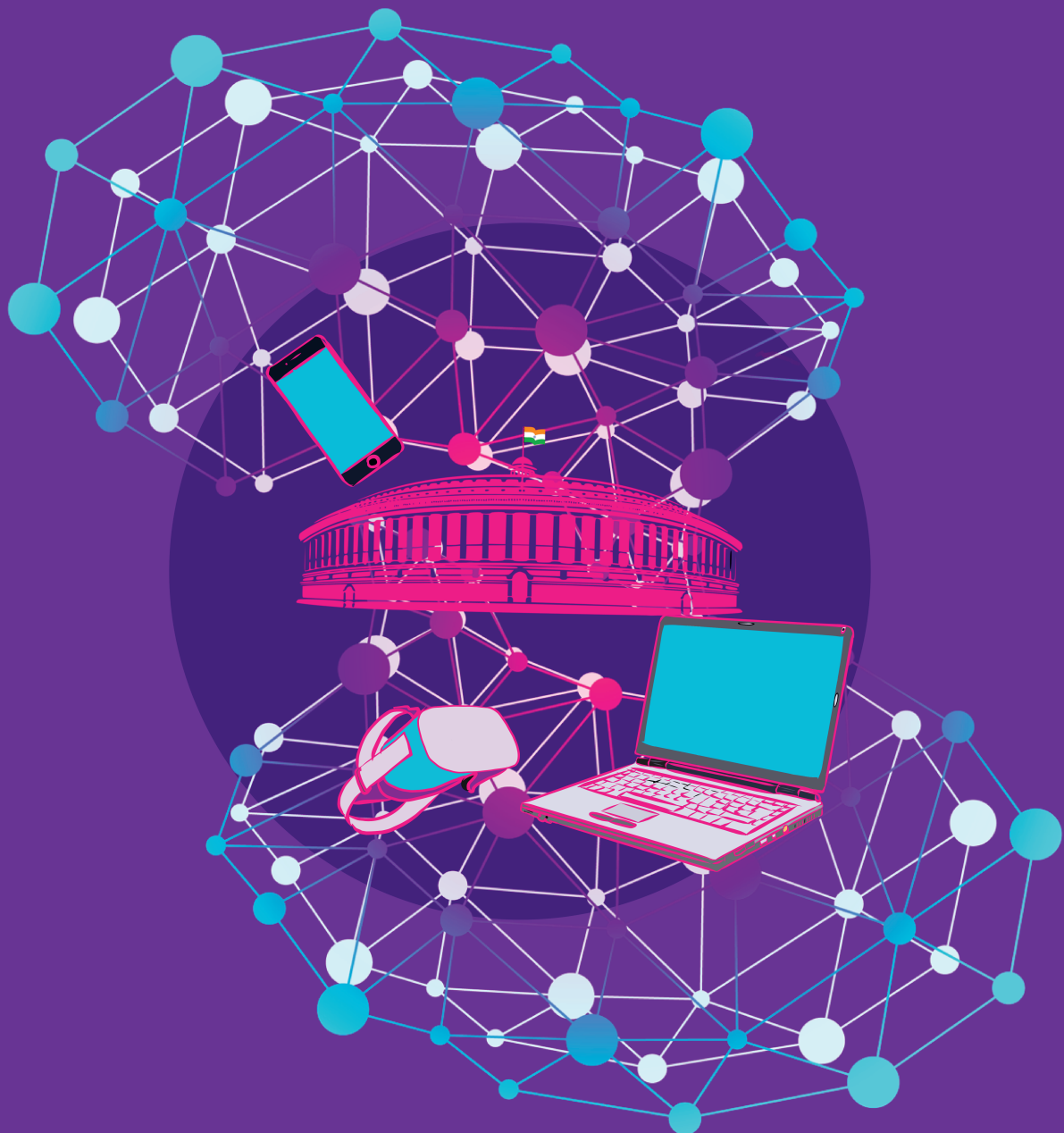


ROADMAP FOR A FUTURE-READY DIGITAL INDIA ACT

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CONTENTS

INTRODUCTION	5
1. WHY WE NEED A NEW IT LAW	6
A. EMERGING TECHNOLOGY IS AT ODDS WITH EXISTING PROVISIONS RENDERING CERTAIN TECHNOLOGICAL USE-CASES ILLEGAL, POTENTIALLY DENYING SOCIETY THE BENEFITS OF DIGITAL ADVANCEMENT	6
B. NEW DIGITAL ACTIVITIES CAN BE INCOMPATIBLE WITH EXISTING LEGAL DEFINITIONS, CREATING ROADBLOCKS FOR ENFORCEMENT AND BUSINESS UNCERTAINTY	6
I. ONLINE GAMING	6
II. THE METAVERSE	7
III. AUTONOMOUS CARS	7
2. MAKE THE DIGITAL INDIA ACT FUTURE-READY TO ENHANCE ENFORCEMENT CAPABILITY WHILE ALSO ENABLING DIGITAL BUSINESSES BY GIVING THEM CERTAINTY	9
A. WHY SHOULD THE DIGITAL INDIA ACT BE FUTURE READY?	9
B. STEPS FOR MAKING THE DIGITAL INDIA ACT FUTURE-READY	9
I. INTRODUCE ACTIVITY/PRODUCT-FUNCTION BASED DEFINITIONS TO ENSURE NEW AREAS OF TECHNOLOGICAL CONCERN ARE COVERED	9
II. DEFINE ACTIVITIES IN TERMS OF CONCEPTS RELATED TO PRODUCT FUNCTION, NOT EXAMPLES OF SPECIFIC SERVICE OFFERINGS	12
C. WHY THE TWIN EMPHASIS ON ENABLEMENT AND ENFORCEMENT IS NECESSARY	14
3. UNBUNDLING THE MECHANISM OF INSTITUTIONAL OVERSIGHT UNDER THE DIGITAL INDIA ACT	16
A. DOES THE UNION HAVE PRIMACY OVER THE STATES FOR ENACTING LAWS ON THE DIGITAL ECONOMY?	16
B. CAN THE MEITY SERVE AS THE NODAL MINISTRY FOR THE DIGITAL ECONOMY?	18
C. INTRODUCE A MECHANISM FOR INTER-MINISTERIAL COORDINATION FOR DIGITAL GOVERNANCE	19
4. THE DIGITAL INDIA ACT MUST ESPOUSE CO-REGULATION	23

5. THE DIGITAL INDIA ACT MUST ENGENDER TRUST THROUGH GREATER EMPHASIS ON ACCOUNTABILITY, TRANSPARENCY, AND FUNDAMENTAL RIGHTS	25
A. INTRODUCE A SPECIALISED JUDICIAL OVERSIGHT OF DIGITAL GOVERNANCE MEASURES THAT IS SUPPORTED BY AN INDEPENDENT RESEARCH BODY	25
B. MAKE EXECUTIVE RULE-MAKING MORE TRANSPARENT	26
C. ENABLE DETAILED TRANSPARENCY REPORTING BY COMPANIES BY MINIMISING CONFIDENTIALITY REQUIREMENTS AROUND SURVEILLANCE REQUESTS	26
SUMMARY OF RECOMMENDATIONS	28
ENDNOTES	30

INTRODUCTION

The Indian Government recently announced that it will introduce the Digital India Act, a new information technology law, that will replace the Information Technology (IT) Act, 2000. Reports indicate that the new legislation will focus on engendering greater “openness, safety, trust and accountability” in the digital economy.¹ The emphasis on accountability possibly means a recasting of the intermediary liability regime, to place greater responsibility on the shoulders of digital businesses. Indeed, it is important to introduce measures that enable the State to safeguard public interest and rights online. However, it is also important that in a bid to usher in greater liability for digital businesses, decisionmakers do not compromise on economic goals, such as the target of a trillion-dollar digital economy by 2025.

This report argues that the goals of achieving economic growth and addressing public interest concerns online are not mutually exclusive. Specifically, it lays out principles and objectives that will enable the Digital India Act to improve enforcement capabilities in the online realm and also grant digital businesses greater regulatory certainty – an important consideration for technological and economic progress.

This report is divided into 5 chapters. Chapter 1 argues that the new law should plug gaps in the current IT Act that either preclude the meaningful exploitation of new technologies, or put certain new technology businesses/activities beyond the purview of enforcement. Thus, a new technology law that is capable of accounting for emerging technologies and not rendered obsolete by the innovations of tomorrow is the need of the hour. Chapter 2 argues that a future-ready legislation is key to overcoming the gaps in the IT Act, as well as enhancing enforcement and playing an enabling role for digital businesses. Chapter 3 unbundles the mechanism of institutional oversight and coordination under the Digital India Act. Chapter 4 argues that the Digital India Act should espouse co-regulation, as it boasts of advantages over both State-led and self-regulation. Chapter 5 argues that the Digital India Act must engender trust in the digital economy through greater emphasis on accountability, transparency, and fundamental rights.

1. WHY WE NEED A NEW IT LAW

It is axiomatic that legislation is unable to keep up with the dynamism of technology. The digital landscape in India in 2022 is a far cry from what it was when the IT Act was introduced. The purpose behind the introduction of the IT Act was to create an enabling environment for digital transactions and e-commerce. For perspective, at the time, Google was only two years old, Amazon was still solely selling books, and Netflix was still a DVD rental service. Additionally, only a handful of what are now some of India's most valued start-ups were founded the same year.

When new business models emerge, they test the limits of existing governance frameworks. The IT Act, was last amended in 2008 to deal with the challenges raised by the digital world, while also ensuring that innovation remained relatively unfettered. The 2008 amendment introduced criminal provisions for online speech, provisions to guard against cyber-terrorism, and clarifying language around the perimeter of the safe harbour for intermediaries under Section 79.² In the 14 years since, technological innovation pushed the digital realm to become a more pervasive presence in the social, political, and economic lives of Indians. Moreover, the complexity of the digital world and humanity's engagement with it has increased exponentially. Emerging technological paradigms such as online gaming, the metaverse, and artificial intelligence are bringing their own sets of challenges and opportunities. The following gaps in the IT Act, 2000 prevent it from accounting for these developments.

a. Emerging technology is at odds with existing provisions rendering certain technological use-cases illegal, potentially denying society the benefits of digital advancement

Illustratively, Schedule 1 of the IT Act, 2000 lists certain documents to which the Act shall not apply, such as wills and contracts for the sale of immovable property. Consequently, it disallows the use of digital signatures, which form a core component of blockchain technology, in such transactions. Thus, it is necessary for a new framework to enable such use-cases by creating a mechanism for recognition.

b. New digital activities can be incompatible with existing legal definitions, creating roadblocks for enforcement and business uncertainty

Legislation defines business models or instruments in a static way, limiting its purview to focus on business models that exist at the time of enactment. Resultantly, there can be uncertainty around the governance of newer technologies, particularly in terms of jurisdictional responsibilities. And a governance vacuum sets the stage for ad-hoc interventions, which can lead to suboptimal outcomes for both consumers and industry. There are several arenas of emerging technology governance where such scenarios are visible. These are explored in the case studies below.

i. Online Gaming

Online gaming is a fast-growing sector in India. In 2021, 433 million Indian internet users i.e., 35 percent of the country's total population played online games.³ Investment in the sector grew by 383 percent in the same year and the industry is expected to be worth more than USD 182 billion by 2025.⁴

Indian judicial decisions have divided games into two segments – games of skill and games of chance. According to judicial precedent, games of chance are competitions where success did not depend to a substantial degree on a player's skill.⁵ Games of chance are regulated under gambling and betting laws of different states.⁶ While some games of chance are highly regulated, several are prohibited. Over the years, court cases have clarified that offline games such as rummy and horse racing are games of skill.⁷

However, the status of online games of skill online remains cloudy, both in legislation and judicial decisions. Consequently, several such games of skill end up being regulated under state gambling laws. Illustratively, in 2021, the state of Tamil Nadu introduced the Tamil Nadu Gaming and Police Laws (Amendment) Act 2021, which amended the Tamil Nadu Gaming Act, 1930, to extend prohibitions on games of chance to cyberspace.⁸ Importantly, the amendment also provided that any games of skill played for monetary stakes would also be prohibited.⁹ In the matter of *Junglee Games India Private Limited & Anr. vs The State of Tamil Nadu*, the Madras High Court struck down the amendment because it went beyond the legislative powers allotted to the state under the Constitution, to regulate gambling and betting.¹⁰

The Ministry for Electronics and Information Technology clarified to Parliament that online gaming entities are intermediaries under the IT Act, 2000.¹¹ However, in the absence of specific legal clarity on the subject, it is likely that states may continue to bring in amendments to their gambling laws to ban online gaming. Notably, Karnataka, Telangana, Andhra Pradesh, and Kerala have passed laws under which online games of skill are regulated under gambling laws.¹² Some of these statutes have also been struck down.¹³

ii. The Metaverse

Like online gaming, the metaverse is emerging as an important locus of digital commerce. Seventy-nine percent of metaverse users have made a purchase and over USD 120 billion in investment flowed into the metaverse in 2022, according to data from McKinsey.¹⁴ Several large Indian information technology firms are launching metaverse-related initiatives. Infosys reportedly launched the Infosys Metaverse Foundry, which has developed over 100 use cases for the metaverse.¹⁵ Similarly, Tech Mahindra is reportedly working on 60 projects related to the metaverse around the globe.¹⁶

There is no consensus on a unified definition of the metaverse. One paper defines it as “a hypothetical synthetic environment linked to the physical world”.¹⁷ Another account describes it as a “shared online space that incorporates 3D graphics, either on a screen or in virtual reality”.¹⁸ Despite varying definitions, there does seem to be broad agreement that the metaverse will involve the interplay of many technologies. These will include immersive technologies such as virtual reality, augmented reality, blockchains, artificial intelligence, internet-of-things, and 3-D graphics.¹⁹ It is also likely that metaverses will be global – meaning individuals from different jurisdictions will be able to interact through them.²⁰ A corollary here is that there are likely to be several kinds of metaverses, both intra-nationally and internationally.

There is likely to be legal ambiguity around both the technologies deployed on the metaverse, as well as the use-cases, even if the latter are simply extensions of existing products and services. For instance, it is questionable whether entities running metaverses would qualify as intermediaries under the IT Act, 2000. Broadly, the IT Act, 2000 defines an intermediary as “any person that transmits, stores, or receives an electronic record on behalf of another person”.²¹ Several metaverses are governed by decentralised autonomous organisations (DAO) – digital entities with decentralised governance structures that carry out governance through code. It is unlikely that DAOs would qualify as “persons” because they are not a recognised corporate entity.

iii. Autonomous Cars

In India there is little clarity on whether self-driving cars would be permitted under current road transport laws. Section 3 of the Motor Vehicles Act, 1988 provides that no person shall drive a motor vehicle in any public place without a valid licence. The legal personhood of autonomous technologies i.e., artificial intelligence, is not yet established under law. It may be the case, then, that self-driving cars may not be permitted in India. If they were, how would other questions related to these technologies, such as the reconciliation between matters related to digital governance such as privacy, cybersecurity, and intermediary liability, against concerns specific to motor vehicles, be resolved?

The gaps highlighted by the case studies cited above must be addressed by a new technology law. To reiterate, these gaps can lead to ad-hoc interventions, which, in some cases like online gaming, leads to illegitimate bans on thriving Indian businesses, without necessarily resolving the problem. Illustratively, there are several offshore gambling and betting websites on which Indians have reportedly incurred financial losses.²² For instance, in 2020, police officials in Hyderabad received complaints from people who lost INR 97,000 and INR 1.64 lakh on an offshore betting site linked to Chinese nationals.²³ Further investigations into the matter led to the recovery of INR 30 crores.²⁴ However, states cannot take these sites down because their laws lack extraterritorial application and there are deficiencies in technical capacity.

With newer, more complex technologies such as the metaverse and autonomous vehicles, the level of legal ambiguity, and the consequent operational uncertainty, increases exponentially. Due to the pace of development of these technologies, it is unwise to rely on courts to resolve these legal questions. Courts can only go as far as interpreting existing provisions, they cannot create new ones.

Chapter 1 Summary: Why We Need a New IT Law

- The IT Act, 2000 was last amended in 2008 and, therefore, fails to adequately account for technological developments that have taken place over the last fourteen years.
- Certain provisions of the IT Act are at odds with emerging technology, rendering some use-cases illegal and denying their benefits to society.
- New digital activities may be incompatible with existing definitions, creating roadblocks for enforcement and business uncertainty. Examples include online gaming, the metaverse, and autonomous cars, all touted as technologies of economic significance.
- A new IT law is therefore needed to plug the gaps in the existing IT Act, 2000.

2. MAKE THE DIGITAL INDIA ACT FUTURE-READY TO ENHANCE ENFORCEMENT CAPABILITY WHILE ALSO ENABLING DIGITAL BUSINESSES BY GIVING THEM CERTAINTY

a. Why Should the Digital India Act be Future Ready?

To overcome the gaps in the IT Act, 2000 the Digital India Act must be future-ready i.e., accommodate any digital service offering or activity that might be invented in times to come. The path to a future ready Digital India Act involves the introduction of a mechanism to recognise new technological constructs. Such a mechanism is key to ensuring that the dynamism of the technology industry is not at odds with the State's enforcement capability. Put another way, a recognition mechanism will make it difficult for newer business models to evade legal obligations. Concomitantly, it will clarify that digital businesses are under the purview of the Ministry of Electronics and Information Technology, giving the former much-needed certainty.

Other jurisdictions are also focussing on making their laws and regulations future-ready, to deal with the unpredictability of technological evolution. For instance, the preamble to the proposed EU Regulation on Markets in Crypto-Assets expressly states that the framework must be future-proof to be able to “keep pace with innovation and technological developments”.²⁵

The idea of future-readiness has been considered in academic literature. Chander considers three broad solutions to future-proof the law. First, governing the “product function” rather than the technology, so that the same function can be regulated across different technologies.²⁶ Second, relying on ex-post determinations to evaluate legitimacy, as was done in the Jungle Games matter.²⁷ Such judicial determinations are effective at ensuring evidence-based outcomes, but may be time-consuming and limited in impact, when there are legal ambiguities. However, when there are specific doctrinal concerns regarding harms, such as those related to competition, ex-post regulation may be a better instrument for resolution. The third solution, Chander notes, is to “encompass all future technological developments peremptorily”.²⁸ This means defining terms broadly to enable the technology law to anticipate or accommodate future developments. This paper advocates for a combination of the first and the third, namely focussing on product function, and wide and anticipative definitions, to ensure that the Digital India Act largely avoids being rendered obsolete by the innovations of the future.

b. Steps for Making the Digital India Act Future-Ready

i. Introduce Activity/Product-Function Based Definitions to Ensure New Areas of Technological Concern are Covered

The Internet Corporation for Assigned Names and Numbers (ICANN) devised a model that divides digital governance into three parts – economic and social, logical, and infrastructure.²⁹ Figure 1 borrows from ICANN's tripartite digital governance model to show the current scope of the IT Act against what it should cover. The IT Act, 2000 seeks to govern digital activities that lie in the economic and social layer in Figure 1. Unfortunately, the IT Act, 2000 places greater emphasis on the recognition of baseline technologies and technical constructs that underpin digital activities, rather than the activities themselves. While there is recognition of intermediation and origination as product functions, there is no way to recognise subsets of these activities. More importantly, the IT Act, 2000 neglects to define e-commerce.

The Digital India Act must fill this gap by creating a scheme of recognition through definitions that focus on product functions/activities to ensure, as far as possible, that no new area of concern remains ungoverned. As mentioned before, the focus on product function permits the regulation of an activity across different

technologies.³⁰ Thus, in the future, the law should cover any sale of goods online, regardless of who or what the seller is or what technology is being used to facilitate the transaction.

A product function-focussed Digital India Act must include a catch-all phrase for any activity that takes place online or through electronic transmission. Digital undertaking, the term coined for this purpose, would cover any online activity (Please see Table 1 below for definitions). It is defined as “the use of any electronic means to generate, facilitate, or enable any form of electronic transmission”. The broadness of the term may raise concerns about the inclusion of entities that may engage with digital technologies, however fleeting that engagement may be. However, that is also the purpose, namely that no activity online should go uncovered to limit the chances of activities carried out through future technological paradigms, evading the oversight of the Digital India Act.

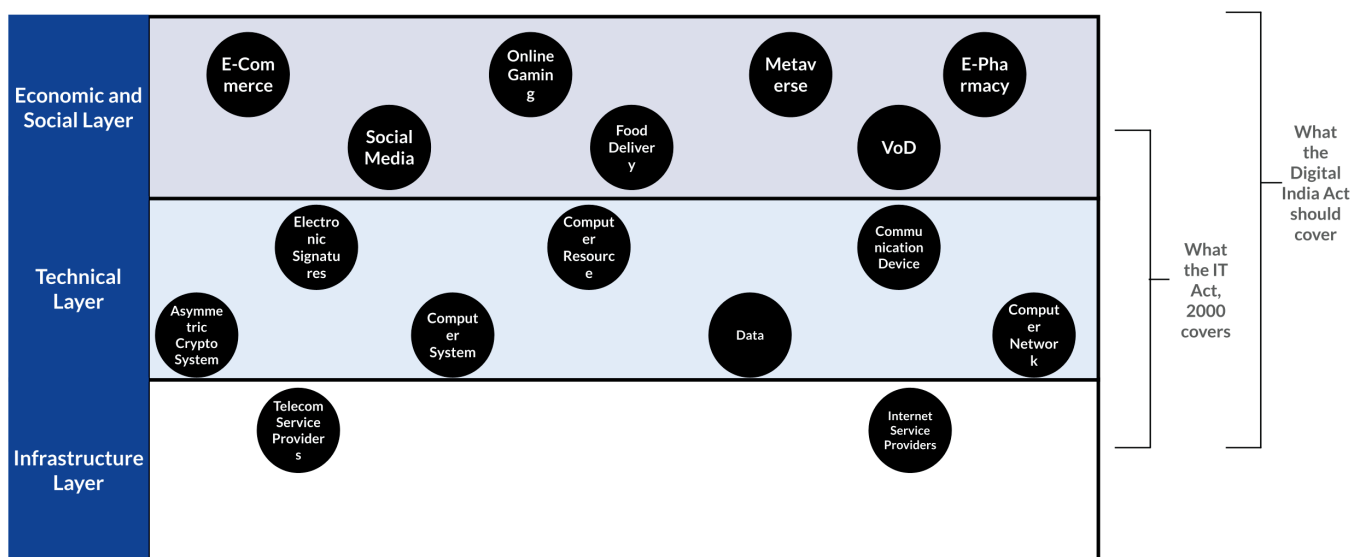


Figure 1: Basic Taxonomy for Digital Product Functions³¹

Source: Author's own

Note: The inclusion of telecom service providers and internet service providers is only for the purpose of intermediary liability. The report does not advocate that the Digital India Act regulate any license activities carried out by these stakeholders. The examples provided in each layer in the diagram above are illustrative and not exhaustive.

Next, the inclusion of wide definitions for e-commerce and intermediaries is recommended (Table 1), as e-commerce and intermediation are fundamental digital activities/product functions. The definition provided for e-commerce in this report is purposefully broad to include any commercial activity online. The definition of intermediary has also been widened to account for multiple parties interacting directly or indirectly through a platform. Table 1 below provides the definitions suggested for these terms, the explanations of the definitions, as well as the rationale behind them.

TABLE 1: DEFINITIONS FOR A FUTURE-PROOF DIGITAL INDIA ACT

Term	Definition	Rationale
Digital Undertaking	<i>A digital undertaking is the use of any electronic means to generate, facilitate, or enable any form of electronic transmission.</i>	<ol style="list-style-type: none"> 1. The premise behind such a definition is to capture any and all activity in the digital sphere. 2. The broad definition may raise concerns about the inclusion of entities that may engage with digital technologies, however fleeting that engagement may be. However, that is also the purpose, namely that no activity online should go uncovered. This way there are very limited chances of future technological paradigms evading the oversight of the Digital India Act. 3. Exceptions and explanations may be introduced as necessary.
E-commerce	<i>E-commerce includes any commerce enabled by electronic means.</i>	<ol style="list-style-type: none"> 1. The broad definition provided here is to ensure that it covers the wide ambit of digital commerce. 2. The expansive definition, however, is meant to serve as a base for further sub-classifications of e-commerce. Such sub-classification is necessary because a majority of policy interventions target a small subset of e-commerce, namely e-retail. For instance, there the FDI policy defines e-commerce broadly enough for it to apply to types of businesses beyond e-retail. It could, for instance, cover video-on-demand services. However, the FDI policy on e-commerce is clearly not intended for such IP-based or service businesses, as it disallows activities such price-setting, without which these businesses could not function.
Intermediary	<i>An intermediary means any digital undertaking that brings together or facilitates or enables interactions between any third parties electronically.</i>	<ol style="list-style-type: none"> 1. The term intermediary is already expansively defined in the IT Act. However, it seemingly only accommodates two-sided markets, based on the examples given in the definition which include telecom service providers and e-auction websites. 2. The use of the term “third parties” in the definition provided here accommodates paradigms like metaverses, that can host interactions between multiple parties at one time.

ii. Define activities in terms of concepts related to product function, not examples of specific service offerings

The use of illustrations in legal definitions can have a narrowing effect, particularly in the face of technological innovations that challenge legislative assumptions about how an activity/function/technology may evolve. For instance, the definition of “intermediaries” under the IT Act cites examples of qualifying entities to include telecom service providers, networks service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces, and cyber-cafes. These examples were included because they were the prevalent digital intermediation services when the IT Act was enacted. Going by these illustrations, it is unclear how something like the metaverse or online gaming are classifiable as intermediaries.

Conversely, definitions that capture the concept underpinning the product-function or activity have the potential to be more enduring, as they are not limited to existing technologies. For example, the US Securities and Exchange Commission is able to classify certain digital assets as securities by virtue of a 1946 Supreme Court decision that defined the term investment contract (which is a security under the US Securities Act, 1933) as a concept, rather than naming similar instruments to illustrate its meaning.³² In the matter of the SEC vs. W.J. Howey Co., the Supreme Court defined an investment contract as an “investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others”.³³ The definition is known as the Howey test because it sets out certain elements that the SEC can look for, to determine whether a digital asset is a security. The Howey test grants an important future-proof lever to the SEC to regulate financial assets such as crypto-assets, which did not exist when the Securities Act was introduced or when the decision in the Howey case was pronounced.

An added advantage of considering product-functions/activities in terms of concepts is that it enables quicker and more conclusive decisions on jurisdiction than ex-post determinations. The method is also more amenable to the judicial interpretive process and gives judges greater clarity about legislative intention. The definitions for a digital undertaking, e-commerce, and intermediaries set out in Table 1 above and Table 2 below, follow a similar pattern of listing out elements that authorities can look for to bring a technological activity under their purview. While such an interpretational prerogative lies with the judiciary, there are several examples of regulatory authorities and ministries that are empowered to notify items that are similar to what they already regulate. For instance, the Reserve Bank of India is empowered to notify any financial instrument that it deems similar to bank notes, as a currency, under the Foreign Exchange Management Act, 1999 (FEMA).³⁴

TABLE 2: IDENTIFICATION TESTS IN PRODUCT FUNCTION DEFINITIONS

Term	Definition	Elements
Digital Undertaking	<i>A digital undertaking is the use of any electronic means to generate, facilitate, or enable any form of electronic transmission</i>	<ol style="list-style-type: none"> 1. Actor agnostic: The term digital undertaking is not qualified by any type of entity or person, thereby enabling it to account for completely autonomous digital activities as well those carried out by natural and juridical persons of all kinds. 2. Use of any electronic means: The purpose of including this phrase ensures that any activity carried out digitally will be covered. This would even cover the online activities of brick-and-mortar establishments. 3. To generate, facilitate, or enable any electronic transmission: This covers any iteration of what are considered originators, concerns that generate their own content or sell their own goods such as inventory-based e-commerce entities, or intermediaries i.e., concerns that facilitate interplay between third-parties, as well as any other type of digital activity.
E-commerce	<i>E-commerce includes any commerce enabled by electronic means.</i>	<ol style="list-style-type: none"> 1. Any commerce: The use of the word commerce shrinks the perimeter of e-commerce when compared to a digital undertaking, as it covers only commercial endeavours. 2. Enabled by any electronic means: Covers all commercial activity, even offline vendors that use a website or digital payment service for their business.
Intermediary	<i>An intermediary means any digital undertaking that brings together or facilitates or enables interactions between any third parties electronically.</i>	<ol style="list-style-type: none"> 1. Any Digital Undertaking 2. Enables or facilitates interactions: The inclusion of these terms necessarily broadens the ambit of the term considerably to include telecom service providers and other digital intermediaries, beyond those operating in two-sided markets, while also emphasising a degree of platform neutrality – as intermediaries are primarily vehicles for the transmission of information – not generators of content. 3. Between third-parties: This creates scope to include communication typologies that go beyond one-to-one or one-to-many interactions i.e., accounts for multiple parties interacting simultaneously. 4. Electronically: This could include interactions facilitated on communications technologies that go beyond the internet.

iii. Introduce a Mechanism for Sub-Classification and Notification of Business Models

Specificity is also an important element of quality law-making.³⁵ It allows for better targeting of policy concerns raised by a particular business model.³⁶ The broad categories of digital undertakings, e-commerce, and intermediaries will encompass several different types of business, each requiring different governance modalities. As such, the Digital India Act must include a mechanism for the sub-classification of entities under the different activities identified here for specific and targeted governance.

A corollary of specificity is the inclusion of a notification mechanism that enables the nodal ministry under the Digital India Act to notify entities that qualify as intermediaries, e-commerce, or both. Further, these entities can be further notified under the sub-classifications identified by the Ministry. The notification mechanism will go a long way to give unequivocal clarity on matters of jurisdiction.

As an illustration, sub-classifications for intermediaries can be introduced. The Digital Millennium Copyright Act, for instance, has four different classes of intermediaries. Similarly, sub-classifications for e-commerce can be brought in to draw out distinctions between e-retail and other forms of online commerce. Current government instruments fail to draw out this distinction. Illustratively, the Foreign Direct Investment (FDI) Policy Circular 2020 defines e-commerce widely as “buying and selling of goods and services including digital products over digital & electronic network”.³⁷ The FDI policy for e-commerce is not intended for IP-based or service-based e-commerce because, among other things, it disallows things like price-setting, without which such businesses would be unable to function. At the same time, the definition of e-commerce in the FDI policy is wide enough to cover intangible goods and services. The Digital India Act must, then, draw out distinctions between different forms of e-commerce as there are different governance considerations applicable to each.

Sub-classifications identified for intermediaries as well as e-commerce can subsequently be notified by the Government.

c. Why the Twin Emphasis on Enablement and Enforcement is Necessary

Globally, digital governance efforts have disproportionately focussed on reining in the purported excesses of large digital businesses. The most active jurisdiction on this front is the European Union. It recently enacted the Digital Markets Act and Digital Services Act, both of which place constraints on platforms that reach a certain subscriber threshold. The Digital Markets Act, for instance, prohibits large platforms deemed “gatekeepers” from carrying on certain activities.

In India, there is considerable interest in following the example of the EU, as there is a perceived commonality of both political and commercial self-interest. Illustratively, the Parliamentary Standing Committee on Commerce recently suggested identifying platforms that reach a certain scale as “gatekeepers” and subjecting them to stricter supervision – a verbatim import from the DMA.³⁸

However, the narrow focus on espousing the constraints placed by the EU on technology businesses loses sight of the measures being taken in that jurisdiction to encourage investment and innovation in its tech businesses. While the EU is introducing restrictive regulation, it is also looking to issue laws that will incentivise investment in their start-ups. Illustratively, the proposed EU Listing Act seeks to enable greater accessibility to funding for start-up founders while allowing them to retain control of their organisations.³⁹ It also streamlines requirements for capital markets to enable easier access to them.⁴⁰ In doing so, the EU hopes to encourage the infusion of USD 45 billion in its deep tech start-ups.⁴¹ Another example is the EU’s proposed regulation for Markets in Crypto Assets which seeks to address policy concerns while encouraging innovation in the cryptocurrency market.⁴² Thus, even conservative jurisdictions such as the EU recognise that regulatory efforts in the technology sector require a careful balance of restrictions and incentives to manage risks and catalyse growth.

Another important consideration is global competitiveness in the digital economy. To compete in a global digital market, companies need to be big. Unlike the EU, India boasts of several enterprises that are market leaders in several digital segments. For instance, BookMyShow has a 70-75 percent share in the market of online movie bookings.⁴³ Similarly, online food delivery is a duopoly of Indian companies as well, with each entity accounting for close to 50 percent of the market.⁴⁴

Market access and reciprocity are subsets of global competitiveness. If India wants its digital businesses to have a global presence, it must endeavour to remain open and set out balanced normative expectations for entities that originate from other countries.

Thus, there is a strong case for India to look at enabling digital businesses as a core objective, along with addressing enforcement concerns, when redesigning its information technology law.

Chapter 2 Summary: Make the Digital India Act Future-Ready to Enhance Enforcement Capability While Also Enabling Digital Businesses by Giving Them Certainty

- The Digital India Act must be future-ready to ensure what is enacted today is not rendered obsolete by the innovations of tomorrow. Future-readiness is a well-accepted principle of technology law and has been espoused by recent regulatory proposals in the EU as well.
- The means toward future-readying the law is the introduction of a mechanism for the recognition of new product-functions and digital activities. The focus on product function enables the same activity to be regulated across different technologies.
- Product-functions/activities should be defined widely and in terms of concepts rather than illustrations, to ensure their scope is not limited to prevailing business models.
- The Digital India Act must also include a mechanism for classifying broader product functions into specific sub-categories for targeted digital governance. These sub-categories can be introduced through a system of notification.

3. UNBUNDLING THE MECHANISM OF INSTITUTIONAL OVERSIGHT UNDER THE DIGITAL INDIA ACT

The broad-basing of a single legislation to bring the digital economy within its scope raises important questions about the modalities of institutional administration. For instance, the broad definitional scheme set out in the previous section would effectively make the MEITY the nodal ministry for the digital economy. However, would the Ministry have the requisite jurisdiction to take on such a position? Are there any areas where states may hold primary jurisdiction over digital governance instead of the Centre? As several digital businesses intersect with traditional modes of commerce in other sectors, how can jurisdictional overlaps be reconciled? This section endeavours to answer these questions.

a. Does the Union Have Primacy Over the States for Enacting Laws on the Digital Economy?

Schedule VII of the Indian Constitution sets out areas on which the Centre and the states have exclusive (List I and List II respectively) and concurrent (List III) powers to make laws. Under Entry 31 of List I the Union is empowered with the exclusive legislative prerogative over posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication. It makes sense, then, for the Union to have primacy over enacting laws related to digital technologies. A recent recommendation by the Law Commission supports a similar conclusion. In 2018, the 276th Law Commission Report, recommended that Parliament enact a law dealing with online gambling and betting, as it is “played and offered over media”. In other words, the communications technologies are similar to what is provided under Entry 31 of List I.⁴⁵ The recommendation acknowledges that Parliament has the legislative competence to enact laws related to Entry 31 of List I.⁴⁶ A further implication of the recommendation is that the power accorded to Parliament is so wide that it effectively enables it to regulate all activities carried out through online or any other electronic media.

A multi-dimensional technology such as the metaverse, further strengthens the case for the Centre to enact the primary law for the digital economy. Table 3 below considers matters of constitution division of labour for the metaverse, and indicates that there are a significant number of entries relevant to matters of governance under the Union compared to states. For instance, global metaverses will possibly include a cross-pollination of norms from different jurisdictions, which may prompt them to feature more prominently in multilateral or plurilateral arrangements in the future. This falls squarely within the purview of the Centre under Entry 14 of List I. More importantly though, the governance considerations about the different digital technologies that will constitute the metaverse also fall within the purview of the Centre, under Entry 31 of List I. Finally, monetary transactions and intellectual property, drivers of value in the metaverse, are Union subjects as well. As such, it makes sense for Metaverse governance to vest primarily with the Union. This would not derogate from the ability of the states to tax items in the metaverse under Entries 55 and 62 of List II.

TABLE 3: DIVISION OF LABOUR BETWEEN THE UNION AND THE STATES ON MATTERS OF GOVERNANCE RELEVANT TO THE METAVERSE

NOTE: THE ENTRIES LISTED HERE ARE ILLUSTRATIVE AND NOT EXHAUSTIVE.

Sr. No.	Entry Number	Description	Rationale
LIST I : UNION LIST			
1.	Entry 14	Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.	The metaverse is a world without boundaries. Given the global nature of the metaverse, treaties/codes of standards/conventions that traverse boundaries will have to be formulated for effective enforcement of user rights.
2.	Entry 31	Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.	Can extend to newer forms of communication in the metaverse through virtual reality headsets, haptic technology etc.
3.	Entry 36	Currency, coinage and legal tender; foreign exchange	Can extend to Central Bank Digital Currencies (CBDCs) that may be adopted in the metaverse for payments and other financial transactions.
4.	Entry 49	Patents, inventions and designs; copyright, trademarks and merchandise marks	Everything in the metaverse will be made of someone's IP. This entry can thus be extended to the registration, protection and enforcement of IP in the metaverse.
5.	Entry 82	Taxes on income other than agricultural income	Any income arising out of the metaverse (rental income; income from running an e-commerce business in the metaverse; income from sale of virtual land) shall be taxed as per the applicable provisions of the Income Tax Act.
6.	Entry 86	Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.	The income from the transfer of virtual land (if permitted) can be taxable at rates applicable to a normal capital asset.
7.	Entry 92C	Taxes on services	Revenue generated by services offered in the metaverse will be taxable under this Entry.

LIST II- STATE LIST			
1.	Entry 9	Relief of the disabled and unemployable	Granting relief to disabled to ensure greater accessibility and inclusion in the metaverse can fall under this entry.
2.	Entry 18	Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents;	Can be extended to include rights in and over virtual land in the metaverse. Just like in real life, virtual land can be developed, leased, mortgaged or sold.
3.	Entry 55	Taxes on advertisements other than advertisements published in the newspapers 2[and advertisements broadcast by radio or television].	Just like sale of advertisement space on the internet is liable to GST, selling advertisement space in virtual real estate in the metaverse will also be taxable.
4.	Entry 62	Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.	Taxes of virtual concert tickets, event passes, tickets to virtual theme parks, in-game purchases in the metaverse etc.

b. Can the MEITY Serve as the Nodal Ministry for the Digital Economy?

The Government of India (Allocation of Business) Rules, 1961, formulated under Clause 3 of Article 77 of the Constitution, provide that the Ministry of Electronics and Information Technology is responsible for all policy matters related to the internet, aside from licensing internet service providers.⁴⁷ The Allocation of Business Rules further provide that the MEITY is also responsible for cyber laws, administration of the IT Act and other IT laws.⁴⁸ The Allocation of Business Rules clarify to a significant extent that MEITY is the nodal ministry for all matters of digital governance.

Further support for MEITY's position as the nodal ministry for all digital activity lies in the amendment to the Allocation of Business Rules in 2018. It brought matters related to e-commerce under the Department for the Promotion of Industry and Internal Trade's industrial policy mandate.

In 2020, the Allocation of Business Rules were amended once again to grant the Ministry of Information and Broadcasting the power to regulate content on online media platforms.⁴⁹ Even when the MIB was granted the power to do so, it went through the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, to regulate digital media. The MIB presumably took the route through the IT Rules because the existing legislation governing content regulation, that is the Cable Television Network (Regulation) Act, 1995 or the Cinematograph Act, 1952 did not give it powers to regulate content on digital media.

It makes administrative sense, then, for the MEITY to operate as the line ministry for digital activities. The process of extending this charge to other ministries would possibly require legislative amendments well beyond a simple rejigging of the Allocation of Business Rules, which can lead to a long drawn out and

complicated process. Illustratively, the first draft for a data protection bill was submitted in July 2018, yet India still has no law in place.⁵⁰ Conversely, having a single line ministry for the digital economy would allow for greater administrative efficiency.

c. Introduce a Mechanism for Inter-Ministerial Coordination for Digital Governance

Positioning the MEITY as the line ministry for the digital economy does not dispense with the roles of other ministries/departments in its governance. Indeed, it cannot as it would possibly lead to significant problems of capacity. Digital businesses often intersect with matters of policy that extend beyond the online realm that must be addressed by a competent authority. As such, regulators and authorities should be able to feed into the governance of entities and activities covered by the Digital India Act.

Currently, there is limited regulatory coordination on digital governance. A consequentially emerging trend in sectoral regulation of digital activities is the conflation of service innovation with regulatory arbitrage. Sectoral regulators presume that digital businesses have been created to evade regulatory obligations imposed on legacy versions of the same activity. The presumption is guided by calls from legacy market players that seek the imposition of the same rules on similar services, in a bid to do away with the competitive threat they perceive digital businesses present. For instance, in 2018 and 2021, the Cellular Operators Association of India (COAI) called for the imposition of telecom regulations on over-the-top (OTT) communications services.⁵¹⁵²

The availability of digital technologies could enable regulators to rethink how they manage traditional businesses and introduce deregulation. Nevertheless, sectoral regulators tend to move quickly to impose legacy rules on new digital businesses when pressured by legacy incumbents or political exigencies. Illustratively, in 2018 the Telecom Regulatory Authority of India (TRAI) issued a consultation paper to assess the regulatory imbalance between telcos and OTT communications services.⁵³ Such interventions are reactive and severe, with little regard for how they may diminish the benefits such businesses offer consumers (please see Table 4 below). Resultantly, they can render digital models unfeasible, create barriers to entry, and decrease consumer surpluses. Bans, another problematic and common regulatory impulse towards new technology businesses, are a corollary of the treatment of service innovation as regulatory arbitrage (please see example of e-pharmacies in Table 4 below). Such blunt actions point to the inability of sectoral regulators to appropriately reckon with policy concerns raised by digital models responsibly.

TABLE 4: REGULATORY INTERVENTIONS IMPOSING LEGACY FRAMEWORKS ON NEW DIGITAL BUSINESSES

S. No.	Digital Business	Regulation Proposed	Regulator/Ministry	Outcome
1.	Communications Over-the-Top (OTT) Services (E.g., WhatsApp, Telegram)	In 2018, a consultation paper was released proposing the imposition of licensing, interconnection, pricing requirements typically meant for to address a perceived regulatory imbalance between telecommunications service providers and communications OTTs and mitigate national security concerns.	Telecom Regulatory Authority of India, Department of Telecommunications	The regulator recommended that market forces be allowed to prevail as TSPs benefitted from the increased data usage prompted by communications OTTs on their platforms. ⁵⁴ However, the issue has been raised once again as the Department of Telecommunication. recently sent a reference to the TRAI to begin a consultation on the matter in 2022. ⁵⁵
2.	Online Travel Aggregators (OTAs)	Recognition scheme for online travel aggregators, based on a report/recommendation of a committee comprising of, among others, a representative of the Federation of Hotel & Restaurant Associations of India. Minimum requirements for application included paid capital of INR 1 crore, and registration under the Shops and Establishments Act. ⁵⁶ The objective of the scheme was to enhance the credibility of OTAs.	Ministry of Tourism	Creates barriers to entry for new entrants in the market, as only OTAs with continuous operations for at least three years may apply. Increasing cost of doing business for OTAs. MakeMyTrip withdrew from the scheme contending that it was a technology platform, not a hospitality service provider. ⁵⁷
3.	Online Cab Aggregators	Maharashtra City Taxi Rules, which, among other things, required drivers of taxis driven for cab aggregator services to acquire permits which cost INR 25,000 for vehicles with an engine capacity of up to 1400 cc and INR 2.16 lakhs for vehicles with greater engine capacity than 1400cc. Drivers were also required to have evidence of 15 years of domicile in the state, effectively precluding inter-state migrants from participating in these services.	Maharashtra State Transport Authority	After the scheme was announced, only 144 drivers applied for permits, out of a total of 45,000 reported cabs operating on cab aggregator services in the state. ⁵⁸

4.	E-Pharmacy	<p>In November 2019, the Drugs Controller General of India issued a notification to State drug controllers to comply with a direction given by the Delhi High Court in 2018 that prohibited the online sale of medicine without a license.⁵⁹</p>	<p>Drugs Controller General of India</p>	<p>In its report on the promotion and regulation of e-commerce in India, the Parliamentary Standing Committee on Commerce noted that the absence of a regulatory framework for e-pharmacies “results in uncertainty which is not conducive for the fast pace of digital markets”.⁶⁰</p> <p>While the Ministry of Health and Family Welfare (MoHFW) brought out Draft E-Pharmacy Rules through G.S.R 817 (E) which amended the Drugs and Cosmetics Rules, 1945, in August 2018, these were never notified. The E-Pharmacy Rules were, however, problematic to some extent as they introduced data localisation requirements for e-pharmacies, a subject which is not within the purview of the MoHFW as per the Allocation of Business Rules, 1961.⁶¹ This position was further clarified when the MoHFW drafted a “Digital Information Security in Healthcare Act (DISHA Act), which looked into ensuring privacy and security of digital health data, it was informed that the MEITY was in the process of enacting a Data Protection law.⁶² It was further informed that the MEITY’s data protection law “would be applicable to all domains including health”.⁶³</p>
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Regulation must establish a balance between the opportunities presented by innovation while responding to specific policy concerns or harms that technology businesses present. Concomitantly, regulation must not be used as a lever to hamstring newer, more efficient means of doing business, in a bid to wipe out competition for legacy models.

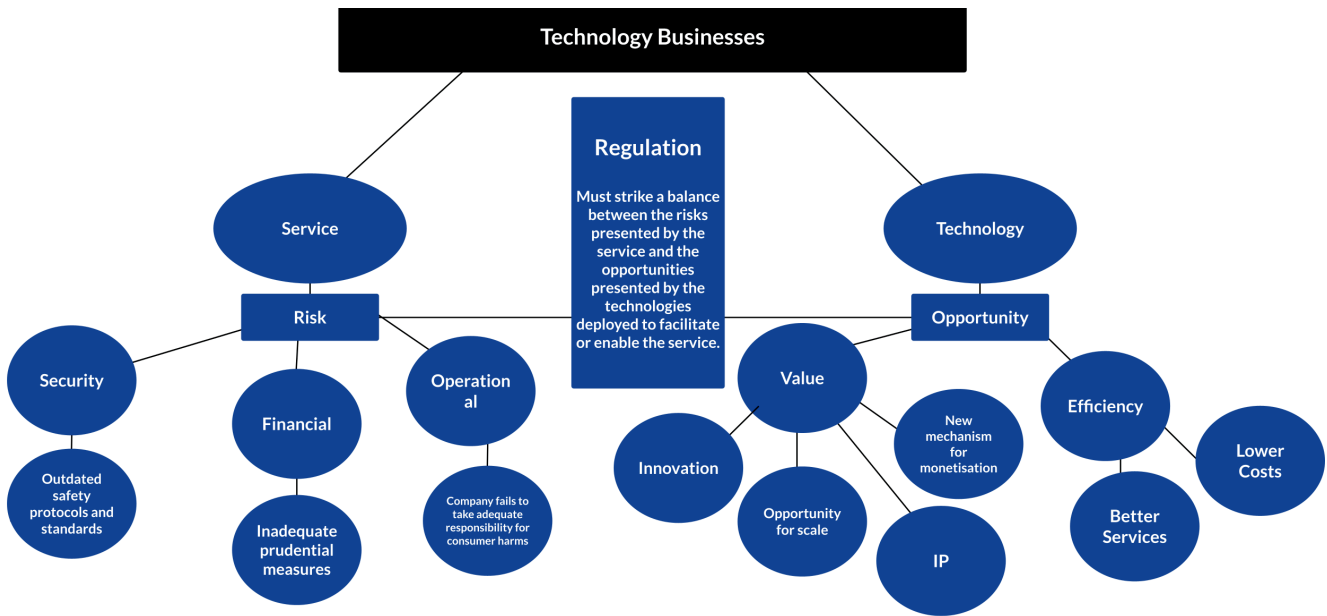


Figure 2: The Role of Technology Regulation
Source: Author's own diagram

What is necessary is a mechanism that enables different ministries to play to their strengths while overseeing the digital economy; as the MEITY and sectoral regulators have somewhat distinct roles to play in the governance of digital undertakings. A recommended approach would be for MEITY to focus on enabling technologies and tackling harms specific to the digital sphere. Other authorities, in turn, can feed in on risks they may be aware of, based on their experiences with similar legacy business models they have dealt with. For instance, in the realm of financial technology, MEITY can look into matters of data protection and cyber-security, while the RBI can focus on mitigating specific financial risks. Operationally, in the fintech sector, RBI can be involved in day-to-day hygiene, while the MEITY can make rules issues specific to the digital sphere, with a view to ensure that neither authority unnecessarily burdens digital businesses.

Chapter 3 Summary: Unbundling the Mechanism of Institutional Oversight under the Digital India Act

- The Union has primacy over the states to enact laws related to the digital economy, by virtue of Entry 31 of List I.
- Similarly, the Allocation of Business Rules, 1961, establish that the MEITY is the nodal ministry for the digital economy. The Rules had to be amended to over the last few years to enable Ministries and Departments other than the MEITY to establish norms for different areas of digital governance.
- The MEITY's position as nodal ministry does prevent other wings of the Government from participating in digital governance. Indeed, it cannot because it would lead to considerable capacity concerns.
- Rather, MEITY and different sectoral ministries must coordinate their efforts on digital governance. Currently, there is a lack of coordination which leads to sectoral regulators imposing legacy rules on new digital businesses.
- There is, therefore, necessity for a mechanism for ministerial coordination on digital governance. Such coordination would involve MEITY issuing norms related to digital governance and sectoral ministries overseeing the day to day hygiene, and issuing rules specific to their expertise and experience.

4. THE DIGITAL INDIA ACT MUST ESPOUSE CO-REGULATION

Governments across the world, including in India, accept that digital governance must be flexible.⁶⁴ Light touch governance frameworks, such as the Information Technology Act, 2000, which play an enabling role for technological applications, have long been the norm. However, as technology matures, the hype can die down and policy concerns can arise.⁶⁵ Consequently, decision-makers may become increasingly tempted to bring in static regulation that does not easily reconcile with the unpredictability, dynamism, and breadth of technology markets.⁶⁶

Self-regulation is often touted as a more expedient model for digital governance than State regulation. However, self-regulation models can have high failure rates because the self-regulatory organisation's measures may be too weak to be feasible or effective,⁶⁷ and consequently enable the State to justify non-intervention. There may also be a lack of transparency in the manner self-regulatory bodies set norms.

An illustration of ineffective self-regulation was when the Advertising Standards Council of India (ASCI), a self-regulatory body for advertising, issued a set of guidelines for the advertising and promotion of virtual digital assets and services in February 2022. The guidelines were issued on the heels of criticism and controversy surrounding misleading and non-transparent advertisements related to crypto-assets.⁶⁸ The guidelines included the requirement for a disclaimer that spoke about the riskiness of investing in crypto-assets.⁶⁹ They also indicated that celebrities and other influencers starring in such ads should take special care to carry out due diligence about crypto products promoted by them.⁷⁰ However, ASCI found that more than 400 ads related to crypto-assets violated the guidelines, till May 2022.⁷¹

Another problem with self-regulation is that it requires competitors, i.e., industry stakeholders, to cooperate. As a consequence, self-regulatory efforts can lead to fragmentation owing to a lack of consensus. Illustratively, a 2022 proposal for self-regulation of social media from Facebook, that also had support from Twitter was opposed by other such entities, that were concerned about how such self-regulation may affect their decisional autonomy.⁷²

Beyond the binary of state regulation and self-regulation exist several co-regulatory models that offer a workable middle road. Co-regulation entails the State partnering with a private body, that may or may not comprise of industry, in a "coordinated" self-regulatory effort.⁷³ The State acts as a participant or facilitator in the self-regulation process, setting out principles that prescribed codes of conduct must follow. The codes of conduct, in turn, are drafted either by the private body.

There can, however, be several types of co-regulation. For instance, in Singapore, the Infocomm Media Development Authority, the country's media and communications regulator, encourages internet content providers to establish codes of practice to complement extant regulation. In another model, civil society organisations and other experts may also be formally co-opted into the co-regulatory process.⁷⁴ Illustratively, Articles 34 and 35 of the Digital Services Act provide for the European Commission to encourage the independent development of standards and conduct codes for better compliance with its stipulations. Article 34, for instance, encourages the creation of standards by bodies within the EU and globally for audits of very large online platforms, interoperability, and submission of notices.⁷⁵

The benefits of co-regulation are three-fold. One, the involvement of the Government in the rule-making process nudges industry players to build consensus. Two, it allows for agile-rulemaking that works with digital business models, rather than against them. Three, co-regulation can help minimise legal challenges to Government regulation as stakeholders directly affected by any new rules are part of the norm-setting process.

The three-tier mechanism for digital governance encompassed in the IT Rules 2021 also serves as a form of co-regulation as industry is tasked with enforcing its stipulations at the first level. The problem, however, is that the broad norms for compliance under IT Rules, 2021 are established by the State, which in turn has prompted considerable litigation.

An alternative model to the structure of the IT Rules, 2021 could be for a co-regulatory mechanism to devise a code of conduct for intermediaries, which is then guided and blessed by a competent government authority, and enforced by industry. Sanctions for non-compliance can then be imposed by the government. This structure may also be less complex than the current three-tier mechanism.

The increasing complexity of the digital world is likely to prompt the necessity of several co-regulatory efforts in the future. Therefore, it would be useful to include a provision in the Digital India Act that enables the creation of co-regulatory codes of conduct.

Chapter 4 Summary: The Digital India Act Must Espouse Co-Regulation

- State-led digital governance is sub-optimal because it involves the introduction of static laws that may or may not be out of touch with technological realities.
- Similarly, self-regulation can be too watered down and consequently, ineffectual. Self-regulatory efforts also tend to suffer from a lack of consensus, resulting in fragmentation.
- Co-regulation, a system of governance that sees the State partnering with private bodies to establish norms, can overcome some of the pitfalls of state-led and self-regulation.
- Co-regulation typically involves a private body creating codes of conduct under the guidance of Government. The private body can be formed by stakeholders from industry, experts, civil society or a mix of the three.
- Co-regulation is less prone to legal challenges as the stakeholders affected by it are part of the norm-making process.
- Government participation in co-regulation nudges industry stakeholders to find consensus.
- May allow for agile and effective rulemaking that works with digital business models, rather than against them.

5. THE DIGITAL INDIA ACT MUST ENGENDER TRUST THROUGH GREATER EMPHASIS ON ACCOUNTABILITY, TRANSPARENCY, AND FUNDAMENTAL RIGHTS

Trust is an important value in digital governance. It helps to encourage greater activity online, particularly in developing countries where there is resistance to adopt new technologies. A survey on internet security and trust conducted by Ipsos on behalf of the Centre for International Governance Innovation (CIGI) and in partnership with the United Nations Conference on Trade and Development (UNCTAD), found that 80 percent of internet users were concerned about their online privacy and suggest that governments were the culprits behind incursions on privacy.⁷⁶ Twenty percent were finding it harder to surf the internet because of censorship.⁷⁷ Global citizens had also lost faith in the internet and were less likely to disclose information.⁷⁸ It is becoming increasingly necessary for technology laws to imbibe principles that usher in greater accountability, transparency, and respect for human rights.

Espousing values and norms that engender greater trust online is also a constitutional mandate for the Indian State. It is constitutionally duty-bound to respect and safeguard the rights of citizens in the digital realm. Indians have fundamental rights to privacy as well as freedom of speech and expression online. In *Justice K.S. Puttaswamy vs Union of India*,⁷⁹ the Supreme Court held that the right to privacy is part of the right to life and liberty under Article 21 as well as the other fundamental rights under the Constitution. Similarly, in *Anuradha Bhasin vs. Union of India*,⁸⁰ the Supreme Court affirmed that the right to free speech and expression guaranteed by Article 19(1)(a) extended to the Internet.

Importantly, in both *Puttaswamy* and *Bhasin*, the Supreme Court established specific qualifications for any legitimate state encroachment on these rights. In *Puttaswamy*, the Court set a three-pronged test to determine whether encroachments on privacy by the State were constitutionally legitimate, namely the existence of a law that pursues a legitimate state aim and it must meet the test of proportionality.⁸¹

According to one constitutional law expert, Justice Sanjay Kishan Kaul fleshed out the test and noted that the proposed incursion on privacy must be necessary in a democratic society and there must be guarantees against abuse of such incursions.⁸² Similarly, in *Anuradha Bhasin*, the Court made clear that restrictions on free speech rights online can only be made on the grounds provided under Article 19(2) and such restrictions must be reasonable, for a legitimate purpose, and prescribed by law.⁸³

Puttaswamy and *Bhasin* (and indeed several other cases related to the rights of citizens online) set a roadmap for how the Indian State can pursue a governance agenda that meets objectives related to matters of public interest, without completely eroding the trust and safety of its netizens.

To this end, the State may consider inducting the following checks and balances in the Digital India Act to engender greater confidence in consumers about the safety and security of the internet, and concomitantly, guard against reduced interest in engaging with the digital economy:

a. Introduce a specialised judicial oversight of digital governance measures that is supported by an independent research body

State decisions that affect the privacy of persons, such as surveillance or interception orders, cannot rest solely with the executive as they require considerable expertise in statutory interpretation. It is a similar case for content takedowns, which can only be carried out on the basis of grounds set forth under Article 19(2) and the tests crafted by courts related to each of those grounds. Therefore, the Digital India Act must

provide for some kind of oversight on such matters. Moreover, the exercise of such oversight, to the extent permitted by the constraints of security or national interest, must be transparent and open to public scrutiny.

Ideally such oversight would be carried out by a specialised tribunal such as the United States' Foreign Intelligence Surveillance Court (FISC) which reviews government applications for electronic surveillance.⁸⁴

However, specialised tribunals in India have a poor track record when it comes to functionality. For example, the IT Act provided for the Cyber Appellate Tribunal (CyAT), a specialised body established in 2006 to address cases of cyber fraud.⁸⁵ Like most specialised judicial bodies, however, it was found that the CyAT was largely defunct. In 2016, a report of the Comptroller and Auditor General found that the CyAT was operating without a chairperson for five years. Moreover, its staff rendered services and made expenditures even though the body didn't perform its main duty of hearing appeals related to cyber fraud.⁸⁶ In 2017, the CyAT was merged with the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), possibly in response to the former's poor functioning. Several other specialised tribunals have been done away with,⁸⁷ ostensibly for similar reasons.

A digital governance tribunal that looks into content takedowns and other executive decisions that require judicial insight may benefit from assistance from an independent research body. Such a body can comprise several organisations that specialise in different areas at the intersection of law and technology. This would help plug gaps in technical expertise of a specialised digital governance tribunal to:

- a. Help build the capacity of judicial members through research;
- b. Give feedback to judicial members on their decisions.

The mechanism of engagement between the specialised digital governance tribunal and the proposed independent research body could be similar to how the Competition Commission of India (CCI) executes its market studies. The CCI engages an implementation partner, which has academic expertise in a particular sector, assists the competition regulator, to conduct a market study. The process is useful to enhance institutional capacity, and enable an evidence-based approach to regulation.

b. Make Executive Rule-Making more Transparent

This can be done through consultations and explanatory memoranda that detail the rationale behind the notification of rules related to digital governance. Such memoranda should give details of data relied on as well as the methodology used to gather it.

c. Enable detailed transparency reporting by companies by minimising confidentiality requirements around surveillance requests

Presently, provisions on the issuance of lawful surveillance orders under the Indian Telegraph Act, 1885 and Rule 419A of the Telegraph Rules, 1951, and the IT Act require the recipients of such orders to keep details confidential.⁸⁸ In addition, telecommunications licences also require service providers to maintain confidentiality regarding the interception of communications for surveillance purposes.⁸⁹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 do require significant social media intermediaries (entities with more than 5 million registered Indian users) to publish monthly reports on content takedowns on their platforms. However, the narrow focus on social media intermediaries excludes a range of organisations that receive content takedown notices. Confidentiality stipulations should be minimised to ensure that only sensitive information is kept secret, while information surrounding actions that would affect people's rights, such as content takedowns and State surveillance, is disclosed.

Chapter 5 Summary: The Digital India Act Must Engender Trust through Greater Emphasis on Accountability, Transparency, and Fundamental Rights

- Trust is an important value in digital governance. It helps to encourage greater activity online, particularly in developing countries where there is resistance to adopt new technologies.
- Espousing values and norms that engender greater trust online is also a constitutional mandate for the Indian State. It is constitutionally duty-bound to respect and safeguard the rights of citizens such as privacy and freedom of speech and expression in the digital realm.
- To engender greater trust online, the Indian state must:
- Introduce a specialized judicial oversight of digital governance measures that is supported by an independent research body. Such a specialized judicial body can vet government requests for content takedowns and surveillance, and anywhere else there may be a conflict between State action and rights. The independent research body can provide technical expertise and research assistance to the judicial body, to mitigate against problems of capacity that have plagued other specialized judicial bodies in India.
- Make executive rule-making more transparent through open consultations and exploratory memoranda.
- Enable detailed transparency reporting by companies by minimising confidentiality requirements around surveillance requests.

SUMMARY OF RECOMMENDATIONS

Chapter 1: Why We Need a New IT Law

- The IT Act, 2000 was last amended in 2008 and, therefore, fails to adequately account for technological developments that have taken place over the last fourteen years.
- Certain provisions of the IT Act are at odds with emerging technology, rendering some use-cases illegal and denying their benefits to society.
- New digital activities may be incompatible with existing definitions, creating roadblocks for enforcement and business uncertainty. Examples include online gaming, the metaverse, and autonomous cars, all touted as technologies of economic significance.
- A new IT law is therefore needed to plug the gaps in the existing IT Act, 2000.

Chapter 2: Make the Digital India Act Future-Ready to Enhance Enforcement Capability While Also Enabling Digital Businesses by Giving Them Certainty

- The Digital India Act must be future-ready to ensure what is enacted today is not rendered obsolete by the innovations of tomorrow. Future-readiness is a well-accepted principle of technology law and has been espoused by recent regulatory proposals in the EU as well.
- The means toward future-readying the law is the introduction of a mechanism for the recognition of new product-functions and digital activities. The focus on product function enables the same activity to be regulated across different technologies.
- Product-functions/activities should be defined widely and in terms of concepts rather than illustrations, to ensure their scope is not limited to prevailing business models.
- The Digital India Act must also include a mechanism for classifying broader product functions into specific sub-categories for targeted digital governance. These sub-categories can be introduced through a system of notification.

Chapter 3: Unbundling the Mechanism of Institutional Oversight under the Digital India Act

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- Make executive rule-making more transparent through open consultations and exploratory memoranda.
- Enable detailed transparency reporting by companies by minimising confidentiality requirements around surveillance requests

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