

NINE-PIN BOWLING AIMED AT FREE SPEECH, PRIVACY

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

The life of Indian Law rather than being shaped along mathematical exactitudes finds itself at the receiving end of an experiential tussle. This tussle has aimed at every stage to bargain for a Fundamental Right in return for some negotiation, sometimes with the desire of the coloniser and at others with the dominant ideology at the Centre.

The subject of concern now is the [Information Technology \(Intermediary Guidelines and Digital Media Ethics Code\) Rules, 2021](#), which threaten to deprive social media platforms of their safe harbour immunity in the event of non-compliance with the said rules. While there are positive aspects about the said guidelines, there are, equally, glaring ambiguities and stifling susceptibilities that should render these contrary to past Supreme Court of India precedents such as [K.S. Puttaswamy](#).

The new media rules are a tightening noose

The Rules must be credited for they mandate duties such as removal of non-consensual intimate pictures within 24 hours, publication of compliance reports to increase transparency, setting up of a dispute resolution mechanism for content removal and adding a label to information for users to know whether content is advertised, owned, sponsored or exclusively controlled.

However, the Supreme Court, in the case of [Life Insurance Corpn. Of India vs Prof. Manubhai D. Shah](#) (1992) had elevated 'the freedom to circulate one's views as the lifeline of any democratic institution'. It went on to say that 'any attempt to stifle, suffocate or gag this right would sound a death knell to democracy' and would 'help usher in autocracy or dictatorship'. And so, it becomes increasingly important to critically scrutinise the recent barriers being imposed via these Rules against our right to free speech and expression.

The problem started when these Rules came to life. They were framed by the Ministry of Electronics and Information Technology (MeiTY). The Second Schedule of the Business Rules, 1961 does not empower MeiTY to frame regulations for 'digital media.' This power belongs to the Ministry of Information and Broadcasting. In the given case although MeiTY has said that these rules shall be administered by the Ministry of Information and Broadcasting, however this action violates the legal principle of 'colourable legislation' where the legislature cannot do something indirectly if it is not possible to do so directly. To propound the problem at hand, the Information Technology Act, 2000, does not regulate digital media. Therefore, the new IT Rules which claim to be a piece of subordinate legislation of the IT Act, travel beyond the rule-making power conferred upon them by the IT Act. This makes the Rules *ultra vires* to the Act.

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An intermediary is now supposed to take down content within 36 hours upon receiving orders from the Government. This deprives the intermediary of a fair recourse in the event that it disagrees with the Government's order due to a strict timeline. Additionally, it places fetters upon free speech by fixing the Government as the ultimate adjudicator of objectionable speech online.

The other infamous flaw is how these Rules undermine the right to privacy by imposing a traceability requirement. The immunity that users received from end-to-end encryption was that intermediaries did not have access to the contents of their messages. Imposing this mandatory requirement of traceability will break this immunity, thereby weakening the security of the privacy of these conversations. This will also render all the data from these conversations vulnerable to attack from ill-intentioned third parties. The threat here is not only one of privacy but to the extent of invasion and deprivation from a safe space. These regulations in the absence of a data protection law, coloured in the backdrop of recent data breach affecting a popular pizza delivery chain and also several airlines highlight a lesson left unlearned.

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The problem here is that to eliminate fake news — rather than defining its ambit as a first step, the Rules proceed to hurriedly take down whatever an arbitrary, ill-decided, biased authority may deem as “fake news”.

Lastly, the Rules create futile additional operational costs for intermediaries by requiring them to have Indian resident nodal officers, compliance officers and grievance officers. Intermediaries are also required to have offices located in India. This makes profit making a far-fetched goal for multinational corporations and start-up intermediary enterprises. Therefore, not only do these Rules place a barrier on the “marketplace of ideas” but also on the economic market of intermediaries in general by adding redundant financial burdens.

Our concluding words on the rapidly diluting right to free speech are only those of caution — of a warning that democracy stands undermined in direct proportion to every attack made on the citizen’s right to have a private conversation, to engage in a transaction, to dissent, to have an opinion and to articulate the same without any fear of being imprisoned.

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