

A FACT CHECK UNIT THAT IS UNCONSTITUTIONAL

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'There is no doubt that it creates a chilling effect on the freedom of speech and expression' | Photo Credit: Getty Images

The Government of Tamil Nadu issued an order recently to set up a Fact Check Unit with the intent of checking across all media platforms the authenticity of information related to the Government of Tamil Nadu. This government order (GO) is violative of several fundamental rights guaranteed by the Constitution of India, and is unconstitutionally vague and arbitrary.

Earlier this year, the Government of India had amended the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, to set up a fact check unit in order to identify "fake, false or misleading" information in respect of "any business of the Central Government". These rules were challenged before the Bombay High Court, and the judgment is expected to be delivered on December 1. The Government of India gave an undertaking to the High Court that the fact check unit will not be notified until the judgment. Even though the GO has a passing reference to these provisions of the IT Rules, it does not disclose the undertaking given by the Government of India to the Bombay High Court.

The operative part of the GO issued by the Government of Tamil Nadu says that the fact check unit will check the veracity of information related to the announcements, policies, schemes, guidelines and initiatives of the Government of Tamil Nadu. Annexure III to the GO has more details on the unit's functioning.

The fact check unit has been given powers to take suo motu cognisance of social media posts/articles that require fact checking. Needless to say, it can also act on complaints received by them from anyone. Identified complaints are then researched using various fact checking tools and verified through government sources such as websites, press releases, and government social media accounts. The information will then be split into actionable and non-actionable pools. Complaints under the first category will then be forwarded to the authorities concerned to initiate legal action. Further, after verifying the authenticity of the information from the authorised source of the government, the fact check unit will disseminate creative contents through its social media platforms to create awareness.

This part of the GO violates several settled principles of law. There is no doubt that it creates a chilling effect on the freedom of speech and expression, a fundamental right guaranteed under Article 19(1)(a) of the Constitution. This can only be reasonably restricted under Article 19(2) in

the interest of the sovereignty and integrity of India, 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. More importantly, such restriction under Article 19(2) can only be by way of a “law”, which, as held by the Supreme Court of India, must be legislation passed by the State. Thus, it is settled law that a GO cannot impose restrictions on the freedom of speech and expression. It is also pertinent to note that “public interest” is not a ground under Article 19(2) to restrict the freedom of speech and expression.

The fact check unit has been tasked with checking the authenticity of any information related to the Government of Tamil Nadu. Now, the phrase “information related to the Government of Tamil Nadu” has not been defined in the GO, thereby making it unconstitutionally vague and arbitrary. Would an opinion authored by an economist criticising economic/social policies of the government or an investigative article by a journalist fall under the lens of the fact check unit? This ambiguity will have a chilling effect on the freedom of speech and expression of Indian citizens. This will effectively choke the flow of information to the public, which goes against the principles of participative democracy.

The GO is riddled with other illegalities. The scheme of the GO does not provide for an opportunity of hearing to the author of the post, who can be a journalist, researcher, comedian, satirist, or members of the opposition political party. Thus, the government has become the judge, jury, and executioner on the authenticity of any information related to the Government of Tamil Nadu.

The introductory paragraph of the GO states that the emergence of social media and its related issues of mis/disinformation, fake news, and hate speech have necessitated the creation of the fact check unit by the State government. This is only partly true because hate speech has no direct nexus with information related to the Government of Tamil Nadu, which is the focus of the fact check unit. Indeed, mis/disinformation and fake news are a challenge for democracies throughout the world. This was most evident during the U.S. presidential election of 2016, the Brexit referendum and the Colombian referendum of 2016. The situation is no different in India wherein politicians and TV anchors peddle mis/disinformation with no remorse.

However, the GO issued by the Government of Tamil Nadu is not a solution to curb mis/disinformation and fake news. Consultations need to be held with all stakeholders including the public and intermediaries such as Facebook, X, and Google. For instance, in Europe, the European Commission issued the Code of Practice on Disinformation on September 26, 2018, after a broad consultative process and opinion poll covering all member States. These measures include support for an independent network of fact-checkers and promoting media literacy. There is no magic wand here, but a state-run fact check unit will only cause more harm to society.

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