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Manipulation of psychological health via unequipped data protection laws: A critical analysis of the role of competition authorities as saviours

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Abstract-- The world is growing at a fast pace and interdependence on data is increasing rapidly. The big giants like Facebook and Google are the main holders of data of people with the assurance of protection of it. Privacy of data is the main concern in using it for commercial purposes or other market objectives. In India the right to privacy is a fundamental right. However, we don't have appropriate laws to protect it. Provisions in the IT Act is the only protection available. If the same comes to competition laws, then there are some problems in using the data for market manipulations. In terms of competition law, the major concern is anticompetitive practices and abuse of dominant position. For competition law the dynamics of protection of data is an entirely different area and forming a threshold to consider the alarming situation is very difficult here. The studies are here effect-based study. As data has become a powerful tool and all the key decisions whether related to economy or social impact are taken through the analysis done from available data. First and foremost, issue in the research paper is the data protection which is also related to right to privacy leading to mental health issues and next is the use of that data to create anticompetitive malpractices. The paper critically analyzes all the loopholes, shortcomings and future expectations of fruits and abuse with overall repercussions on the market.

Keywords--Data Protection, Digital Market, Data Sharing, Data Privacy, Competition, Anticompetitive

Introduction

In the 21st century the reliance on data has increased a lot. Institution or organization who has access to data and information about the person or thing, is more powerful than any other organization.¹ Gone are the days, when the wars were fought through weapons and kings or governments were more concerned about saturated collection and manufacturing of arms and ammunitions. The time has come where only by using data, wars on finance, economy, medicine, territory and other crucial sectors can easily be won by opponents. Information or data are playing a key role in it. If you have appropriate data, half of the victory has come automatically.

The health has become a primary concern and more than the physical health mental health plays a vital role in anyone's life. Data protection and its laws and further use of it in the market are affecting the health of human beings if not utilized properly. Expose of key data may hamper privacy and in the similar way the commercialization of the same may hamper the overall health. So the law is not in isolation it consider the aspects of health as well which may crucially affect the health in drastic way.

Digital economy has given a boom to the importance of data. Now the situation has come that access and need of data is inevitable to run the business, economy or any other important implementation.² However, the limits of encroachment are not clear. What are the situations, when the same data are useful and also against privacy and create competitive issues? There is a very thin line between use and encroachment on privacy through data. The same is applicable on competitive practices and anticompetitive practices.

Failure of the exercise of data may bring the assignments into failure also. Competition Law may be exercised to deal with the situation where any anti-competitive practice is taking birth due to the procurance of data. Competition Law may be a savior where the lack of data is leading to the failure of work and such lack of data is creating competition concerns in the market. Now accessibility to the information has become a big concern for the market as the economy is completely dependent on the data. It can be called a data driven society.

The research paper analyzes the right to privacy which is also a health issue, second aspect elaborated critically is the laws of data protection in India and its scope in future and further the involvement of competition law in it. Further it analyses the possible future positive interference of it on the data protection laws and its regularization in the use of data for commercial purposes.

¹ Sinkula, J. M. (1994). Market information processing and organizational learning. *Journal of marketing*, 58(1), 35-45.

² Srnicek, N. (2017). *Platform capitalism*. John Wiley & Sons.

Data Privacy and Laws in India

Right to Privacy as fundamental right

In the historic judgment of *Puttaswamy v. Union of India*³ (*Aadhar Case*), a nine judges bench of the Supreme Court of India has decided the right to privacy as the fundamental right provided under the part-III of the Indian Constitution. *M.P. Sharma Case*⁴ and *Kharag Singh Case*⁵ were remarkable decisions in this regard however it was not clear that the right to privacy is specifically a fundamental right. The Puttaswamy Judgment overruled both the previous case with the larger bench of nine judges and settled the law once and for all. In this Aadhaar case right to privacy has been advocated as an important fundamental right.

Information Technology Act, 2000

Section 43A⁶ of the IT Act, 2000 provides for the '*reasonable security practices and procedures*' in relation to any '*sensitive personal data or information*' which is handled by a body corporate. It also provides compensation to the user if the data of the user is being misused and manipulated. Protection of personal data through electronic means is being protected in it.

Second important provision in the IT Act, 2000 is section 72A⁷, which provides for the imposition of penalty on the person who discloses personal information without the consent of the person whose information is being disclosed. The punishment of sentence up to 3 years or fine up to 5 lakh rupees of both can be imposed as per section 72A on the violators. Though the penal provisions have been provided, the implementation and sufficiency in the digitally evolving world is not up to the mark.

The Personal Data Protection Bill, 2019

After the ruling provided in the famous Puttaswamy judgment which declared the right to privacy as a fundamental right, a joint parliament committee was set up to draft the personal data protection bill. On December 11, 2019, an ad hoc joint select committee which is also called joint parliament committee was set up for the concrete consideration on the personal data protection bill, 2019. The Personal Data Protection bill was approved by a joint parliament committee on 1st December 2021 after 2 long years.

The definition of personal data under section 3(28)⁸ of the Personal Data Protection Bill, 2019⁹ has broadened the scope and protection of an individual. If

³ K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1

⁴ M. P. Sharma and Others vs Satish Chandra, 1954 AIR 300, 1954 SCR 1077

⁵ Kharak Singh vs The State of U. P. & Others, 1963 AIR 1295, 1964 SCR (1) 332

⁶ The Information Technology Act, 2000 (No. 21 Of 2000).

⁷ The Information Technology Act, 2000 (No. 21 Of 2000).

⁸ The Personal Data Protection Bill, 2019. "*personal data*" means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling"

we read it closely, it applies to the data of a natural person whose identification can be derived through different means of features whether online or offline and it includes any combination of such features or any inference from it. The bill enhances compliance and provides better control of data by an individual. The bill sets up a regulator also to monitor data protection called data protection authority of India.

It specifically mentions the data processing, limitations, restrictions, accountability, rights, privacy, exemptions and penal provisions for avoiding the provisions.¹⁰ These powers and rights can be exercised by the data protection authority (DPA) accordingly. The DPA has been exempted from some restrictions by the government. The government under the personal data protection bill has a lot of powers and privileges which can be invoked as per the future requirement of data protection.

Report by the Committee of Experts on Non-Personal Data Governance Framework¹¹

The Data Protection Bill, 2019 deals with the protection and control of personal data. However the question arises on the use of non personal data which is not identifiable. Report of MEITY dated December 16, 2020 defines non personal data as the data which is not identifiable or the data is not related to identification purpose.

Some of the outcomes of the report were the conversion of the personalised data into non personalised data. A data through which the identity of an individual can not be reached out, is anonymous data and comes under non personalised data. The data protection bill is applied to the personalised data and its processing.

Matter comes into light when it tries to clash with the regulators. As the regulations are only applicable to personal data. Section 91 (2) and Section 93 (x) creates some dilemma if an anonymous data could be identified to an individual then it would come under personal data and the bill would be applicable. So it has been recommended in the report to delete the portion “other than the anonymized data referred to in section 91” in Section 2(B) as infructuous.¹²

As per the report such non personalised data can be used as metadata. Data business can also be opened. Though after a specific threshold registration of business is necessary. Such non personal data in bul can be used for startups, research, reports, processing, findings etc. Data collected by different organizations for different purposes may be used for other useful objectives. Recommendations for data sharing, regulations on data sharing, sharing for the purpose of sovereign and public good have been dealt.

⁹ The Personal Data Protection Bill, 2019, Retrieved December 29, 2021, from http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

¹⁰ The Personal Data Protection Bill, 2019, Retrieved December 29, 2021, from http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf

¹¹ Ministry of Electronics and Information Technology, Report by the Committee of Experts on Non-Personal Data Governance Framework, Retrieved December 30, 2021 from mygov_160922880751553221.pdf

¹² Ministry of Electronics and Information Technology, Report by the Committee of Experts on Non-Personal Data Governance Framework, Retrieved December 30, 2021 from mygov_160922880751553221.pdf

For the competition law purpose data plays a significant role. Report indicating that the existing competition law would not suffice to protect the competition. Though the per se violation on dominant position is not possible in every case however the report seems to accuse the regulation and to further move towards the improvement in competition law. Competition Law may be a lead role player to protect the competition in the market which is the real objective of it in the very essence of the preamble. As opposed to the advice in the report, the competition law may be a big game changer in the market in terms of appreciating dominance and preventing abuse of dominance.

Thus, the milestones of the government on the path of data protection laws are good but for the non personal data and its conversion still have a lot of gray area if it is harmonized with the different regulations like competition law, IT laws, trade secret laws, copyright laws etc. A further need of vivid picture for holistic and robust framework development of data protection is required and for that strong regulators can be blessings over sunshine to the market and consumers.

Data Protection and Competition Law Regulation

The Competition Act, 2002 has the foundation on the preamble which in the very beginning emphasizes on the three principles, first is the establishment of competition commission of India second is to maintain competition in the market and third is to prevent anti-competitive practices in the market. For the investigation purpose the competition commission of India focuses on section 3 for the anticompetitive agreements, section 4 for the abuse of dominant position and the last section 5 & 6 are combination provisions. The basic task of the Competition Commission of India is to find any of the anticompetitive acts under section 3,4,5 and 6. Further CCI also ensures that the firm is not leading to anti-competitive practices.

In the digital era, markets are invisible with continuous dynamic changes. Big manipulative invisible hands are playing with the consumer's needs. In one way or another demand is being created and data is playing a big role in recognising it.¹³ Generally competition law works after recognising all the factors upon which the market is running. When it comes to the digital market then the problems are faced by the regulators in handling the situation and analysing market characteristics.¹⁴ Determining the size of market and competitiveness is a strenuous task. Different barriers for the new entrants in the market and interoperability are some other issues being faced by the market.

Though the Competition Commission of India has been researching the data collection on digital forms which is being recognised as an asset,¹⁵ however, it's use for the anticompetitive practices and the application of competition law in the

¹³ Kerber, W. (2016). Digital markets, data, and privacy: competition law, consumer law and data protection. *Journal of Intellectual Property Law & Practice*, 11(11), 856-866.

¹⁴ Podszun, R., & Kreifels, S. (2016). Digital platforms and competition law. *J. Eur. Consumer & Mkt. L.*, 5, 33.

¹⁵ Competition Commission of India, Market Study on the Telecom Sector in India: Key Findings and Observations, dated January 22, 2021, Retrieved January 14, 2022, from http://cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf .

cases of anti-competitive practices using the digital data were more emphasized in the recent report of market study on e-commerce in India published by CCI.¹⁶ The concern was the use of a digital data pool for competitive advantages and unfair practices. The Competition Commission of India further reported that the data collection and network creation through it would definitely make players more competitive but it must not be in terms of abusing dominant position. Manoeuvre must be for competitiveness not for the anticompetitive activities and undue advantages from them. If the use of data and assessment of the market through it is causing adverse effects on competition then competition law must come in between the two.

How Data Determines the Market

In the digital market or the market based on data driven from digitalization, traditional methods are just primary stage equipments. For defining market power in the era of data driven industries, the need for updated tools and techniques are inevitable.¹⁷ The laws to deal with such updated disruption must also be refurbished.¹⁸ In the situations based on data, finding the anti-competitive practices and dominance is a bit complex procedure.

In the process the CCI takes data as a non-price competitive measure which has been endorsed by the CCI in the orders against WhatsApp and Facebook in WhatsApp Suo Moto Order.¹⁹ In the WhatsApp case, the dominant position was determined on the basis of traffic on the platform and its further network effects.²⁰

The Competition Commission of India determined market share or power according to the potential of collecting data and using it as network effects, however, at the later stages the CCI further clarified that the combination of two or more platform must be assessed on every aspect of aftermarket effects and its reciprocation into adverse effect on the competition. In the digital economy data is an asset for a competitive environment so the work of the regulatory authority is to assess the possibilities of abusing data for undue advantages and creating adverse effects on the competition, consequently, the CCI must also work the same line.²¹

¹⁶ Competition Commission of India, Market Study on E-Commerce in India: Key Findings and Observations, Dated January 2020, Retrieved January 14, 2022, from https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf; also see Summary of Workshop Proceedings: CCI Workshop on Competition Issues in the Telecom Sector in India, February 2021, Retrieved January 14, 2022, from http://cci.gov.in/sites/default/files/whats_newdocument/Proceedings-Telecom-Workshop.pdf

¹⁷ Stanley, S., & Prasad, S. A Primer on Competition in the Digital Economy.

¹⁸ Sinha, V., & Srinivasan, S. (2021). An integrated approach to competition regulation and data protection in India. *CSI Transactions on ICT*, 9(3), 151-158.

¹⁹ The Competition Commission of India Order under Section 26(1) of the Competition Act in In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021, dated March 24, 2021, Retrieved January 15, 2022 from https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf

²⁰ The Competition Commission of India, Harshita Chawla v. WhatsApp Inc. and Facebook Inc. ("Harshita Chawla Order"), Case No. 15 of 2020, dated August 18, 2020, retrieved January 15, 2022, from <https://www.cci.gov.in/sites/default/files/15-of-2020.pdf> and Shri Vinod Kumar Gupta v. WhatsApp Inc. ("Vinod Gupta Order"), Case No. 99 of 2016, dated June 1, 2017, retrieved January 15, 2022, from <https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf>

²¹ Federation of Hotel & Restaurant Associations of India (FHRAI) & Anr. v. MakeMyTrip India Pvt. Ltd. (MMT) & Anr. along with Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) & Anr. ("MMT Interim Order"), Case No.

Regulators keep an eagle eye on the market activities and invisible hands of the market specifically in the digital world creates more challenges for the regulators. Though the work will remain the same, the way to deal with the new antitrust environment must be by the re-equipped hands of the regulators making the regulators cope up with the new dynamic situations.

Data Manipulations and Abuse of dominant position

Since all the decisions are taken through the aid of data that is why data is taken as an important asset in today's world of trade and commerce. As per the ordinary prudence if data is an asset for decision making in the market, then the protection of data, privacy of data and use of data must be taken at the utmost care.²² Platforms like Google are collecting data according to human behaviour, choices & reactions through different sources and the same is being applied in forming the market strategies.²³ Small players are also taking the assistance of giant players in the market for improving their market strategies.²⁴

Sharing of data from one player in the market to another may create a dominant position and it may lead to the abuse of dominant position.²⁵ Big giants in the market have good access to the crucial data which may create domination and the same may be exploited for undue advantages which consequently has adverse effect on the competition.²⁶ To prevent the misuse of data, the regulatory practices must be full of checks and balances. The Competition Commission of India has shown concern regarding the sharing of data and use in business practices.

The stand of the Competition Commission of India

The Competition Commission of India has endorsed that data is useful as a non-price competition parameter.²⁷ Privacy is an important factor for data protection and the data protection laws can play a significant role for privacy but the protection of competition in the market and protection of consumers are separate from privacy. Since for the fostering of competition in the market, use of data is necessary in the digital world but the regulations are an inevitable part to prevent anticompetitive elements in the market. On the one hand privacy of individuals is a fundamental right, on the other hand competition in the market is no separable part. Thus, using the data in a safe way requires a strong regulatory framework for data sharing and application of it in the market. Regulatory measures can

14 of 2019 and 01 of 2020, dated March 9, 2021, retrieved January 15, 2022, from

https://www.cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf

²² Provost, F., & Fawcett, T. (2013). Data science and its relationship to big data and data-driven decision making. *Big data, I*(1), 51-59.

²³ Mulyana, A., Briandana, R., & Rekart, E. (2020). ICT and social media as a marketing communication platform in facilitating social engagement in the digital era. *International Journal of Innovation, Creativity and Change*, 13(5), 1-16.

²⁴ Quelch, J. A., & Klein, L. R. (1996). The Internet and international marketing. *MIT Sloan Management Review*, 37(3), 60.

²⁵ Nuccio, M., & Guerzoni, M. (2019). Big data: Hell or heaven? Digital platforms and market power in the data-driven economy. *Competition & Change*, 23(3), 312-328.

²⁶ Sokol, D. D., & Comerford, R. (2015). Antitrust and regulating big data. *Geo. Mason L. Rev.*, 23, 1129.

²⁷ Competition Commission of India, Market Study on Telecom Sector in India, Retrieved January 17, 2022 from https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf

only protect the thin line between privacy and application of data for business purposes.

Whenever the laws or situations go into conflict, the only way to tackle the problem is 'doctrine of harmonious construction'. The Competition Commission of India must make harmonious construction with the data protection agencies and other regulators. In this way the problems may be bifurcated and the Competition Commission of India can take the cognizance of the matters of anticompetitive elements. The assessment of data transfer and its use shall also be in consonance with the activities of other data protection agencies.

Jurisprudence of the competition is still developing in India. India, a country with diverse market conditions, is going through a sudden transition phase where the choices of consumers and competition in the markets are changing rapidly. On the misuse of data, the CCI does not have strong footings and in number of cases the CCI has closed the matters due to no direct relevance and corroborations.²⁸ In some matters like WhatsApp and Facebook, the CCI has decided without corroboration. So, without any fixed rule, investigations and assessments depend upon the contemporary circumstances.

Conclusion

For now, no standard yardsticks are set up for the investigation of matters on data protection. Some of the matters are in higher courts to be decided and the CCI is still developing its discourse on it. The regulatory authorities must start with liberal investigations without creating any hustle to the individuals and markets. Showing strictness without understanding the market multi colours would be an unwise decision. This strategy would give some time to the CCI to understand the market and encourage them for optimal usage of its resources.

Most urgent requirement now is the strong legislation on data protection and implementation. In the legislation, the limiting of the scope of broad area to deal with the data must be provided to guide the regulatory authority for their focused investigations. The Ministry of Electronics and Information Technology has described in a notification²⁹ the threshold as fifty lakh registered users for being a social media intermediary. So, the Competition Commission of India must consider this and make data sharing policies accordingly.

The Competition Commission of India, as a regular authority, must adhere to all the rules and regulations by keeping a harmonious strategy with other data protection agencies. The approach of the Competition Commission of India must be very clear regarding the assessment of the digital market. The CCI may work on the projection of future effects of current situation and decide accordingly.

²⁸ The Competition Commission of India, XYZ v. Alphabet Inc. & Ors., Case No. 07 of 2020, dated November 9, 2020, Retrieved January 17, 2022 from <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf>

²⁹ Ministry of Electronics and Information Technology, Notification dated February 25, 2021, Retrieved January 18, 2022 from <https://www.meitv.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf>

Data, privacy policy and use of data in the market strategies, all must act in consonance with each other. Agencies must maintain transparency of the individual data. The right to privacy must be saved and the market must flourish by the same data without infringing privacy. The use of data and its sharing must not lead to the anticompetitive practices and abuse of dominant position by creating adverse effects on the competition. The Competition Commission of India, as a regulatory authority to prevent competition in the market, must ensure all implementation and growth in jurisprudence related to data protection. The positive efforts by the CCI shall lead to the innovation in the data protection, use and sharing of it with transparency.

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