

## INSIGHT

# Are we barking up the wrong tree?

India's main focus needs to be on policies that foster innovation and freedom for individuals and organisations alike



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**C**halo, picture dekthe hein" is a sentence that has withstood the test of time. In 2019 though, it sets forth a different sequence of events compared to a decade ago. Now, most likely, it results in a group chat about whether to go to a movie theatre or watch a movie or show over a streaming service. If the decision is to go to the theatre, someone usually looks for show timings online, and books tickets on BookMyShow. A few might travel by Ola or Uber cabs to get to the destination. Did the event even happen if a group selfie is not uploaded on various social media platforms after the show? If the plan is to stay home, surely Swiggy can be called upon to deliver hot pizzas.

In view of the features and functions they provide, digital platforms like Swiggy, Ola, Uber, BookMyShow, Netflix, MakeMyTrip, Amazon, Facebook, Twitter, Zomato, and even gaming platforms like Candy Crush, Quiz Up, and Minecraft act as intermediaries — channels or platforms that are conduits for information, entertainment, and other products and services. Intermediaries merely offer a platform for point-to-point communication, and a forum to connect

users. To protect every Indian's freedom of speech and Right to Privacy, they are granted a "safe harbour" status under the Indian Information Technology Act of 2000.

Lately, however, there has been much discussion on imposing stricter regulation on these, driven primarily by the intent to curb harassment, eliminate the scourge of fake news, or criminal activity online. While a noble cause, greater regulations will do nothing to resolve these issues; instead, they might introduce a slew of new problems. The real solution already exists — our independent judicial system. Objections to user-generated content shared on an intermediary platform can be argued in a court of law, and if the content is indeed objectionable, a court order can be issued. It is important to note that many such platforms already have community guidelines and terms of service that don't allow users to upload and share certain types of content. Such content can be reported by users for takedown.

The proposal for stricter regulation seeks to make intermediaries responsible for regulating their content; if found non-compliant, they can lose their safe harbour protections. Additionally, intermediaries are provided an extremely short amount of time, just 24 hours, to evaluate flagged content, request clarifications, and respond.

Is this even practical? Such tight timelines could be implemented for certain types of unlawful content like child pornography, extremist content etc but they are difficult to enforce for all content categories. Most apps and intermediaries are available for a global audience; and if India-focused that's an incredible amount of data to regulate.

With various languages, dialects, slang words, nuances, cultural references, and humour that people regularly use for communication, this is a disaster waiting to happen.

Consider this. To most of us, the words "*main tera khood pi jaunga*" brings to mind a young and angry Dharmendra. To someone unaware of the reference, it might sound like a threat!

When such misunderstandings happen during face-to-face interactions, how on earth do we expect intermediaries to proactively self-regulate the enormous amount of content generated 24/7 on their platforms? Even artificial intelligence has not evolved to understand the context and nuances at this level of granularity. Let's be careful what we wish for. If we want intermediaries to moderate and take down content that they deem incendiary, it would be unlawful censorship. Intermediaries will willy-nilly restrict content to lower the risk of non-compliance with regulation, thus infringing upon our fundamental rights.

The passionate discourse for intermediary regulations fails to take into account the financial burden these regulations put on the intermediaries — particularly start-ups and small businesses that see their cost of doing business going up significantly if they have to incorporate sophisticated technology and manpower to monitor content, not to mention the burden of contesting legal issues over non-compliance. This will surely stifle innovation in India.

Another proposal is for companies to maintain a physical presence in India. For global entities, it is not always financially viable to maintain a physical office in every country they operate in. Sure, India is an attractive market, but under growing constraints, these companies

might be forced to leave India out. This then denies Indians the ability to leverage global innovations. Indian companies would be in danger of facing retaliatory regulation in other countries.

Another consequence of unwarranted regulation is exposure to massive legal liabilities. What if the viral hit song "*Coca Cola tu*" angered a rival soft drink company? If several of their employees flag mentions of the song on social media as "offensive", the intermediaries might have to restrict the song or risk potential penalties. It would be a huge legal liability if the music director or Coca-Cola decided to contest this decision. Ironically, circumventing courts for content-related decisions will result in more legal battles.

The mandates for intermediaries to continually monitor and regulate information is also a gross violation of global norms. Based on the United Nations' Rapporteur's Report on the promotion and protection of the right to freedom of opinion and expression, independent and impartial judicial authorities should be deemed arbitrators of lawful expression — not the government. Additionally, global guidelines providing a road map to manage intermediaries, the Manila Principles, clearly state that content cannot be restricted without clear, unambiguous orders from a competent court of law.

Since India aspires to be one of the world's leading economies, why are we squandering opportunities to encourage free-market enterprise? To stop miscreants from using intermediary platforms to incite violence or spread false information, we need to streamline the legal system and infuse greater transparency into the decision-making process of the courts. India's main focus needs to be on policies that foster innovation and freedom for individuals and organisations alike.

(Research inputs by Chandana Bala)

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