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Liability of intermediary: Law & technical nuances

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Abstract

Intermediary Guidelines provide a framework which helps to ensure the smooth functioning of various intermediaries like Hosts, search engine providers and internet service providers. This paper mainly deals with the fundamental right of speech and expression concerning the right of every citizen to freely express themselves as an individual living in a democracy, on one side and the restrictions that governments impose on free speech being circulated on various intermediaries like social media platforms for the purposes of protecting the sovereignty and integrity of India and securing peace in the country.

Keywords: Intermediaries, sovereignty, censorship, free speech, horizontal approach, vertical approach

Introduction

Intermediaries, such as hosts, internet service providers, and search engines which play an important role in ensuring free and smooth flow of information and communication on the internet are governed by the Intermediary Guidelines. They facilitate censorship with the help of proxy, by holding intermediaries liable for certain kinds of content available on the internet. Intermediaries being private parties may either readily agree to remove this content or prevent access to it for the purposes of saving themselves from liability, which severely restricts the freedom of free-speech of the authors and propagators of the content. This article argues that the existing intermediary liability law in India undermines Indians' enjoyment of the right to freedom of speech and expression on the internet because it encourages intermediaries to engage in overbroad censorship of content. This censorship is aggravated by a lack of transparency, making the law prone to abuse by both the state and private actors [1].”

Legal “frameworks dealing with liability of the intermediaries usually use two kinds of regulatory structures: the first is the “horizontal” approach where a single liability regime is applied to any infringement notwithstanding of the area of law it concerns itself with. For example, the same regime will apply to intermediaries for defamation and copyright violation. On the other hand, the “vertical” approach follows a procedure where different liability regimes are applicable to specific domains, such as defamation, copyright, or child pornography. India follows the latter i.e., the vertical approach. Information Technology Act 2000 (“IT Act”) is the main statute creating a framework which addresses the issue of intermediary liability. However, other than the IT Act, Sections 51(a) (ii), (b) and 63 of the Copyright Act, 1957 and Section 104 of the Trade Marks Act, 1999 are also applicable to intermediaries, Section 79 of the IT Act, which affords intermediaries immunity from liability, allows intermediaries to claim exemption from liability for offences under general laws such as the Indian Penal Code (1980) and the IT Act itself [2].”

““Intermediary” is defined under the IT Act in Section 2(1)(w), as “any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment

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¹ ADVANI, P. (2013). Intermediary Liability in India. *Economic and Political Weekly*, 48(50), 120-128. Retrieved February 23, 2021, from <http://www.jstor.org/stable/24479053>

² Gellis, C. (2013). 2013 State of the Law Regarding Internet Intermediary Liability for User-Generated Content. *The Business Lawyer*, 69(1), 209-215. Retrieved February 23, 2021, from <http://www.jstor.org/stable/43665654>

Sites. Online auction sites, online marketplaces and cyber cafés.” This definition was added by the Information Technology (Amendment) Act, 2008. While this definition still has its lacunas, it must be recognised that this is a big step forward from the pre amendment definition which defined an intermediary as, “Any person who on behalf of another person receives stores or transmits the message or provides any service with respect to that message.”

The accompanying rules state that all requests and complaints received under this process, along with the action taken, must remain confidential.”

Hypothesis

If a citizen of a democratic country does not even have the right to question what is happening in the country, then in what kind of democracy are we living in?

Justification

“Section 69A of the IT Act has been used by the government on various occasions, particularly in authorising and validating internet shutdowns. Section 69A of the IT Act, 2000, allows the Central Government to block public access to an intermediary “in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognisable offence relating to above”. The accompanying rules state that all requests and complaints received under this process, along with the action taken, must remain confidential [3].

For the Union government, it quickly became a matter of pride. Holding up Twitter’s employees isn’t something that would look good for India in the eye’s of the world as the world’s largest democracy. When the order for revocation of Article 370 was passed in August 2019, the Union Government proceeded to issue its highest-ever number of orders in a single month i.e., Nine. With the recent set of blocking orders using Section 69A, it is clear that Twitter believes the Union government has crossed a line and that not obeying and complying with the legal orders is potentially worth its company’s officials going to jail [4].

Social Media sites like Instagram, Twitter, Facebook are categorised as platforms or intermediaries that do not own content but help to regulate and share third-party content. As a result, intermediaries enjoy certain exemptions from liabilities with regard to content, data, and communication. If any unlawful content is shared across on such platforms, The Ministry of Information and Technology directs the concerned intermediary to remove the unlawful content within a specified period of time failing which penal action follows [5].

The grounds on which these powers may be exercised

³ Fatima, t. (2007). Liability of online intermediaries: emerging trends. *Journal of the Indian Law Institute*, 49(2), 155-178. Retrieved February 23, 2021, from <http://www.jstor.org/stable/43952103>

⁴ Jhunjunwala, G., & Kumar, P. (2014). Developments in India—Website Owner and Service Provider Liability for User-Generated Content and User Misconduct. *The Business Lawyer*, 70(1), 307-312. Retrieved February 23, 2021, from <http://www.jstor.org/stable/43665705>

⁵ SESHU, G. (2012). Poor Guarantee of Online Freedom in India. *Economic and Political Weekly*, 47(24), 14-16. Retrieved February 23, 2021, from <http://www.jstor.org/stable/23214889>

are given as follows

In the interest of the sovereignty or integrity of India, defence of India, the security of the state.

1. Friendly relations with foreign states.
2. Public order, or for preventing incitement to the commission of any cognizable offence relating to these.
3. For investigating any offence.

Reason for Intermediaries to Show Compliance to IT Act

1. **International Requirement:** Most nations internationally have now drafted and passed laws making cooperation necessary by Internet service providers or web hosting service providers and other intermediaries in certain circumstances.
2. **To Fight Cybercrime:** Cooperation between law enforcement agencies and intermediaries is now deemed a vital cog for the purposes of fighting cybercrime and various other crimes that are committed using computer resources. These include hacking, digital impersonation and theft of data.
3. **To Prevent Misuse of Internet:** The potential of the misuse has led to law enforcement officials constantly seeking to curb the ill-effects of using the medium.

Case Study

Shreya Singhal v Union of India (2015)

In this landmark 2015 judgement of the honourable Supreme Court, for the first time, a recognition of the Indian citizen’s free speech rights over and above the Internet by striking down the draconian Section 66A of the IT Act, which provided for punishment for sending offensive messages through communication services. The provisions of the IT Act provided for the arrest of those persons who posted allegedly offensive content on the internet upholding their fundamental right of freedom of expression. Section 66A defines the punishment for sending "offensive" messages through a computer or any other communication device like a mobile phone or tablet and a conviction of it can fetch a maximum three years of jail and a fine [6].”

Moving ahead, in context of intermediary liability, the Court held that “Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material.... Similarly, the Information Technology Intermediary Guidelines Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.”

“The Court also observed that it would become very difficult for intermediaries like Google, Facebook, Instagram etc. to act when requests and complaints running in millions are made and the intermediary now has the sole responsibility to judge as to which of such requests are legitimate and which are not.

The verdict in Shreya Singhal holds immense importance for various reasons. In a rare step, Supreme Court took the extreme step of declaring altogether illegitimate, a censorship law passed by Parliament. This judgement has increased the scope of the fundamental right available to us to express ourselves freely, and the limited space given to

⁶ ABRAHAM, S. (2015). Shreya Singhal and 66A: A Cup Half Full and Half Empty. *Economic and Political Weekly*, 50(15), 12-16. doi:10.2307/24481877

the state in restraining this freedom in only the most exceptional of circumstances.

Subsequently, the Supreme Court, in the case of *Kamlesh Vaswani v Union of India*, issued directions to intermediaries to disable specific content where websites operating and dealing with child pornography was sought to be restricted.”

Suggestions

The Union Government needs to maintain and allow greater transparency in matters relating to the content blocking orders under Section 69A, IT Act. The whole debacle of the *Twitter vs government* tussle over the recent farm laws issue is a good example showcasing political interference for the purposes of propagating a particular agenda and in the name of peace. The Government had asked Twitter officials to remove content involving the use of an incendiary hashtag, and the suspending accounts allegedly used by Sikh separatist groups and "backed by Pakistan". In response to this legal notice by the Central government, Twitter had first blocked some 250 accounts citing objections based on public order. Some of the accounts blocked belonged to activists and parties connected with supporting the months-long protests on the outskirts of Delhi and an investigative news magazine. Then, six hours later, Twitter restored the accounts, citing "insufficient justification" for continuing the suspension^[7].”

“Police in our country gets psychologically influenced to sensitivity of political dynamics and the fallout of violence thereafter rather than taking an unbiased right legal decision. This happens because police in many cases is controlled and answerable to their political bosses instead of “conforming to the commands of the law”. Granted that the Fundamental Right of freedom of speech cannot be absolute and has to be subject to reasonable restrictions but such restrictions must be practical and rational. One such restriction is in the case of defamation and it’s completely logical in that sense. Supreme Court in a plethora of judgements has referred to the importance of fundamental right of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government.”

Conclusion

“The Indian position and stand on the liabilities of intermediaries lacks the necessary nuance. Despite a noticeable improvement in the IT Act in expanding the safe harbour protection enjoyed by intermediaries, the onerous obligations imposed on intermediaries by delegated legislation and judicial decisions severely threaten the enjoyment of the right to freedom of speech and expression on the internet. There is a need to clarify certain principles without which the immunity afforded to intermediaries stands on slippery ground. An attempt should also be made to borrow useful legal principles from other jurisdictions, such as the counter-notification procedure, and to develop a more comprehensive and constitutionally consistent law governing intermediary liability. The rules issued under the IT Act have negated the progressive steps taken by the legislation. It is imperative to ensure that they do not confer

arbitrary power on the state as well as the intermediary itself. Judicial decisions must also guard against increasing the burden on intermediaries, as obligations to monitor content are not only infeasible, but may further lead to intermediaries resorting to overbroad filtering which will severely chill speech. Thus, the present law in India must be carefully developed by both the legislature and judiciary to create a clear, comprehensive and fair framework with regard to intermediary liability^[8].”

In the striking down of Section 66A and the role of Section 79 in the landmark judgement of *Shreya Singhal*, the Supreme Court has not only given a fresh lease of hope to the freedom of speech and expression in India, but has also performed its role as a constitutional court upholding the sacred values of the democracy that our country professes to be. The Court has provided the jurisprudence of free speech with an enhanced and amplified clarity.

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⁸ BAILEY, R. (2012). Censoring the Internet: The New Intermediary Guidelines. *Economic and Political Weekly*, 47(5), 15-19. Retrieved February 23, 2021, from <http://www.jstor.org/stable/41419840>