

MOOT PROPOSITION

[¶1] The Republic of Intia is extremely diverse and has an enormous population size. In spite of a stark digital divide persisting in the country, cheap access to internet has enabled the citizens of Intia [across all ages] to use and spend a major chunk of their daily time using the internet and social media.

[¶2] WhereApp is one of the most prominent online-messaging applications used in Intia. In fact, Intia has a greater number of WhereApp users' than any other country with an active monthly userbase of 390 million. Due to its immense popularity, WhereApp has time and again gathered controversy for its role in several incidents of mob lynching, due to spread of fake news and misinformation.

[¶3] One of the most important features of WhereApp is the use of end-to-end encryption technology, which ensures complete privacy of its users' and helps in keeping the exchange of messages between two or more people secure and private. Intia's Ministry of Technology ("MoT") in exercise of the powers conferred under the appropriate sections of its Information Technology Act, enacted the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2022 ("IT Rules") in May 2022. Soon after the enactment, the IT Rules received a severe backlash due to its mandate of requiring online-communication applications like WhereApp to help in the identification of 'first-originator' of information after receiving appropriate orders.

[¶4] Ms Hermoine, a social activist immediately approached the Hon'ble Supreme Court of Intia, citing various provisions of the IT Rules "problematic for people's privacy". WhereApp also released an official statement, clearly highlighting that adherence to the mandate under IT Rules will lead to a compromise in people's right to free speech and privacy. MoT responded and strongly rebutted this statement and said- "WhereApp's statement is an attempt to dictate terms to the world's largest democracy. Through its actions and deliberate defiance, WhereApp seeks to undermine Intia's legal system. Furthermore, WhereApp is refusing to comply with the very regulations in the intermediary guidelines on the basis of which it claims safe harbour protection from any criminal liability in Intia."

[¶5] While the IT Rules debate was ongoing, the State of India enacted their new Telecommunications Act [hereinafter, “The Act”] with an aim to consolidate and amend the laws governing provision, development, expansion and operation of telecommunication services, telecommunication networks and telecommunication infrastructure and assignment of spectrum, etc. There was a lot of hue and cry by digital rights organizations and non-profit organizations concerning Section 24(2) of The Act which states:

On the occurrence of any public emergency or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central or a State Government, may, if satisfied that it is necessary or expedient to do so, in the interest of the sovereignty, integrity or security of India, friendly relations with foreign states, public order, or preventing incitement to an offence, for reasons to be recorded in writing, by order:

(a) Direct that any message or class of messages, to or from any person or class of persons, or relating to any particular subject, brought for transmission by, or transmitted or received by any telecommunication services or telecommunication network, shall not be transmitted, or shall be intercepted or detained or disclosed to the officer mentioned in such order;

(b) Direct that communications or class of communications to or from any person or class of persons, or relating to any particular subject, transmitted or received by any telecommunication network shall be suspended.

[¶6] The Act which aims to unify and repeal several old statutes, now explicitly broadened the definition of ‘telecommunication services’, and included ‘Over-the-top (OTT)’ and ‘internet-based communication services’ as well.

[¶7] Mr Harry, Founder of Humara Internet Foundation, working towards protecting digital rights of the citizens, filed a petition before the Hon’ble Supreme Court of India citing Section 24(2) of The Act as unconstitutional in its present form. Mr Harry during an address to a

media house said- “The new Telecommunications Act is an attack on end-to-end encryption and the protection of fundamental rights of people and miserably fails to adhere to the internationally recognized privacy principles endorsed by the Hon’ble Apex Court of India in its landmark judgment.” His stand garnered support from a wealth of digital rights organizations and people, and soon became a hot topic of discussion for the prime-time debates.

[¶8] Responding to the statement made by Mr Harry, the Department of Telecommunications (“DoT”) states- *“Evidence suggests that the use of Darknet and end-to-end encrypted messaging platforms have become a haven for terrorists. Therefore we need to have strong measures in place for effective surveillance and tracking of such anti-social elements. The government is not asking for access through an unsecured backdoor but instead is requesting for the digital equivalent of a secured fortified ‘front door’ with locks and bars.”*

[¶9] Since Ms Hermoine’s petition was sub judice, the Hon’ble Apex Court was of the view that both the petitions involved similar set of question of facts and question of laws and therefore clubbed the petitions for a combined hearing on November 06, 2022. The Hon’ble Court framed the following issues and directed that unless compelling reasons are shown no further issues shall be taken up for hearing.

1. Whether the petitions under Article 32 maintainable?
2. Whether the relevant provisions made under IT Rules and Telecommunications Act, ultra vires to the Constitution of India?
3. Whether the provisions under the IT Rules and Telecommunications Act are in commensurate with the Government of India’s policy on Telecommunications and Information Technology?

NOTES:

1. All names, characters, places and incidents above are entirely fictional with resemblance to any real-life equivalent being coincidental at best, mistaken at worst.
2. Republic of India is a fictitious country with a Constitution and laws in pari materia with that of Republic of India.