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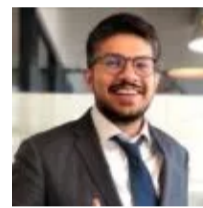
ARTICLE

India: Does India's New Attempt At Regulating News Pass Constitutional Muster?

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"There is as yet no liberty if the power of judging be not separated from legislative power and the executive power"- Charles de Montesquieu, The Spirit of the Laws, 1748

The Constitution of India makes several nods acknowledging the doctrine of Separation of Powers between the different pillars of our democracy. However, one tends to notice this only when there is a breach of this most basic principle.

Valid arguments do of course exist against strict observance in a welfare state such as our own. For example, legislative power should not be allowed to proceed unchecked, and the Judiciary may interfere where a law transgresses a line drawn by the Constitution. Similarly, the Judiciary may be required to make rules for its own functioning.

The Executive is responsible for implementing laws as made by the Legislature- called 'Acts', and is also often required to make laws- called 'rules' where specifically prescribed in the Act. It is thus logical that such rules should be in furtherance of the 'Act' itself, and can't go beyond the scope of the Act.

On 6 April 2023, the Indian Government notified amendments ("**Amendment**") to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("**Guidelines**"), available [here](#). As part of the Amendment, the Government has amended Rule 3(1)(b)(v) of the Guidelines - which now makes it incumbent upon the intermediary to state in its Terms of Service that its users should not transmit information regarding any business of the Central Government that is identified to be false, fake, or misleading by a fact check unit of the Central Government to be specified by the Ministry of Electronics and Information Technology ("**Ministry**").

Not only is the intermediary required to publish the aforementioned, it is also required to make "reasonable efforts" to ensure that its users do not host, display, upload, modify, publish, transmit, store, update or share any such information, a fantastically nebulous term, that will likely lead to a great deal of anxiety and sleepless nights in the industry.

Section 79 of the Information Technology Act ("**IT Act**") grants "safe harbour" protection to intermediaries - wherein they are not held liable for any third-party information made available or hosted by them. However, non-compliance with the Guidelines leads to a removal of this "safe harbour" protection, and the intermediary can then be held directly liable for an offence under applicable provisions.

SEPARATION OF POWERS OF THE EXECUTIVE AND JUDICIARY

The origin of the doctrine of separation of powers can be traced back to Aristotle and Plato, but it was the French philosopher Montesquieu who first elucidated and expanded upon the doctrine in his book 'Esprit des Lois' (1748). He pointed out that liberty can only be attained in a system of governance when there is a separation between the organs of government. The root of this doctrine lies in the system of checks and balances created by the division of government powers among autonomous organs, as such a system would ensure that no one organ oversteps its bounds.

Even as there is no explicit statement affirming this doctrine in the Indian Constitution, it finds its place in the constitutional structure through the clear delineation of powers between the Legislature, Executive, and Judiciary provided for in the Constitution. Separation of powers has also been recognised by the Supreme Court as part of the Constitution's basic structure, an inalterable aspect of the law of the land.¹

"The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. *It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.*"²

As pointed out earlier, in the Indian context, the separation of powers does not refer to a strict and inflexible delineation of responsibilities among the bodies of Government, as there are provisions which allow, for instance, the judiciary to make rules, or the executive to perform judicial functions. However, it is essential to note here that such duties are limited in scope and serve to further the operation of governance and the system of checks and balances.

The Amendment granting powers to a fact check unit of the Central Government specified for this purpose by the Ministry (an authority which, by definition, is a unit of the Central Government and hence squarely falling within the definition of the Executive) to adjudicate upon whether information is "fake, false or misleading", on the face of it, appears to be a violation of the very fundamental doctrine of separation of powers and the associated checks and balances - especially as this power conferred upon the Executive can be used to suppress information or news which may be critical of that very government. This also appears to be contrary to a basic principle of natural justice, wherein a party shouldn't be permitted to be a judge in its own case (*'Nemo Judex in Causa Sua'*).

It is important here to examine the language used in the Guidelines and the obligation imposed on intermediaries. The Amendment requires intermediaries to "make reasonable efforts" to ensure that their users do not publish such fake, false or misleading information. The phrase "make reasonable efforts" is ambiguous at best, and creates massive potential for misuse - the government under this power conferred to it could require intermediaries to take down such content from their platforms and even ban users who publish such information.

CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

A fundamental right granted to each Indian citizen is the right to freedom of speech and expression. The Supreme Court has stated in the past that the freedom of speech and press are a foundational pillar of all democratic states. Public education, which is an essential facet of the functioning of a democracy, is not possible without free political discussion.³

The Constitution does provide for the imposition of reasonable restrictions on this right, however, such restriction must be "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence." The Supreme Court has also opined on the scope of such restrictions in the past, and has held that the following facets must be kept in mind when imposing such a restriction:

1. The restriction must not be arbitrary or of an excessive nature going beyond the need of society and the object sought to be achieved by the legislation.
2. There must be a direct relationship or reasonable connection between the restriction and the object of the legislation.⁴

On the face of it, the power conferred upon the Executive under the Amendment does not seem to fulfil the abovementioned requirements.

EXECUTIVE ACTING BEYOND ITS BOUNDS UNDER THE ACT - TAKING UP THE POWERS OF THE LEGISLATURE

As mentioned earlier, the separation of powers does not refer to a rigid division of responsibilities and powers amongst entirely independent government organs. The Executive can be empowered by the Legislature to make rules in furtherance of a legislation. However, this power is not boundless, and must be limited to the scope of the legislation. Additionally, long-standing limits have been placed on this power of the Executive by the Supreme Court.

The Supreme Court has held in the past that while the Legislature may delegate to the Executive the power to make rules for the effective enactment of a legislation and its extension to certain specific areas, the power to "delegate legislative functions" is not envisaged under the Indian Constitution.⁵ The phrase "legislative functions" here has also been defined by the Supreme Court as the "determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."⁶

The IT Act under its ambit has no provisions regarding the moderation of content that may be termed as 'fake' or 'false'. Section 69A of the IT Act, which grants content moderation powers to the Government, provides for the removal of content only on very specific grounds - in the interest of India's sovereignty and integrity, defence or security of India, friendly relations with foreign States or public order, or preventing incitement to the commission of any offence relating to the above. These grounds of removal also find a locus with the scope of reasonable restrictions allowed on the fundamental right to speech and expression granted by the

Indian Constitution. The scope of the phrase "identified as fake, false or misleading" is far beyond that stated in Section 69A of the IT Act. Additionally, the vague nature of the language and the wide discretion given to the Executive (as the Executive is the sole decision-maker regarding the question of whether any information is "fake or false") can lead to a situation where the restriction placed on free speech and expression exceeds the bounds of reasonableness.

The language in Section 79 of the IT Act - "the intermediary observes due diligence *while discharging his duties under this Act* and also observes such other guidelines as the Central Government may prescribe *in this behalf*" - seems to further point to the interpretation that rules made by the Executive under this section must fall squarely within the scope of the Act.

UPROAR FROM THE FOURTH PILLAR

The Guidelines, when they were enacted in 2021, were faced with widespread criticism from a range of experts, industry representatives, members of the press, and civil society groups. A Special Rapporteur report from the United Nations also criticized the Guidelines as not meeting the requirements of "International law and standards related to the rights of privacy and to freedom of opinion and expression". Parts of the Guidelines have been stayed by High Courts and proceedings challenging the constitutionality of these Guidelines are currently pending in several courts across the country.

Despite the contentious legal position of the Guidelines, the Amendment has been notified, which seems to, on a legal analysis, be quite possibly unconstitutional. A statement was issued by the Editors Guild of India when this Amendment was initially proposed⁷ which outlined various concerns, including the "potential to place unreasonable restrictions on digital news media" and the stifling of legitimate Government criticism.

The question of this Amendment's legality has already been brought to the courts - where comedian Kunal Kamra filed a petition in the Bombay High Court challenging the constitutionality of the Amendment along similar arguments as those outlined above, and has led an effective stay on the operation of the Amendment at least till this 10th of July 2023. This petition adds to the list of contentions regarding the Guidelines, and it remains to be seen what the view of the judiciary will be in this matter.

Footnotes

1 Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461, para 316

2 I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643, para 21

3 Romesh Thapar v. State of Madras, AIR 1950 SC 124, para 9

4 Papnasam Labour Union v. Madura Coats Ltd., 1195 AIR 2200, para 15

5 In Re: The Delhi Laws Act 1912, AIR 1951 SC 332, para 35

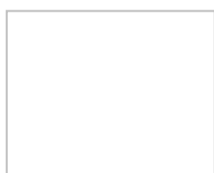
6 Harishankar Bagla and ors. vs. The State of Madhya Pradesh, AIR 1954 SC 465, para 12

7 The difference in the initial draft amendment and the Amendment which was finally enacted is limited to the following two aspects:

1. The draft amendment's scope was defined as "fake or false" information, but there was no limitation on the subject matter of this information. The Amendment restricts the scope to information regarding "business of the Central Government" but includes the term "misleading" along with "fake or false".
2. The draft amendments identified the fact check unit at the Press Information Bureau or any other agency authorised by the Central Government for such fact checking. The Amendment has not identified any specific authority to be the relevant fact checking entity and has left this determination to be made by the Ministry.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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