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RECONCILING PRIVACY AND FREEDOM OF SPEECH AND EXPRESSION IN THE DIGITAL LANDSCAPE IN INDIA

AUTHORED BY - PONNI J

ABSTRACT

Communication is an important life skill that enables us to effectively express ourselves. The advent of computers and internet has revolutionised communication sector. The growth of social and digital media has been catalysed by the human instinct to communicate and connect with his fellow humans. It is all about establishing and maintaining personal connections at a larger scale. Social media platforms are third-party websites or applications that facilitate social interaction and content-sharing among its users. Mainly used for social interaction and access to news and information, social media has become an inevitable part of our daily life. The speed and range of communication over these media are vast. One can post his views globally in double quick time. Though there are many advantages for social media, lack of regulation has led to chaos. Internet being a borderless network faces certain inherent problems with regard to its regulation. A website might be hosted in a particular country, run by staff in another country and the person posting objectionable content might be from yet another country. This creates problems regarding jurisdiction. Jurisdictional issues are only a tip of the iceberg. The advancement of the technology is so quick that identification of newer and novel methods made available to customers and bringing them all under various laws and regulations itself is a herculean task and implementation of the same is yet another. Free speech is a key feature of the internet. But free speech is often hampered by content regulation by tech giants. Another problem is lack of privacy. The moment we discuss buying something, we have ads popping up on our social media pages suggesting to buy a particular brand. This shows the level of surveillance the tech giants have on us. In this digital panoptic on, privacy has become a myth. In this back drop, the Government of India released Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 to regulate social media, digital media and OTT platforms. The Digital Data Privacy Act 2023 was also enacted to protect digital personal data. This article examines the contours of right to free speech and right to privacy in the digital sphere introspecting the recent rules and enactments.

INTRODUCTION

The twenty first century has witnessed a tremendous advancement in technology and this has influenced almost all walks of life. The invention of computers and internet is regarded as the fastest technological revolution of all times. Prior developments in technology have been gradual such as the move from the telegraph to telephone, radio and television, video telephony to satellites. However, with the advent of computer networks and internet there was a lightening change and every state is dependent upon interconnected computer networks for all its day-to-day activities including communication, transportation, medical care, education, governance. Increasingly people in the information society are becoming involved in online services, online contracts, electronic commerce, online transactions, and online publications.¹ Use of computer systems became inevitable in all fields. Social media is the buzz word today. Social media users are bestowed with capacity to communicate to a large crowd without time or place constraints. Such speed and range of communication brings with itself certain problems also of which few shall be discussed in detail.

There comes the doubt if the autonomy and dignity of the individual can be reconciled with the vastly accelerated movement of information in an electronic environment. Today, sharing is the norm and keeping private is an exception. The actual problem is that this digital age is characterised by an enormous capacity to collect, store and manipulate data and thereby carry out digital surveillance on individuals. It is true that social media provides opportunities for individuals to reach out to people minimizing geographical and cultural borders. But this scale and range of communication which is seen as a boon can become a bane as the information shared can be recorded and used against the individual undermining his right to Privacy.

PRIVACY AND FREEDOM OF EXPRESSION DICHOTOMY

In this digital age, freedom of expression and privacy are mutually reinforcing rights. Though the advancement in communication technology has fostered freedom of expression and democratic participation, a person may in realizing his right to free expression incidentally or intentionally encroach upon another's right to privacy and vice versa. On one hand, digital technologies have facilitated the exercise of freedom of expression and the sharing of information but on the other

¹Dr.Bimal Raut, JUDICIAL JURISDICTION IN THE TRANSNATIONAL CYBERSPACE, 2, (Jain Book Agency 2004)

hand they have also greatly increased the risk of violations of the right to privacy by enabling storage and manipulation of personal data. Conversely, the laws and measures to protect the right to privacy undermine freedom of expression.

The concept of privacy has myriads of meanings and its ambit is ever widening. Earlier privacy was believed to be limited to personal space and physical boundaries, now it refers to privacy of personal information also. Basically, privacy is the right to be left alone.² It is the right to be free from unwanted interferences into one's personal life. The right to privacy finds place in almost all Human Rights instruments including Article 12 of the Universal Declaration of Human Rights (UDHR)³, Article 17 of the International Covenant on Civil and Political Rights (ICCPR)⁴, as well as Article 8 of the European Convention on Human Rights (ECHR).⁵

National laws also recognize privacy as a fundamental right. Most countries have the right enshrined in their constitution or other statutes. The privacy jurisprudence in India stems from an extensive interpretation of Article 21.⁶ The right to privacy in Indian constitutional law can be traced back to the dissenting judgment in *Kharak Singh v. State of Uttar Pradesh*⁷ a case claiming that police surveillance and domiciliary visits of accused was violative of Article 21 and the court declared the domiciliary visits at night to be unconstitutional. Another important case is *Govind v. State of Madhya Pradesh*⁸ where Supreme Court dealt with domiciliary visits and harassment by the police and held that the right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing, and is subject to restriction only on the basis of compelling public interest. A nine judges bench of the Supreme Court of India in Justice *K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors*⁹ unanimously held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. The

² Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*, 4(5) Harv. L. Rev. 193, 195 (1890)

³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS No. 5, 213 UNTS 221.

⁶ INDIA CONST. art. 21 'No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁷ AIR 1963 SC 1295

⁸ AIR 1975 SC 1378

⁹ AIR 2017 SC 4161

court urged the need for the implementation of a new law relating to data privacy.

Privacy adheres not merely in a boundaried space but in the ability of the individual to choose and be autonomous. When it comes to internet, a person has the right to choose what he does and to keep private his personal information. Though users believe they have complete autonomy over the flow of their personal data on cyberspace it is not true. Whatever we do on the internet leaves a digital foot print. Today, exchange of personal information via electronic means is part of a conscious compromise through which individuals voluntarily surrender information about themselves and their relationships in return for digital access to goods, services and information. The moment we discuss buying something, we have ads popping up on our social media pages suggesting to buy a particular brand. This shows the impact tech giants have on privacy of internet users. Bringing in the analogy of right against surveillance to surveillance in internet paradigm, in a country like India where targeted surveillance of an individual based on a criminal record requires high standards to be followed, it is never easy to mandate collection and storage of data of every internet user.

Freedom of expression is the mother of all the other liberties. A robust protection of freedom of speech and expression is hall mark of a democracy. In a democracy the right to free expression encompasses within it the right of an individual to speak as well as the right of the community to be informed. Freedom of speech and expression finds place in almost all human rights instruments including Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and European Convention on Human Rights.

Everyone has the freedom to seek receive and impart information through all media regardless of frontiers.¹⁰Art 19(2) of International Covenant on Civil and Political Rights, 1966 states that “Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Art 10 of European Convention on Human Rights says every one shall have freedom of expression which includes “freedom to hold opinions and to receive and impart information and ideas without interference by public authority

¹⁰See Supra note 3, art.19

and regardless of frontiers.” Thus, the essence of freedom of speech and expression is the act of seeking, receiving and imparting information or ideas irrespective of the medium used. A person has as much freedom of expression over internet as he has on print media or any other media.

The Indian constitution recognises freedom of speech and expression as a fundamental right.¹¹. The right is subject to reasonable only on grounds of 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. Any act or provision imposing restrictions on freedom of speech and expression on grounds other than those mentioned in the Constitution amounts to violation of freedom of speech and expression. The Supreme Court in the celebrated judgment of *Shreya Singhal v. Union of India*¹² struck down Section 66A of the Information Technology Act which authorised police to arrest people for social media posts construed “offensive” or “menacing”.

Though freedom of expression over internet is much celebrated, lack of regulation can lead to anarchy. In absence of a proper system of regulation by the government, companies arbitrarily decide which content to regulate and how i.e. whether to remove it or post warning or to conduct a fact check or to control its virality by making it visible to only few using algorithm. The company may arbitrarily choose to suspend an account for expressing certain words but at the same time allow another to continue with the account even when he has also expressed the same words.¹³ The government of India has from time-to-time enacted appropriate legislations and allied rules to adapt to the changing times.

INFORMATION TECHNOLOGY ACT AND ITS EFFECT ON PRIVACY AND FREE SPEECH

Till recently the IT Act, 2000 and the rules made thereunder were the only legislations to deal with privacy and free speech over the internet. Information Technology Act, 2000 contains a few provisions related to the individual’s privacy but they are not exhaustive in nature. Under the Information Technology Act, 2000, a body corporate who is possessing, dealing or handling any

¹¹ INDIA CONST. art. 19 (1)(a)

¹² AIR 2015 SC 1523

¹³ The perfect example would be cases where Donald Trump was allowed to post abusive or misleading content which would have been removed if it had been posted by an ordinary person.

sensitive personal data or information of an individual, and is negligent in implementing and maintaining reasonable security practices in protecting the data and results in wrongful loss or wrongful gain to any person, then such body corporate may be held liable to pay damages to the person so affected¹⁴. It is important to note that there is no maximum limit specified in the Act for the compensation that can be claimed by the affected party in such circumstances. The Act penalises the act of intentionally or knowingly capturing, publishing or transmitting the image of a private area of any person without his consent, under circumstances violating privacy of that person.¹⁵

Section 72 of the Information Technology Act, 2000 deals with a circumstance under which any person who, in pursuance of any of the powers conferred under the IT Act Rules or Regulations made thereunder, secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned, discloses such material to any other person. The person making such disclosure is liable to be punished with imprisonment for a term which may extend to two years, or with fine which may extend to Rs 1,00,000 or with both.¹⁶ Disclosure of information knowingly and intentionally, without the consent of the person concerned and in breach of the lawful contract is punishable with imprisonment for a term extending to three years and fine extending to Rs 5,00,000¹⁷.

Under Section 69 of the Act, which is an exception to the general rule of maintenance of privacy and secrecy of the information, provides that where the Government is satisfied that it is necessary for the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States, public order, for preventing incitement to the commission of any cognizable offence relating to above, or for the investigation of any offence, it may issue directions to intercept, monitor or decrypt any information generated, transmitted, received or stored in any computer resource.

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 deals with the protection of “Sensitive personal data or

¹⁴Information Technology Act , S.43 A No.21, Acts of the Parliament, 2000 (India)

¹⁵*Id.*, S.66E

¹⁶*Id.*, S.72

¹⁷*Id.*, S.72A

information of a person”, which includes the personal information relating to passwords, financial information such as bank account or credit or debit card or other payment instrument details; sexual orientation; medical records and history; and biometric information. The rules mandate for collection and processing of personal data. However, there is no mention about nature of consent to be obtain. Under the provisions, a mere opt out system where the fiduciaries have a default setting to collect and process personal data unless the user opts out from it would suffice. Any introspection on free speech jurisprudence in connection with IT Act would always start from the draconian provision under S.66A which was struck down as unconstitutional as it arbitrarily, excessively and disproportionately invades the right of free speech and upset the balance between such right and the reasonable restrictions that may be imposed on such right.¹⁸ This legislation was more than two decades old and couldn't by itself regulate the present-day digital revolution. With so much of fake news and misinformation proliferating especially in the difficult times of the pandemic, the Government of India was compelled to take actions to regulate communication over internet. This paved way for the IT (Intermediary guidelines and digital media ethics code) Rules 2021.

INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE 2021 AND ITS IMPLICATIONS FOR PRIVACY AND FREE SPEECH

The Government of India, in exercising its powers under S.87 of the Information Technology Act, 2000, framed the of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (new IT Rules) superseding the earlier Information Technology (Intermediary Guidelines) Rules 2011 at a time when debate over right to privacy and freedom of expression over social media was at its peak. The rules purport to regulate intermediaries, social media intermediaries, OTT Platforms and digital media publishers. Part I of the rules deal with definitions. Part II deal with due diligence by intermediaries and grievance redressal mechanism and Part III deal with Code of Ethics in relation to digital media. A faction of people believed it to be a much awaited much needed legislative measure to regulate the over-the-top, online news portals etc., but another faction recognized it as deceptive exercise of government surveillance and censoring violating fundamental right to freedom of speech and expression. In 2023 the rules

¹⁸*Shreya Singhal v. Union of India* AIR 2015 SC 1523

were amended inter alia to bring in online gaming platforms also under the purview. The important provisions which have an impact on user's privacy and freedom of speech and expression are discussed.

These new rules brought in a grievance redressal mechanism for the ordinary users of social media. The new guidelines have classified digital social media into two parts namely social media intermediaries and significant social media intermediaries. The significant social media intermediaries are those digital platforms having more than fifty lakh users and are mandated to follow certain additional due diligence.

The rules stipulate that non-compliance with due diligence will take away their immunity under the safe harbour provisions. Due diligence includes publishing the rules and regulations, privacy policies and the user agreement in English or any language specified in eighth schedule to the Constitution for accessing the computer resource. The platforms are required to inform each user the privacy policy, user agreement, rules and regulations in language of his choice and ensure that the users do not host, display, upload, modify, publish, transmit, store, update or share any information that belongs to categories prohibited under the rules.¹⁹The users shall be warned at least once every year that noncompliance with the rules and regulations, privacy policy or user agreement might get the access terminated or get the non-compliant information removed or both.²⁰The rules mandate intermediaries to establish a robust grievance mechanism for receiving and resolving complaints from the users of victims. Intermediaries shall appoint a grievance officer to deal with such complaints and share the name and contact details of such officer. The grievance officer shall acknowledge a complaint within 24 hours and resolve it within 15 days from its receipt. The total number of complaints received is to be reported to the Government every month.

The rules prescribe certain Additional due diligence to be followed by significant social media intermediaries. A significant social media intermediary should have a physical contact address in India and appoint a chief compliance officer RTO ensure compliance with the Act and rules. These intermediaries should have a nodal contact person resident in India for 24x7 coordination with

¹⁹ Information Technology (Intermediaries Guidelines) Rules, 2021, Rule 3 (b)

²⁰ *Id*, Rule 3(c)

law enforcement agencies. A resident grievance officer shall be appointed who shall deal with resolution of complaints made under grievance redressal system. The social media intermediaries are duty bound to publish a monthly compliance report enumerating the details of the complaints received and action taken and the details of contents removed proactively. Though the rules were released with the promise of empowering the ordinary users and controlling the tech giants, in effect the rules have an adverse effect on the privacy and freedom of expression of the users. The most controversial provisions are dealt hereunder.

TRACEABILITY MANDATE

Internet has gained popularity because of its range and speed. Another aspect that catalyzed growth of use of this medium is the sense of anonymity that it gives to the user. However, the IT Rules 2021 mandate significant social media intermediaries providing messaging service to enable identification of the first originator of the information on its computer resource upon an order passed by a court of competent jurisdiction or an order passed under section 69 of the IT Act by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009. Such an order can be passed only for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to sovereignty and integrity of India, security of the state, friendly relations with foreign states, or public order or of incitement of an offence relating to above or in relation with rape, sexually explicit material or child sexual abuse material punishable with imprisonment for a term of not less than 5 years.²¹

This rule mandating intermediaries to provide for tracing of the originator of the information on their platforms if required by a court of competent jurisdiction or competent authority is most debated area. End to end encryption is the most secured way to transfer data online because when messages are end to end encrypted, only the sender of the message and the receiver of the message can view the message and not by any one else in between including the messaging service company. Allowing tracing the originator would imply breaking down encryption. Breaking down of encryption will have serious repercussions on user's privacy.

²¹ *Id*, Rule4(2)

TAKE DOWN WITHOUT OPPORTUNITY TO BE HEARD

Audi alteram partem is the primary rule of natural justice. It would only be fair to hear the user before taking down a content that he has posted. The rules mandate that intermediaries shall remove or disable access within 24 hours of receipt of complaints that expose the private areas of individuals, show such individuals in full or partial nudity or in sexual act or is in the nature of impersonation including morphed images.²²In case of take down of content on its own accord, intermediary is bound to give users an opportunity to be heard. In cases where significant social media intermediaries remove or disable access to any information, a prior intimation shall be communicated to the user who has shared that information with a notice explaining reasons for such actions and the user must be given a reasonable opportunity to question the action taken by the intermediary.²³

An intermediary upon receiving an order of a court or being notified by the appropriate government or its agencies through authorized officer should not host or publish any matter which is prohibited under any law relating to the sovereignty and integrity of India, public order, friendly relation with foreign states etc.

The intermediary has to consider takedown orders by a court or government agency within 36 hours. There is no provision for the user whose content is removed to have his say on the removal. In a country like India with diverse cultural and political sensibilities, it is certain that, an intermediary may receive hundreds of complaints every day. It would be practically impossible for the Chief Compliance Officer to scrutinize each complaint on merits. So it is likely that to avoid liability for the intermediary, legitimate forms of free expression might be suppressed. This could undermine freedom of speech and expression which ensures an individual's right to express one's opinion.

AUTOMATED CENSORSHIP

Rule 4(4) requires Significant Social Media Intermediaries to endeavour to deploy technology-based measures, including automated tools, to proactively identify and block sexual abuse

²²*Id.*, Rule 3 (2)(b)

²³*Id.*, Rule 4(8)

material or information identical to previously removed information.²⁴ AI enabled technology is not error free and are prone to failures. AI enabled techniques can err in identifying particular types of content including sexual abuse material. A proper mechanism of human oversight is required to protect the interests of free speech.

CENSORSHIP OF NEWS PLATFORMS AND OTT PLATFORMS

Changes in technology and the society has brought news platforms to the online terrain. Though print and broadcast news media are regulated under Press Council of India Act and Cable TV Networks (Regulation) Act, the online news media remained largely unregulated till recently. The Intermediary Rules 2021 lays down a code of ethics for publishers of online news. As per the rules a complaint alleging violation of code of ethics may be filed by any person. Under the rules, there is a three-level grievance redressal mechanism. At level one, there is a grievance officer appointed by the publisher to look into the matter at the primary stage. The decisions of the grievance officer are subject to review by self-regulating bodies of experts in the industry that are required to be registered with the government. The third level is an interdepartmental committee with wide powers. The committee will be headed by an authorised officer of the ministry not below the rank of a joint secretary and looks into the complaints referred to it by the self-regulating body or by the ministry. The head of the Inter Departmental Committee can direct blocking of certain content. Though on paper there is an ideal step by step structure envisaged, the Inter Departmental Committee may also take up certain matters *suomotu*, before the first two tiers are exhausted. This leads to unnecessary interference by the Central government in censoring news and current affairs. The rules therefore evidently lack a proper check and balance system against the government interference in curtailing free speech.

THE DIGITAL DATA PROTECTION ACT, 2023 IN RECONCILING PRIVACY WITH FREE SPEECH

The Digital Personal Data Protection Act 2023 was brought in with the objective of enhancing right to privacy of an individual by providing for protection of data obtained and stored digitally or data obtained by other means and then converted to digital form. The Act emphasises the need

²⁴*Id.*, Rule 4(5)

of explicit consent from the individuals whose data is being processed. The data principal also has the right to access information about the processing of his data,²⁵ to withdraw consent at any time, to request corrections or erasure of data²⁶, nominate representatives to act on his behalf in case of death or incapacity²⁷ and file grievances.²⁸

Under the Act, the data fiduciaries, the entities responsible for collecting and processing personal data and are duty bound to ensure data accuracy and completeness, establish robust security measures to prevent data breaches, notify the Data Protection Board of India and affected individuals in case of breaches and delete data after the purpose.²⁹ Data fiduciaries must exercise extra-caution while processing the personal data of children or disabled as it is mandatory to obtain consent of parent or guardian.³⁰ The Act recognises some data fiduciaries and imposes additional obligations, including the appointment of a data protection officer and the undertaking of impact assessments and compliance audits.

Though the Act appears to be perfect in delineating the rights of data principals and elaborating the duties of data fiduciaries and data processors, there are exceptions in favour of Governmental interventions on individual privacy. The data principal rights and data fiduciary obligations (except data security) do not apply in cases of prevention and investigation of offenses and the enforcement of legal rights or claims. The central government also holds the authority to grant exemptions for specific activities, such as government processing for state security and public order, as well as research, archiving, or statistical purposes.³¹ This excessive discretion given to the central government may lead to arbitrariness. The challenge lies in finding a balance between the right to privacy and reasonable exceptions on government processing of personal data.

The Act empowers Central Government to block access to information in the interest of the general public if requested by the Data Protection Board. Allowing the government to selectively block stories would definitely undermine the freedom of speech and expression.

²⁵ The Digital Personal Data Protection Act, S.11, No.22, Acts of Parliament, 2023 (India)

²⁶ *Id.*, S.12

²⁷ *Id.*, S.14

²⁸ *Id.*, S.13

²⁹ *Id.*, S.8

³⁰ *Id.*, S.9

³¹ *Id.* S.17

CONCLUSION

The digital space is ever-expanding and the laws regulating this sphere have to continuously expand to keep pace with the developments. Till recently the decades old Information Technology Act was the sole legislation specifically dealing with right to privacy and freedom of expression in the digital sphere. Government issued rules from time to time to cope with developments coming up in the field. Intermediary Rules were introduced at a time when the Data Protection bill was already tabled definitely strike at the root of privacy by mandating internet platforms to trace the originator of information as it practically amounts to end of end-to-end encryption. The rules will have serious effects on freedom of expression as it gives power to government to regulate news and entertainment available online. The government has brought immense changes to the way the internet will work in India just by amending the rules under pre-existing sections of Information Technology Act. The framing of rules without proper public consultation shows it was a product of haste. This governance framework for regulating intermediaries bringing with it such far-reaching consequences on liberty of individuals is already the subject of challenge at the court of law and the fate shall be decided by courts. The Digital Personal Data Protection Act though marks a watershed in the privacy jurisprudence in India and appears to effectively protect the personal privacy of citizens, in turn jeopardises the freedom of expression of the people. The Act has a peculiar section imposing certain duties on the data principal. An act that was brought to protect privacy of individuals posing obligations or duties on such citizens itself casts doubt on the motive of the government. The Act deceives the citizens by giving them a feeling of Data Principal is the king where in fact Government is the King. Giving too much discretion to the government may lead to anarchy. The efficacy of the regulation lies in balancing the individual interests of free speech and privacy with the public interest or the national interest.