Speak up for freedom

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Abstract

Kapil Sibal's attempts to curb online speech reveal ignorance about how the Web works

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The Union minister for communications and information technology,Kapil Sibal,is a knowledgeable lawyer,and someone who is reportedly committed to the freedom of speech. He would not lightly propose regulations that contravene Article 19(1)(a) (freedom of speech and expression) of our Constitution. So how is one to explain his recent proposals on controlling online speech? Or even the immoderate IT Rules that have been in force since April?

This controversy exploded when The New York Times revealed,on Monday,that Sibal and his ministry had been in touch with Facebook,Google,Yahoo,and Microsoft,asking them to manually filter user-generated content before it is published,to ensure that objectionable speech is screened out. He made specific mention of content that could hurt religious sentiments,or incite communal riots. Sibal defended this as not being "censorship" by the government,but "supervision" of user-generated content by the companies themselves.

Let us leave aside the question of free speech — Sibal is clear he does not wish to impinge upon it. One need not point out that the freedom of speech means nothing if not the freedom to offend (as long as no harm is caused). There can,of course,be reasonable limitations on the freedom of speech as provided in Article 19 of the International Covenant on Civil and Political Rights

(ICCPR) and in Article 19(2) of our Constitution. My problem lies elsewhere.

First,the secrecy with which these decisions were taken — it is unfortunate that the New York Times has to be given credit for Sibal addressing a press conference on this issue (he admitted as much). What he is proposing is not enforcement of existing rules and regulations,but of a new restriction on online speech. This should have,in a democracy,been put out for wide-ranging public consultations first.

The more fundamental disagreement is over how the question of what should not be published is decided,and who can be held liable for unlawful speech. As Sibal himself told The Wall Street Journal in an interview this May,"To make

the intermediary liable for the user violating that code would,I think,not serve the larger interests of the market." The intermediaries (that is,all persons and companies who transmit or host content on behalf of a third party) are mere messengers,just like a post office. They do not exercise editorial control,unlike newspapers. By all means,prosecute Facebook,Google,Yahoo,Microsoft etc when they have created unlawful content,or exercised editorial control over unlawful content,or incited and encouraged unlawful activities,or failed to remove illegal content despite it being brought to their notice by a court order or the like.

Newspapers or news channels have editors who can take responsibility for content — they can afford to,because the amount of content is limited. YouTube,which has 48 hours of videos uploaded every minute,cannot do the same. (One wag even suggested that Sibal was not suggesting a means of censorship,but of employment generation and social welfare for censors and editors.) To try and extend editorial duties to these intermediaries by executive order or through "forceful suggestions" would entail amending Section 79 of the Information Technology Act,which ensures they are not to be held liable for their user's content — the users are.

Internet speech has,to my knowledge and to date,never caused a riot in India. It is when offensive speech is taken out of books or from the Internet and translated into inflammatory speeches on the ground with megaphones that it actually become harmful,so those should be targeted instead. Besides,the laws that apply to offline speech already apply online. If such speech indeed incites violence,the police can be contacted and a magistrate can take action. Companies like Facebook and Google already exercise self-regulation,even excessively. Anyone can flag any content on YouTube or Facebook as violating the site's terms of use. Indeed,even images of breast-feeding mothers have been removed from Facebook on the basis of such complaints. So it is incorrect to suggest that there is no self-regulation. In two recent cases,the high courts of Bombay (the Janhit Manch case) and Madras (the R. Karthikeyan case) refused to direct the government and intermediaries to police online content,saying that this places an excessive burden on the freedom of speech.

In this regard,the IT Rules published in April are great offenders. While speech that is "disparaging" (while not being defamatory) is not prohibited by any statute,intermediaries are required not to carry "disparaging" speech,or speech to which the user has no right (how is this to be judged? Do you have rights to the last joke that you forwarded?),speech that promotes gambling (as the government of Assam does through the PlayWin lottery),and a myriad other kinds of speech that are not prohibited in print or on TV. Who is to judge whether something is "disparaging"? The intermediary itself,on pain of being liable for prosecution if it is found have made the wrong decision. Any person may send a notice to an intermediary to "disable" content,which has to be done within 36 hours if the intermediary doesn't want to be held liable. Worst of all,there is no requirement to inform the user whose content it is,nor to inform the public that the content is being removed. It does not require a paranoid conspiracy theorist to see this as a grave threat to the freedom of speech.

Many human rights activists and lawyers have made a very strong case that the IT Rules on intermediary due diligence are unconstitutional. Parliament still has an opportunity,until the 2012 budget session,to reject these rules. Our

parliamentarians must act now.

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