

Law as an enabler for the digital economy: An Indian Perspective

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I. Background

First of all, I thank IILS for inviting me to speak on this very important and contemporary topic in light of India's aim to achieve one trillion dollar digital economy by 2025. The question is whether the present legal framework as well as the policy direction be an enabler (or spoiler) in achieving this aim. And if there are gaps, which I understand there are in galore, how to rectify it.

As far as technological strength is concerned, we are certainly capable of achieving newer heights in digital economy. In late 90s and early 2000s, India has shown its prowess in informational technology related trade, when it became the largest IT exporter in the world. However, lately the we could not keep pace with the changing nature of the technology and business models when the usage of machine learning, artificial intelligence, internet of things, blockchain etc. increased substantially. This laggardness may be partly attributed to lack of investment in R&D and innovation by the then leading Indian IT firms. This may also be because of lack of enabling law and policy environment, that failed to encourage investments and innovations in the new technology space.

Off late, however, I see serious attempts by the polity and private sector, particularly the burgeoning start-up ecosystem, to catch the new technology band wagon under the Digital India umbrella. There is political will and intent, no doubt. But I also feel that our laws are lagging behind the technological developments and there is also a tendency to over-regulate. And certainly there

seems to be lack of coherency in rule and policy making process leading to legal frameworks being somewhat not providing an enabling environment to boost the digital economy, where innovation is so crucial. In addition, there is the presence of regulatory and policy uncertainty in the digital space that adds to the adversity.

There is also uncertainty about the economic policy direction that we want to traverse. For instance, the call of *atmnirbhar bharat* is being interpreted differently by different stakeholders, leading to protectionist approaches in the *laissez faire* framework. There are also incidences where there are economic directional issues between the Centre and the States. In addition, the judicial pronouncements are hovering between socialist and market-based principles, contributing to the prevailing economic direction uncertainty.

In this backdrop, let me confine myself to the issues pertaining to the present and upcoming legal frameworks that deals with digital economy, in general, and e-commerce, in particular. Viewing the time constraints, I will be flagging some eight issues, which if addressed can help contribute towards the fast and broad-based development of the digital economy in India. These issues are:

1. Multiple Definitions of e-Commerce
2. Multiple Jurisdictions vis-à-vis e-Commerce
3. Achieving Right Balance for Intermediary Regulation
4. Emerging Data Governance and Competitive Digital Economy
5. Consumer Concerns in the Personal Data Protection Bill, 2019
6. Differential Regulatory Approach
7. Cybersecurity – Need for an Updated Regime
8. Interpretation of terms like ‘National Interest’ and ‘National Security’

II. Legal framework – whether enabling?

The Information Technology Act, 2000, is the main framework under which the digital economy is being regulated. This law was enacted when the IT industry in India was booming, but it seems that it is inadequate to optimally regulate the newer technologies that are being increasingly employed today in the digital space.

1. Multiple Definitions of e-Commerce

As far as e-commerce is concerned, the very objective of the IT Act is to give recognition to e-commerce transactions, but it does not define ‘e-commerce’ as such. The definitions of ‘e-commerce’ under the FDI Policy and the proposed e-Commerce Policy or those under the Consumer Protection Act, 2019 and the Central Goods and Services Tax Act, 2017 are not consistent with one another. Similarly, the term ‘digital product’ is not defined, which can cause regulatory confusions, particularly with respect to the application of rules and also to business compliances.

All these create regulatory uncertainty which is detrimental to business development in India.

2. Multiple Jurisdictions vis-à-vis e-Commerce

Further, the regulatory uncertainty increases when there are multiple jurisdictions. For instance, various facets of regulation of e-commerce are being dealt by DPIIT, Meity, D/o Consumers Affairs etc. The fact that ‘retail’ is in state subject adds another layer to the uncertainty. The confusion with respect to ‘essential’ and ‘non-essential’ items, determined incoherently by different states during the second wave lockdown, not only impacted e-commerce businesses but also consumers who had dynamic needs.

Extreme regulatory measures like bans, unreasonable licensing conditions,

tendency to micro manage the business, etc. adversely impacts consumer welfare as well as business innovations. Competition in the digital economy vastly depends on innovation capabilities.

3. Achieving Right Balance for Intermediary Regulation

Recently, the new Intermediary Guidelines were adopted under the IT Act putting more responsibilities on intermediaries with respect to third party actions. Earlier such intermediaries used to enjoy safe harbour which helped them to innovate and grow. Striking proper balance between holding liable for menaces like misinformation, fake news, child pornography and allowing intermediaries to innovate and grow is important. Putting more weightage on liability may harm the digital ecosystem, particularly those firms which are new and small and may not have enough resources to meet the increased compliance costs.

4. Emerging Data Governance and Competitive Digital Economy

The way we craft the governing framework for 'data' is another very important facet that would decide whether our laws contribute to an enabling environment for the growth of the digital economy. An optimum data protection regime is long due, but we are taking more time to put it in place than needed. This delay itself is causing uncertainty in the market.

In addition, there seems to be multiple rules in the pipeline to govern personal and non-personal data. There are also talks of some sector specific regimes, for instance for health data. We already have a separate regulation under RBI with respect to cross-border flow of banking and payment data. Propositions like data localisation or restrictions on data flow is another layer that can adversely affect the digital economy ecosystem. All these adds to the regulatory complexities, which in turn enhances compliance costs.

Though ‘data’ is called new oil, viewing its importance in the digital economy, but unlike oil it does not burn up when used by one and can be used by multiple players at the same time. Since data is being considered as a new factor of production, the same can be made more accessible to multiple firms in order to engender competition in the digital economy, which is marred by the phenomenon called ‘winner takes most’. Promoting concepts like data portability and interoperability would result in a competitive digital markets. It is hoped that the upcoming data protection regime, in form of Personal Data Protection Bill, 2019.

5. Consumer Concerns in PDP Bill

There are also consumer or user-facing concerns in the PDP Bill. For instance, no time limit has been prescribed to depose of any complaints made by users. Similarly, the procedure for seeking remedy must be accessible and understandable to the users – or data principals under the PDPB – which may not happen without a massive awareness generation programme.

Data ownership is another area where there is no clarity, which may raise confusion if data is taken as property to be sold or transferred. Since, users or consumers creates those data at first place, first ownership rights may be bestowed upon them. Users being termed as ‘data principals’ in the PDP Bill, does not necessarily bestows ownership rights. The matter is, however, more complex than it may look.

6. Differential Regulatory Approach

India seems to be adopting differential regulatory approach with respect to national and foreign digital market players. For instance, due to the FDI Policy while foreign e-commerce platforms need to refrain from adopting inventory-

based model, no such compliance is required by the national e-commerce platforms. Similar distinctions can be observed in the emerging data protection regime. This is not a sound regulatory practice. It is okay to put conditions before establishment of any foreign firm, but post-establishment it needs to be regulated same as any domestic entity.

7. Cybersecurity – Need for an Updated Regime

Cybersecurity is another area where there are visible gaps in the legal framework. We all know that during the lockdowns cybercrimes have increased exponentially, which severely effect consumer trust in the digital economy. We also understand that cybersecurity is important for national security – cyber space is now recognised by NATO as akin to land, water and air with respect to defence and war. The cybersecurity provisions in the IT Act has become old, and may not be suited for an advancing digital economy.

We will have to sync the cybersecurity regime with the internet governance regime in holistic manner. The convergence between policies of data protection, e-commerce and cybersecurity is key to ensuring sustainable growth of the digital economy and ensuring user safety.

8. Interpretation of ‘National Interest’ and ‘National Security’

It has been observed that due to lack of clear guidelines, often terms like ‘national interest’ or ‘national security’ are interpreted to suit the ruling political bosses. This disturbs the right regulatory balance, particularly where individual rights like freedom of speech or privacy are involved. We need some interpretation guidelines for more balanced implementation of various regulations related with digital economy.

The Way forward

I have flagged some of the general gaps in the legal framework in the given context. Deep diving on the issue will unearth many such gaps. Most of these concerns have been communicated to the policy and law makers by various stakeholders. These need to be accommodated by the government while making rules.

The crux of the matter is that we need to reduce regulatory uncertainty and guard against over regulation tendencies. We at CUTS is advocating for institutionalising Regulatory Impact Assessment (RIA), which can result in good and optimal regulation.

There is a need for mass scale digital literacy programme. This not only includes the ability to use digital technology, but also understanding the liabilities, and risks associated with such technologies as well as to understand how to raise effective grievances.

We also need to focus on on-boarding small business to e-commerce platforms, so that the gains of the digital economy are more broad-based. As it is, market concentration is on rise, which is fuelling economic inequality. Using competition policy and law aggressively would help increase inclusivity in the digital economy.

More so, India is still miles to go as far as reducing the vast digital divide. During pandemic there is a good chunk of young population whose education has suffered. If such divide is not reduced, the same can further increase economic inequality posing law and order problems.
