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Free, Regulated or Restricted Internet: A Tussle between Central Government and the Online Publishers over Intermediaries

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ABSTRACT

Rights and restrictions form an important part of the working of a democracy. The Freedom of Speech and Expression and Information Technology act envisages a similar relation where they not only guarantee the rights but also imposes restrictions and responsibilities over the content published online through intermediaries by the originator. This interrelation is conjugated by the rules made under the Information Technology Act, 2000 to further evaluate the influx of data over the social media and other intermediary platforms. Therefore, the author has agonized the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 provided by the central government by virtue of powers given under the IT act with respect to the Fundamental rights guaranteed under the constitution of India and with the IT act itself. Therefore, the paper majorly focuses on the issues revolving around the provisions of the IT act and the rules thereunder which concern the applicability of the fundamental and legal rights guaranteed and the legal conflict between them.

Keywords: *Information Technology, Interrelation, Freedom of Speech and Expression, Responsibilities.*

I. INTRODUCTION

Fundamental Rights guaranteed under Part III of the Constitution of India and the restrictions thereunder still remain one of the most debatable topics with most amenable applications and implications still after 70 years of it being constituted. Every time the debate starts with enactment of any new legislation and regulation which directly or indirectly affect the citizens, however the debate forms an essential part of the common legal jurisprudence as every legislation comes with rights, duties and responsibilities. Justice CHANDRACHUD in a Supreme Court case drew correlation between the rights and duties and defined rights as

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interests which the legislation protects by imposing corresponding duties over others.³ However, the right and duty correlate to not just protect the interest but to enjoy the interest secured by imposing a legal duty in the form of restrictions on the existent rights so that it doesn't hinder and overlap the others' interests.

II. PROTECTION U/S 79 OF THE IT ACT

One of the remarkable steps towards such balance of interests came into being with the enactment of the IT Act with the intent to safeguard the interests of the users over the various platforms on Internet by securing the rights and imposing duties over the users and the service providers to protect the individual and societal interests.

The act provides protection to the intermediaries⁴ from any sort of liability in cases where it acts as a platform which allows the information to be freely communicated and where it has no influence over its initiation or transmission and no functionary of tweaking of the data⁵ except the one which is done under the deterrence of any order by the government or the concerned authority overlooking the same, as authorised by the central government. This stance was also reiterated in the case of *Shreya Singhal vs Union of India*⁶. However, in case of flouting of any of such rules in this regard, the protection might not be applicable, while on the other hand the intermediary is free from any kind of legal liability if it abides by all the orders of the authorities. This set of provision has a lot been on table of issues over its possibility of being used for extinguishing of the fundamental rights⁷ in the growing substance of use of Internet as a primary media for communicating and expressing one's thoughts, which has been asserted more after being declared as a constitutional right. One of which was the *Shreya Singhal Judgement*⁸ which came as a delineation to the interpretation of the provisions of the IT act as well as a corollary for holding of section 66A⁹ as unconstitutional and as well narrowing down the scope of Section 69A¹⁰ as being literally interpreted and restricted in the way as defined in judgement.

III. THE SPAT BETWEEN TWITTER AND THE CENTRAL GOVERNMENT

The debate took a new reinstatement during the spat between the central government and

³ *State of Rajasthan v Union of India* (1977) 3 S.C.C. 592 (India).

⁴ Information Technology Act 2000, s 2(w).

⁵ Information Technology Act 2000, s 79(1).

⁶ *Shreya Singhal v Union of India* (2015) 5 S.C.C. 1 (India).

⁷ INDIAN CONSTI.1949

⁸ *Shreya Singhal* (n 4) 181.

⁹ Information Technology Act 2000.

¹⁰ *Ibid.*

Twitter over the order of the Ministry of Electronics and Information Technology which called for suspension of some of the accounts of individual users and some organisations over the twitter during the violent protests which took place in and around the Indian capital city of Delhi in January 2021.¹¹ The order was done citing the powers given to the ministry in virtue of Section 69A of the IT Act and was accordingly implemented temporarily by the platform. After the damping down of the violence, the suspension of accounts was lifted over numerous accounts including journalists and other individuals and the accounts were restored¹² by the platform while citing the fundamental right to freedom of speech and expression guaranteed under Constitution of India.

IV. ARTICLE 19(1) (A) AND THE IT ACT AND RULES

This issue however raises serious concerns over the applicability and efficiency of the constitutional principles and the fundamental rights guaranteed thereunder in the virtual cyberspace and the greatest concern over the governmental powers to govern over the virtual world by limiting the fundamental rights of the individuals over the internet-based platforms, majorly Article 19(1)(a) i.e., the Freedom of speech and expression.

With the advent of Internet and the congenial cyberspace emerging out of it, a great threat happens to be posed over the fundamental applicability of the constitutional principles and the underlying values of the fundamental rights thereunder and this concern was widely accepted by the Supreme Court.¹³ The issues range from the distorted use of right to freedom and expression, which undermine the right to property as guaranteed under the constitution of India. The platforms also become a breeding ground for the circulation of the illegal pornographic content which is either banned and even those which were made without permission of the subject or by coercion. Other big problem faced by the uncontrolled intermediary platforms is the polarisation by the fake news which can even lead to genocide in some cases.¹⁴ Other factors include cyberbullying, fake news, privacy issues, harassment leading to mental health issues etc. These are the result of the greater violations of the freedom of speech and expression which result in the infringement of interests of others' freedom and other fundamental rights.

¹¹ Anuj Srivas, 'Understanding the Nuances to Twitter's Standoff with the Modi Government' (*The Wire*, 12 February 2021) (April.13, 2021,10:11 PM), <<https://thewire.in/tech/twitter-modi-government-block-section-69-a>>

¹² Twitter Safety, 'Updates on our response to blocking orders from the Indian Government' (*Twitter Blog*, 10 February 2021) (April.13, 2021,9:05 PM), <https://blog.twitter.com/en_in/topics/company/2020/twitters-response-indian-government.html>

¹³ Shreya Singhal (n 4).

¹⁴ I. Bojczuk, 'Global Media MIT' <<http://globalmedia.mit.edu/2018/11/09/zap-zap-whos-there-whatsapp-and-the-spread-of-fake-news-during-the-2018-elections-in-brazil/>> (assessed 13 April 2021)

V. THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021

These largescale violations over the intermediary platforms have become a matter of great concern which were met by the imposition of the Information Technology (Intermediary Guidelines) Rules, 2011 to regulate the intermediary platforms to control such infringements and to establish statutory due diligence. However, the successor¹⁵ has addressed a wider scope which distinguishes between the news and current affairs platforms, on-demand services, and the online curated content providers¹⁶. It also establishes a grievance mechanism for the users through a three-tier model wherein, a body of publishers is at primary level; a self-regulating body consisting of publishers and other members as per the code at secondary level; and finally, an oversight mechanism and Inter departmental committee by the central government at the top level.¹⁷

The primary objective of this mechanism is to overlook the grievances against the published content over the platform in self-sufficient manner but in the timeline allotted under the regulation, i.e., 15 days for primary level. The primary level is the receiving point of the grievance with respect to the code of ethics. Whereunder a Grievance Officer would be appointed who would be responsible for complying with every condition.¹⁸ These include the ones formulated by the body at secondary level and the charter for self-regulating bodies formulated by the Oversight mechanism. It has to deliver its response to the grievance holder in contemplated time.

This grievance officer needs to be member of the body at secondary level which would be headed by a retired judge of the Supreme Court, a High Court or any other independent eminent person as contemplated under the Rule 12. This body acts as a supervisory body as well as an appellate authority.¹⁹ This body is further regulated by the Oversight Mechanism at the central level. Apart from this, an “Inter-Departmental Committee” is headed by an “Authorised Officer” who shall be appointed by the Ministry may pass certain orders pertaining to the content published.²⁰

¹⁵ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021.

¹⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 2.

¹⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 9.

¹⁸ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 11.

¹⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 12.

²⁰ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 13.

VI. THE IT RULES: PROBLEMS

The Inter Departmental Committee which is setup under the set of rules shall constitute the members who are the representatives of the various ministries under the Government of India including Ministry of Information and Broadcasting, Ministry of Law and Justice, Ministry of Home Affairs etc. The powers given to the committee and the self-regulation body of the publishers include the power to frame relevant conditions at discretion over any matter and create own set of guidelines apart from warning, censuring, admonishing, reprimanding any published content or requiring an apology from the entity over the content in any particular case as it deems fit under its power laid down in subrule 5 of Rule 14 and subrule 5 of Rule 12.

This entity as per Rule 14 and 8 read with Sub-Rule (t) of Rule 2 shall include “an online paper, news portal, news aggregator, news agency and such other entity called by whatever name, which is functionally similar to publishers of news and current affairs content” except “newspapers, replica e-papers of the newspaper and any individual or user who is not transmitting content in the course of systematic business, professional or commercial activity”. It shall also include the publishers of the Online Curated Content.²¹

The provision of compliance with the Code of Ethics for the online news publishers raises concern over their inclusion in the class of Intermediaries and then regulating them. However, the code of ethics for the News and current affairs, as per appendix, has only three aspects including, firstly, Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978; secondly, Programme Code under section 5 of the Cable Television Networks Regulation) Act, 1995; and lastly, the content which is prohibited under any law for the time being in force.

However, the issue further arises, when the provision is even overridden by Rule 16 which gives emergency powers to the head of the committee who can in case of emergency under conditions mentioned under Section 69A of the act issue orders for blockage of any content. It raises fair concern over the publishers’ content, predominantly, the online journalism and freedom of speech and expression over internet, since the mere recommendation of such sort by the committee may totally restrict a user or publisher from exercising free speech over the internet. However, such a recommendation needs to get approval from the Secretary, Ministry of Information and Broadcasting, Government of India,²² but raises great concern as there is no subject of pre-decisional hearing. Adding to this, the Subrule 2 of Rule 16 specifically denies

²¹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 2(1)(q).

²² Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 16.

the formulation of any hearing for that matter while issuing orders for blocking of the content. However, other judicial recourses are always open, still this has greater potential to impose temporary restrictions which can be purposely used to exploit Free Speech and particularly Freedom of Press, since the order and compliance might already have been taken place.

VII. ANALYSIS AND CONCLUSION

A law which restricts any fundamental right has to pass the test of proportionality. As under the rights guaranteed under Article 19(1)(a), law has to be covered by one of the eight subject matters set out under Article 19(2) and so on for respective freedom. If it does not, and is outside the pale of reasonable restrictions under 19(2) to (6), the courts shall strike down such law.²³

In context with the current IT rules, the powers are derived from the sub-section (1), clauses (z) and (zg) of sub-section (2) of section 87 of the Information Technology Act, 2000 (21 of 2000). Now the scope of these two subsections relate to powers to give directions to intermediaries which are defined under Section 79 which can be restricted with respect to Section 69A; whereunder the restrictions can only be held only if the act is held violative of certain restrictions similar to Article 19(2) and not beyond it.²⁴ However, if laid down in line with the law, then the restrictions need to be reasonable and proportionate, depending on the facts of each case and to be decided by the court.²⁵

The restrictions under Rule 12 Subrule 5 and Rule 14 subrule 5 should also be examined in the light. The issue here comes that whether warning, censoring, admonishing, or reprimanding any published content or requiring an apology would constitute as a restriction. The important point to discuss here is that a journalist cannot be forced to declare the source of information²⁶ and journalism is all about bring facts and news to the public domain, then how can any law be constitutional which makes the journalist to issue an apology as that would undermine the freedom of press.

The extra powers and scope of repression are violative of the constitutional mandate and beyond the scope of powers vested through the act, thus making it unconstitutional. As the IT act is a parent legislation, the scope of the IT rules, cannot go beyond the powers and authority granted by the parent act. But in the given case, the authority has been given the power to exercise control over free speech and that too including online press where it can order for

²³ Anuradha Bhasin v UOI (2020) 3 S.C.C. 637 (India).

²⁴ Shreya Singhal v Union of India (2015) 5 S.C.C. 1 (India).

²⁵ Anuradha Bhasin v UOI (2020) 3 S.C.C. 669 (India).

²⁶ Press Council Act 1978, s 15.

warning, censuring, admonishing or reprimanding and even ask them to issue an apology letter. Adding to this, the rule 16 doesn't take into context, any application of the principle of Natural Justice. There is no pre-decisional hearing opportunity given in this case, to represent himself and neither any notice is being published. The emergency provision also goes beyond the powers from which the rules were issued, however, a review committee under rule 419A of the Indian Telegraph Rules, 1951 can reverse that order subject to their approval.

In the case of *Shreya Singhal*²⁷, the court while ascertaining the constitutionality of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, declared the rules to be constitutional only after the court took into consideration the various safeguards provided in the rules. These include the conditions like the pre-decisional hearing of not only the intermediary but also the originator before a blocking order is passed. Adding to this "...it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made."

However, such conditions seem to be missing over the 2021 guidelines and stand before the test of constitutionality where several petitioners including Foundation for Independent Journalism, Director of The Wire and editor-in-chief of The News Minute.²⁸ The issues at hand that might be contemplated could include, firstly, the scope of Rule 12 Subrule 5 and Rule 14 subrule 5 with respect to the Article 19(1)(a) and 19(2), secondly, the scope of inclusion and specific directions for the news publishers, i.e. defined in Rule 8 under Part III, with respect to the scope of powers provided under Section(s) 87(2)(z), 87(2)(zg), 69A and 79, and thirdly, the scope of the emergency powers provided to the committee under Rule 18 in light of the principles laid down in the *Shreya Singhal* case and the principles of Natural Justice.

²⁷ *Shreya Singhal v Union of India* (2015) 5 S.C.C. 178.

²⁸ The Wire Staff, 'Delhi HC Issues Notice to Centre on The Quint's Petition Against New IT Rules' (*The Wire*, 19 March 2021) (assessed 13 April, 2021, 10:04 AM), <<https://thewire.in/media/delhi-hc-issues-notice-to-centre-on-the-quints-petition-against-new-it-rules>>