens. They have also been enshrined in Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) of the Constitution. While Part III rights and freedoms are justiciable, Part IV principles are typically not. A suggested reason for this ordering is the accommodation and compromise that these principles evince which should necessarily render them non-justiciable.^{vii} However, the Indian constitutional development is rather telling, chartering a course of the balance between the two and witnessing several phases of the inter-relationship.^{viii} This stemmed from the classic conundrum of the use, tools of interpretation and the relevance of constitutional text (Part IV) which could not be enforced or be brought before the courts.^{ix} Surely, the Constituent Assembly had greater plans in mind. This classic discussion also arose at the inception of this distinction, during the Constitutional Assembly Debates.

The aspirations were summarised by Dr B.R. Ambedkar as he explained its nature, *"If it is said that the Directive Principle have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law."*^x

Several members and proponents defined this Part as *"the essence of the Constitution which give us a target, they place before us our aim and we shall do all that we can to have this aim satisfied."*^{xi} Further, its role in the legislative and executive actions of the State required the *"political machinery in the exercise of power to respect these instruments of instructions."*^{xii} They were also held to be *"fundamental in the governance of the country and it is the duty of the State to apply the principles in making laws."*^{xiii}

During the drafting of the Constitution, there were also widespread discussions related to the provision of a charter for an economic democracy in the Constitution, in accordance with the Objectives Resolution which sought to assure political, social and economic justice to the people of India.^{xiv} It was also clarified, time and again, by the drafters that the content of economic democracy can only be laid down by the Parliament.^{xv} At the same time, the Constituent Assembly was aware of the class divisions that had debilitated the

country and stringent measures that were needed to deal with the same, including constitutional ones.

Throughout the framing of the Constitution, even up until its final revision, some members wished to provide the basis of economic justice as fundamental rights. To that end, Dr B.R. Ambedkar laid down the object in framing this Constitution as two-fold:^{xvi} *"(i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever, it is in power, shall strive to bring about economic democracy."* When challenged if the Constitution furthered the aspirations of a true democracy in India, Dr B. R. Ambedkar emphatically made reference to Article 39 as an example of socialist principles governing the State in its aims to make policies and laws.^{xvii} There were various amendments which were suggested regarding its scope and mandate, in the hope of realising the ideal of economic justice, the most emphatic of which was forwarded by Mr KT Shah. He proposed a change to spell out the content of the article by laying down the type of resources to be protected and the method of care. He expressed that the article should provide for community ownership of natural resources such as mines, mineral wealth, forests, rivers and flowing water, seas, which is to be enforced through the State or state corporations.^{xviii}

To the more narrower term of 'natural resources', a change for which the amendment was sought to be made, Dr B.R. Ambedkar indicated his reservation as the original draft encompassed broader language which included the intent of the suggested amendment.^{xix} Finally, the proposal was not accepted and Article 39 (b) was retained as seen in its current form. It provides;

The State shall, in particular, direct its policy towards securing—

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

Modern jurisprudential developments in India have not shied away from affirming the legislative categorisation of wealth (through taxes),^{xx} land,^{xxi} buses, motor vehicles and contract carriages,^{xxii} coke oven plants and coal mines,^{xxiii} electrical energy^{xxiv} and

spectrum^{xxv} as 'material resources'. Further, the redistribution of a resource from private ownership to a community has also been affirmed as has been the idea of 'distribution' to be broad enough to capture different ownership structures and not just State ownership.^{xxvi} However, these policies were a site of contestation due to its apparent conflict with many fundamental rights such as the freedom to carry out trade and the right to equality. Amidst the political whirlwind of that era, Article 31C was added to the Constitution by the Constitution (Twenty Fifth Amendment) Act, 1972^{xxvii} which sought to shield laws framed to further redistribution from such challenges. The relevant part provides;

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19;

It was regarded as a way to enforce Article 39 (b) and (c) in the form of regulation of a fundamental right such as Article 19 (1) (g) [freedom to practice profession, carry out any occupation, trade or business], within the limits of Article 19 (6) [reasonable restriction].^{xxviii} However, further developments clarified that it neither precluded judicial review nor provided an unfettered exemption. Instead, whenever challenged a judicial enquiry would ensue to understand “*a real and substantial connection between the law and the Directive Principles [Article 39 (b), (c)]. To determine whether a law satisfies this test, the court would have to examine the pith and substance, the true nature and character of the law as also its design and the subject matter dealt with by it together with its object and scope. The dominant object of the law must be to give effect to the Directive Principle, to be accorded protection under the [amended] Article 31C.*”^{xxix}

It is pertinent to note here that the above scheme is subject to judicial reconsideration before a nine judge bench of the Supreme Court in the case of Property Owners Association v. State of Maharashtra.^{xxx} It will also discuss important aspects of the doctrine of revival as well as the contours of Article 39 (b). The conclusion will further inform this

discussion and provide new insights to build upon.

How to view Data Sharing?

The Draft Non Personal Data Report, 2020 in India has suggested that data sharing may occur amongst data businesses, peer to peer or as facilitated by the regulator. Similarly, it classifies data per its source or subject as public,^{xxxi} private or community whereby community data would be held in data trusts, to be used or processed as per what the community wills to the data trustee. This characterisation is not hard to understand if viewed from the lens of how natural resources are normatively understood to belong to the people, or the community in general, which is a subset or type of 'material resources', as constitutionally treated. Since the source or subject of such data vests in the multitude of a group, one way to view it is as an extension or derivative of such natural resources. For example, soil, forests, air quality data is the data or digital manifestation of soil, forests and air which are natural resources, governed by the public trust doctrine. Such data is held to be naturally occurring community data.^{xxxii} Finally, the NPD Report concludes with the need for a future framework legislation to lay down principles for recognising legitimate trustees for community data and the data sharing principles.^{xxxiii}

It must be noted that the data related policy proposals in India do not contemplate any acquisition or nationalisation of data. However, for the sake of enabling widespread data sharing and availability, it seeks to explore new ownership structures, with or without State intermediation but with community rights and claims. It seeks to put in place data and benefit sharing arrangements, thus governing the distribution of such resources. So far, ownership and control of 'material resources' under the ambit of Article 39 (b) has been seen to vest in the State, either as a trustee or through public corporations. Since data is considered to be a community resource, diversely owned, it necessitates a trustee or stewardship framework for its governance. The proposed framework envisages a community ownership, distinct from State ownership. Normatively, it is one way to give effect to the community in

the sense that the State is assumed to be the agent of the overall national community (or state community), to ultimately provide welfare of all resources to the people on whose behalf it acts.^{xxxiv}

Data exhibits traits of a public good because of its use at zero or negligible marginal cost.^{xxxv} Big Data, because of the way it is collected and held by dominant business entities with strong network effects and exclusive collection capacities, can be excluded.^{xxxvi} The current practices of the market distort the public good nature of data which can be rectified by regulation. Since the content of 'material resources' spans a wide variety of resources such as buses, taxes, coal mines or electricity all premised on their ability to generate wealth and value for the community at large, it is suggested that data, non-personal, natural, industrial or machine generated data can also be subject to a law based on the objectives of Article 39 (b). This law can incorporate conditions of community ownership as well as widespread data sharing for larger societal and economic objectives.

Conclusion

It is necessary to explore the strength of the corresponding data governance frameworks, not only from the lens of the policy objectives but also in terms of their constitutionally tenability so that a fundamental and broad consensus can be evidenced.^{xxxvii} Such explorations and discussions can provide a source for future case laws and the dialectical foundation for ways to understand data. It can also test the contemporaneity of the Constitution which has successfully withstood various challenges across time. Thus, if a law to govern non personal data is framed with the key principles of common good at heart and a clear nexus with the public interest that it seeks to serve, such a law can be effectively shielded from possible legal or constitutional challenges.

Notes

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- ii) Weber, S. (2017). Data, development, and growth. *Business and Politics*, 19(3), 397-423. doi:10.1017/bap.2017.3
- iii) *Communication from Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Commission*, <https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf>
- iv) Personal Data Protection Bill 2019 (Section 91); Ministry of Electronics and Information Technology, India. (2020). *Report by the Committee of Experts on Non Personal Data Governance Framework*. https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf
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- vii) Tarunabh Khaitan, Directive principles and the expressive accommodation of ideological dissenters, *International Journal of Constitutional Law*, Volume 16, Issue 2, April 2018, Pages 389–420, <https://doi.org/10.1093/icon/moy025>
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- ix) *Constituent Assembly Debates* (Vol. 7, Nov 5 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-05#7.49.176, https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-05#7.49.86
- x) *Constituent Assembly Debates* (Vol. 7, Nov 4 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04#7.48.241
- xi) *Constituent Assembly Debates* (Vol. 7, Nov 6 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-06#7.50.99
- xii) *Constituent Assembly Debates* (Vol. 7, Nov 4 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-04#7.48.243

xiii) *Constituent Assembly Debates* (Vol. 7, Nov 8 1948), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-08#7.51.177

xiv) *Constituent Assembly Debates*. (Volume 1, Dec 13, 1946). https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13#1.5.17

xv) *Constituent Assembly Debates* (Vol 7, Nov. 19 1948) https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19#7.56.167; *Constituent Assembly Debates* (Vol. 7, Nov. 22 1948) https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-22#7.57.114; *Constituent Assembly Debates* (Vol. 5, Aug. 30 1947) https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-30

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xvii) *Constituent Assembly Debates*. (Volume 7, Nov. 15 1948). https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-15

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xx) *Seth Sukhlall Chandanmull v. A.C. Jain, Income Tax Officer and anr.*, (1959) 37 ITR 101.

xxi) *V. Parthasarathi v. State Of Tamil Nadu And Ors.*, AIR 1974 Mad 76.

xxii) *State of Karnataka v. Ranganatha Reddy*, AIR 1978 SC 215.

xxiii) *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Limited*, 1983 SCR (1)1000, Page 19.

xxiv) *Tinsukhia Electric Supply Co. Ltd v. State Of Assam And Ors.*, 1989 SCR (2) 544.

xxv) *Re: Special Reference No.1 of 2012*, (2012) 10 SCC 1.

xxvi) *Supra* n xxii.

xxvii) Constitution (Twenty Fifth Amendment) Act, 1972. <http://legislative.gov.in/constitution-twenty-fifth-amendment-act-1971>

xxviii) Law Commission of India. (1971). *Forty Sixth Report on the Constitution (Twenty Fifth Amendment) Bill, 1971* <http://lawcommissionofindia.nic.in/1-50/Report46.pdf>. Page 9, 10. Para 24, 27.

xxix) *Minerva Mills Ltd. v. Union of India* 1980 2 SCC 591 as affirmed in the case of *Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Limited*, 1983 SCR (1)1000.

xxx) *Property Owners Association v. State of Maharashtra*. <https://main.sci.gov.in/jonew/bosir/orderpdfold/49986.pdf>

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xxxiii) Data that arises socially or relationally may be considered a social resource; Singh, P.J. & Vipra, J. (2019). Economic Rights Over Data: A Framework for Community Data Ownership. *Development*. 62(1). 53-57.

xxxiv) Ministry of Electronics and Information Technology, India. (2020). *Report by the Committee of Experts on Non Personal Data Governance Framework*. https://static.mygov.in/rest/s3fs-public/mygov_159453381955063671.pdf. Page 20, 43.

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xxxvi) Rosnay, M.D. & Crosnier, H.L. (2012). *An Introduction to the Digital Commons: From Common-Pool Resources to Community Governance*. Building Institutions for Sustainable Scientific, Cultural and genetic Resources Commons. <https://halshs.archives-ouvertes.fr/halshs-00736920/document>.

xxxvii) Jones, C.I. & Tonetti, C. (2020). Nonrivalry and the Economics of Data. *American Economic Review*. 110(9). 2819-2858.

xxxviii) A specific focus on data debates in the Constitution is beginning to emerge. For example, see the neurorights based constitutional amendment in Chile Columbia Neurorights Initiative. <https://nri.ntc.columbia.edu/projects>; a change in the Constitution of Michigan (a sub federal unit) to protect personal data and electronic communication Graham, L. (November 4, 2020). Election 2020: Michigan voters approve Proposal 2, protecting electronic data. *Michigan Radio NPR*.

Data Governance Network

The Data Governance Network is developing a multi-disciplinary community of researchers tackling India's next policy frontiers: data-enabled policymaking and the digital economy. At DGN, we work to cultivate and communicate research stemming from diverse viewpoints on market regulation, information privacy and digital rights. Our hope is to generate balanced and networked perspectives on data governance — thereby helping governments make smart policy choices which advance the empowerment and protection of individuals in today's data-rich environment.

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IT for Change aims for a society in which digital technologies contribute to human rights, social justice and equity. Our work in the areas of education, gender, governance, community informatics and internet/digital policies push the boundaries of existing vocabulary and practice, exploring new development and social change frameworks.

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