Fixing India's anarchic IT Act

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Abstract

It is time to adopt a democratic, transparent and multi-stakeholder approach to Internet regulation in India.

Section 66A of the Information Technology (IT) Act criminalizes "causing annoyance or inconvenience" online, among other things. A conviction for such an offence can attract a prison sentence of as many as three years.

How could the ministry of communications and information technology draft such a loosely-worded provision that's clearly unconstitutional? How could the ministry of law allow such shoddy drafting with such disproportionate penalties to pass through? Were any senior governmental legal officers—such as the attorney general—consulted? If so, what advice did they tender, and did they consider this restriction "reasonable"? These are some of the questions that arise, and they raise issues both of substance and of process.

When the intermediary guidelines rules were passed last year, the government did not hold consultations in anything but name. Industry and non-governmental organizations (NGOs) sent in submissions warning against the rules, as can be seen from the submissions we retrieved under the Right to Information Act and posted on our website. However, almost none of our concerns, including the legality of the rules, were paid heed to.

Earlier this year, parliamentarians employed a little-used power to challenge the law passed by the government, leading communications minister Kapil Sibal to state that he would call a meeting with "all stakeholders", and will revise the rules based on inputs. A meeting was called in August, where only select industry bodies and members of Parliament were present, and from which a promise emerged of larger public consultations. That promise hasn't been fulfilled.

Substantively, there is much that is rotten in the IT Act and the various rules passed under it, and a few illustrations—a longer analysis of which is available on the Centre for Internet and Society (CIS) website—should suffice to indicate the extent of the malaise.

Some of the secondary legislation (rules) cannot be passed under the section of the IT Act they claim as their authority. The intermediary guidelines violate all semblance of due process by not even requiring that a person whose content

is removed is told about it and given a chance to defend herself. (Any content that is complained about under those rules is required to be removed within 36 hours, with no penalties for wilful abuse of the process. We even tested this by sending frivolous complaints, which resulted in removal.)

The definition of "cyber terrorism" in section 66F(1)(B) of the IT Act includes wrongfully accessing restricted information that one believes can be used for defamation, and this is punishable by imprisonment for life. Phone-tapping requires the existence of a "public emergency" or threat to "public safety", but thanks to the IT Act, online surveillance doesn't. The telecom licence prohibits "bulk encryption" over 40 bits without key escrow, but these are violated by all, including the Reserve Bank of India, which requires that 128-bit encryption be used by banks. These are but a few of the myriad examples of careless drafting present in the IT Act, which lead directly to wrongful impingement of our civil and political liberties. While we agree with the minister for communications, that the mere fact of a law being misused cannot be reason for throwing it out, we believe that many provisions of the IT Act are prone to misuse because they are badly drafted, not to mention the fact that some of them display constitutional infirmities. That should be the reason they are amended, not merely misuse.

What can be done? First, the IT Act and its rules need to be fixed. Either a court-appointed amicus curiae (who would be a respected senior lawyer) or a committee with adequate representation from senior lawyers, Internet policy organizations, government and industry must be constituted to review and suggest revisions to the IT Act. The IT Act (in section 88) has a provision for such a multi-stakeholder advisory committee, but it was filled with mainly government officials and became defunct soon after it was created, more than a decade ago. This ought to be reconstituted. Importantly, businesses cannot claim to represent ordinary users, since except when it comes to regulation of things such as e-commerce and copyright, industry has little to lose when its users' rights to privacy and freedom of expression are curbed.

Second, there must be informal processes and platforms created for continual discussions and constructive dialogue among civil society, industry and government (states and central) about Internet regulation (even apart from the IT Act). The current antagonism does not benefit anyone, and in this regard it is very heartening to see Sibal pushing for greater openness and consultation with stakeholders. As he noted on the sidelines of the Internet Governance Forum in Baku, different stakeholders must work together to craft better policies and laws for everything from cyber security to accountability of international corporations to Indian laws. In his plenary note at the forum, he stated: "Issues of public policy related to the Internet have to be dealt with by adopting a multi-stakeholder, democratic and transparent approach" which is "collaborative, consultative, inclusive and consensual". I could not have put it better myself. Now is the time to convert those most excellent intentions into action by engaging in an open reform of our laws.

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