THE WAY THE COOKIE CRUMBLES: THE FUTURE OF COOKIE REGULATION IN INDIA

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Despite their innocuous associations, internet cookies symbolise the power imbalance inherent on the internet. Moreover, they throw up significant privacy concerns that lie at the heart of our digital economy. Recently, European privacy group None of Your Business ('NOYB') developed a system to identify websites with unsatisfactory use of cookies. The group found that most cookie banners surveyed did not comply with the General Data Protection Regulation ('GDPR'). Common complaints included the absence of a reject option, misleading colours that emphasise the "accept all" option over others, and the absence of a clear mechanism to withdraw consent.

A cookie refers to a small text file that is placed on one's device by the website being browsed. Effectively, it enables a website to "remember" the individual. For example, a website may deploy cookies to retain items added to a user's shopping cart, and display them on the next visit. The information stored by cookies may include name, e-mail address and IP address. Cookies enable businesses to glean important insights on their users' online activity, thus ensuring the smooth running of the digital world. However, the data rich nature of cookies also means that individuals may be profiled and identified sans their consent.

In this piece, we undertake a comparative study to understand the future of cookie regulation in India. Our analysis is qualitative, and based on the comparison of four jurisdictions which are most suitable to inform such regulation, namely the United Kingdom ('U.K.'), Ireland, Canada and Singapore. The object of our analysis is to identify the critical elements of cookie regulation in these jurisdictions, and analyse the desirability of adopting such regulation in India.

We have narrowed down our study to these four jurisdictions for three reasons. *First*, each identified jurisdiction is a common law jurisdiction, much like India. *Second*, each of these jurisdictions mirrors the legislative drafting style in India, with English and Canadian laws often acting as precedent for Indian lawmaking. *Third*, cookie regulation (or the absence thereof) in each of these jurisdictions is characterised by a common link – the existence of a robust data protection law, and its enforcement by a data protection authority.

The third reason is significant, since cookie regulation is a limb of privacy law. The usage of cookies flags a variety of privacy concerns – located broadly in the domains of notice, consent and fair data processing. In the Table below, we convert these domains into key parameters, and analyse the responsiveness of each jurisdiction towards regulating the same.

TABLE 1: COMPARISON OF COOKIE REGULATION ACROSS COUNTRIES

	United Kingdom	**Ireland**	**Canada**	**Singapore**
Are there any privacy laws in this jurisdiction?	Yes	Yes	Yes	Yes
Are there any *specific* laws governing the deployment/use of cookies in this jurisdiction?	Yes	Yes	Yes	No
Do the specific laws mandate platforms/websites to give users notice of their deployment of cookies?	Yes	Yes	No	No
Do these laws require a user's explicit consent to the deployment/use of cookies by the platform?	Yes	Yes	No	No
Do these laws outline specific mechanisms to protect vulnerable groups against behavioural advertising and online profiling?	Yes	Yes	No	No

Three Models

Our analysis reveals the emergence of three regulatory models among the surveyed jurisdictions. Singapore is the first model, and does not favour any special legislation or formal guidance on the subject of cookies. It is characterised by a reliance on extant data privacy laws to resolve concerns

related to cookies. Further, Canada is the second model, which distributes the burden of regulating cookies onto two different legislations, the Canada Anti-Spam Legislation ('CASL'), and the Personal Information Protection and Electronic Documents Act, 2002 ('PIPEDA') – invoking the regulatory capacity of multiple regulators. Lastly, the third model rests on regulating cookies via guidance issued by the relevant data protection regulators, as well as a reliance on extant data privacy laws, evidenced in the UK and Ireland.

On a review of the above models, we identify Singapore to be an outlier in cookie regulation. This does not mean that the model does not address the fair use of cookies. Materials, resembling a formal guidance, indicate that data collected by cookies is considered to be a composite mix of personal and non-personal data. It is likely that the provisions of the Personal Data Protection Act, 2012 ('PDPA') apply to personal data collected by cookies. Cookies that collect non-personal data may be exempt from the provisions of the PDPA.

In contrast, the Canadian model prefers a horizontal approach to regulating cookies. In 2003, the Canadian Privacy Commissioner ruled that cookies contain personal information. Consequently, the privacy-related aspects of the use of cookies have been regulated under the PIPEDA. This regulatory paradigm was modified with the CASL taking effect in 2014. While PIPEDA required users to meaningfully consent to the collection, use or disclosure of cookies, CASL noted that an individual would be considered to have consented to cookies, if such consent could be reasonably inferred from their conduct. Websites are deemed to already have a user's express consent to using cookies, unless they disable cookies in their browser.

Overall, there is enough to suggest that Singapore and Canada do not advocate excessive regulation for cookies. While there are merits to this approach – enabling states to preserve regulatory capacity and not make the pursuit of privacy laborious for stakeholders – these jurisdictions may have missed an opportunity to meaningfully address cookies. Decision-making around cookies in both Canada and Singapore is largely subject to extant, sector-agnostic privacy law, with specific cookie-centric regulatory concerns (such as lifespan or proportional use) remaining understudied.

The third model, adopted by the UK and Ireland, is a useful illustration of devoting greater institutional capacity to regulate cookies. The model trusts data protection regulators to further regulate cookies – by issuing relevant guidance. Guidance issued by both the UK and Ireland is mature, richly-layered and attempts to break down regulation into a compliance-oriented checklist. These jurisdictions advise against implied consent for cookies, and advocate proportionality in the retention of cookie-related data. This provides insight on cookie lifespan too, with the Irish Data Protection Commissioner explicitly disavowing session cookies with an eternal lifespan.

India, and the way forward

The turn taken by the regulators in the third model (U.K. and Ireland) outlines the opportunities that specialised cookie regulations present for a robust data economy like India. Regulation can meaningfully change the way individuals interact with cookies. It is our belief that India should build such regulation in a balanced manner – safeguarding individual privacy while enabling market players to pursue data protection at little extra cost.

Presently, data protection law in India is at a nascent stage. With the Personal Data Protection Bill, 2019 stuck in deliberation, there is room to manoeuvre its provisions to better address the concerns raised by cookies. It is therefore for the Parliament to decide, whether to hard-code some of these interventions into the law, or to entrust the responsibility of cookie regulation onto the proposed Data Protection Authority of India.

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