Recent Indian IT Rules: A Tussle with Constitutionality

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Abstract

This paper examines the three main aspects of the new IT rules passed by the executive: The grievance redressal mechanism, the intermediaries now being responsible for the content published on their sites, and social media traceability. An analysis is made as to their legality under the constitution and court precedents. A special emphasis is put on the violations of fundamental rights, namely article 14, 19 and 21. Whether there is a rational connection between the objects of the act and the executive order is examined and excessiveness of the present rules is shown. An alternate way to make a more balanced and sound decision is suggested.

Introduction

The Government, in February 2021 notified Information Technology (Intermediary) guidelines and Digital Media Ethics Code Rules[1]. It is definite that the legitimacy of such a move is in question, but on paper, the executive gets its rule making power from section 87 of the IT act 2000[2]. These regulations were notified even though major OTT platforms had already announced a self-regulatory framework, the Universal Self-Regulation Code that was backed by the Internet and Mobile Association of India (IAMAI). 17 platforms adopted an 'implementation toolkit' for self-regulation only to be rejected by the government.

Grievance Redressal Mechanism

The rule concerning OTT (over the top) media platforms and other news media platforms is that there will now be a three tier grievance redressal mechanism to ensure their compliance with the code. Level I – Self-regulation by the applicable entity; Level II – Self-regulation by the self-regulating bodies of the applicable entities; Level III – Oversight mechanism by the Central Government. In case of any objections or complaints from the public regarding any of the content published by these platforms, the central government, by way of this rule, may exact an apology from the concerned platform or even block the content and the platform they publish on. Part 1 of the IT rules use vague terms like 'insulting' 'immoral' and 'libellous' as standards for determining speech that merits prohibition. It is a fundamental rule in legal jurisprudence that the governed must be given an opportunity to understand and comprehend what is prohibited. In the Shreya Singhal case[3], the Supreme Court struck down section 66A of the IT Act, which contained the term "insult" as well. Vague terms such as these leave it almost on the personal opinion of individuals of the Level III committee to decide whether a piece of content will get to see the light of day or not.

Besides, such broad adjudicating powers to determine the validity of content and examine the merit of a grievance/complaint against a creative work have been handed to bureaucrats with no heed paid to the basic legal principle of separation of powers, an essential part of the constitution.

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[1] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, 2021 G.S.R. 139(E).
[2] Information Technology Act, No. 21 of 2000, INDIA CODE (2000).
[3] *Singhal v. Union of India*, (2013) 12 SCC 73.

More importantly, on the fundamental rights front, the rules are a glaring violation of Article 14 of the constitution[4]. The publisher of contentious content will have to acknowledge the receipt of a complaint within 24 hours of its filing, and within 72 hours of the receipt of an order provide all the information in its possession to the government agency that is investigating the matter. This capricious time limit and unreasonable regulations on grievance redressal mechanisms prove the arbitrariness of these rules, aside from the lack of rationale.

The new IT rules not only bear the peril of excessive self-censorship by OTT platforms but it also curbs individual expression to a great extent. Creative expression and freedoms are curtailed by this rule because content now will have to justify its 'legitimacy', so to say, to multitudes of religious and racial groups who might bombard grievance redressal mechanisms to get their way and ban content that doesn't sit right with their principles. To avoid complaints and backlash, OTT platforms may stop housing content that might result in complaints being filed against the OTT platform, and the creative industry will be left with a norm to rate the quality of a show on the basis of its agreeability. It is not news to anybody that because of the religious, caste, lingual diversity in India, there have been a lot of clashes between religious groups and the film industry. These rules will allow the step of exchange of dialogue to be skipped altogether, and jump right into banning the content posted.

This problem stands stronger yet on news media platforms, which will also have the same self-censorship requirements which will more directly affect the right to freedom of press and the right to information of the citizens of India under Article 19 of the constitution. [5] A petition made to the Delhi High Court against these rules read,

"The right to freely criticise the government is an essential and an inalienable part of the right to practice news journalism and a regulatory mechanism with the government at its apex is a manifestly unreasonable interference with the said right, especially if subjective and vague criteria like 'good taste' and 'decency' can be invoked to lead to Government interference."

[4] INDIA CONST. art. 14.
[5] INDIA CONST. art. 19.

In the case of Bennett Coleman & Co. v. Union of India[6], the Supreme Court held that freedom of press is the 'ark of the covenant of democracy' since public criticism is critical to the working of public institutions. A case that's apt for the present context is Sahara India Real Estate Corporation Ltd. v. SEBI, 2012[7], in which the court held that the functions of the press cannot be restricted to the expression of those thoughts and ideas which are accepted and acceptable, but also extends to those which offend or shock any section of the population.

Shift of responsibility on Social Media Intermediaries

The second of three main rules put forth is that social media intermediaries will now be responsible for any of the content that is uploaded on their platform. This rule goes directly against section 79 of the IT act[8], the same act from which the rules derive their power. An executive order is not valid if it exceeds the power granted to it by a statute, let alone blatantly violating one of its provisions. Furthermore, in the case of KN Guruswamy vs. State of Mysore, 1954[9], the Supreme Court held that no executive action could contravene any of the provisions of its parent act, or exceed the power granted by the same. This rule will force the intermediaries to censor any content on their platform that they suspect is likely to be "objectionable" by the standards prescribed by the government. As seen on Twitter already, there have been several such instances where the intermediary has had to block content because it fits in the giant square of problematic content as labelled by the new rules.

First Originator Traceability

Section 4(2) of Part II of the new rules states that the "first originator" of any content hosted by social media intermediaries. This is a clear breach of the right to privacy under Article 21[10] of the constitution of India, as opined in the case of KS Puttiswamy vs Union of India[11]. Essentially what this rule does is completely scrap the end to end encryption practice put in use by intermediaries such as WhatsApp. This rule also violates Article 14 of the Indian Constitution in that it is

[6] *Bennett Coleman & Co. v. Union of India*, (1967) 2 SCR 454.
[7] *Sahara India Real Estate Corpn. Ltd. v. SEBI*, (2012) 10 SCC 603.
[8] Information, *supra* note 2.
[9] *K.N. Guruswamy v. State of Mysore*, (1954) SC 592.
[10] INDIA CONST. art. 21.
[11] *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

arbitrary and lacks rationale. If a piece of content is created by a person and shared forward by others, the author believes that there is no difference in the degree of culpability of the creator and the sharer. If the sharer has forwarded certain objectionable content, they endorse in it just the same as the originator and there remains no reason why a rule to trace the first originator exists. It is needless to say that this is not pushing for pinning culpability on all people who have endorsed in a piece of objectionable content, but to bring to light the hollow and dubious rationale behind the enactment of such a rule. There is a clear unintelligible differentia in the context of who is decidedly culpable under these rules and who is not.

Conclusion

The new IT rules are a flagrant attack on the fundamental rights of individuals and the press. Not only does the executive reach beyond its power to make the rules, but it also tops it off by laying down rules that lack any rationale whatsoever, and give the executive overarching powers to curb speech and shun dissent. The rules violate article 14 and 21, both available to even non-citizens. However, it is needless to say that their main aim remains clamping down on dissent. Anything mildly objectionable to a certain section of the population can spiral into a big issue if enough people complain, and it's hard to see how any piece of creation can be an all-pleaser, proving that this futile exercise is a moral-policing tactic that can be bent as a weapon against harmless expression.

An important feature of deliberative democracy is that the state and the subject get an equal say in the formation of rules. Consultation of stakeholders should've been the foremost priority of the government to lay down effective regulations that achieve the objective of minimising paedophilia, hate crimes, sex racquets on the internet while also keeping the sanctity of creative thinking, freedom of thought and expression and independent journalism intact.