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What is Data in this Brave New World?

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During last year, there had been a whirlwind of events such as— digitalization of society be it in governance (e.g. Aadhaar) or even our daily mundane lives (e.g. cashless payments), debates surrounding net-neutrality, ransomware attacks, data breaches and numerous other privacy or surveillance issues. All of them reveal two important aspects of being linked together in a common thread. Firstly, humans are getting smarter through advanced technology, as they are living in an age of information. In this age data is not merely a piece of information, rather it is equivalent to an ‘*economic good*’ or ‘*commodity*’ and even regarded as an ‘*asset*.’ It consequently lends the second aspect – as for how our lives in a cyberspace are stretched, intensified and speeding up under globalization where effects over one part of the world are quite visible in another part of the world.

Gone are the bygone days when we anticipated a digital society that would transform our lives. Now it is a reality in this third millennium and here data is a new source of energy. In human history, if the twentieth century is remembered as the age of wars and end of colonialism, then the twenty-first century would supposedly be remembered for the rise of the age of information, the age of terrorism and also what we can foresee the ultimate demise of privacy. It was possible due to cheaper storage and faster computing techniques

available in this period, and it would have been impossible in earlier centuries. Presently, our lives are enormously *datafied* due to emerging tools, technologies and process of *datafication* of lives. Here we persistently traverse through *dataveillance*, where our digital technologies breathe more than human beings in a form of data [1]. Now data is everywhere around us and the *mantra* for success lies around data. And not merely private companies are there for its relentless quest but also the public organizations. Because data is new capital and new valuable asset under present informational capitalism. It has been treated as storable material to provide information services and also to rejuvenate governance, democracy, and development.

In last two decades, there has been a dramatic transformation in India. It commenced from a statutory legislation to regulate information and communication technologies on October 17, 2000. It was a clarion call as India embarking into the digital world in a new millennium. For instance, it was for the first time that a digital document was recognized to be equivalent to a hard paper for which it used an asymmetric cryptosystem and a hash function i.e., digital signature. The most recent transformative addition was the **recognition of privacy as a constitutional right** by the Supreme court on August 24, 2017, especially in the context of digitalization.

It is quite apparent that data is the new capital and the important assets in the economy were composed of bits. It is not a rotten stale, rather a valuable and profitable good. In economic terms, it is been regarded as a non-rivalrous, non-fungible and non-excludable good [2]. It is not any form of data but particularly personal data that can be used by many to generate profitable revenue. And the personal data includes information which is identifiable to the individual; it may include metadata, sensitive personal data, and even payload data.

There are innumerable characteristics of data. Firstly, it is not ephemeral rather it is imperishable and even eternal. Though it is intangible yet its outcomes have tangible effects on our lives. It is both rivalrous (personal data as individual's property) and also non-rivalrous because it can be used differently for innumerable times. Even the court in the *K Puttaswamy v Union of India* judgment acknowledged the nature of data is non-rivalrous, and mentioned two other facets i.e., invisible and recombinant. The advancements in Information Technology enabled humans to communicate at a lightning fast speed. Here "*to travel at the speed of light enhances the invisibility of access to data.*"[3] Simultaneously, data privacy invasions and uninformed data collection are also swiftest and invisible. Additionally, data is also "*recombinant in the sense that data output can be used as an input to generate more data output.*"[4] It became possible due to the unrestrained global flow of data under globalization making it '*non-excludable*,' given its high accessibility, tradability, and duplicability. Unlike a tangible good such as car or coal, data being an intangible good carries substantial economic value which is incommensurable. That is why data does not merely pose challenges as a human rights issue with regard to violations of privacy, rather it also comprises another side of trade issue across the globe which is restrained through non-trade barriers i.e. data protectionism [5].

| | <i>Excludable</i> | <i>Non-excludable</i> |
|----------------------|---|--|
| <i>Rivalrous</i> | Private goods food, clothes, cars (Personal Data) | Common Pool Resources water, forests, fish, oil, coal. |
| <i>Non-rivalrous</i> | Club goods cinemas, private parks, satellite television | Public goods free-to-air TV/Radio, roads, national defence (Data) |

Matrix of Types of Goods [6]

For instance, in Aadhaar, the biometrics (personal data) of an individual is his/her private good until it is shared. Once it is shared it becomes a public good which is non-rivalrous and non-excludable as it can be used by many (state agencies and private companies). Simultaneously, it is a private good, which is rivalrous and excludable because, as per the privacy rules, it can be used only by that individual. In another instance, the personal data of an individual on Facebook, though it is a private good of that particular individual, simultaneously it is a public good too. This is because it is consumed and processed by many (public viewers, Facebook, and third-party companies) making it non-rivalrous and non-excludable.

Apart from just being a valuable capital for the public organizations, it is also a critical asset and commodity. In fact, Justice Sanjay Kishan Kaul in Puttaswamy judgment cited that – “Uber, the world’s largest taxi company, owns no vehicles. ‘Facebook’, the world’s most popular media owner, creates no content. ‘Alibaba’, the most valuable retailer, has no inventory. And ‘Airbnb’, the world’s largest accommodation provider, owns no real estate.”[7] It all became possible because of the huge accumulation of data assets, which is crucial for their existence for which they depend on the consumers. Undoubtedly after realizing the economic value of data, the organizations have started enclaving. About which ORF Vice-president Samir Saran considers “if data is the new currency, then encryption solutions are the new Swiss banks and the market leaders in the tech space like Apple, Facebook and Google are all vying for recognition as digital Swiss banks.”[8]

In this scenario privacy is not about entirely blocking or curtailing the information flows or even opposite of sharing, rather it is controlling, regulating and managing the use of information. In the third millennium, a new battleground for war has been chalked out. It is a bloodless war for sovereignty over the data where public and private organizations (data controllers) fight to get a greater degree of access and control over information. Because

there is a cacophony regarding the nature of privacy governance, whether it would be – Privacy Self-Management or Paternalistic Privacy Management. Along with this, there is also a middle path which is being considered as what American Professor of Law Daniel Solove calls Libertarian Paternalism (nudging individuals to make informed choices by not diminishing freedom) [9]. We need to wait as see how the BN Srikrishna committee is going resolve this dilemma and protect the individuals (data subject) right to privacy.

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