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IT IS A NEW ASSAULT ON INDIA’S LIBERTY

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‘It will only remain for the state to tell us what the truth is’ | Photo Credit: Getty Images/iStockphoto

On April 6, 2023, the Union government introduced a new set of measures with a view to crushing fake news and misinformation on the Internet. These introductions came through an amendment made to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, or IT Rules. The amendment grants to the Union Ministry of Electronics and Information Technology (MeitY) unbridled power to create a “fact check unit”, which will identify false or misleading online content that concerns the central government’s business in any manner. Should social media intermediaries fail to prevent users from hosting or publishing information that have been flagged as false by the fact check unit, they stand to lose their “safe harbour” immunity. In other words, any protection that online platforms might have enjoyed against criminal prosecution will be withdrawn.

The upshot of the new regulation is this: the Union government gets to decide for itself what information is bogus and gets to exercise wide-ranging powers of censorship by compelling intermediaries to take down posts deemed fake or false. In a democracy, where information is free, and where the right to freedom of speech is constitutionally guaranteed, the new law must strike us as deeply abhorrent.

The IT Rules derive their authority from the Information Technology Act, 2000, a law which, at its inception, was meant to provide “legal recognition” for electronic commerce. Through section 79, the Act provides a “safe harbour”, by granting immunity to intermediaries, so long as these entities observe “due diligence” in discharging their duties under the law, and so long as they follow other guidelines prescribed by the state. An intermediary under the law refers to any person who receives, stores, or transmits electronic records — it would include Internet service providers, search engines, and social media platforms. For example, WhatsApp, Signal, Twitter, Facebook, and Instagram are all what the law construes as intermediaries.

When the IT Rules were introduced in 2021, in supersession of a previous guideline, it was already riddled by controversy. Divided into two distinct parts, the rules sought to regulate intermediaries through MeitY and the digital news media, including over-the-top (OTT) media services, such as Netflix and Amazon Prime, through the Union Ministry for Information and Broadcasting. Insofar as intermediaries are concerned, the IT Rules imposed a series of onerous obligations, a breach of which could result in a loss of safe harbour.

Among other things, the rules required social media platforms, in particular messaging services, to provide technological solutions that would enable them to identify the first originator of any information on their service, where demanded by government, under a set of given circumstances, or where mandated by an order of court. Given the implication of this on end-to-end encryption, and as a result on our right to privacy, the IT Rules has been subject to several sets of challenges, with petitions now pending consideration in the Supreme Court of India.

The amendments introduced this month bring with them a new assault on our liberty. To be sure, misinformation or fake news — whatever one might want to call it — is rampant on the Internet. Its effects are unquestionably deleterious. But what might the solutions to this problem be? There is the oft-cited passage from Justice Louis Brandeis's classic 1927 opinion in the United States Supreme Court case, Whitney vs California, where he wrote that "if there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence...". But given the structural inequalities in society, we know that a resolution of this kind is not always helpful, that speech by itself can be harmful, and when it is, it demands intervention from the law.

Equally, though, we must be cognisant that not all problems are capable of easy legislative solutions. Certainly, thoughtless censorship is never an answer. What is worse, in the case of the IT Rules, restrictions flow not through legislation, but through executive diktats. And these commands militate against substantive constitutional guarantees. Article 19(1)(a) grants to every citizen a right to freedom of speech and expression. That right can only be limited through reasonable restrictions made by law on one or the other of the grounds stipulated in Article 19(2), namely, 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".

As is plain to see, fake news and misinformation are not grounds on which speech can be limited. No doubt, if a piece of information is proven to be false and has a direct bearing on one of the grounds stipulated in Article 19(2), such speech can be limited through law. But the amendments made to the IT Rules do not caveat the restraints they place in any manner. Instead, they confer on the Fact Check Unit limitless powers to decide what information is false and, in the process, compel social media intermediaries to act based on these findings.

In its landmark judgment in Shreya Singhal vs Union of India (2015), the Supreme Court, in striking down Section 66A of the IT Act, held that a law that limits speech can neither be vague nor over-broad. The amendment to the IT Rules suffers on both accounts. First, the notification fails to define fake news. Second, it allows the government's fact-check unit to make declarations on the veracity of any news "in respect of any business" that involves the state. The use of open-ended and undefined words, especially the use of the phrase "any business" — in a nation such as India, where the state has wide-ranging reach — indicates that the government will have an effective carte blanche to decide what each of us can see, hear, and read on the Internet.

Any workable and constitutionally committed campaign against fake news would have looked first towards a comprehensive parliamentary legislation on the matter. And a legislation emanating out of such a process would have tethered limitations on speech to the grounds stipulated in Article 19(2). It would have further ensured that the government cannot act as an arbiter of its own cause. In France, for example, where legislation exists to counter the spread of misinformation during elections, the declaration is made not by government but by an independent judge.

A proper, lawfully enacted statute would have also demanded a decision on whether a directive

to remove misinformation is the only solution to fake news, or whether there are other, less restrictive alternatives available — for instance, in many cases, a government faced with what it believes is deceptive news always has the power to provide its own version of the facts, without calling for an erasure of other accounts.

The amendments to the IT Rules are not only a product of pure executive instruction but also eschew each one of these considerations. The consequences are chilling. Intermediaries faced with the threat of prosecution will naturally weed out information deemed false by the Fact Check Unit. It will only remain for the state to tell us what the truth is. The rights of the press, and indeed of the common person, to question authority, to speak truth to power, will be diminished, and our civil liberties obliterated.

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