



Legal Challenges for Corporations in the 21st Century

Kaushik Basu and Ajit Mishra

This chapter is based on a transcript of the Panel Discussion on Legal Challenges for Corporations in the 21st Century, held on 23rd January, 2021. The session was chaired by Prof. Kaushik Basu and the three panelists were Dr. Naushad Forbes (Co-Chairman, Forbes Marshall), Mr. Dhruv Sawhney (Chairman, Triveni Group, India), and Mr. Janmejaya Sinha (Chairman, Boston Consulting, India). After the panelists shared their views, other participants joined in the discussion. We have kept the conversational style intact.

The landscape of the global economy is changing at a pace rarely seen before. This is throwing up new challenges for regulation, policymaking

K. Basu

Department of Economics and SC Johnson College of Business, Cornell
University, Ithaca, NY, USA
e-mail: kb40@cornell.edu

A. Mishra (✉)

Department of Economics, University of Bath, Bath, UK
e-mail: am344@bath.ac.uk

and the law, for not just India, but the world. We have had two days of discussion with contributions from prominent scholars, economists and lawyers on various issues within the broad field of law and economics. In this session, we have speakers, who are running businesses, advising corporations and living the life amidst the very changing global landscape that scholars have been analysing. The aim of this session is to hear the views of these practitioners from their own perch of business and their interactions with governments and regulatory authorities, and to engage with them on some key questions.

Question 1: The regulation of big corporations—from Big Tech to Big Pharma—has created controversies all over the world. Traditional antitrust laws do not seem to be working. Should we leave markets unregulated or do we need to think out of the box as to how we regulate big corporations to ensure that the benefits are widely dispersed?

Kaushik Basu opened the discussion by pointing out how the challenge of regulation has got heightened by the rise of the mega corporation. At one level, the largeness is of value because industries like those related to technology and pharmaceuticals have great economies of scale; their size makes them efficient and enables them to conduct expensive research. On the other hand, such market dominance is not good for the workers, nor for the consumers, as old-fashioned oligopoly theory taught us. Not surprisingly, this has led to a contentious debate. While many economists believed, and a few still do, that big corporations should be left free to face the market forces on their own, this view is not shared by many. Even in countries like the US where the market has been important, there has been concern that there should be some regulatory structure for the big players especially now that business has become bigger than ever anticipated. The challenge is made harder by the fact that traditional policies such as the antitrust laws, which in the US go back to the late nineteenth century, do not seem to be working as effectively as one would have wished.

Naushad Forbes: As economies move on, law should move along with them. Looking at the history of antitrust activities, the world used to be better for antitrust interventions. Examples include the breaking up of Standard Oil in the early twentieth century or an unsuccessful attempt to break up US Steel or the recent breakup of AT&T along with breaking up of IG Farben in Germany which ended up in three leading chemical

companies. If there are monopolies having dominant power in certain regions, then they end up with not just excessive pricing power but also with lower productivity. In such cases, companies spend their resources in buying out competitors instead of investing in technology and R&D. Thus, instead of competing on the basis of R&D, they compete to gain market dominance. The present antitrust legislation in the countries reflects a time when people priced aggressively to put others out of business and then raising prices after they had done so. The big tech companies today operate without charging for their services, and don't need similar pricing strategies to expand. In such a situation, it is possible for these companies to fulfil all requirements of the antitrust legislation and still attain dominance without falling foul of any legislation.

For this reason, the legal structure needs to keep up with how the industries are moving. We therefore require internationally coordinated action by governments to set new rules that would operate to break up the existing technology company monopolies. Breaking these up is much tougher than preventing them from being formed. The present antitrust legislation can be used to prevent acquisitions which prevent competition from developing. For example, when Facebook acquired WhatsApp, they were both not so large that it would have been a matter of concern. It is, however, questionable as to why the acquisition by Facebook of Instagram was allowed to take place. Facebook at that time was already a huge corporation, and Instagram was an emerging competitor. This could have been prevented through existing antitrust legislation. Governments around the world need to agree on some rules relating to what a competitive behaviour constitutes and what a competitive market requires. They need to be willing to ensure that the market remains competitive.

Janmejaya Sinha: An overarching regulatory framework needs to be laid out before going into the details of the regulations. Four things need to be considered while talking of such a regulatory framework. First, is the regulation within the country or is it present internationally? Second, if it is international, then what is the geopolitical (international) context? Third, if it is domestic, then how is the geopolitical context impacting the domestic choices and how does the political economy of the country express itself? Lastly, what are the areas of regulation?

The foundational issue in the areas of technology regulation is the international dimension. This means that we first need to specify issues

that are internationally agreed upon to be regulated and further identify the underlying common value structure, allowing such a discussion internationally. But, in terms of the international context, the world's leading powers, the US and China, do not share the same value structure. The US values liberty, privacy, and entrepreneurialism. On the other hand, China values state control, public good and the primacy of the Party towards certain national goals. In such a situation, even creating a framework of discussion becomes difficult. The same dilemma is reflected in the domestic context as well, the world is getting divided into spheres. As the Singapore Prime Minister had stated, choosing between US and China is quite hard both because of the nature of Singapore's trade, and the strategic importance of both countries in the long run. It makes geopolitical navigation very hard if one wants to stay on good terms with both.

In terms of specifics, there are eight areas of concern in relation to tech regulation. They are as follows: (1) privacy, (2) data localization, (3) immigration, (4) tax, (5) sanctions (any country with a dollar account can get sanctioned in ways which are awkward for them), (6) cyber, (7) monopoly and (8) content oversight. It is a complicated discussion which cannot be easily simplified. These are the important questions that we need to come to terms with before delving into questions about who should regulate monopolies and how. The framework laid out here is to problematize the issue that is being dealt with and appreciate why it is so difficult to deal with.

In India especially, we need to see how we can create bilateral constructs where we can at least agree upon the underlying framework to start making some progress to effectively regulate firms operating in our boundaries. Bilateral or trilateral discussions would help us come to clear standards with which we can move forward. The exact details of regulations have to be jointly discovered even as interests would be varied.

Dhruv Sawhney: There are some basic problems in relation to the question. First, in capitalism, the winner takes all. There is a concentration of power by success. Second, there is the question whether we want to have decentralized legislations. This is a concept that we need to start thinking about because the governance aspect is really about the individual, when we speak of liberties or data.

Legal procedure today is based upon precedents which is dangerous given that the technological developments in the last five years have

destroyed all the precedents. There is very little in law talking about what has happened in the last five years with large corporations that were not conceived of then but surfacing now. We need to realize that regulation cannot change the dynamics.

The national and politically narrow-minded constructs cannot be avoided. While it is important to talk of breaking monopolies, for them not to be there, the paradigm has to be constructed differentially. The foundation of global standards may already have a bias having been formed by special groups. We are in a time of not very high growth with a realization that things like demands for jobs are going to be very difficult to satisfy. While the concentration of power in big corporations is dangerous, at the same time, we need to make sure that the international regulation that we bring does not add to the problem. Many multinationals have used the existing regulations especially in the area of trade to stifle competition.

We need a different paradigm to approach the problem of regulation of corporations with new concepts and constructions. The regulations that we do bring about cannot be long term and should have the ability to change very fast because the present technological changes will not be there a few years down the line, to be succeeded by fresh ones. We need to understand that we are putting something in the interim and that it would not continue for a long time to come.

Question 2: While globalization began at least 5,000 years ago, its pace picked up after WWII and especially in the last 3 or 4 decades with the advance of digital technology. Yet, our laws remain by-and-large balkanized and nation-specific. This is creating hurdles to business and also creating incentive to spend time and energy navigating these laws. We have also not been able to grapple well with global issues like climate change and labor migration. How should we handle globalization? Should there be more effort to have global laws and conventions?

Naushad Forbes: Post the Second World War, the world set up many multilateral institutions such as the UN, WHO, WTO, and more recently the Paris Accord which could in the future evolve into a climate change related multilateral institution. These are what we need right now. Thus, a mechanism does exist for addressing issues of global regulation. It is important for the leading countries to subscribe to these multilateral institutions—especially the US. Under Donald Trump, the US actually dropped out of several multilateral institutions. Trump in fact directly

attacked the premise of these institutions having any kind of say over national sovereign rights. Out of the seventeen executive orders that President Biden signed on his first day, two were to re-join multilateral institutions (the WHO and the Paris Accord). But the world cannot be held hostage to the outcome of the US elections every four years. We therefore need a different mechanism. For instance, a group of like-minded countries such as Germany, Japan, South Korea, Australia, Canada, Indonesia and India that subscribe to international law and systems could give multilateral institutions the credibility they need so that we are not completely dependent on what happens in the US over the electoral cycles. However, these countries would have to commit to accept what the multilateral institution determines to be the right decision, even if it is against their own immediate interests.

Janmejaya Sinha: We need multilateral institutions for negative global externalities like climate and health. For mercantilist and economic issues, we need to think of creating bilateral or regional structures which can determine how to function given the disparities in the underlying value system that different parts of the world have. In addition, countries need to develop soft power as it helps them be able to shape the narrative by being able to constrain the powerful by getting them to answer questions on what is fair and therefore more universally acceptable.

Dhruv Sawhney: Broadly speaking, globalization has not worked. Corporations have adopted globalization because that is what makes them successful. Now, we want to stop such globalization and bring in regulations to move back. Secondly, globalization has received setbacks politically. For instance, in the case of Brexit, the British have moved out of globalization, a move that took place democratically. Further, laws related to globalization have to be implementable. We have frequently seen that UN resolutions (laws) have failed to be implemented. For example, in the case of the Iraq war, whatever was prescribed could not be implemented.

There are national groups and interests which are also at work. For example, China has become one of the superpowers of the world without being properly globalized, and now, it can come in and out as per its own convenience and for a national not a global purpose. The intent now therefore has to be global cooperation which is the soft power bit. There cannot be a law which you can implement and everyone would

follow. The soft power and cooperation aspect is recognized when they are doing it for their national and individual good.

The whole construct of globalization needs to change. A great example is the issue of climate change. There has to be an accord on climate change because it affects individual countries (and citizen living inside) though some countries may be affected sooner than others. Trade, however, cannot be put in the same basket as climate change because if we were to put it all in one basket, there would be innumerable examples of things not having worked in the past. Similarly, labour migration is an example of an issue that requires international cooperation but we have to ensure that it does not take away jobs domestically. So, some mechanism has to be there to take into account labour issues in international cooperation. This is not to be seen as international labour laws which have been used to stifle national competition, and we have to be careful about the power of big corporations to do that. Security too needs a global approach because of its impact on so many people across different countries.

We need to think of globalization not just in terms of trade where we can never get away from the national aspects. There has been a big point of India not joining the Regional Comprehensive Economic Partnership (RCEP). We need to think of how we can join such global structures while considering the national prerogatives. Thus, it is cooperation rather than globalization that we need to talk about.

Question 3: Corruption is a big challenge for all emerging economies. What people do not often realize is that just determination and anger are not good enough to control corruption. We need expertise and proper design because a poorly planned corruption control scheme with ill designed laws can devastate the economy and hamper legitimate business. What can be done in this regard?

Kaushik Basu pointed out that what makes corruption control harder than people imagine is that corrupt and legitimate activities are intertwined in an economy. If the heavy hand of regulation is used unmindful of collateral damage, legitimate activity can be brought to a halt while going after corruption. For example, if we were to investigate and question every international transaction of every Indian in order to stop illegal money from being parked abroad, we would end up creating bureaucratic hurdles that would slow down the legitimate engagement of Indians with international business, and this would negatively impact India's connectivity with the world and ultimately hurt the nation's growth. At the same time,

we do need to curb corruption. What we have to realize is that to do so, without bringing the whole economy to a halt, is not easy. There is also the risk of government nurturing cronyism in its effort to control corruption. Corruption containment requires intelligence, expertise and design. We have to look around the world for experiments, successes and failures. For example, the Indonesian government created a completely independent body comprising of thinkers, regulators and corporations to deal with corruption and the government did not have a say as to who is corrupt. This is because often corruption control mechanisms become instruments for the government to use to attack and persecute those whom they do not like.

We need to decide if we should create such an autonomous body, if we should have a committee of corporates along with government officials and also social activists to think of the rules and regulations we need and the power and agency we should give to such an autonomous body.

Naushad Forbes: Corruption is not just a problem of emerging markets; it is a much broader problem. For example, if we were to consider the super Political Action Committees of the US and their financing of politics, it is nothing but corruption. It does not involve a specific bribe but it involves financing in exchange of either favourable legislation or blocking of legislation later on. With recent changes in India's political party donation laws, it is now completely legal, for a corporate, to make an anonymous donation to a political party. It is legal but that does not make it less corrupt. Here, there may be an exchange taking place that we may never know of since it is anonymous and opaque. We need much more transparency in all these areas. Consider for example, Goldman Sachs' work with the Greek government before their currency crisis. This was legal at that time. The question is, does that make it less corrupt because it was legal at that time?

We normally tend to come up with very specific regulations that end up being met in most cases. The compliance does not necessarily improve matters. For example, in the case of SEBI regulations for corporate governance in India, corporates do comply with these regulations but it is not obvious that because of this we end up with more honest firms. Regulations cannot make dishonest firms turn honest. We need to address the ways in which the systems operate, where we could know everything about a transaction and its implications and nobody would mind such transparency. The metric has to be to see how we get as

much transparency as we possibly can in dealings between companies and government without placing undue burden on parties for compliance.

Janmejaya Sinha: Corruption can be divided into three buckets. First is petty corruption (speed money) which is much more prevalent in emerging markets where bureaucratic delay can be easily engineered and well-developed institutions do not exist. The second form of corruption is political funding which prevails in many countries, not just in emerging markets. The third is contract corruption where one wants to change the odds of a deal where the counterparty is most often a government agency but sometimes, may even be a large corporation. Simplistic solutions like asking for the setup of an autonomous body to oversee corruption begs the question as to who regulates the regulators. Speed money is not a cause of worry in these markets because as the per capita income grows, petty money would become less of an issue. In terms of the other two, the central question is whether we can have transparency post the deal. For instance, in cases of election funding, at the end of the election term, without any consequences, we could come to know how much money was given to which party by whom. There need to be mechanisms which can enable such transparency.

Next, we need to have contract enforcement within a reasonable time unlike right now when civil cases go on for 20 to 40 years and the results of a civil case then do not have any consequence. Strengthening of institutions is critical but that comes with development and a lot of use. When institutions get established, accepted and used, then there are consequences and people try to follow the rules and recognize that getting caught has consequences.

Dhruv Sawhney: First, corruption is universal and not just a phenomenon of emerging economies. We need to make corruption a much broader subject.

Second, the political process in a democratic system is a very big cause of corruption, be it giving flush money in some emerging economies or having a deal-based system in some developed economies. It is still a quid pro quo. The primary issue is transparency and governance which should root out how we approach political funding. In large parts of the world like China, Russia and Eastern Europe, they have done away with such a system. Yet, China did not grow into a superpower from a developing economy without any corruption.

Third, it is crucial to use technology as a viable tool of lessening the impacts of corruption. With the digital age, the discretionary powers can be lessened.

Fourth, the stifling of competition by big corporations and globalization is also corruption. When a medium-sized firm has to deal with a big corporation and there has to be international arbitration, the big corporation is in a position to spend much more. While, the Indian system of contracts is not sustainable due to the absence of quick judgements, it is not right to have a mechanism which is going to make transparency more difficult and force the smaller people out of the system. In contracts, therefore, we should not have long-term resolutions like India has.

OPEN DISCUSSION

Ajit Mishra

Corruption—Economists previously thought of corruption as a pure enforcement problem. Now there is a growing realization that it is in fact part of a bigger governance problem. In terms of instruments, the earlier literature reflected the influence of the economics of enforcement and focused mostly on sanctions/penalties, rewards and monitoring or audit (detection of corrupt act), but now economists are widening these and issues like transparency, moral education and intrinsic motivations are also viewed as important components of anti-corruption strategies.

While there is agreement that transparency and non-discretionary powers are essential, the crucial question is how to bring these in. Often, it is through legislation, new rules and regulations. But if these new rules are not carefully designed, they can lead to undesirable outcomes. There are studies which show that excessive regulations to fight corruption can be counter-productive. They will end up stifling the system. For example, the United Nations Convention against Corruption says that we must reduce the *ad hocness* in our system and specify everything (that is related) in a contract, so as to reduce scope for corruption. There are, however, instances where this attempt can be taken to a ridiculous level. When an author looked at the procurement of oatmeal cookies by a government agency in a certain country, the description runs into 26 pages!

For control of corruption, we need a system-wide approach. For example, when we talk of how corruption in corporations has to be controlled, it should not be a pure enforcement issue, and there should be scope for some self-regulation, to be taken into consideration while framing laws.

Globalization—In terms of globalization, the decision by the UK to exit the EU (Brexit) is often cited an example of setback to globalization. However, Boris Johnson's interpretation would be that the UK moved out of a regional bloc to go global! Still, it is widely accepted that globalization has caused deep dissatisfaction and rising inequalities within countries. The benefits of globalization have not reached all sections of society. We do need the cooperation framework as Mr. Sawhney had suggested.

Bob Hockett

Corruption—We seem to automatically view corruption as something criminal or quasi-criminal or representing a deep moral failing. This is true of many instances of corruption. However, there may be instances where the corruption we encounter isn't like that. It may be due to acculturation to a different set of norms that we have been attempting to use to displace other norms. These were not automatically depraved or immoral. If we were to regard certain social practices or social institutions as those that bring rewards provided that certain procedures are followed, it is like following the rules of a game for gains. But, if these rules are not followed, then that is what is corrupt. If this is done in established games like soccer or cricket where the rules are well known and fixed, then there is a moral turpitude involved when those rules are not followed. But if the game changes less overtly so that it has evolved into a new game, then somebody might be playing by the old rules without fully realizing that these are not the current rules. Such a person is not morally depraved but simply not up to date with the new rules. Treating it like such a game with changing rules, we might be able to better anticipate when corruption is going to occur and be able to deal better with it as we are viewing it as a social phenomenon and not as something that requires moral sanctions.

Amrita Dhillon

Corruption—A literature review of the new behavioural approaches to corruption would take account of norms that Bob Hockett and Ajit Mishra were talking about. The findings of this literature say that people care about both descriptive and prescriptive norms. Descriptive norms are what people around you are doing. That is the culture of corruption. For example, if one is stopped by a traffic police cop in India, the expectation is that he will ask for a bribe and one is prepared to pay that bribe. Since one expects others to be corrupt, they are more likely to be corrupt themselves. An important question that comes up is how do we change these norms at all. Prescriptive norms are about appropriateness of actions, and these may differ across different societies. For example, is helping the family more appropriate than being honest?

Luis F. López-Calva

Corruption—One of the issues with the approach taken by many international organizations is that the issue of corruption control is seen as

one of state capacity and enforcement. This is why we have failed systematically. Only now, we have moved onto the soft behavioural aspects to help us understand what sustains such a deals-based equilibrium. If we continue to approach corruption as only an issue of institutional capacity that requires enforcement as a solution, we face a problem. There is the theory of collective representation, if one is perceived as corrupt because of being in the political system, the benefit from not being corrupt is small because they will still be seen as corrupt and would also lose the opportunity to get some money which is not rational. It is a complicated question as to what kind of devices we need to move towards an equilibrium without corruption. Leadership also matters. If a President says that not paying taxes is a not bad thing to do, it is much more difficult to move to an equilibrium without corruption! When corruption is approached through a more social and behavioural angle, it becomes more complex but at the same time anti-corruption strategy is potentially more effective.

Dhruv Sawhney

Corruption—Consider the case of electricity theft. The administration deals with about 250,000 farmers every day. Electricity and stealing of electricity were a big issue. Now, providing electricity became a good political thing. They went against people stealing the electricity because they showed that when somebody was tapping lines they were stopping someone else from getting power. It became a social norm to stop this corruption. There should be laws to make it a social good.

Climate Change—Climate change in India is slowly becoming a political necessity, to stop Delhi from being one of the most polluted cities in the world. It does not have to come from regulation because we cannot stop every farmer from burning crop residue. The Paris Accord is a really good thing which would also help us put some figures on carbon neutrality. It is better for it to be a cooperative movement than a legislative one.

Kaushik Basu

Social Norms—We must not overlook the fact that we do things sometimes not because we make personal gains from such acts, not because the law requires us to do so, but because it is a deeply ingrained norm to do so. Most of us do not think of picking someone else's pocket, and this has nothing to do with the law, nor with our view that there may not be enough money in the person's pocket, but rather because we are

programmed in terms of our norms and values, not do so. Economists do not pay enough attention to this. But the success of societies could depend critically on the kinds of norms that prevail. This is related to what Ajit Mishra referred to as intrinsic motivation. Moral education can indeed play a role in curbing corruption and creating a better society.

Amrita Dhillon

Moral costs and corruption—There was an experiment where they make students do some real-world tasks. They exogenously have some bribes being offered to them where they bend the rules a little bit, and when they see that they are harming a third party, the demands for bribes reduce. They take longer to come to a decision as to whether to take bribes or not. The moral costs are made more salient when you show the harm to a third party.

Despite there being such a crisis related to climate change, the political corruption is coming down. In the case of electoral bonds, all parties seem to agree that it is fine to have such a system.

Naushad Forbes

Globalization—Is there a correlation between de-globalization and the democratic protest movements that have been going around the world? Globalization actually supports democratic movements in most countries. For example, in Belarus, the protestors were highly inspired by what had happened in Eastern Europe many decades ago and they also had support from governments overseas. However, they do hold off criticizing countries like China because it is too powerful. But, if they did, it would support the democratic movements in different parts of the country.

Climate Change—The approach to the Paris Climate Agreement was that if we were to start from voluntary action by countries, it would be a way to get everyone on board. It can then be made transparent in terms of how the countries are doing in acting on their own voluntary commitments. This can be used to eventually move to where this could become legally binding.